

1978

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

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 MUNICIPAL COR-
PORATION; and THE MUNICIPAL
COUNCIL OF LOGAN CITY,

Plaintiffs,
Respondents and
Petitioners,

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.

FILED

AUG 2 1978

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PETITION FOR RE-HEARING

BRIEF OF PETITIONERS

Clerk, Supreme Court, Utah

* * * * *

PETITION FOR RE-HEARING ON SUPREME COURT DECISION

* * * * *

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AS AMICUS CURIAE

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AS AMICUS CURIAE

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SUPREME COURT OF THE STATE OF UTAH

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LOYE E. MARTINDALE, DARWIN W.
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vs.

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

Defendants and
Appellants

PETITION FOR
REHEARING

Supreme Court No. 15498

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To the Honorable Chief Justice and the Associate
Justices of the Supreme Court of Utah:

The Respondents present this petition for a rehearing
of the above cause and, in support thereof, respectfully show:

1. The appeal in the cause was argued before this
Court on May 9th, 1978.
2. On July 13, 1978, this Court rendered its decision
in favor of the Appellants and against the Respondents reversing
the judgment of the District Court in part.
3. Respondents seek a rehearing upon the following
grounds:

- a. THE OPINION OF JUSTICE HALL DENIED RESPONDENTS DUE PROCESS OF LAW IN THAT:

"Issues" and "facts" beyond those properly before the trial court and improper and untrue were accepted by the opinion without opportunity for hearing, presentation of evidence or cross examination of witnesses or "extraneous circumstances" of "legislative history and intent."

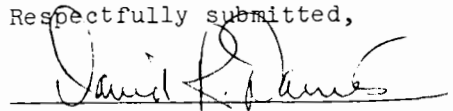
- b. THE OPINION OF JUSTICE HALL IS UNSUPPORTED AND INACCURATE IN THAT

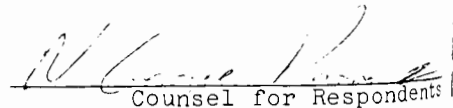
It inaccurately characterizes rules of interpretation employed in Federal-State separation of power models and makes unsupported conclusions about substantive allocations of power in those models.

For the foregoing reasons, it is urged that this petition be granted.

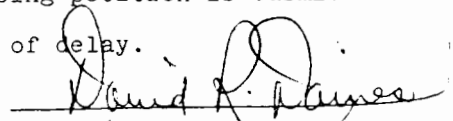
Dated: August 1, 1978

Respectfully submitted,




Counsel for Respondents

I hereby certify that the foregoing petition is submitted in good faith and not for purposes of delay.



NATURE OF THE CASE AND DISPOSITION

This is a Petition for Rehearing on this Court's decision filed on the 13th day of July, 1978 as written by Mr. Justice Hall. The scope of the requested rehearing is limited to that portion of the decision which reverses the trial court's Summary Declaratory Judgment involving the interpretation and application of statutes related to the Council-Mayor Optional Form of Municipal Government.

NATURE OF RELIEF SOUGHT ON REHEARING

Pursuant to their Petition, the petitioners seek the following relief:

First, that the Court issue a new opinion sustaining the trial courts Declaratory Summary Judgment in its entirety in accord with dissent of Justice Crockett or failing that;

Second, remand the case to the trial court on a finding of ambiguity or doubtfulness of the statutes with instructions to receive proper evidence of "extraneous circumstances" to aid in the interpretation of the statutes.

STATEMENT OF FACTS

The substantive "facts" as they relate to this petition for rehearing (on Point II) were as they are established in the record of the trial court in the transcripts, verified and unverified pleadings, affidavits, and documents and no new statement thereof is material to this petition for rehearing.

The procedural "facts" that relate to Point I are that the trial court interpreted and applied the Council-Mayor Optional Form of Municipal Government Act on the basis of primary rules of construction, and was not urged by any party nor did it determine that the act was ambiguous or of doubtful meaning or application to the issues before the court. It was on this basis that Appellants lodged their appeal. No party (including amicus curiae) has asked for nor has this Court determined that the Act was ambiguous or of doubtful meaning or application to this case.

The following matters bearing on interpretation were interposed on appeal for the first time in an unsworn petition and brief signed by Melvin Leslie, Steven W. Allred and Jerrald D. Conder, as legal counsel "representing" three legislators, amicus curiae. Those "new" matters were their subjective understanding of legislative intent; claimed linkages between intent in the repealed Strong-Mayor Act and the Act in question and general "legislative history."

This appearance of Amicus Curiae was objected to on motion before the Supreme Court to allowing their appearances on the grounds that it attempted to introduce "new facts" and the Chief Justice stated that their appearance could not introduce "new facts."

BRIEF

POINT I

2. THE OPINION OF JUSTICE HALL DENIED RESPONDENTS PROCEDURAL DUE PROCESS IN REVERSING THE TRIAL COURT.

The opinion of Justice Hall erred by invading the province of the trial court and resorted for the first time on appeal to "extrinsic circumstances" to interpret a legislative enactment without first determining an ambiguity existed. All the parties submitted this matter to the trial court for "Summary Judgment" on the basis that the court could determine the interpretation of the law without resort to extrinsic facts and the trial court so ruled.

No party at the Summary Judgment level alleged or attempted to introduce testimony that the statutes were ambiguous or of doubtful meaning as applied to the issues presented.

There is no pleading, document, affidavit that was before the trial court or anything other than the unsworn briefs before the Supreme Court alleging or claiming in any way that the Council-Mayor Optional Form of Government Act was either ambiguous or of doubtful meaning or any other similar claim as those laws applied to the issues before the trial court. The trial court made no such finding of ambiguity or doubtful meaning either expressly or impliedly,

and the trial court then properly ruled in Summary Judgment on the issues based on the primary rule that statutes are interpreted according to the legislative intent as expressed in the law, as interpreted in accordance with well accepted canons of statutory construction.

The trial court would have erred had it in fact inquired into "extrinsic circumstances" unless, first, some party had claimed the applicable statutes ambiguous or of doubtful meaning or application and, second, the trial court had found affirmatively that they were ambiguous or of doubtful meaning. Neither condition was met.

Any inquiry beyond the expressions of the act and into "extraneous circumstances" are to be prefaced by the strong caveat of a finding of "ambiguity or doubtfulness."

The meaning to be ascribed to a statute can only be derived from a considered weighing of every relevant aid to construction. In some cases, the true meaning of an ambiguous statute may be found from extraneous circumstances. For this purpose, it has been regarded as proper for courts to resort to, or take judicial notice of, facts or events, of common knowledge reasonably within the scope of judicial cognizance. However, conjectures aliunde are not sufficient for this purpose. It is clearly improper to resort to extrinsic circumstances where the statute is plain and unambiguous.

73 Am Jur 2nd Statutes §147.

A federal case in the Fourth Circuit succinctly pinpoints the gross fallacy of the opinion of Justice Hall as it wanders aimlessly into forbidden and erroneous "extraneous circumstances."

When the meaning of a law is evident, to go elsewhere in search of conjecture in order to restrict or extend the act would be an attempt to elude it, a method which, if once admitted, would be exceedingly dangerous, since there would be no law, however definite and precise in its language, which might not by interpretation be rendered useless.

Re Boggs-Rice Co. (CA4) 66 F2d 855.

The citations in the Memorandum of Amicus Curiae in support of Petition to Intervene clearly establish this same principle. Thus in Utah this Court has determined that a condition precedent to delving into "history" and "purpose" is a finding first that the legislation's interpretation is doubtful or uncertain.

The Petition of Amicus Curiae to Intervene clearly establishes a critical point that would otherwise require an examination of the record in the trial court to discover. Their avowed purpose in intervening was

5. That the legislative intent and history of aforesaid legislation have not been fully presented to the lower Court and such information may be of assistance in this Court's deliberations.

Petition at p. 2.

This statement correctly reflects the status of the record. No one claimed "ambiguity" or "doubtfulness" and the trial court properly relied on the primary rule of interpreting the act and its intent from its wording and the necessary implications of that wording. Counsel for the Amicus Curiae (who should of all be most familiar with rules of statutory interpretation) implies that the trial court

should have wandered into those clearly forbidden paths by inquiring into "history" and the "subjective intent of three legislators."

The offense to justice was further compounded when Respondents specifically objected orally before this court to Amicus Curiae appearing for the purposes stated in their petition and were assured by Mr. Chief Justice Ellett in that hearing that the Court was sufficiently perceptive to disregard such matters and would only consider legal arguments based upon facts in the trial court record.

But contrary to the rule of law, procedural due process and the express assurances of this Court, the opinion of Justice Hall adopts facts and rests its conclusion on those improper "extraneous circumstances" and "historical conjectures" introduced in the briefs of Amicus Curiae and Appellant.

Citations from the Opinion:

Three state legislators also appear as amici curiae for the avowed purpose of informing the Court as to the legislative intent in enacting the Act.

Opinion of Justice Hall at p. 2.

In order to place the issues presented by this appeal in proper perspective it is helpful to trace the structural development of municipal government in Utah.

Opinion of Justice Hall at p. 2.

It was from that legislation (Strong Mayor Act) that the initial legislative intent clearly emerged to provide an optional form of municipal government framed in the image of the federal and state systems.

Opinion of Justice Hall at p. 2.

In 1975 the Legislature repealed the Strong Mayor Form of Government Act and enacted substantially similar provisions in the Act upon which this appeal focuses. The legislative intent remained clear to provide variations in the traditional forms of government consistent with present day needs as is evidenced by the following observation inserted as a preface to the Act:

Opinion of Justice Hall, at p. 2.

We are of the opinion that the trial judge placed undue emphasis on that portion of the Act which declared the Council to be the "governing body." His disinclination to construe all of the provisions of the Act in the light of the definition of that term, as set forth in the Act, caused him to draw erroneous conclusions and thus misinterpret the law.

When the Act is read in its entirety, and each provision thereof is read in context with all of the others and when viewed in the light of the legislative history of municipal government in Utah, we are compelled to conclude that it in fact provides for the absolute separation of executive and legislative powers. A fortiori, the 1977 modifications to the Act specifically vest the whole of the executive powers in the Mayor and only the legislative powers in the Council, and we consequently hold that the council-mayor form of government as adopted by Logan City is a true separation of powers form of government.

Opinion of Justice Hall, at p. 6.

The opinion of Justice Hall on its face is a clear acknowledgment that it "viewed in the light of the legislative history (introduced by conjecture), of municipal government in Utah" and but for that it would have sustained the trial court's decision which was based on the interpretation of the "four corners of the law."

Even had the above cited conjecture been a correct statement of historical fact, the injury to procedural due

process would have been substantial for the procedure employed denies Respondents their right to present evidence, cross-examine witnesses and have review on appeal limited to factual issues tried in the lower court.

But here there is a more substantive injury; those same "legally irrelevant historical facts and conjectures" are in fact historically wrong as evidenced by the attached affidavits of the Honorable Senator Bullen and the Honorable Representative Gardner.

The explicit conjecture that the divisions provided in the repealed strong-mayor form of government were "intended" to be "substantially similar" to those provided in the Council Mayor form is disputed in the sworn affidavit of Senator Bullen. Such a conjecture is unfounded in light of the true history. The true course of events could only lead one to the exact opposite conclusion. The facts as revealed by the Bullen affidavit are:

1. Rejection by a majority of Logan City electorate in 1973 in a referendum of the Strong Mayor Form of Government.
2. Repeal by the Legislature primarily because of the Logan electorate's rejection of the substance of that Strong Mayor Act.
3. Adoption of Council-Mayor Form by the 1975 Legislature to overcome the substantive objections of Logan's electorate to the repealed Strong-Mayor Form.

4. The subsequent acceptance by majority of Logan's electorate of the Council-Mayor Form in a referendum.

The correct and true history does not support the opinion of Justice Hall that there was no substantive difference between the two acts. A comparison of the power vesting and definition provisions of the repealed Strong-Mayor form and the Council-Mayor Form also belie the conclusions in the opinion of Justice Hall.

Also attached hereto is an affidavit of one of the so-called amicus curiae which exemplifies the result of a denial of due process. The Honorable Representative Willard Hale Gardner one of the three (legislator) witnesses who according to the opinion of Justice Hall concurred in "declaring legislative intent," but in fact, who never filed so much as an affidavit or even a bare signed statement as to what his intent was, counters and rejects the reading of legislative intent presented in the Brief bearing his name and relied upon by the Court. Mr. Gardner claims that it was his understanding and that of the legislature that the Council would have the powers attributed by the Court to the Mayor as they pertained to buying and selling real property and approving subdivisions and zoning in general. The result of a denial of due process is to have that man's views represented to this court without so much as his knowledge that he or his name is being used therefore. It becomes clear why due process requires a hearing, confrontation of

witnesses, opportunity for cross-examination, etc., in the introduction of evidence. The opinion of Justice Hall in accepting this evidence indicates the result of a palpable denial of due process. Evidence which is not evidence and which does not exist has found its way into the opinion of Justice Hall. By this precipitous meandering into "extraneous circumstances" on appeal under the guise of some spurious notion of judicial notice, Respondents have been denied due process.

Respondents are continuing to examine other legislators and walk that endless and costly path of dubious legality in search of evidence pursuant to "secondary rules of construction." Respondents now have substantial reason to believe that the opinion of Mr. Justice Hall with regard to legislative intent and its conclusions is not in harmony with the views of the other two legislator witnesses as those views would be expressed in cross examination in a trial court. Respondents know that innumerable legislator-witnesses could be called who would repudiate the conclusions.

This is a clear case of judicial legislation, accomplished at the expense of Respondent's due process guarantees, in violation of the United States Constitution and the Constitution of the State of Utah.

Of course the whole bailiwick ought to be off limits until ambiguity is affirmatively found. It is clear that any principle allowing consideration of the above cited

conjectures by legislators or about legislation is dependent on the Court's initial determination that the statute is doubtful or ambiguous. American Jurisprudence Second discusses the general rules respecting "extraneous circumstances" finding that it is only appropriate for the "interpretation of ambiguous language," "where the meaning of the words used is doubtful," etc. Statutes §§ 148, 150.

Moreover, the legislative history of a statute may not compel a construction at variance with its plain words, and where the language of a statute is unambiguous, consideration of the history of the legislation is not permissible. Although it has been declared that the legislative history of an act becomes important only in extremely doubtful matters of interpretation.

Statutes §151 (Footnotes omitted - emphasis added).

As to the evidence which may be used of these "extraneous circumstances" there are significant restrictions

The opinions of individual legislators, or the testimony of a member of the legislature as to the intention of the legislature in enacting a statute, may not be given consideration.

Statutes § 169 (Footnotes omitted).

Apart from opinions expressed in debates, the actual proceedings of the legislature, or the steps taken in the enactment of a law, or the history of the passage of the law through the legislature, may be resorted to as an aid in the interpretation of a statute. However, there is contrary authority; moreover, it has been said that only in extremely doubtful matters of interpretation does the legislative history of an act of Congress become important. Of course, there may be no resort to the legislative history of the enactment of a statute, the language of which is plain and unambiguous, since such

legislative history may only be resorted to for the purpose of solving doubt, not for the purpose of creating it. By the same token, it has been said that when statutory language is explicit, legislative history simply corroborates the obvious meaning of the language used in the law

It is well settled that to ascertain legislative intent in enacting a statute the language of which is of doubtful or ambiguous import, resort may be had to the journals or other legislative records showing the history in the legislature of the act in question while it was in process of enactment.

Statute §170 (footnotes omitted).

It is noted here that the opinion of Justice Hall resorts to legislative history without finding any ambiguity in the statutes and further has relied on improper evidence. Respondents note too that the doubt was created in the first place by resort to improper evidence at the appellate court level.

The procedure used can be likened to an appeal dealing with the application of the parol evidence rule where the trial court rules on the meaning of a contract and its application based upon a submission of the parties. The trial court reads the contract, gives it a proper "four corners interpretation," there being no claim of uncertainty or ambiguity and properly no resort by the trial court to extrinsic parol evidence. The losing party then appeals and the appellate court at the suggestion of amicus curiae takes "judicial notice" of hotly contested and highly questionable "parol" or "extrinsic evidence" inadmissible in the trial court and presented in an unsworn brief to interpret the contract and overrule the trial court's "four corners" interpretation. This occurs on the appellate level without a

suggestion of ambiguity or uncertainty or doubtfulness as to the meaning of the contract. There is no hearing, no right to cross examine or confront witnesses, etc. Add to that mixture two sworn affidavits indicating the appellate court is wrong about the parol facts.

The opinion of the Court clearly denied Respondent constitutional rights and violated accepted procedures as follows:

1. Rule 12-(4) of the Utah Rules of Evidence:

A judge or a reviewing court taking judicial notice under paragraph (1) or (3) of this rule of matter not theretofore so noticed in the action shall afford the parties reasonable opportunity to present information relevant to the propriety of taking such judicial notice and to the tenor of the matter to be noticed.

2. Article I, Section 7 of Constitution of the State of Utah and the 14th Amendment to the Constitution of the United States in the following particulars:

(a) The right to have the appeal determined on the evidence and issues before the trial court and not arbitrarily:

Due process of law protects against arbitrary action, consequently, arbitrary action by the tribunal in the hearing of a cause or in its order violates due process.

16 Am Jur 2nd Constitutional Law §576 (Footnotes omitted).

(b) The right to fundamental fairness in the use of evidence.

The due process clause of the Fourteenth Amendment forbids fundamental unfairness in the use of evidence, whether true or false. It is an

immutable principle of jurisprudence that where governmental action seriously injures an individual and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case, documentary evidence and, even more important, testimony, must be disclosed to the individual so that he has the opportunity to show that it is untrue. Due process implies the right to contradict by proof every material fact which bears on the question of right involved. Moreover, the case against the party asserting the protection of the due process guaranty must be made out by proof, in the absence of a default.

16 Am Jur 2nd Constitutional Law §578 (Footnotes omitted).

(c) The opportunity for hearing and cross examination relative to "extraneous circumstances" or "legislative history."

An opportunity for hearing is one of the essential elements of due process.

16 Am Jur 2nd Constitutional Law §569 (Footnotes omitted).

(d) The right to raise issues and set up defenses to "legislative history and subjective intent":

Due process requires that a party sought to be affected by a proceeding shall have the right to raise such issues or set up any defense which he may have in the cause. Even if he has no defense to the action, the fundamental law of the land secures to him the right to be heard in his own defense

Procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood.

16 Am Jur 2nd Constitutional Law §574 (Footnotes omitted).

POINT II

2. THE OPINION OF JUSTICE HALL IS UNSUPPORTED AND INACCURATE.

The opinion of Justice Hall found Logan's form of government to be patterned upon the federal and state models involving separation of powers:

He [the Mayor] further contends that this is because the Act is patterned after the absolute separation of powers doctrine set forth in the federal and state constitutions. With these contentions we agree and reverse the ruling of the trial court.

Hall Opinion at p. 1 [emphasis added]. The opinion's reasoning is amply displayed throughout.

It was from that legislation that the initial legislative intent clearly emerged to provide an optional form of municipal government framed in the image of the federal and state systems.

Hall Opinion at p. 2 [emphasis added].

Helpful to such a determination is a definition of executive and legislative powers. Simply stated, legislative powers are policy making powers, while executive powers are policy execution powers.

Hall Opinion at p. 6. Interpretation of the Act is to be based primarily on federal and state models involving separation of powers and "helpful" to that interpretation are definitions of "legislative" and "executive" powers.

Using this basis as the touchstone for interpretation, the Hall Opinion then applies its method of interpretation to the issue of whether the mayor [executive branch] or the municipal council [legislative branch] has the power

and authority to buy, sell or exchange real property concluding
as follows:

The policy-making powers reserved to the Council
clearly do not encompass decisions to buy or
sell property or to otherwise manage it
We consequently hold that the management of
city property, including its sale and purchase,
is an executive function reserved to the Mayor.

Hall Opinion at p. 6 [emphasis added].

What is truly clear in Justice Hall's opinion is
that there was no understanding of federal and state models.
The Constitution of the United States specifically provides
in Article IV, Section 3:

The Congress shall have the Power to dispose
of and make all needful Rules and Regulations
respecting the . . . property belonging to
the United States

Respondents have been unable to locate, despite diligent and
painstaking research, a single, solitary judicial decision or
legal commentary or treatise which holds other than that
Congress has the power to control United States' property
and that the President does not. For everywhere the rule is
as stated in American Jurisprudence.

It [the legislature] not only has a legislative
power over the public domain, but it also
exercises the powers of the proprietor therein.
Congress may deal with such lands precisely as
a private individual may deal with his property,
and may sell or withhold them from sale.

63 Am Jur 2d, Public Lands §13 at 488 [footnotes omitted].

The rules cannot be more direct and clear:

Congress has both legislative and proprietary
powers with respect to the public domain . . .
it may regulate the use and occupancy of the
public domain precisely as an individual may

deal with and control his land. The power over the public domain intrusted to congress by the Constitution is exclusive, plenary and without limitations.

73 C.J.S. Public Lands §3 at 649 [footnotes omitted].

Congress is vested by the Constitution with the power of disposition of public lands. The power is without limitation and congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property or any part of it, and to designate the persons by whom, and to whom the transfer shall be made. The president has no right to dispose of public lands under the Constitution.

73 C.J.S. Public Lands §24 at 675 [footnotes omitted].

See also 73 C.J.S. Public Lands §§237, 238, 239.

The opinion fares no better with state constitutions

The Utah Constitution provides

The Public Institutions of the State are hereby permanently located at the places hereinafter named each to have the lands specifically granted to it by the United States . . . to be disposed of and used in such manner as the legislature may provide

Art. XIX §2 [emphasis added].

All lands of the State that have been, or may hereafter be granted to the State by Congress, and all lands acquired by gift, grant or devise from any person, or that may otherwise be acquired, are hereby accepted, and declared to be the public lands of the State; and shall be held in trust for the people, to be disposed of as provided by law

Art. XX §1 [emphasis added]. Clearly under Utah's Constitution the legislature controls real property for it can only be disposed of "as provided by law" and clearly the governor does not make law. Of course, the Congress of the United States and the Legislature of the State of Utah have seen fit

to delegate some portions of this authority to various boards and officials. Nevertheless without question the power and authority to buy, sell and exchange real property belongs to the legislative body in both federal and state models. The conclusion concerning real property in the opinion of Justice Hall based on its own logic is unsupported and inaccurate.

The opinion of Justice Hall goes awry in side-stepping and ignoring the wording, of the statute itself, rules of statutory construction and accepted methods of interpreting power allocations in separated power, executive-legislative-judicial governments. The opinion oversteps all this to an assumed and perceived conception of the intent of the legislature, a conception which itself is introduced for the first time on appeal in an improper and highly prejudicial manner. The best indication of the quality of that conception is the fact that the very legislator who is represented to this Court as having that legislative intent and design is now indicating directly to this Court by sworn affidavit that his view was misrepresented, that he shares the opposite view and that he was not the source of the facts presented therein. See Affidavit of the Honorable Willard Hale Gardner, attached hereto as Exhibit A.

The opinion of Justice Hall sidesteps the following accepted rules of statutory construction:

1. Expressio unius est exclusio alterius: When a legislature expressly enumerates powers, powers not given are considered expressly withheld. The opinion in construing

mayoral powers does not follow this rule. Opinion of Justice Hall at p. 6.

2. Noscitur a sociis: Words should be interpreted in context, i.e., "executive powers" in context would be considered those powers expressly given the Mayor in the Act. See Section 10-3-1219(a) and 73 Am Jur 2d, Statutes §213 at 407.

3. Significance to be accorded every word: The opinion of Justice Hall ignores Section 10-3-1212 of the Act where it says the municipal council is to consider "land acquisition."

4. Words presumed to have same meaning in statutes on the same subject: The opinion of Justice Hall finds legislative body means one thing in the Act and something else [the executive] in zoning and subdivision laws and applies a similar methodology to use of "governing body" in the Act and elsewhere in the Code. See 73 Am Jur 2d, Statutes §233 at 416.

5. No legislative intent is presumed from recodification: The opinion of Mr. Justice Hall states the Legislature made an "effort to clarify" and "deleted" "governing body" from the Act in an admitted recodification. Opinion of Justice Hall at 5. This is contrary to all settled rules of construction regarding recodifications. See e.g., 76 Am Jur 2d, Statutes §324 at 472.

6. No repeal by implication: The opinion of Justice Hall finds the Act by implication repeals and reorders

the entire municipal code with respect to power allocation. See reasoning at page 7 in the opinion of Justice Hall with respect to three separate subdivision laws. This is contrary to well settled laws of construction. See 76 Am Jur 2d, Statutes §§396, 400, 401 [noting that a repeal by implication must be "clear, manifest, controlling, necessary, positive, unavoidable, and irreconcilable inconsistency and repugnancy," such that the two acts cannot be reconciled and given effect], §402 ["Moreover it has been held that there must be some express reference to the previous statute"]. The opinion of Justice Hall effects this repeal entirely by its definition of "executive" in a general usage and applies that to long-standing, well established, detailed laws respecting subdivision approval. See 76 Am Jur 2d Statutes §181.

7. Statutes are presumed harmonious and consistent:

As described, supra, in regard to repeal by implication, the opinion of Justice Hall eschews the interpretation that would make the Act consistent with other laws respecting municipal government.

8. Acts should be construed as a whole: The opinion of Justice Hall rests not to the Act as a whole but on the mere general usage of the words executive branch and legislative branch first appearing in a recodification.

9. A repealed statute replaced by an entirely reordered and changed statute is not indicative of legislative intent: The Strong Mayor Form of Government is entirely dissimilar except in certain general descriptions, it also

has express repealers, no enumeration of powers and does not call the council "the governing body." See 76 Am Jur 2d, Statutes §236. Respondents urge first that there is a shift evident from one act to the other, i.e., "Strong Mayor Form of Government" to "Council-Mayor Form of Government" and second, that, in any event, the construction placed on the strong mayor law is itself erroneous.

10. Similar legislation in other states is ignored. The opinion of Justice Hall does not consider nor refer to the interpretations in numerous other states which have adopted similar legislation. See Respondents Brief at pp. 19-22.

11. Confusion should be avoided. Interpretations which produce uncertainty or insecurity are to be avoided as are distinctions based on "a course of reasoning too unsubstantial and too finely drawn for the regulation of human action." 76 Am Jur 2d, Statutes §261 at 430, e.g., Id., §269 at 436. The opinion of Justice Hall would have Logan remake the entire municipal code on whether a particular function is "executive" or "legislative." Mistakes are likely to be frequent and litigation is the only final recourse for determinations.

The dangers of disregarding the cannons of statutory construction and basing a decision on unsworn allegations of individual legislators are manifest. First, as the treatises express it

statutes are considered to have been enacted
with a view to their interpretation according

to the settled maxims and principles
of statutory construction.

76 Am Jur 2d Statutes §142 at 349. The legislature cannot enact its will if the court presumes its enactments are not according to the canons of interpretation. Second, there is a high probability for error in making such conjectures aliunde. Error that is actual and palpable herein not merely possible.

The opinion itself is not true to its own conclusions. That is its method of interpreting the allocation of powers in a legislative-executive-judicial, separated powers government is not consistent with the method of interpretation used in federal and state models:

In considering the nature of any government, it must be remembered that the power existing in every body politic is an absolute depotism; in constituting a government, the body politic distributes that power as it pleases and in the quantity it pleases, and imposes what checks it pleases upon its public functionaries. The natural and necessary distribution of that power, with respect to individual security, is into legislative, executive, and judicial departments. It is obvious, however, that every community may make a perfect or imperfect separation and distribution of that power at its will.

16 Am Jur 2d, Constitutional law §210 [footnotes omitted]. That is, that the separation of powers concept does not say which powers are to be separated to each body but merely that they are to be separated.

The courts have perceived the necessity of avoiding a narrow construction of a state constitutional provision for the division of the powers of government into three distinct departments, for it is impractical to view the provision from the standpoint of a doctrinaire.

16 Am Jur 2d, Constitutional Law §214. Indeed Respondents contend that is exactly what the opinion of Justice Hall does. it devises "doctrinaire" definitions of "executive" and "legislative" and then demands the entire remaking of the Municipal Code on that basis.

Indeed, the rules of interpretation with respect to allocations of power in the federal and state models are not followed or even alluded to in the opinion of Justice Hall:

In accordance with the doctrine that the state constitution is not a grant of power, but only a limitation, as far as the legislature is concerned, it is a recognized principle of constitutional law that except where limitations have been imposed by the federal or state constitution, or by the valid treaties and acts of Congress, the power of a state legislature is unlimited and practically absolute; it extends to any subject within the scope of civil government, a state legislature does not act under enumerated or granted powers, but rather under inherent powers, restricted only by the provisions of the constitution. If limitations upon the exercise of the lawmaking function are not found in the constitution, they do not exist, except insofar as all constitutions may be said to be limited. As a rule, therefore, and speaking generally, a legislature may do what the state and federal constitutions do not prohibit. So long as no constitutional limits are exceeded, the legislative will is supreme and must be obeyed by all other departments of the government.

The powers of the other two departments are not as extensive. The reason is that, unlike the lawmaking power, the power of the executive and judicial departments in a state government is a grant, not a limitation, and those two coordinate departments of government can therefore exercise only the powers conferred upon them by the constitution..

16 Am Jur 2d, Constitutional Law §228 [footnotes omitted, emphasis added].

It has been said that the executive power is more limited than legislative powers, extending merely to the details of carrying into effect laws

enacted by the legislature as they may be interpreted by the courts, the legislature having the power, except where limited by the constitution itself, to stipulate what actions executive officers shall or shall not perform.

76 Am Jur 2d, Constitutional Law §216 [footnotes omitted, emphasis added]. These principles are too well known and followed to be subject to any question. See cases cited in 16 Am Jur 2d, Constitution Law §228. Corpus Juris Secundum summarizes the rules succinctly:

[T]he legislative department has all power not expressly denied to it or given to another branch of the government, and that wherever the legislative power of a government is undefined it includes the judicial and executive attributes, and that so great is the scope and extent of this authority that, in the absence of constitutional restrictions, the department wielding it might with comparative ease absorb within itself all the functions of the state. It is the predominant branch of the government, and in the absence of express limitations, the extent of its power cannot be definitely stated.

16 C.J.S., Constitutional Law §106 at 296, [emphasis added].

The application of these rules of interpretation based on federal and state models is that the municipal council (legislative body) has all those powers and duties not given the Mayor (executive branch). Further that these powers are separate and neither entity can interfere with the other's exercise of power given or remaining in its sphere. The opinion of Justice Hall is methodologically opposite, it determines that the "executive" shall by mere use of that word be deemed to have any and all functions meeting the opinion's own skewed definition of "executive." As a result of this cankered method all power allocations existing in municipal government

are to be nullified and reconstructed. The opinion is not true to its own method--if it wishes to slavishly apply federal and state models then let them be applied well.

Any idea that the Congress of the United States or the Legislature of the State of Utah has merely "pure legislative powers" is palpably erroneous. This is most clearly elucidated in decisions and discussions of delegability where the distinction is critical:

The general doctrine as to the inalienability of the lawmaking function applies to the federal government. Congress cannot delegate to any other body its strictly legislative powers.

As has already been indicated, the rule of nondelegability is applicable to legislative powers only; the rule does not bar Congress or other legislatures from delegating such of their powers as are not legislative in nature. Thus, the rule is that in order that a court may be justified in holding a statute unconstitutional as a delegation of legislative power, it must appear that the power involved is purely legislative in nature--that is, one appertaining exclusively to the legislative department.

16 Am Jur 2d, Constitutional Law §§241, 242. [footnotes omitted]. Given the wide range of delegation, the numerous powers of a legislative body which are not "legislative in nature" is evident. For example, the Utah State Legislature has delegated its powers to buy, sell and exchange real property to a State Land Board, executive officers, etc. What is happening is that a power not legislative in nature but confided to the legislative body is being delegated pursuant to state law. Of course, from time to time the Utah State legislature may itself sell property on its authority, it

having the entire authority to do so. For example, in 1957 the State legislature directed the sale of legally described lands to the Ute Indian Tribe reserving to itself the minerals for the consideration of \$2.50 an acre. See Section 65-18-83 U.C.A. 1953.

The weaknesses inherent in the opinion of Justice Hall are well illustrated in its ruling on subdivisions:

When viewed in the light of the foregoing concepts, [referring to definition of "executive" and "legislative"] the approval of subdivisions in accordance with rules, policies, and procedures adopted by the legislative branch of municipal government clearly appears to be a function of the executive branch

In treating this issue, the trial judge, although erroneously, had already determined that the Council was generally vested with executive powers as would permit it to approve subdivisions. Consequently, he unnecessarily concerned himself with the delegability of that power.

Consistent with the doctrine of separation of powers, the Council has no executive powers to delegate and it only exercised its legislative powers in adopting the ordinances which established the policies to be executed by the Mayor in reviewing and approving subdivisions. In reaching this conclusion we are not unmindful of three separate statutory provisions, separate from the Act, which bear upon the approval and subsequent recordation of subdivision plats in the office of the county recorder. One such provision provides for approval by the planning commission and "legislative body" and renders void any subdivision plat recorded in the office of the county recorder which has not been so approved; and another provides for approval by the "legislative authority"; and the third provides for approval "by its governing body, or by some city or town officer for that purpose designated by resolution or ordinance."

The inconsistencies in the terminology of the statutes in referring to the approving authority is of some concern, but is by no means overpowering for the following reasons. The obvious purpose

of each of the statutes is to insure appropriate approval of plats in order to preserve their sanctity when recorded. This is necessary to protect those who acquire property within the plats, since a properly recorded plat is a prerequisite to valid title. It is also obvious that the statutes do not undertake to vest any authority to approve plats but only to recognize existing authority to approve and require it to act. Hence their use of the terms "legislative body," "legislative authority," and "governing body" must be deemed to have been in their generic sense only and not an attempt to designate the functions of any particular governing body.

It is also to be observed that the statutes are of long duration, having been enacted before strong-mayor and council-mayor forms of government were provided for, and when only traditional forms of government were available. Consequently, it is not surprising that they contemplate only a single governing body exercising both legislative and executive powers. It is interesting to note, however, that even so, the statute that appears in the "Plats and Subdivisions" chapter of the Code recognizes that the governing body may designate, by resolution or ordinance, a city or town officer as the approving authority.

We conclude that the Mayor's approval of subdivision plats is an appropriate executive power and that such is in compliance with statutory requirements and prerequisites for the recording thereof.

Opinion of Justice Hall at p. 7-8 [emphasis added].

The task imposed upon a city by this method of interpretation should be clarified. The entire Chapter 9 of Title 10 governing zoning powers and subdivision approvals uses the term "legislative body." In the opinion of Justice Hall the use of that term "legislative body" in Section 10-9-25 should be read in cities adopting the Optional Forms Act as "the mayor" because that function in that statute appears to be not purely "legislative." So each usage of the

term "legislative body" in Chapter 9 must now be scrutinized to see whether it means "the mayor" or truly the "legislative body."

For example, Section 10-9-23 which provides:

From and after the time when the planning commission of any municipality shall have adopted a major street plan, the legislative body may establish an official map of the whole or any part or parts of the municipality theretofore existing and established by law as public streets. Such official map may also show the location of the lines of streets on plats of subdivisions which shall have been approved by the planning commission. The legislative body may make, from time to time, other additions to or modifications of the official map by placing thereon the lines of proposed new streets or street extensions, widenings, narrowings, or vacations which have been accurately surveyed and definitely located; provided, however, that before taking any such action the legislative body shall hold a public hearing thereon and provided, further, that such proposed addition to or modification of the official map shall be submitted to the planning commission for its approval, and in the event of such commission's disapproval, such addition or modification shall require the favorable vote of not less than a majority of the entire membership of the legislative body.

If the "legislative body" term in Section 10-9-23 is interpreted to be legislative body and not mayor then it is that body which establishes the "official map" and determines any changes to the map by "new streets" "additions," "extensions," "widenings," "narrowings," etc. Under the opinion of Justice Hall the mayor would not have this authority, since the adoption of a street plan is presumably an ordinance and thus, "purely legislative." But if the "legislative body" does control adoption and changes in the official map pursuant

to Section 10-9-23 how can the mayor be considered the repository of the authority to approve subdivisions which inherently is the right to approve and accept new streets into the city street plan?

Interestingly the application of the opinion of Justice Hall leads to another curious result in application to Section 10-9-25. The statute has two uses of the term legislative body. The opinion finds the second usage to be "the mayor." The first usage refers to certifying the official map to the "legislative body." Thus the opinion of Justice Hall tends to the anomalous conclusion that within Section 10-9-25 the first use of "legislative body" means legislative body and the second use of "legislative body" means the mayor. And why, because there is language in the Optional Forms Act loosely referring to an executive branch, a legislative branch, and separation of powers.

The application of the opinion of Justice Hall to subdivision and zoning laws reveals it to be contrary to: numerous canons of statutory construction. [Rules of construction are indicated by numerical reference to paragraphs at pp. of this brief.]

1. It gives the mayor a power not enumerated contrary to Rule #1.

2. It interprets "executive" out of context then applies the definition out of context to Chapter 9 term "legislative body" contrary to Rule #2.

3. It interprets words "legislative body" in the same statute to have different meanings contrary to Rule #3.

4. It repeals and/or amends the entire use of "legislative body" in Chapter 9 by the implications of the imposed definition of "executive" contrary to Rule #6.

5. It disregards the Rule #7 that statutes are to be harmonized.

6. It engenders great confusion and uncertainty contrary to Rule #11.

7. It draws distinctions "too unsubstantial and too finely drawn to regulate human action," i.e., regulate zoning, contrary to Rule #11.

The court's disregard for these rules in relation to subdivision approval is a presumption that the state legislature did not know the maxims of construction or and that the legislature did not know that the entire zoning and subdivision were built on a power allocation to the "legislative body."

Further, the application of the accepted interpretations of federal and state power allocations reveals the erroneous conclusions reached in the opinion of Justice Hall. Those accepted interpretations wholly ignored with respect to its discussion of subdivision approval are as follows:

1. The legislative body has all powers not granted to executive or judicial departments.
2. Separation of powers is to be determined by each body politic, there is no requirement that certain powers be allocated to certain branches.
3. Divisions of power in separation of power governments are not to be doctrinaire; that is, they are to be divided by allocation not definition.

4. The legislative body may stipulate, except where limited, as to what the executive may or may not do.

Interestingly the opinion of Justice Hall indicates its ruling is not as to delegability, but sheer executive power. That is, the municipal council has no power to delegate and thus cannot even set controls on the use of that power. That is, the Mayor cannot be regulated for it is, in the opinion of Justice Hall, an executive power; "We need not concern ourselves and the trial judge "unnecessarily concerned himself with the delegability of that power." Opinion of Justice Hall at p. 7.

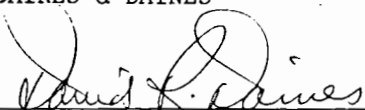
The application of the opinion of Justice Hall to subdivision approval reveals its flaws; flaws which pervade the entire opinion and all its holdings. It is neither consistent with its own chosen models nor with accepted rules of statutory construction.


CONCLUSION

The errors complained of if allowed to stand will erect a monument of confusion to the rule of law, due process, and will cause perpetual conflict in any municipality operating under the Optional Forms of Municipal Government Act. The opinion of Justice Crockett should be adopted by the Court.

Respectfully submitted,

DAINES & DAINES

by 
David R. Daines

by 
N. George Daines
Attorneys for Respondents-
and Petitioners

HOUSE OF REPRESENTATIVES
STATE OF UTAH

REP. WILLARD HALE GARDNER. 38TH DISTRICT

1495 OAK LANE - PROVO, UTAH 84601

COMMITTEES: APPROPRIATIONS (GOVERNMENT OPERATIONS, CHAIRMAN)
REVENUE AND TAXATION - LOCAL, STATE & FEDERAL GOVERNMENTS



STATE OF UTAH) SS
COUNTY OF UTAH)

I, WILLARD HALE GARDNER, BEING DULY SWORN ON OATH DO
DEPOSE AND SAY:

1. That I am a member of the Utah House of Representatives and have been since before 1974. Further that I was actively involved in the passage of Senate Bill #179 in the 1975 Session, known as the Optional Forms of Municipal Government Act.

2. That my name appeared as Amicus Curiae in Supreme Court No. 15498, Martindale v. Anderson. Until July 28th, 1978, I was not aware that my name was specifically being used but I do recall some discussion concerning the case some time ago. The Brief of Amicus Cuarlas does not accurately represent my views concerning this municipal form of government. I never recall being asked for my views nor was I consulted concerning the contents of the Brief filed.

3. That to my knowledge the sponsor of this legislation never specifically discussed the intent of the legislation with specific regard to real property transactions or approval of subdivisions with regard to whether power was to be lodged with the municipal council or mayor. However the view that these powers are lodged solely with the mayor appears contrary to every deliberation and consideration to which I was privy during the preparation and passage of this legislation.

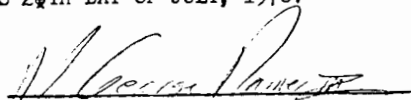
4. With regard specifically to the purchase, sale and exchange of real property my intent was and I believe the intent of the legislature was that the municipal council have the authority and power of control. The fulfillment of the plans and actual acts in carrying out those powers could, of course, be delegated. It is contrary to any intent that I ever had that a mayor acting on his own authority could sell parks, or any other municipal real property without authority of the municipal council.

5. That with regard to subdivision approval again it is contrary to any legislative intent that I ever had or which I believe the legislature ever had that the mayor possessed unilateral power to approve or disapprove subdivisions. This again is such a significant and important decision in a municipality that it should not be left to one man's determination but that such decisions should be made by the legislative body elected by the people. As to whether this power is delegable or as to the appropriate procedure for delgation I have no firm opinion.

6. With regard to the Act generally, it is my opinion that all municipal statutes not modified directly by the Act would remain applicable. That is that for example in the powers given cities to regulate by zoning those references to "legislative body" would be to the municipal council except where the Optional Forms Act specifically changes that power allocation. I do not believe that the legislature intended to cause a city to embark on the task of reducing every power given to cities into tight categories of legislative and executive qualities and thereby remak~~en~~ the muncipal code.


WILLARD HALE GARDNER

SUBSCRIBED AND SWORN BEFORE ME THIS 20TH DAY OF JULY, 1978.


Notary Public

Residing at: *River Heights*
Commission expires: *1/23/80*

IN THE SUPREME COURT STATE OF UTAH

LOYE E. MARTINDALE; DARWIN W.
LARSEN; CAROL W. CLAY; LOGAN
CITY, a municipal corporation;
and the MUNICIPAL COUNCIL of
Logan City,

Plaintiffs, Respondents

vs.

Mayor DESMOND L. ANDERSON;
City Attorney J. BLAINE
ZOLLINGER; City Auditor and
Budge Officer DUANE H. BECK.

Defendants, Appellants

AFFIDAVIT ON
PETITION FOR REHEARING.

STATE OF UTAH)
 : ss.
County of Cache)

COMES NOW CHARLES BULLEN and being first duly sworn
on oath deposes and says:

1. That I am at the present time a duly elected and
serving member of the Utah State Senate; and,
2. That during the 1975 Session of the Utah Legislature,
I was a member of the Utah House of Representatives representing
Legislature District No. 58 which includes most of Logan City.
Since that time, I have continued in being elected State Senator
in District No. 25 in 1976.
3. That since becoming a member of the Utah Legis-
lature, I have been familiar with the legislative action relative

to so called "Optional Forms of Municipal Government" primarily because of political initiatives with respect to such legislation from groups and individuals promoting changes for the specific benefit of Logan City; and,

4. That I know that the Strong-Mayor Form of Optional Municipal Government Act was in force and available to Logan City if approved by the electorate between 1959 and 1975, and that pursuant to said act a proposal of adoption was presented to the voters of Logan City in referendum form in 1973 and the majority of voters of Logan City rejected the Strong-Mayor Optional Form of Municipal Government; and,

5. That the Strong-Mayor Optional Form of Government act was repealed by the legislature in its 1975 Session, that I know that one of the primary political forces that implored the legislature to repeal the act was the negative results of the 1973 referendum in Logan City reflecting substantial, substantive objection of the Logan electorate to the Strong-Mayor Optional Form of Government; and,

6. That during the 1975 legislative session, various proposals of Optional Forms of Municipal Government were proposed including one HB 215 which I sponsored but later withdrew in favor of SB 179 sponsored by State Senator Karl Snow and others, which became law. In my opinion, all of the optional forms presented intentionally did not contain the words "Strong-Mayor. Such title and substance changes from the Strong-Mayor Act were consciously designed to construct one or more Optional Forms of Municipal Government available to all cities but which

corrected the preceived substantive objections of the Logan electorate to the Strong-Mayor Form. Thereafter, the same Logan body electorate which had rejected the Strong-Mayor Form adopted the Council-Mayor Form; and,

65 7. That from my exposure of the legislative process it was my distinct understanding that the Mayor under SB 179 had the exclusive authority to deal administratively with Department Heads and city employees, but that the Mayor could only buy, sell or trade real property upon authorization and/or directors of the Council. I also understood that matters such as location of roads and streets as inherently involved in subdivision approvals and adoptive major road plans and long term commitment of city services to new development were also within the powers given to the council; and,

8. It was my understanding of SB 179 that it did propose to separate powers between the council and the Mayor. That in separating the powers it was a distinct intentional departure from the previous Commission-Mayor Form of Government. I understood that the act provided generally for such division on policy making or legislation and administrative or executive lines as between the Council and Mayor respectively. I understood that these general terms were given express and specific meaning by the act itself, which defined, quite apart from those general designations, in terms directly applicable to muncipal government under Utah law, which body had which powers.

9. That as a member of the House Sifting Committee,

1975 Session, in representing the desires of Logan City for an Optional Form of Government, I was instrumental in referring Senate Bill 179 to the House floor and causing its passage.

9. I understand that this affidavit is given for the purpose of evidencing general and specific legislative intent with respect to the subject legislation on a petition for rehearing before the Utah Supreme Court and that if I am given the opportunity, I will testify and be subject to cross-examination on the statements contained in this affidavit and hereby waive any privilege that may be granted to me to refrain from testifying concerning the above or related matters.

SIGNED this 31st day of July, 1978.



CHARLES BULLEN

SUBSCRIBED and sworn to before me this 31st day of July, 1978.



Notary Public

Residing at: Logan Utah

Commission expires: 12/16/79

CERTIFICATE OF SERVICE

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

Melvin E. Leslie, Esq.
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Councilman Claude J. Burtenshaw
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Logan, UT 84321

this 2 day of August, 1978.

Jayne Christensen