

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 : Reply of Appellant To Respondents' Sep 5 1978 Petition For Rehearing And Brief of Appellant

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 CORPORATION;
and the MUNICIPAL COUNCIL
OF LOGAN CITY,

Plaintiffs, Res-
pondents and
Petitioners,

vs.

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

Defendants and
Appellants.

Supreme Court No. 15498

FILED

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REPLY OF APPELLANT TO RESPONDENTS' SEP 5 1978
PETITION FOR REHEARING AND
BRIEF OF APPELLANT

Clerk, Supreme Court, Utah

* * * * *

David R. Daines, Esq.
N. George Daines, Esq.
DAINES & DAINES
128 North Main
Logan, Utah 84321

ATTORNEYS FOR PLAINTIFFS
RESPONDENTS and PETITIONERS

Melvin E. Leslie, Esq.
Steven W. Allred, Esq.
LEGISLATIVE GENERAL COUNSEL
403 State Capitol Building
Salt Lake City, Utah 84114

ATTORNEYS FOR AMICUS CURIAE

J. Blaine Zollinger, Esq.
Logan City Attorney
61 West 1st North
Logan, Utah 84321

Calvin L. Rampton, Esq.
Suzanne M. Dallimore, Esq.
JONES, WALDO, HOLBROOK &
McDONOUGH
800 Walker Bank Building
Salt Lake City, Utah 84114

ATTORNEYS FOR DEFENDANTS-
APPELLANTS

Councilman Glenn T. Baird
Councilman Claude J. Burtensha
61 West 1st North
Logan, Utah 84321

AS AMICUS CURIAE

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David R. Daines, Esq.
N. George Daines, Esq.
DAINES & DAINES
128 North Main
Logan, Utah 84321

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RESPONDENTS and PETITIONERS

Melvin E. Leslie, Esq.
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LEGISLATIVE GENERAL COUNSEL
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Logan City Attorney
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61 West 1st North
Logan, Utah 84321

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LARSEN, CAROL W. CLAY; LOGAN	:	
CITY MUNICIPAL CORPORATION;	:	
and the MUNICIPAL COUNCIL	:	REPLY OF APPELLANT TO
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	:	FOR REHEARING
Plaintiffs, Res-	:	
spondents and	:	
Petitioners,	:	
	:	Supreme Court No. 15498
vs.	:	
	:	
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CITY ATTORNEY J. BLAINE	:	
ZOLLINGER, CITY AUDITOR	:	
and BUDGET DIRECTOR DUANE A.	:	
BECK,	:	
	:	
Defendants and	:	
Appellants.	:	

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF
THE SUPREME COURT OF UTAH:

Appellant respectfully urges that Respondents' Petition
for a Rehearing in this case be denied on the following grounds:

1. Respondents have failed to show a proper ground for
rehearing in that their petition is not based on any matter
not already before this Court when it rendered its opinion or
that was not available to Respondents to present at some
earlier point in this case.

2. Respondents have failed to meet their burden of
showing this Court overlooked a material fact, based its decision

on a wrong principle of law, misapplied or overlooked anything materially affecting the result reached in its decision, or erred in its conclusions of law.

For the foregoing reasons, Appellant respectfully urges that Respondents' Petition for Rehearing be denied.

DATED this ____ day of September, 1978.

J. BLAINE ZOLLINGER
Logan City Attorney
Attorney for Appellant

JONES, WALDO, HOLBROOK & McDONOUGH

By
CALVIN L. RAMPTON

By
SUZANNE M. DALLIMORE
Attorneys for Appellant

NATURE OF THE CASE AND DISPOSITION

Appellant here responds to Respondents' Petition for Rehearing filed August 2, 1978, urging that this Court rehear and reconsider its opinion rendered on the 13th day of July, 1978. Respondents urge rehearing of those portions of this Court's decision that reverse the First Judicial District Court's Summary Declaratory Judgment, which judgment construed and interpreted Utah's Optional Forms of Municipal Government Act (hereinafter referred to as the "Act" or the "Optional Mayor-Council Act").

Respondents seek relief in the form of a new opinion from this Court that sustains the lower court's Summary Declaratory Judgment, in accord with the dissent of Judge Crockett filed in this Court's opinion, or, in the alternative, for an Order expressly finding the statutes in question ambiguous and remanding the case to the lower court for the purpose of receiving evidence pertinent to the resolution of the ambiguities so found. Appellant seeks the denial of Respondents' Petition for Rehearing on the grounds alleged above as are more fully supported in the Appellant's accompanying Brief.

STATEMENT OF FACTS

Appellant agrees that the substantive facts relating to this Petition for Rehearing are accurately reflected in the record of the case that was before this Court when it rendered its opinion on July 13, 1978.

Appellant objects, however, to Respondents' elaboration of "procedural facts", in that that is not a statement of facts at all but is rather unsupported argument in favor of Respondents' position on its Petition for Rehearing.

The procedural facts that are pertinent to this Court's determination of Respondents' position are rather as follows:

1. Respondents (Plaintiffs below) filed a Complaint in the First Judicial District Court for the State of Utah seeking a judicial declaration of the respective rights, duties and powers of the municipal council and the mayor of Logan City under the Utah's Optional Mayor-Council Act.

2. Appellant (Defendant below) moved to dismiss that action, which motion was denied. There were various procedural machinations regarding motions to strike and to dismiss filed by both parties.

3. Respondents moved for summary judgment on nearly every count in the claims alleged in their Complaint, and stipulated that there were no material issues of fact with respect to the construction of the Act to obtain a ruling on their Motion for Summary Judgment. Respondents did not seek

an evidentiary hearing on the key question of the separation of powers under the Act which question necessarily involved the issue of who, the mayor or the council, had the power to dispose of and make determinations with respect to real property.

4. The lower court issued an interim memorandum decision granting partial declaratory summary judgment on certain of Respondents' claims, reserving other of the claims involving factual matters going to the actual disputes between the parties for evidentiary hearing.

5. After the evidentiary hearing on these issues, at which time Respondents did introduce evidence going toward the basic questions of interpretation of the Act, for example, the Ballot Title upon which the citizens of Logan City had voted in adopting the Optional Mayor-Council Act, the lower court issued a final declaratory summary judgment ruling in favor of Plaintiffs' positions on virtually all their claims.

6. Appellants appealed from the lower court decision and both parties filed briefs. This Court received amicus briefs from two of the Logan Municipal Councilmen and from certain legislators, including a sponsor of the optional Mayor-Council Act. All briefs argued the law governing questions of statutory interpretation, the history and context and development of the Optional Mayor-Council Act.

7. Neither in their brief nor at oral argument did Respondents urge that an express finding of ambiguity was necessary before the legislative intent behind the Act could be considered by this Court, or that Respondents had been or would be denied due process if legislative intent were considered. This was the case even though Respondents filed their brief nearly one month after the legislator's amicus brief was filed and directly addressed the amicus position on legislative intent in their appeal brief.

8. On July 13, 1978 this Court rendered its opinion reversing the lower court in ruling in favor of the position urged by Appellant with respect to the proper interpretation and application of the Optional Mayor-Council Act.

BRIEF

POINT I

RESPONDENTS HAVE FAILED TO SHOW A PROPER GROUND FOR REHEARING IN THAT THEIR PETITION IS NOT BASED ON ANY MATTER NOT ALREADY BEFORE THIS COURT OR THAT WAS NOT AVAILABLE TO RESPONDENTS AT SOME EARLIER POINT IN THIS CASE.

It is clear that the Utah Supreme Court has never favored petitions for rehearing and that a heavy burden is upon those seeking a rehearing of a decision from this Court to justify it on a proper ground. E.g., In Re MacKnight, 4 U. 237, 9 P. 299 (1886). Petitions for rehearing will be denied when the petitioners offer nothing new and important for reconsideration by the court. Docheneau v. House, 4 U. 438, 11 P. 618 (1886); Jones v. House, 4 U. 484, 11 P. 619 (1886). Petitions for rehearing will not be granted even on the basis of totally new issues and arguments if those points and arguments were available to the petitioners to have presented to the court at any prior stage of the proceeding. Such new matters will not even be considered by the court on a petition for rehearing. E.g., In Re Lowe's Estate, 68 U. 49, 249 P. 128 (1926); Western Securities Co. v. Silver King Consol. Mine Co., 57 U. 88, 192 P. 664 (1920); Dahlquist v. Denver & Rio Grande R. Co., 52 U. 438, 174 P. 833 (1918).

Respondents base their petition for rehearing on several arguments, all of which were either pointed out to the lower court as shown by the record on appeal, or in Respondents' appeal brief, or in oral argument before this Court.

Respondents make much of the argument that unless and until there is an express finding that a statute is ambiguous, no matters beyond the express language of the enactment, particularly legislative intent, may be considered. However, the very basis for this action was that Logan City officials were not clear from the terms of the Optional Mayor-Council Act as to the scope of their respective powers and duties. Appellant argued in its appeal brief that the lower court had misconstrued the Act. Appellant argued that the Act's language must be viewed in light of other Utah statutes and of the intent of the legislature in enacting the overall statutory scheme.

Respondents' brief urged that the express language of the Act, particularly of the 1975 version where it referenced "governing body" decided the issue, as was the basis for the lower court's judgment. Respondents' brief did not urge that the question of interpretation or application of the Act was improperly before this Court on appeal in that no express finding of ambiguity had been made as it now urges in its petition for rehearing. Indeed, Respondents' brief explicitly traced the history of the Act from the 1975 version through the 1977 amendments, and expressly referred to legislative intent in several places. (See e.g., Brief of Respondents at pp. 22, 23, 28).

Moreover, Respondents addressed the amicus brief filed by the legislative general counsel which brief dealt with the propriety of considering legislative intent, and with the

actual intent behind the Act. Again, Respondents did not urge that the issue could not be considered absent an express finding that the Act is ambiguous.

Consequently, all of the arguments that Respondents make with respect to the necessity of finding an ambiguity in the statute were available to it at the briefing stage of this appeal. Having not raised the issue then, Respondents may not now urge the point as a ground upon which rehearing can be granted.

Respondents make the somewhat incredible argument that they have been denied procedural due process by virtue of this Court's rendering an opinion based upon the record before it. Respondents' argument is that this Court's receipt of the legislators' amicus brief constituted the receipt of evidence of legislative intent that was not presented to the trial court below and upon which this Court impermissibly relied. This, Respondents urge, denied them the right to confront and cross-examine witnesses, and to present their own "evidence" of legislative intent.

As will be seen in Point II of this brief, this Court properly received and properly used the amicus brief filed by the Utah State legislators. Moreover, the amicus brief contained nothing that could even remotely be characterized as evidentiary. It contained arguments only of the proper laws of statutory interpretation, the history of the Act, and the context in which it was enacted. These are matters which this

Court has repeatedly held are proper matters of consideration. E.g., Parker v. Rampton, 27 U.2d 36, 497 P.2d 848 (1972).

But more importantly, the argument that due process was denied was available to Respondents at the initial briefing stages of this appeal. Appellant believes that Respondents did not there raise it because they could not, having waived the point by themselves filing for declaratory relief, having moved for summary judgment and having stipulated that there was no material issue of fact with respect to proper application and interpretation of the Optional Mayor-Council Act.

It is ridiculous for Respondents to claim they have been denied their day in Court. They are held to have known that this Court places a heavy premium on ascertaining legislative intent whenever the meaning of a statute is called into question. E.g., Johnson v. State Tax Commission, 17 U.2d 337, 411 P.2d 831 (1966). Clearly intent became important the instant Respondents filed their Complaint.

If Respondents had thought it material to introduce below individual legislator's testimony, journals, records or any other facts pertinent to intent, they could have done so. They did not. They may not, therefore, now urge their failure to introduce evidence as a ground for a rehearing.

Respondents argue that this Court has essentially decided this appeal arbitrarily. Again, the issue of the arbitrariness of this Court's opinion turns on the validity Respondents' previously available argument that an express

finding of ambiguity was necessary, and secondly, upon the validity the Respondents' argument that it therefore follows that they were denied due process. As none of Respondents' premises constitute new matters not available to them at least at the initial briefing stages of this appeal, it follows that their conclusion of arbitrariness is similarly vulnerable.

Respondents raise many points of law that they claim this Court decided erroneously, including the legislature's power over real property and the proper rules of statutory construction to be applied to this case. All of these points were argued exhaustively by Respondents before the court below, and before this Court. This Court had the benefit of all arguments and authorities and ruled accordingly. None of these matters, therefore, is new, and, as will be seen under Point II, Respondents have not met their burden of convincing this Court that it ruled improperly on any of them. Again, these arguments provide no justification for a rehearing. Respondents' argument on rehearing is essentially and fundamentally that they are disappointed with the majority decision in this Court. This Court didn't rule in favor of the Respondents, and they simply do not like it. They wish the majority had accepted Justice Crockett's view, who ruled to Respondents' liking apparently on the same record as the rest of the Court.

This Court has held that it is not a proper ground for rehearing that counsel is dissatisfied with the result as

reflected in the final opinion. This Court will not rehear a case simply to drop points or to adopt other conclusions based upon what might or might not be satisfactory to counsel seeking the rehearing. Beaver County v. Home Indemnity, 88 U. 1, 52 P.2d 435 (1935).

Appellant respectfully urges that Respondents' arguments for rehearing do not raise one new material point not available to Respondents before. Therefore, totally aside from any consideration of the meritoriousness or the legal accuracy of Respondents' arguments, they have simply not alleged any proper ground upon which this Court can grant a rehearing. For this reason alone, Appellant respectfully urges that Respondents' petition for rehearing be denied.

POINT II

RESPONDENTS HAVE FAILED TO MEET
THEIR BURDEN OF SHOWING THIS COURT
HAS OVERLOOKED A MATERIAL FACT, BASED
ITS DECISION ON A WRONG PRINCIPLE OF
LAW, MISAPPLIED ANYTHING MATERIALLY
AFFECTING THE RESULT REACHED IN ITS
DECISION OR ERRED IN ITS CONCLUSIONS
OF LAW.

As was noted above, the burden is heavy upon the petitioners seeking a rehearing to convince the court of the following: (1) that it failed to consider some material point; (2) that it erred in its conclusions of law; (3) that petitioner has discovered some new matter, some new position and point of law overlooked before that was unknown at the

origination of the appeal and which properly ought to be considered by the court in connection with the opinion rendered.

In Re MacKnight, 4 U. 237, 9 P. 299 (1886).

Appellant has shown that Respondents' arguments contain nothing not available to them before. Consequently, they must convince this Court that it erred, overlooked or misapplied proper rules of law. This too they have failed to do.

Respondents rely heavily upon the legal argument that as a matter of statutory construction there must be an express finding that a statute is ambiguous before any extraneous matters, including any questions of legislative intent can be looked to by the court in construing the statute. Respondents urge that this follows from an established rule of statutory construction characterized as the "plain and unambiguous rule."

The plain and unambiguous rule is almost universally accepted, and provides that where the meaning of a statute is unequivocally clear, the court will not look beyond it to create an ambiguity. However, Respondents have misconstrued the application of the rule. It does not follow from the rule that all statutes are presumed plain and unambiguous unless and until some party points out and claims upon an alleged ambiguity and the court thereafter expressly finds such an ambiguity to exist. It does not follow that any statute capable of an interpretation is therefore plain and unambiguous. Rather, the rule provides that there are certain terms and phrases that all reasonable men

would understand as having the same meaning, and which could only mean one thing in the context of the statute in which they are found. In such a case, it is obvious that the courts will not allow a party, who disagrees with the plain and unambiguous meaning of a statute and wishes it to have a different meaning, to introduce evidence creating an ambiguity. That is not the same as requiring that a party expressly point out to the court what the ambiguity is and that the court so affirmatively find before any evidence pertinent to the interpretation of the phrase or statute is receivable. No Utah Supreme Court case has ever held that a court must affirmatively or expressly on the record find the existence of an ambiguity before it can look to matters beyond the actual statutory words as an aid to interpretation.

Respondents' argument that there was no ambiguity in the Optional Mayor-Council Act is patently absurd. There was a sufficient ambiguity in the statute to give rise to Respondents' filing a complaint containing nine separate counts alleging actual disputes between members of the Logan City Municipal Council and the Mayor of Logan City in interpreting their respective powers under the Optional Mayor-Council Act. Respondents raised the issue of the ambiguity and in fact claimed under it by filing their Complaint for declaratory relief. The trial court expressly found that the questions raised by Respondents' Complaint were properly subject to declaratory relief in that not only was there a statutory interpretation in-

involved (necessarily implying an ambiguity), but that actual day-to-day real disputes existed between the council and mayor as to what powers and duties the act imposed upon them to warrant declaratory relief. (See Final Declaratory Summary Judgment at pp. 4-6). No error on the part of this Court in looking to proper matters of legislative intent is therefore made out.

Given that Respondents' argument as to the necessity of an express finding of ambiguity and the failure of the lower court to so find is incorrect, every argument that follows from that incorrect premise is also fallacious. Respondents' next argument is that this Court improperly looked at and considered a brief in the form of an amicus curiae filed on behalf of certain state legislators going into questions of legislative intent. The Utah court has held repeatedly that where a statute is unclear (as it obviously was in this case) the court would properly look to the reasons for and the history of the enactment to determine legislative intent. Parker v. Rampton, 28 U.2d 36, 497 P.2d 848 (1972).

Indeed, Respondents themselves pointed out the history of the Act as being material to its construction in their brief on appeal at p. 10. This Court, therefore, properly allowed the amicus brief to be filed, the brief was filed in a proper form serving the classic function of an amicus to aid the Court in understanding certain areas with respect to intent that were necessary to the Court's interpretation of the statute

contained nothing evidentiary and was properly relied on by the Court as background for its decision.

From Respondents' fallacious premise that an express finding of ambiguity is somehow a condition precedent to the consideration of any legislative intent, they move to their next fallacious premise that legislative intent was improperly expressed in the amicus brief, and from that, to their fallacious conclusion that Respondents were denied due process because improper evidence worked its way into this Court's opinion. To state Respondents' argument is to disprove it. As the question of the application and interpretation of the Optional Mayor-Council Act was at issue, the statute obviously was unclear. As the statute was unclear, it was proper for this Court to consider all correct elements of legislative intent. Correct elements of legislative intent were properly expressed and in proper form in the amicus brief filed by the legislators. The Court's opinion which touched upon the amicus brief as background and history only, was a proper use of the matters contained in the amicus brief. It, therefore, follows that at every step of this appeal, the proceedings have been completely proper and have done no harm to Respondents except that the decision was not the one that they sought.

Respondents' due process argument, of course, also alleges that they were denied the opportunity to present witnesses as to legislative intent. It is abundantly clear, as has been argued before this Court in the past, that individual

opinions of single legislators are not proper considerations going to legislative intent. E.g., Castenada-Gonzalez v. Immigration and Naturalization Service, 564 F.2d 417, 424 (D.C. Cir. 1977); See also, Jensen v. Matheson, Supreme Court Case No. 15826, July 27, 1978.

It follows, therefore, that Respondents cannot claim a denial of due process on the basis of their inability to introduce witnesses whose testimony would never have been material to any stage of the proceeding. Indeed, Respondents did in fact introduce evidence at the trial court level going to the legislative intent behind the statute in the form of the Ballot Title upon which the citizens of Logan City voted.

In short, Respondents' arguments based on ambiguity, improper evidence and arbitrary decision by this Court and the denial of due process are all completely unsound. Therefore, Respondents have not met their burden of showing that on any of these bases the Court acted erroneously.

Respondents further argue that as a matter of law, the Court improperly applied the federal and state models with respect to the proper separation of power even if it correctly characterized the Logan City form of government as a true separate powers form of government. Respondents focus on the question of the power to buy and sell real property as distinguished from the power to make general policy with respect to its ultimate disposition. Respondents' argument basically is that the respective Constitution of the United States and of the State of Utah give their respective legislative bodies

"plenary" power over the disposition of public lands.

As was argued in Appellant's brief at the outset of this appeal, however, the question is not what the Utah state legislature or the Congress of the United States has power to do but what the municipal council of Logan has power to do. Appellant argued that the grant of power in this case was state statute which provided the fundamental legal basis, sort of a quasi constitution, for Logan City government.

Upon proper application and interpretation of the statutes granting power to the municipalities in the State of Utah, this Court ruled that the mayor has power over the disposition of real property as an executive power under the statutory scheme of a separate-powers form of government in Logan City. The Court had before it all the arguments of law pertinent to the point as presented by Appellant and Respondents.

What Respondents are doing is re-arguing their position with respect to the power over real property. Again, Appellant urges that Respondents' only real grievance with the opinion issued from this Court is that it did not favor Respondents. Consequently, Appellant believes that Respondents have not urged any meritorious basis for a rehearing on the real property question.

Finally, Respondents urge that the opinion of Justice Hall has misapplied or ignored all of the fundamental rules of statutory interpretation. Interestingly, throughout their briefs

Respondents do not cite specific Utah cases that deal with what specific canons of statutory construction this Court is obligated to apply. Rather, Respondents rely heavily on general treatises that address principles adopted throughout the country in varying degrees in varying courts. The appropriate rules of statutory construction were argued by Appellant in its initial brief, and were pointed out again by amicus in their brief on behalf of the state legislators. The Utah law on this subject provides that legislative intent must be looked to and specifically states to what sources of legislative intent this Court might look. E.g., Johnson v. State Tax Commission, 17 U.2d 337, 411 P.2d 831 (1966).

The ambiguity in the statute at issue here does not depend on any hypertechnical narrow rule of construction such as those urged by Respondents. What is at issue here, placed in issue by Respondents' filing their claim for declaratory relief, is the overall, general application of an entire statutory scheme both specifically as its language applies and generally as modified and in the context of the overall grants of power to municipal governments.

This Court found that the lower court had improperly construed this statutory scheme by focusing too narrowly on specific words such as "governing body" without viewing the entire statutory framework. This Court then proceeded to view the entire statutory framework to put all phrases and all alloca-

tions of power in the proper context. That was what this Court was obligated to do by the issues raised in the context of the proceedings below and on this appeal.

This Court applied not only the proper rules of statutory construction but the only rules of statutory construction material to the issues before it. Again, Appellant urges that Respondents are objecting not to the method by which this Court reached its conclusion, but the conclusion reached in that it was not favorable to Respondents. Indeed, Respondents urge that this Court adopted the opinion of Justice Crockett. Appellant frankly cannot see where Justice Crockett specifically and methodically applied those canons of construction urged by Respondents as proper. Indeed, it appears that Justice Crockett applied the very same method that the rest of this Court applied, that of viewing the statutory scheme as a whole in context and came to a differing conclusion. It is the conclusion with which Respondents agree, they have no objection with his method so that it appears that they should have no objection to the majority's method of arriving at its conclusion.

From the foregoing, it appears that Respondents have not met their burden of convincing this Court that it erroneously applied any rule of law. Nor have they shown to the satisfaction of anyone that this Court failed to consider any material point. Nor have they shown that some newly discovered point of law is

pertinent and overriding. All Respondents have done is urge that this Court erred by not agreeing with their position. This Court has never held that to be a proper ground for rehearing, and certainly it is not so in the instant case. For the above reasons, therefore, Appellant respectfully urges that Respondents' petition for rehearing be denied.

RESPECTFULLY SUBMITTED this _____ day of September, 1978.

J. BLAINE ZOLLINGER
Logan City Attorney
Attorney for Appellant

JONES, WALDO, HOLBROOK & McDONOUGH

By _____
CALVIN L. RAMPTON

By _____
SUZANNE M. DALLIMORE
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed, prepaid, two copies of the following APPELLANT'S REPLY TO RESPONDENTS' PETITION FOR REHEARING AND BRIEF OF APPELLANT, to the following:

David R. Daines, Esq.
N. George Daines, Esq.
DAINES & DAINES
128 North Main
Logan, Utah 84321

ATTORNEYS FOR PLAINTIFFS
RESPONDENTS and PETITIONERS

Melvin E. Leslie, Esq.
Steven W. Allred, Esq.
LEGISLATIVE GENERAL COUNSEL
403 State Capitol Building
Salt Lake City, Utah 84114

ATTORNEYS FOR AMICUS CURIAE

Councilman Glenn T. Baird
Councilman Claude J. Burtenshaw
61 West 1st North
Logan, Utah 84321

AS AMICUS CURIAE

DATED this 5th day of September, 1978.


