

2001

Ira Royal L. Tribe et al. v. Salt Lake City Corporation : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

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BRIEF

13856A

IRA ROYAL L. TRIMBLE, et al.,
Plaintiffs and Appellants,

—VS.—

SALT LAKE CORPORATION, et al.,
Defendants and Respondents.

Case No.
13856

Brief of Plaintiffs and Appellants

Appeal from Judgment in Favor of
Defendants-Respondents by the
District Court of Salt Lake County
The Honorable Joseph G. Jeppson

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IN THE SUPREME COURT OF THE STATE OF UTAH

IRA ROYAL L. TRIBE, et al.,
Plaintiffs and Appellants,

—vs.—

SALT LAKE CORPORATION, et al.,
Defendants and Respondents.

Case No.
13856

Brief of Plaintiffs and Appellants

NATURE OF THE CASE

This is an action for a declaratory judgment to determine constitutionality of the Utah Neighborhood Development Act (Section 11-19-1 et seq., Utah Code Annotated 1953) and of actions taken and proposed to be taken by the defendants and respondents pursuant to such act and to determine the proper interpretation of certain provisions of such act.

DISPOSITION IN THE LOWER COURT

The trial court, sitting without a jury, was presented documentary and testimonial evidence and entered judgment in favor of defendants and respondents holding that the Utah Neighborhood Development Act (hereinafter referred to as the "Act") is constitutional

and that certain resolutions of certain of the defendants are lawful and valid, including resolutions approving a plan for the issuance of bonds by the Salt Lake City Redevelopment Agency ("Redevelopment Agency") for the payment of which certain parking revenues and "tax increments" are pledged. (R. 99-100).

RELIEF SOUGHT ON APPEAL

Appellants seeks reversal of the judgment of the trial court and a declaration that the Act and the activities undertaken and proposed by the defendants pursuant thereto are violative of both state and federal law.

STATEMENT OF FACTS

Plaintiffs Tribe own real and personal property within an area of Salt Lake City designated as the C.B.D. West Neighborhood Development Agency Project Area (the "Project Area"), that is, the blocks and streets adjacent thereto of the two block area bounded on the north by First South Street, on the east by Main Street, on the south by Third South Street and on the west by West Temple Street. (R. 90, 93, 94). Plaintiff Christensen does not own property within the Project Area but like the Plaintiffs Tribe is a qualified elector and taxpayer of Salt Lake City and each annually pays property taxes levied by Salt Lake City, Salt Lake County, Salt Lake City School District and the other taxing agencies who levy taxes on property located within Salt Lake City. (R. 91). Action was brought by the plaintiffs on their own behalf and, in Count II, on behalf of themselves

and all other members of a class which they represent consisting of qualified electors of Salt Lake City who pay property taxes.

Salt Lake City Corporation (the "City") is a city of the first class organized and operating under the laws of the State of Utah. (R. 92). The Redevelopment Agency of Salt Lake City (the "Redevelopment Agency") was created by the City on June 10, 1969, in accordance with authority purportedly granted by the Utah Neighborhood Development Act (Chapter 19, Title 11, Utah Code Annotated 1953, first adopted as Chapter 5, Laws of Utah 1969, First Special Session and subsequently amended in part by Chapter 5, Laws of Utah 1970, Chapter 17, Laws of Utah 1971 and Chapter 4, Laws of Utah 1974, Budget Session; said Act to be distinguished from the Utah Community Development Law, Chapter 15 of Title 11, Utah Code Annotated 1953). (R. 91, 121). As authorized by Section 11-19-3, the members of the Board of Commissioners of Salt Lake City Corporation, they being the "legislative body" of the City, were designated as the Redevelopment Agency of the City. (R. 91). The official name of the Redevelopment Agency has been established as the "Redevelopment Agency of Salt Lake City" (See Exhibit 6).

The Redevelopment Agency was created for the purposes specified in the Act. On February 4, 1971, Salt Lake City Corporation adopted an ordinance officially approving a redevelopment plan for the Project Area. (R. 123, see also Exhibits 3, 4, 5, 7 and 8). The plan recognized that in this Project Area there were a number

of substandard buildings and uses of land and that through rehabilitation in some cases or acquisition, clearance and rebuilding in other cases, the Project Area could be improved with the result, among other things, of the "strengthening of the tax base and economic health of the entire community" (See Exhibit 4, Section B, Subparagraph g; see also R. 93, 94).

Shortly after the adoption of the plan, in May of 1971, federal monies were obtained and in June of 1971 an executive director (M. Danny Wall) and staff were hired. (R. 120, 122). Since May of 1971 only federal monies have been used for the operation of the Redevelopment Agency and no city, county, state or other local funds have been used in any respect (R. 122, 123, see also Exhibit 9). Prior to May of 1971, no city or other local funds were appropriated to the Redevelopment Agency but city officers and employees were used in the formulation of the plan adopted in February of 1971 and in the presentation of this plan in the application of the Redevelopment Agency for federal funds. (R. 122)

Within the Project Area, the Redevelopment Agency has currently three major projects in active stages of planning and completion. The first is the construction of retail stores and an office building on the northeast corner of Second South and West Temple Streets. This project is under contract with a developer, West Temple Associates, and is currently in the stage of formulation of construction plans. (R. 134, 135) The second major project is on the southeast corner and is proposed to consist of an office building and Sheraton Hotel. The

developer, Hartnett and Shaw, is currently preparing a full scale proposal for this project which, if approved by the Redevelopment Agency, will result in a contract for the sale and development of this parcel by the developer. (See Exhibits 10 and 11 for a rendering of the proposal for this project.)

The third major project and the one with which we are principally concerned in this action is the construction and operation of a parking facility in an area between Second and Third South Streets and extending to West Temple Street, excluding the corners on West Temple, the corner at Third South and West Temple occupied by Valley Bank & Trust and the corner at Second South and West Temple on which the proposed Sheraton Hotel Project would be built. (See Exhibit 12 for the precise location of this project.) Unlike the two other projects, the parking facilities would be owned by the Redevelopment Agency and when completed charges for parking would be made by the Redevelopment Agency. (R. 143-44, 147) The parking facilities would be operated either directly by the Redevelopment Agency or under lease to a private parking operator, but in either event the net parking revenues, after payment of operating costs, would be used by the Redevelopment Agency. (R. 147) Because this is an entirely new parking facility, neither the City nor the Redevelopment Agency will have received any revenues from this facility prior to its completion and operation.

To finance the proposed parking facility, the Redevelopment Agency proposes to issue \$15,000,000 of

tax allocation and parking revenue bonds. (R. 92, 146, 147). The nature of this bond issue has been approved by both the Redevelopment Agency (Exhibit 1) and by the City (Exhibit 2). The proposed bond purports to be an obligation of the Redevelopment Agency only and not of the City or of any other taxing agency and each bond will contain a statement on the face of the bond that it is not a general obligation or liability of the City or any other taxing agency, but only a "special" obligation of the Redevelopment Agency payable solely from the net parking revenues of the parking facility and from the "tax increment." (See Section 3 on Page 7 of the proposed bond resolution, a part of Exhibit 1, R. 21 and also the form of the bond in Section 26 on pages 37-38 of such resolution, R. 50-51.

The nature of the tax "increment" or tax "allocation" requires some explanation. The formula is set forth in Section 6 of Chapter 4, Laws of Utah 1974 (11-19-74) and essentially provides that if a redevelopment plan contains a tax allocation provision, an assessed valuation base for all taxable property within the project area is established consisting of the assessed valuation of all taxable property in the project area as of the last equalized assessment roll prior to the adoption of a plan containing such a provision. Also, as explained in the testimony of M. Danny Wall, after the adoption of a plan containing such a provision and the transmission of such plan to the County Auditor and County Assessor and to each of the taxing agencies who levy taxes on property included in the project area, the taxes thereafter

levied are divided between the existing taxing agencies and the Redevelopment Agency. (R. 156) That portion of the taxes produced upon the assessed value as of the base year is allocated to the existing taxing agencies, the remainder of such taxes, representing the taxes attributable to the increase in assessed valuation from the base year, is allocated to the Redevelopment Agency. The taxes thus produced on this increased assessed valuation is the "tax increment" referred to in the bond resolution and which is proposed to be pledged for the payment of the Redevelopment Agency bonds. (R. 156).

To accomplish this, it will be necessary for the Redevelopment Agency, with the approval of Salt Lake City and after a public hearing, to amend the existing redevelopment plan to provide for the tax allocation. (See Utah Code Annotated, §§ 11-19-23, 11-19-15 et seq.-20 and 11-19-34.) The amendments so adopted will provide that the assessment base for this Project Area will be the assessed valuation for the year 1970, that being the last equalized assessment roll prior to the adoption of the original redevelopment plan in February of 1971. (See R. 96, 99) Thus, from and after the adoption of this amendment and its filing with the Salt Lake County Auditor, Salt Lake County Assessor, Utah State Tax Commission and the various taxing agencies who tax property in the Project Area (Salt Lake City, Salt Lake County, Salt Lake School District and various special districts such as the Metropolitan Water District of Salt Lake City, and the Salt Lake City Mosquito Abatement District), taxes levied on valuations thereafter assessed will be divided between the taxing agencies and the Redevelopment

Agency in accordance with the statutory formula. Thus, if the redevelopment plan is so amended and this is accomplished in 1974, commencing in 1975, the proceeds of taxes collected on all property in the Project Area will be divided between the taxing agencies and the Redevelopment Agency as described above.

Please note that there is no control attempted or authorized to alter the amount of the levies fixed by the various taxing agencies or to determine the assessed valuations of the Project Area from year to year. All that is done is to divide the proceeds of the taxes levied, whatever they may be, between the existing taxing agencies and the Redevelopment Agency in accordance with the statutory formula.

Exhibit 13 shows in terms of known figures plus projections the effect of the tax allocation for the Project Area here involved. The 1970 assessed valuation for all of the taxable property in the Project Area was slightly in excess of \$3,000,000 and this produced total property taxes by all taxing agencies of approximately \$295,000. (See also R. 158) Taking into account only the estimated increase in assessed valuation as a result of the two projects in the Project Area, the building to be constructed by West Temple Associates and the Sheraton Hotel Office Building complex, the assessed valuation for the total Project Area would increase to a figure between \$6,400,000 and \$9,800,000 and would result in increased taxes being collected in the Project Area of between \$628,000 and \$962,000. These additional taxes would be allocated to the Redevelopment

Agency and this "tax increment" would be pledged for the payment of the Redevelopment Agency bonds. Exhibit 14 shows that based both upon these projections of tax increment and similar projections of the parking revenues, there will be sufficient funds from these two sources to pay the principal and interest on the bonds and to build up and maintain the reserve fund required by the bond resolution.

ARGUMENT

In considering the specific issues of constitutionality and statutory construction raised by the following arguments, it might be of assistance to consider three basic issues, the solution of which will assist in solving the specific issues and which are common to most of these specific issues. The first of these basic issues is the legal nature of the Redevelopment Agency — is it a separate entity public corporation or other type of political subdivision having a legal nature separate from that of the City, or is it merely a department, agency or division of Salt Lake City? A second major issue is the legal nature of the proposed bonds—are they in fact bonds of Salt Lake City although issued in the name of the Redevelopment Agency? In either event, are they to be considered a "general obligation" bond within the meaning of the election requirement, debt limit and lending of credit provisions of the Utah Constitution? The third basic issue is the legality of the proposed construction and operation of the parking facilities. Will these facilities be considered to have a purpose essentially private in nature or is there a public

purpose sufficient to justify, constitutionally, the use of public funds for the construction and operation of the parking facilities?

POINT I

UTAH CONSTITUTION, ARTICLE VI, SECTION 28, PROHIBITING DELEGATIONS TO A SPECIAL COMMISSION OF THE POWER TO MAKE, SUPERVISE OR INTERFERE WITH A MUNICIPAL IMPROVEMENT OR TO PERFORM MUNICIPAL FUNCTIONS IS VIOLATED BY THE UTAH NEIGHBORHOOD DEVELOPMENT ACT AND BY THE CREATION AND OPERATION OF THE REDEVELOPMENT AGENCY.

Utah Constitution, Article VI, Section 28, (formerly Article VI, Section 29 prior to the revision of Article VI which was adopted at the general election in 1971) provides as follows:

The legislature shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, to levy taxes, to select a capitol site, or to perform any municipal functions.

In *Backman v. Salt Lake County*, 13 Utah 2d 412, 375 P.2d 756 (1962), the Utah Supreme Court stated that three conditions are necessary to violate this provision: (1) delegation to a private commission of power (2) to interfere with municipal property or (3) to perform a municipal function (375 P.2d at 760).

A. *The Redevelopment Agency is a Special Commission.* Although the Utah Neighborhood Development Act does not expressly declare redevelopment agencies created under it to be separate public corporations, the defendant Salt Lake City has treated the Redevelopment Agency here as such a separate entity. (R.97) The Agency employs its own officers and employees who are not subject to the rules applicable to city employees generally. (R. 173, 174) The Agency maintains separate offices, separate accounting records and a separate payroll. (R. 178) The funds of the Agency are not handled by city officers nor commingled with city funds, but are maintained in a separate bank account under the sole control of the Agency. The Agency operates under a separate budget with fiscal years entirely different than those of the City (see Exhibit 9), and from time to time the Agency has borrowed funds under its own name and under circumstances where any obligation against the City is directly negated. (R. 175, 177; see also Exhibits 15 and 16) The City has officially recognized the Agency's separate character and this is particularly evident in the resolution of October 14, 1971. (Exhibit 6) Although the members of the Redevelopment Agency are the same persons as the members of the Board of Commissioners of Salt Lake City, they act in different capacities. For example, the mayor of the City is not automatically the chairman of the Redevelopment Agency, but the Redevelopment Agency elects its own chairman and secretary. The former mayor, E. J. Garn, was merely a member of the Agency and Commissioner Conrad Harrison is the chairman of the Agency. (See generally R. 91, 174). Le-

gally, this should be held as more than a mere theoretical putting on of different hats, because members of the Redevelopment Agency acting in that capacity have primary fiduciary obligations owed to the Agency to perform their functions in the best possible way for the benefit of the Agency even in dealings between the Redevelopment Agency and the City. See the discussion in Antieau, *3a Municipal Corporation Law*, §30P-12. That there may be dealings between the City and the Redevelopment Agency is specifically indicated by Section 11-19-23.1 of the Act.

Finally, we point out that the Redevelopment Agency is, being subject to the Act, authorized to act solely for the limited purpose of redevelopment and only in the manner provided by the Act. Thus, it is not a city authorized to act for a great variety of municipal purposes, but can only act for the limited purpose for which it was created. Furthermore, the Utah Neighborhood Development Act seems to authorize the Agency to act initially on its own behalf without action by the City. For example, Section 11-10-13 of the Act permits the Agency to adopt a redevelopment plan but requires that after adoption of the plan it must be submitted to and approved by the legislative body of the City. Ordinarily, there would be no need for such approval if the Agency were considered a department or agency of the City, because in such case, approval by the Agency would be the equivalent of approval by the City.

For the foregoing reasons, we urge that the Redevelopment Agency is a special commission within the constitutional prohibition.

B. *There is a Legislative Delegation to the Redevelopment Agency.* It was successfully argued by the defendants that there is no legislative delegation in violation of Article VI, Section 28 even if the Redevelopment Agency is considered a special commission and even if it is authorized by the Utah Neighborhood Development Act to interfere with municipal improvements and with municipal functions. Defendants contended and the trial court held that any delegation involved was a delegation by the City itself when it created the Redevelopment Agency. The contention is that the City was authorized to make such a delegation pursuant to the Act if it chose to do so. (R. 94).

The Utah cases have not specifically addressed themselves to this question. The Utah cases seem to fall under two categories—first where a state agency was delegated authority by the legislature which resulted in an interference with municipal property or municipal functions. Examples are cases involving the Utah Public Service Commission, such as *City of St. George v. Public Utilities Commission*, 62 Utah 453, 220 Pac. 720 (1923); *Logan City v. Public Utilities Commission*, 72 Utah 536, 271 Pac. 961 (1928); *County Water System v. Salt Lake City*, 3 Utah 2d 46, 278 P.2d 285 (1954); *State Water Pollution Control Board v. Salt Lake City*, 6 Utah 2d 247, 311 P.2d 370 (1957); and *State Tax Commission v. City of Logan*, 88 Utah 406, 54 P.2d 1197 (1936).

A second class of cases has involved the legislative creation or authorization to create special districts or new types of political subdivisions operating within the geo-

graphic limit of existing cities or counties. Examples are *Backman v. Salt Lake County, supra*; where certain large counties were required to hold an election which if approved would result in the establishment of a city auditorium board whose members would be appointed not exclusively by the county, but also by state officers and cities located within the county; *Lehi City v. Meiling*, 87 Utah 237, 48 P.2d 530 (1935), approving an act authorizing metropolitan water districts created by one or more municipalities after an election by the qualified municipal electors approving their creation and governed by a board of directors appointed by the municipalities comprising the district; *Tygesen v. Magna Water Co.*, 119 Utah 274, 226 P.2d 127 (1950) approving an act authorizing the creation of water and sewer improvement districts within counties, such districts being initiated either by the county commission or by resident taxpayers of the proposed district and to be governed by a board of trustees elected from the district; *Carter v. Beaver County Service Area No. 1*, 16 Utah 2d 280, 399 P.2d 440 (1965), invalidating an act authorizing the creation of county service areas in unincorporated areas of a county created at the instance of either resident taxpayers or the county commission itself and to be governed by a board of trustees elected from the service area so created; and *Branch v. Salt Lake County Service Area No. 2*, 23 Utah 2d 181, 460 P.2d 814 (1969) holding constitutional on a limited basis an amended version of the county service area act.

In none of these cases did the court deal expressly with the question of whether the legislature could author-

ize a city or county to delegate certain municipal functions to a special commission, although this might be considered implicit in the holdings of at least some of these cases. For example, the *Carter* case, *supra*, involved a special district whose creation was initiated by the county whose municipal functions were found to have been interfered with. Thus, it would follow that the consent of the county or delegation, if you will, implicit in the initiation of the district by the county is not sufficient to avoid the prohibitions of Article VI, Section 28.

The Pennsylvania Supreme Court construing a constitutional provision substantially identical to Article VI, Section 28, held that a municipality cannot, pursuant to enabling legislation, delegate its powers to a special commission or private corporation. In *Lighton v. Abington Township*, 336 Pa. 345, 9 A.2d 609 (1939), the Supreme Court of Pennsylvania refused to allow a township to issue non-debt revenue bonds which authorized a private trust company to assume control of a municipally owned sewage system in the event of default on the part of the city. The court reasoned:

As the Constitution specifically deprives the state of power to delegate the management of the municipal property to a private corporation, certainly the agent, the township, will not make such a delegation; the effects of the limitation on the principal would be destroyed if the agent could do what was prohibited. (9A.2d at 612).

California and Colorado have apparently reached a contrary result, holding that if the creation of a special district or special commission was approved by the local

municipality or even by the electors thereof, there is no violation of a clause similar to Article VI, Section 28. See, for example, *City of Whittier v. Dixon*, 24 Cal. 2d 665, 151 P.2d 5 (1944); *Housing Authority v. Dockweiler*, 14 Cal. 2d 37, 94 P.2d 794 (1939); *City of Aurora v. Aurora Sanitation District*, 122 Colo. 407, 149 P.2d 662 (1944).

We suggest that the Pennsylvania rule should be followed here. It is consistent with the familiar principles governing the powers of municipal corporations that "the powers of municipal corporations are delegated and a municipal corporation may exercise only the powers granted and in the manner prescribed" (*Tooele City v. Elkington*, 100 Utah 485, 116 P.2d 406 (1941)) and that the powers of a city are "strictly limited to those expressly granted, to those necessarily or fairly implied in or incident to the powers expressly granted, and to those essential to the declared objects and purposes of the corporation . . ." (*American Fork City v. Robinson*, 77 Utah 168, 292 Pac. 249 (1930); *Stevenson v. Salt Lake City Corporation*, 7 U.2d 28, 317 P.2d 597 (1957)). If the legislature which is the source of most of the powers of cities and counties in this state cannot act in a particular area because of constitutional limitations, certainly the legislature could not delegate to its agents, the cities and counties, the power to so act in the same restricted areas.

C. *There is Interference with Municipal Improvements and the Performance of Municipal Functions.* There can be no question in this case but that there will

be a direct interference with municipal improvements. Recall the testimony of Mr. Wall in describing the plans for the parking facilities in which he indicated the necessity for rerouting existing city owned water lines and sewer lines and described the extensive excavation of the streets made necessary for access to the underground parking facilities. (R. 181-82) Indeed, on both Second South and Third South Streets the entrances will be in the center of the street with obvious interference with existing traffic patterns. That these changes will be accomplished in cooperation with the City we have no doubt, but it is cooperation compelled by the activities of the Redevelopment Agency.

The question of interference with a municipal function is a matter dealt with in most of the Utah cases construing Article VI, Section 28. The purpose of the constitutional provision has been stated to be “. . . to hold inviolate the right of local self-government of cities and towns with respect to municipal improvements, money, property, effects, the levying of taxes, and the performance of municipal functions . . .” (*Logan City v. Public Utilities Commission, supra*) and also “to insure, insofar as practicable, the powers to cities and towns to manage their own internal affairs . . .” (*State Water Pollution Control Board v. Salt Lake City, supra*). The latter case also contained perhaps the most succinct definition of the term, “municipal function,” by stating the term “was used in its broad sense and would include any activity properly engaged in by the city or municipality, whether governmental or proprietary.” (311 P.2d at 374) The case is also instructive in prescribing a territorial

criterion suggesting that regulations of the State Water Pollution Control Board could not affect or apply to "the problem of sewerage disposal within Salt Lake City, and as affecting the inhabitants thereof . . ." but that such regulations could apply if there was a menace to the health of other communities or inhabitants of the state (311 P.2d at 375). In *Backman* the operation of a civic auditorium and sports arena was declared to be a municipal function (375 P.2d at 760). In *Carter v. Beaver County Service Area No. 1, supra*, the operation of a hospital was held to be a municipal function and the court condemned the broad scope of the act there involved as permitting the performance of so many traditionally local functions as to "emasculate the performance of municipal functions vested by the Constitution of Utah in the local corporate authorities." (16 Utah 2d at 282).

In this matter we suggest that the activities of the Redevelopment Agency are more local in character than they are state-wide in character. In the redevelopment process we are dealing with blighted property. That property, of course, is located in a particular area and in this case wholly within the corporate limits of Salt Lake City. Cities have traditionally and for many years controlled streets and sidewalks within the cities (see 10-8-8 to 10-8-8.5, 10-8-11, 10-8-23, 10-8-24, 10-8-30 and 10-8-32). Cities have long had the power to control buildings within the city, not only for safety purposes but for health and fire purposes (see 10-8-52 to 10-8-55, 10-8-66 and 10-8-70). Regulation of buildings via zoning and planning has long been considered a municipal function (see Chapter 9 of Title 10, Utah Code Anno-

tated 1953). Through a city's power to declare and abate nuisances, blighted conditions in an area can be cured (10-8-60; see also Salt Lake City Ordinances, Chapter 26 of Title 18). The power of a city to acquire and dispose of property is established by Section 10-8-2, Utah Code Annotated 1953.

Thus, in virtually every aspect of the redevelopment process existing municipal authority can be found. It is simply a question of whether or not the City *chooses* to exercise this authority. Furthermore, the construction and operation of parking facilities are expressly made a proper function of cities in this state by Section 10-8-8, Utah Code Annotated 1953. Parking itself is essentially a local matter affecting primarily the immediately surrounding area contiguous or at small distances from the location of the parking facility. While undoubtedly visitors to Salt Lake City from other parts of the state and nation will be benefitted by improvements to the Project Area, this is a generalized benefit and the primary benefit remains with the inhabitants of the City. Thus, we do not contest the trial court's finding of state-wide impact (R. 94). We merely point out that these are problems which are characteristically solved on a city-wide basis with the primary benefits thereof going to the residents of Salt Lake City.

We are aware of the California cases holding that redevelopment is a state function (see *Fellom v. Redevelopment Agency*, 157 Cal. App. 2d 243, 320 P.2d 884 (1958); *In re Bunker Hill Urban Renewal Project 1B*, 37 Cal. Rep. 74, 389 P.2d 538 (1964), but these California

cases are readily distinguishable because in California the authority for redevelopment agencies to act is established by a state constitutional provision (Cal. Constitution, Article XIII, Section 19) which, as the *Bunker Hill* case pointed out, modified the prior constitutional provisions granting charter cities control over "municipal affairs" (389 P.2d at 572). The Colorado cases of *Rabinoff v. District Court*, 360 P.2d 114 (Colo. 1961); and *People v. Newton*, 101 P.2d 21 (Colo. 1940), although stating generally that urban renewal and public housing were state functions, are not helpful because both cases fail to discuss Article V, Section 35 of the Colorado Constitution which is virtually identical to the Utah provisions of Article VI, Section 28.

In conclusion on this point, we commend to the court the extensive discussion of the history and varying interpretations of constitutional provisions similar to Article VI, Section 28 in the two-part article by David O. Porter, "The Ripper Clause in State Constitutional Law: An Early Urban Experiment," found in Volume 1969 Nos. 2 and 3 for April and June of 1969 of the *Utah Law Review*.

POINT II

THE PROPOSED REDEVELOPMENT AGENCY BONDS CONSTITUTE A DEBT OF THE CITY WITHIN THE MEANING OF UTAH CONSTITUTION, ARTICLE XIV, SECTIONS 3 AND 4.

If, in fact, the proposed Redevelopment Agency bonds are to be considered in legal effect obligations of Salt Lake City and if the bonds by their terms are such

obligations as to constitute debt within the meaning of the constitutional provisions, Article XIV, Section 3 would require the bonds to be authorized by vote of a majority of the city electors voting at an election where such a proposition is submitted, and Article XIV, Section 4 would require such bonds to be included in the computation of indebtedness for purposes of the debt limit prescribed in such section. Reference is made to Exhibit 17 for an analysis of the outstanding debt of Salt Lake City. From this it will be observed that the \$15,000,000 of Redevelopment Agency bonds will not in amount exceed the taxes and other revenues of the City for the current fiscal year, but because the Redevelopment Agency bonds are payable and intended to be payable over a period of years rather than during the current year, an election would be required if the constitutional provisions apply (See *State v. Spring City*, 123 Utah 471, 260 P.2d 527 (1953)). Furthermore, Exhibit 17 indicates that if the Redevelopment Agency bonds are issued against the present city general obligation bonded indebtedness and applying the debt limit computed from the 1973 assessed valuation, the debt limit of the City would not, in fact, be exceeded, but, of course, the availability of the unused debt limit for other purposes would be diminished to the extent of the \$15,000,000 of bonds proposed to be issued.

The real questions then become whether the Redevelopment Agency bonds are to be considered an obligation of Salt Lake City and, if so, whether the bonds are of the type which would constitute "debt" within the meaning of the constitutional provisions.

A. *The Redevelopment Agency Bonds are to be Considered Obligations of Salt Lake City.* In our amended complaint we have pleaded inconsistently and in the alternative (See paragraph 9, Amended Complaint) and our argument is inconsistent and in the alternative to the argument posed in Part A of Point I. We here contend that the Redevelopment Agency is in legal effect simply an agency, department or subdivision of Salt Lake City and thus obligations of the Agency are, in fact, obligations of the City. We contest the trial court's Findings of Fact 8, 13 and 14 (R. 93, 95) and Conclusions of Law 3 and 4 (R. 98-99).

The Utah Neighborhood Development Act in authorizing the creation of redevelopment agencies does not in terms establish the agency as a separate body politic and corporate, or as a separate political subdivision of the state. There is simply no such statement in the law. Contrast the express statement in Section 11-15-4 relating to redevelopment agencies created under the provisions of the Utah Community Development Law, a statute not here involved. This has great significance for the application of the constitutional debt limit and election requirement because the Utah Courts have construed the constitutional provisions strictly and applied them only to counties, cities, towns and school districts. Special districts created by or under the authority of statutes, which districts are legal entities, separate and apart from the designated political subdivisions, have been held not to be subject to the constitutional debt limit (See Note, "Constitutional Restrictions Upon Municipal Indebtedness," 1966 *Utah Law Review* 462 at 478). Thus, in

Lehi City v. Meiling, *supra*, the court held the debt limitation and election requirements did not apply because the metropolitan water district was a "quasi-municipal" corporation rather than a true municipal corporation such as a county, city, town or school district. Similar holdings were reached in *Patterick v. Carbon County Water Conservancy District*, 106 Utah 55, 145 P. 2d 503 (1944) involving the water conservancy districts and *Freeman v. Stewart*, 2 Utah 2d 319, 273 P. 2d 174 (1954) involving improvement districts for water, sewer or sewage systems. See also *Tygesen v. Magna Water Company*, *supra*, and *Provo City v. Evans*, 87 Utah 292, 48 P. 2d 555 (1935). The distinction has been questioned in the more recent cases, however. For example, in *Backman v. Salt Lake County*, *supra*, although the case was decided on other grounds, the court referred to the fact that the special district there involved may have been established in order to avoid the constitutional debt limit (375 P. 2d at 761) and this could be considered the holding or at least an alternative holding in *Carter v. Beaver County Service Area No. 1*, *supra*. The decision of Justice Ellett in *Branch v. Salt Lake County Service Area No. 2*, *supra*, seems to revive the distinction somewhat, but the breadth of this holding was considerably qualified by the cautions expressed in Justice Crockett's concurring opinion in that case (23 Utah 2d at 187-88). Where there is a separate body politic and corporate established by the enabling act, the distinction is perhaps easier to make, but where, as here, such a separation is not clearly provided for in the law, proper construction would seem to indicate that a separate entity was not intended and that the re-

development agency is in fact a department or agency of the city which creates it.

A further indication of legislative intent in this regard is the fact that if a city elects to create a redevelopment agency, the legislative body of that city is to be designated as the agency (See 11-19-3). In other words, the enabling statute does not authorize anyone but the legislative body of the community creating the agency to be the redevelopment agency. Accordingly, it would appear that for redevelopment agencies generally and, of course, for the Redevelopment Agency of Salt Lake City here involved, there is an identity between the governing body of the city or county creating it and the agency itself. (R. 91, 94-95)

Note that it is not important at least for purposes of the election requirement that the redevelopment agency be defined as a "department" of the city similar to, for example, its water department. It is enough that it be considered a "subdivision" of the city ("No debt . . . shall be created . . . by any city . . . or any subdivision thereof in this state [without an election]").

B. *The Redevelopment Bonds Constitute a "Debt."*
We recognize that our burden is not met by simply establishing the redevelopment agency bonds as some type of obligation of Salt Lake City. In addition, we must establish, contrary to the findings of the trial court, (R. 95, 98) that these bonds constitute a "debt" within the meaning of the constitutional limitations, for it is clear that if the obligation were a limited type obligation payable

only from a special fund, there is no debt, and neither the election requirements of Article XIV, § 3 of the Utah Constitution, nor the debt limitations of Article XIV, § 4 would be applicable to the particular obligations.

The special fund doctrine was first enunciated by our Supreme Court in *Barnes v. Lehi City*, 74 Utah 321, 279 Pac. 878 (1929). In *Barnes*, Lehi City's mayor and councilmen sought to purchase generating equipment for the city's electric power plant with payments financed through the issuance of bonds to be retired solely from revenues received from the operation of the electric plant. Because the only source of payment of the obligation was to be the revenues produced from the electric system, the Utah Supreme Court held that the issuance of the bonds created no debt in the constitutional sense and thus there was no requirement that the taxpayers approve the issuance of the bonds. This result obtained because the bondholders could not look to any tax money as a source of payment of the bonds. The principles of this case have been followed in a number of other cases including: *Fjeldsted v. Ogden City*, 83 Utah 278, 28 P. 2d 144 (1933); *Wadsworth v. Santaquin City*, 83 Utah 321, 28 P.2d 161 (1933), *Utah Power and Light Company v. Provo City*, 94 Utah 203, 74 P. 2d 1191 (1937); *Utah Power & Light Company v. Ogden City*, 95 Utah 161, 79 P.2d 61 (1938); and *Barlow v. Clearfield City*, 1 Utah 2d 419, 268 P.2d 682 (1954).

We concede that the Redevelopment Agency bonds here involved would fit within this special fund exception if the pledge were limited only to the parking revenues

because in such case the obligation to the bondholders would be limited to new revenues derived solely from the parking facility. The proceeds of the bonds would have been used solely for the construction of a revenue producing facility, the revenues would not theretofore have gone into the general fund of the City to help reduce the property tax burden on the taxpayers of the City, and the sole source of payment of the bond would be the new revenues from the parking facility.

However with the addition of the pledge of the tax increment to the Redevelopment Agency bonds, we contend a debt is created—the pledge of the tax increment constituting a diversion from the general fund. The special fund doctrine is limited by the principles of the *Fjeldsted* case, *supra*. There, this court determined that despite the creation of a special fund which is declared to be the sole source of payment of the bonds, if some of the funds going into the special fund had theretofore gone into the general funds of the municipality, a debt would be created in the constitutional sense. The *Fjeldsted* court held that this diversion from the general fund would indirectly increase the burden on property taxpayers which would impair the protection to taxpayers intended by the constitution's debt limit and election requirements.

Note that in *Fjeldsted* the court did not rely on proof of any actual diversion of a particular amount of money from the general fund. A close reading of that case indicates no evidence being considered by that court of any diversion in fact. The theory of the court seemed

to be that because the water works system there involved had, prior to the issuance of the bonds, produced revenues which, after payment of operation and maintenance expenses of the system, were deposited in the general fund, the taxpayers had the right to *assume* that such revenues would continue to be deposited in the general fund thus making unnecessary an increase in mill levy or imposition of additional other taxes to cover the general operating expenses of the city. There was no evidence that the "diversion" to the special fund in fact caused an increase in mill levy or other burden on the property taxpayer. Furthermore, the court did not consider the other side of the balance sheet—the possible benefits to the general fund arising from the improvements to the system financed by the diverted revenues. Without the financed improvements the general fund might well have been in worse condition because of the payment of additional expenses of operation and maintenance and the "burden" on the property taxpayers thus increased. Thus, on analysis we conclude that the *Fjeldsted* court was dealing merely with the *possibility* of diversion from the general fund and the possibility of indirect "feeding" of the special fund from general revenues. See Note, "Constitutional Restrictions Upon Municipal Indebtedness," 1966 *Utah Law Review*, 462 at 471-78.

In this case we contend the tax increment which is pledged to the payment of the proposed Redevelopment Agency bonds constitutes a similar possibility of diversion from the general fund of the City. Indeed, in this case it seems there is a direct diversion because we are here dealing with an allocation of the property taxes

themselves, not revenues of the City other than property taxes. By the tax allocation provided for in the statute and authorized in the bond resolution (Exhibit 1) a portion of the property taxes collected will be actually diverted from the City general fund where it would otherwise go and instead pledged to the Redevelopment Agency bonds.

The argument that the tax increment is created by the activities of the agency and thus is not something on which the property taxpayers of the City could rely, misses the point. First, the restricted special fund doctrine requires pledge of and payment from only those funds generated solely from the operation of the facility financed with the bonds. The doctrine has never been applied to funds generated from increases in assessed valuation attributable to construction of the facility or to redevelopment in the vicinity of the facility. All of the Utah cases involving cities and towns from *Barnes v. Lehi City, supra*, to the present have involved a self-liquidating operation where the pledged special fund was created from the operation of the financed facility. A possible exception to this limitation in Utah jurisprudence is *Conder v. University of Utah*, 123 Utah 182, 257 P.2d 367 (1953) where approval was given to bonds used to finance a dormitory even though land grant revenues in addition to dormitory revenues were pledged for the payment of the bonds. This is not a real departure, however, because the court was there construing the state constitutional debt limit contained in Article XIV, Section 1 and not the city and county debt limits and election requirements of Article XIV, Sections 3 and 4.

In the second place the premise of defendant that the tax increment is created by the activities of the Redevelopment Agency is inaccurate. The assessed values in the area are influenced by more than the mere construction of the parking facility and redevelopment occurring in the area. Land values are characteristically affected by a great number of factors. There is no evidence indicating some or all of these factors do not equally apply to land within the Project Area here involved. For example, values are continuously affected by economic trends, and, more practically, who would contest that property values can also be affected by what occurs on adjacent property or by property in the immediate neighborhood. Thus, if substantial additions were made to the Salt Palace complex, which is outside the Project Area, there could well be an increase in value of all properties in the Project Area. Furthermore, the court, we believe, can take judicial notice of the general inflationary trend which has increased at least the nominal value of a great many items with real estate perhaps leading the way. Through tax allocation, the existing taxing agencies, including the City, are deprived of the benefit, via greater tax collections, of such increases in value. While it may be said that these potential benefits are theoretical, they are no less theoretical than the diversion of revenues discussed in the *Fjeldsted* case.

We recognize that the *Fjeldsted* rule sometimes designated the "Restricted Special Fund Doctrine," has been criticized by text writers (See Williams and Nehemkis, "Municipal Improvements As Affected by Constitutional Debt Limitations," 37 *Columbia Law Review* 177)

and undoubtedly represents a minority viewpoint (72 A.L.R. 687; 96 A.L.R. 1385; 146 A.L.R. 333). Nonetheless, *Fjeldsted* has not been overruled and, in fact, has been cited with approval in the recent case of *Allen v. Tooele County*, 21 Utah 2d 383, 445 P. 2d 995 (1968).

Thus, we believe that the pledge of the tax increment does involve a violation of the restrictions established by the *Fjeldsted* case. The consequence is that the bonds would not be considered payable solely from a special fund but would be considered "debt" and subject to the constitutional election requirement and debt limitations of Article XIV of the Utah Constitution.

POINT III

THE LENDING OF CREDIT PROVISIONS OF OUR CONSTITUTION WILL BE VIOLATED BY THE ISSUANCE OF THE REDEVELOPMENT AGENCY BONDS AND THE CONSTRUCTION AND OPERATION OF THE PARKING FACILITIES.

A. *There is a Lending of Credit.* *Allen v. Tooele County, supra*, construed Article VI, Section 29 of the Utah Constitution and held that credit was not lent in violation of this provision if the bonds to be issued qualified under the Restricted Special Fund Doctrine of *Fjeldsted*. However, if the obligations do or might involve a burden on taxpayers, credit would be lent. Accordingly, for the same reasons outlined in Point II contending that the obligations are city obligations and that the *Fjeldsted* restrictions are violated, there is a debt involved here and thus a lending of credit in violation of Article VI, Section 29. (cf. R. 95, 99)

B. *The Credit Lent is in Aid of a Private Enterprise or Undertaking.* The question here involves inquiry into the public purpose of, first, redevelopment plans generally, and second, the proposals of the Redevelopment Agency for the parking facilities to be constructed in the Project Area.

Many state courts have approved the constitutionality of redevelopment agency legislation usually following the rationale of the United States Supreme Court case of *Berman v. Parker*, 348 U.S. 26 (1954), where the constitutionality of a congressional act authorizing redevelopment for the District of Columbia was upheld. The Court in that case gave great weight to the legislative declarations of purpose and findings of need for public participation contained in the enabling statute. These declarations and findings were said to be "well-nigh conclusive" (348 U.S. at 32). Significantly, the Utah Neighborhood Development Act contains no such statements of purpose and no findings that public participation in the redevelopment process is required or necessary.

Even in cases upholding state redevelopment statutes, limitations have been imposed. For example, in *Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777, 266 P.2d 105 (1954), the court stated:

It must be pointed out that neither aesthetic views nor considerations of economic advantage to the community or a combination of both are sufficient to justify the use of eminent domain for redevelopment purposes. The redevelopment program must be necessary to protect the public

health, morals, safety or general welfare through the elimination of blighted areas.

* * *

Public agencies and courts both should be chary of the use of the act unless, as here, there is a situation where the blight is such that it constitutes a real hindrance to the development of the city and cannot be eliminated or improved without public assistance. It never can be used because the public agency considers that it can make a better use or planning of an area than its present use or plan. 266 P. 2d 121, 127 (citations omitted).

Other courts have directly invalidated the legislation. See, for example, *Housing Authority v. Johnson*, 74 S.E. 2d 891 (Ga. 1953) and *Adams v. Housing Authority*, 60 S.E. 2d 663 (Fla. 1952). In the latter case the Florida Court stated that the incidental benefits accruing to the public from the establishment of some private enterprise were not sufficient to make the functioning of the enterprise a public purpose. The thrust of the opinion suggests that increased employment, revenues and other varying public benefits were too tangential to give the entire plan a public purpose.

An extensive discussion of the scope of the public purpose doctrine is contained in the case of *Hogue v. Port of Seattle*, 341 P. 2d 171 (Washington 1959). In *Hogue*, the act authorized the creation of industrial development districts from land having specified characteristics and classified as "marginal lands." The opinion of the court discussed the extensive legislative history which involved among other things the findings of the legisla-

ture and citizens' groups that the Seattle area was too dependent on the single industry of Boeing and that it was important to develop additional industry for the area. The act involved contained extensive findings and declarations of public purpose and of need for the authority granted to acquire the land and dispose of it to private enterprise. Despite these findings and declarations, the court concluded that the real purpose of the proposed acquisitions was merely to provide potential industrial sites for future use by business for factories, warehouses, machine shops or other industrial enterprises. The court further reasoned that each step in a redevelopment plan becomes incidental to a public purpose only if the primary purpose of the overall plan is a public purpose. And, regardless of the honest legislative belief that the acquisition and development of land for these uses were essentially for the public good, the *Hogue* court properly maintained that it was its duty to uphold the rights of property owners against the inroads of public bodies seeking to acquire their land for essentially private purposes. (See 341 P.2d at 193)

Testimony in the instant case was to the effect that many undesirable conditions existed in the buildings and structures in the Project Area prior to acquisition and redevelopment by the Redevelopment Agency (R. 125-27, Exhibit 7; R. 172-73; see also R. 93-94) We do not dispute this testimony, but suggest to the court that despite the trial court's findings, the stubborn fact remains that a large part of this property will be merely returned to private enterprise and thus the Redevelopment Agency is a mere conduit for changing the ownership of a specific

piece of property from one private owner to another private owner. Also, we commend to the court the cautions expressed in the *Hayes* case quoted above. Is the redevelopment plan necessary to protect the public health, morals, safety or general welfare through the elimination of blighted areas in the two blocks contained in the project, or is it merely a situation where the Redevelopment Agency here believes that it can make a better use or planning of an area than its present use or plan?

A further question arises in considering the parking facilities portion of the redevelopment plan. Are these parking facilities, title to which will apparently remain in the Redevelopment Agency, facilities that will be for public benefit or will they primarily aid the private property owners in the immediate area? Consider the fact that the Sheraton Hotel project will in its lower stories open out into the parking facility. Consider further the commitments made by the Redevelopment Agency to various property owners within the Project Area that certain parking spaces would be committed for their use. We recognize this commitment was not in the form of reserving a designated number of spaces in the parking facility nor was there a commitment not to charge these property owners for the use of the parking spaces. Nevertheless, there is a direct involvement with these adjacent property owners that calls into question the purely public nature of the facility. Furthermore, parking, particularly in a downtown area as here, will be used primarily, if not exclusively, by customers, invitees, and employees of businesses in the immediate area. We

suggest that the court must balance these private benefits against the public benefits and if the former predominate, the Utah Neighborhood Development Act, or at least the plan for the parking facilities in this case, must fail.

POINT IV

THE CONSTRUCTION AND OPERATION OF THE PARKING FACILITIES WILL RESULT IN THE GRANTING OF PRIVATE BENEFITS CONTRARY TO CONSTITUTIONAL PROVISIONS.

In 10b of the Amended Complaint, we have alleged violation of Article I, Sections 7, 22, 23 and 24 of the Utah Constitution and the 14th amendment to the United States Constitution. All of these provisions in one way or another prohibit public activities in the private sphere and prohibit the use of public funds for private purposes. For the reasons set forth in Part B of our Argument under Point III where we discussed public purpose, we urge that these violations are established, despite the trial court's contrary findings. (R. 95-96)

POINT V

THE ALLOCATION OF TAXES TO THE REDEVELOPMENT AGENCY AND THE USE OF THESE AND OTHER FUNDS BY THE REDEVELOPMENT AGENCY VIOLATES UTAH CONSTITUTION, ARTICLE XIII, SECTION 5.

Utah Constitution, Article XIII, Section 5, provides as follows:

The Legislature shall not impose taxes for the purpose of any county, city, town or other municipal corporation, but may, by law, vest in

the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporation.

In *State v. Standford*, 24 Utah 148, 66 Pac. 1061 (1901), the Utah Supreme Court first considered this constitutional provision in invalidating a state statute requiring counties to impose taxes for fruit tree inspectors for the county where the inspectors were employed and their duties and functions controlled by a state official. The court stated that the constitutional provision was "a limitation upon the power of the legislature to grant the right or impose the duty of creating a debt or levying a tax to any person or body other than the corporate authorities of the county." (66 Pac. at 1063). The court further construed this constitutional provision as preserving local self government for the people of each city and county. "The right of the legislature was to provide for and put in action, not to run and operate, the machinery of the local government to the disfranchisement of the people." (66 Pac. at 1062).

Subsequent cases have upheld statutes under this provision if the statute involved a state purpose as opposed to a city or county purpose (See for example, *Salt Lake County v. Salt Lake City*, 42 Utah 548, 134 Pac. 560 (1913); *Bailey v. Van Dyke*, 66 Utah 184, 240 Pac. 454 (1925); *Denver & R. G. R. Co. v. Grand County*, 51 Utah 294, 170 Pac. 74, 3 A.L.R. 1224 (1917); *Smith v. Carbon County*, 90 Utah 560, 63 P. 2d 259, 108 A.L.R. 513 (1936). We have discussed in Part C of Point I of this brief the question of municipal function as opposed to state function, and we suggest that the question of

municipal purpose under Article XIII, Section 5 involves the same criteria. We conclude here as we did in our earlier discussion that the operation of the Redevelopment Agency and the carrying out of the redevelopment plan in this case is a municipal purpose and not a state purpose.

If there is no state purpose, there is a violation of Article XIII, Section 5 in the context at least of the tax allocation provisions of the Act. By the statute, the legislature requires existing taxing agencies to share a portion of the taxes they levy with the Redevelopment Agency. This is a clear interference with the power of the city and of the county to "collect taxes for all purposes of such corporation." Taxes lawfully collected must be turned over to the Redevelopment Agency. And the trial court specifically held that the Agency is neither a municipal nor a county body. (R. 97) The Agency's undertakings, the court also held, are not of a municipal or county-wide nature. (R. 94, 97).

While it might be contended that the City has consented to this by creating the Redevelopment Agency and approving the proposal to issue bonds secured in part by the tax increment, this is no answer as regards to Salt Lake County and the other taxing agencies who levy taxes in the Project Area. These entities were not involved in the creation of the Redevelopment Agency and will not be involved in the establishment of the tax increment except as they have the right to object thereto at a public hearing when the plan is amended to provide for the tax allocation (See 11-19-34 and 11-19-16). Taxes

levied in accordance with law for county and school district purposes and the purposes of the other taxing agencies will, after collection, be transferred to the Redevelopment Agency and thus it appears there is a clear violation of the constitutional prohibitions.

POINT VI

THE REDEVELOPMENT AGENCY IS SUBJECT TO THE BUDGETARY LAWS APPLICABLE TO CITIES.

With regard to the violations of the budget laws, the record is plain that the Redevelopment Agency here does not comply with the budget laws applicable to Salt Lake City. Its budget is entirely independent from the city budget and receipts and expenditures are handled entirely separate from city funds. (Exhibit 9; R. 130-31, 175-76) If, as we have contended in Point II of this brief, the Redevelopment Agency is simply a department, agency or subdivision of the City, then the normal budget laws found in Sections 10-10-23 to 10-10-75, Utah Code Annotated 1953, must be complied with, and fund handling procedures, including the funds pledged to the payment of the proposed Redevelopment Agency bonds would have to be handled and administered in accordance with these laws.

POINT VII

THE PROPOSED ALLOCATION OF TAXES USING AN ASSESSED VALUATION BASE OF 1970 CONSTITUTES A RETROACTIVE APPLICATION OF THE ENABLING LAW IN VIOLATION OF PROPER PRINCIPLES OF STATUTORY CONSTRUCTION.

In Paragraph 12 of the Amended Complaint we have alleged that the amended redevelopment plan for the Project Area proposed by the Redevelopment Agency will provide for a valuation base as of February 11, 1971, the date of the adoption of the original redevelopment plan. (This translates to an assessed valuation base for the year 1970, as that was the last equalized assessment roll prior to February 11, 1971). Use of the tax increment as a method of financing redevelopment agencies was first authorized by Chapter 4, Laws of Utah 1974 which became effective April 4, 1974. Thus, in 1971 when the original redevelopment plan was adopted there was no possibility of including in the plan at that time provision for allocation of the tax increment to the Redevelopment Agency. We question the right of the Redevelopment Agency to use this retroactive date and suggest that the amendment must use a base measured by the last equalized assessment roll at the time of the amendment to the plan, presumably the assessment roll for 1973 or for 1974, if it is then final.

There is a general and well established principle of statutory construction that statutes should be given a prospective operation only. See 73 *Am. Jur.2d*, "Statutes" §§ 347-55. In addition to this principle, if the retrospective operation of a law impairs property rights or vested rights, the due process clauses of the Utah and United States Constitutions would be violated (73 *Am. Jur.2d* "~~Statistics~~" at 485-86).
"Statutes"

Exhibit 18 (Total Tax Assessment and Property Taxes, Blocks 58 and 69, Plat "A" for the years 1966 through 1973, R. 87) indicates that the assessed valua-

tion of the Project Area declined from 1970 when it was \$3,289,250 to 1973 when it was \$3,048,310, a decline in these four years of \$240,940. Thus, if the 1970 valuation is used when the plan is amended, as is intended by the Redevelopment Agency, the base for determining the tax increment will be higher and the amount of the tax increment less. If this plan is followed, the existing taxing agencies will suffer less diversion of their tax resources and the Redevelopment Agency will gain less tax increment funds. It would thus appear that any property rights or vested rights of the existing taxing agencies and the taxpayers thereof would not be impaired by the retrospective application of the statute and thus our claim of violation of due process is not factually supportable in the instant case.

However, there still remains the troubling question of the principle of statutory construction against retroactive applications. The existence of this doctrine creates uncertainty which should be resolved by a declaratory judgment of this court. The only similar case we have found on this subject is *Redevelopment Agency v. Cooper*, 72 Cal. Rptr. 557, (Cal. Ct. App. 1968). That case held that a 1963 enactment of the California legislature authorizing tax increment financing could be used by a redevelopment agency established in April of 1959. The case further held that an amendment to the original redevelopment plan approved in 1968 authorizing the tax allocation must use the valuation base of 1959 when the plan was originally adopted. There was no discussion of the rationale for this, the court simply applying the 1963 statute literally with no real consid-

eration of the question of retroactivity. Furthermore, unlike the facts in this case, the assessed valuation had increased from the date of the original plan to the date of the amendment by some \$5,000,000 and by using the older assessed valuation as the base for the tax allocation, the Redevelopment Agency obtained a greater allocation than otherwise. Here the converse is true with the older assessed valuation being higher than the current assessed valuation.

In view of these uncertainties, we ask that the Court determine and declare whether or not the statute should be applied to the 1970 valuation base as opposed to a current valuation base. We suggest that the current valuation base is more appropriate.

CONCLUSION

For the foregoing reasons, we respectfully suggest to the Court that the Redevelopment Agency is either a special commission interfering with activities essentially municipal in character in violation of Article VI, Section 28 of the Utah Constitution, or a subdivision of the City, to which constitutional bonding restrictions and budgeting laws should be applicable.

If the Agency is to be classified as merely a department or subdivision of the City and not as a separate body politic, the issuance of bonds to finance the parking facilities must be with the approval of the Salt Lake City electorate, as the bonds essentially become obligations of the City. It also follows that the bonds are a

debt in the constitutional sense and the credit of the City is lent contrary to Article VI, Section 29 of the Utah Constitution. The Restricted Special Fund Doctrine does not provide an exception to these conclusions because there is a diversion of tax moneys — a pledge of a source of payment, the tax increment, which indirectly burdens the taxpayers contrary to the limitations of such Doctrine.

Furthermore, the legislative directive to transfer the tax increment to a redevelopment agency when a redevelopment plan so provides is an unconstitutional imposition of taxes for county or city purposes contrary to Article XIII, Section 5 of the Utah Constitution. The tax increment is not saved from such a constitutional violation nor is the status of a redevelopment agency as a constitutionally prohibited “special commission” altered by contentions that the Utah Neighborhood Development Act involves a state rather than a municipal or local purpose.

Also, redevelopment plans authorized by the Utah Neighborhood Development Act are essentially for a private rather than a public purpose. All these plans can involve the taking of property from one owner at the behest of the government in order to transfer the property to another owner, albeit in altered form. This private purpose is particularly evident in the plan involved in this case where parking facilities will be constructed at public expense whose use involves substantial private benefits to adjoining property owners. This predominately private purpose confirms the unconstitutional lending of the public credit for private benefit and also

gives rise to due process and equal protection violations of state and federal constitutional provisions.

Finally, and even if no constitutional violations are found, we ask for an interpretation of the Utah Neighborhood Development Act to require the use of a current valuation base rather than a retroactive valuation base where tax increment allocation is adopted as a part of a redevelopment plan.

For the foregoing reasons, we urge a reversal of the decision of the District Court.

Respectfully submitted,

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Served a copy of the foregoing Brief on Richard Fox of Strong, Poelman and Fox, Suite 700, El Paso Natural Gas Building, Salt Lake City, Utah by delivering a copy to him on Jan-13, 1975.

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