

1978

Roger L. Brewer et al v. William Chad Peatross : Respondents' Reply to Brief Amicus Curiae

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Gayle E. McKeachnie; Attorneys for Appellant;

George E. Mangan; Attorney for Respondents;

Recommended Citation

Brief of Amicus Curiae, *Brewer v. Peatross*, No. 16027 (Utah Supreme Court, 1978).

https://digitalcommons.law.byu.edu/uofu_sc2/1413

This Brief of Amicus Curiae is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

ROGER L. and SHERYL C. BREWER, husband)
and wife; TED LEE and ANNE G. DAUGHERTY,)
husband and wife; BERT L. and DIANNA L.)
DENNIS, husband and wife; ARVEL V. and)
ZELLA E. HANSEN, husband and wife; KENNETH)
R. and BARBARA A. HEATH, husband and wife;)
JAMES A. and JOANNE MOSER, husband and wife;)
C. LYNN and PAULETTE H. PATTERSON, husband)
and wife; EDWARD J. and LYNE J. PETERSON,)
husband and wife; CRAIG G. and FRED A. L.)
TODD, husband and wife; STEPHEN and KAREN)
URESK, husband and wife; and BARBARA SWAIN,)
as assignee of MAY ELLISON,)

Plaintiffs - Respondents,) CASE NO. 16027

vs.)

WILLIAM CHAD PEATROSS and CARMA S.)
PEATROSS, husband and wife,)

Defendants - Appellants.)

RESPONDENTS' REPLY TO BRIEF AMICUS CURIAE

Appeal From the Judgment of the District Court
of the Fourth Judicial District
The Honorable J. Robert Bullock Judge

GAYLE F. McKEACHNIE
and
CLARK B. ALLRED of
GAYLE F. McKEACHNIE, P.C.
The Bryson Building
53 South 200 East
Vernal, Utah 84078
Attorneys for Appellants

GEORGE E. MANGAN
and
ALEXANDER M. LUDLOW, of
GEORGE E. MANGAN, A.P.C.
P.O. Box 246
Roosevelt, Utah 84066
Attorneys for Respondents

RALPH J. MARSH
and
SCOTT W. CAMERON of
BACKMAN, CLARK & MARSH
61 South Main Street, Suite 500
Salt Lake City, Utah 84111
Attorneys for Title Insurance
Company of Minnesota

IN THE SUPREME COURT OF THE STATE OF UTAH

ROGER L. and SHERYL C. BREWER, husband)
and wife; TED LEE and ANNE G. DAUGHERTY,)
husband and wife; BERT L. and DIANNA L.)
DENNIS, husband and wife; ARVEL V. and)
ZELLA E. HANSEN, husband and wife; KENNETH)
R. and BARBARA A. HEATH, husband and wife;)
JAMES A. and JOANNE MOSER, husband and wife;)
C. LYNN and PAULETTE H. PATTERSON, husband)
and wife; EDWARD J. and LYNE J. PETERSON,)
husband and wife; CRAIG G. and FRED A.)
TODD, husband and wife; STEPHEN and KAREN)
URESK, husband and wife; and BARBARA SWAIN,)
as assignee of MAY ELLISON,)

Plaintiffs - Respondents,) CASE NO. 16027

vs.)

WILLIAM CHAD PEATROSS and CARMA S.)
PEATROSS, husband and wife,)

Defendants - Appellants.)

RESPONDENTS' REPLY TO BRIEF AMICUS CURIAE

Appeal From the Judgment of the District Court
of the Fourth Judicial District
The Honorable J. Robert Bullock Judge

GAYLE F. McKEACHNIE
and
CLARK B. ALLRED of
GAYLE F. McKEACHNIE, P.C.
The Bryson Building
53 South 200 East
Vernal, Utah 84078
Attorneys for Appellants

GEORGE E. MANGAN
and
ALEXANDER M. LUDLOW, of
GEORGE E. MANGAN, A.P.C.
P.O. Box 246
Roosevelt, Utah 84066
Attorneys for Respondents

RALPH J. MARSH
and
SCOTT W. CAMERON of
BACKMAN, CLARK & MARSH
61 South Main Street, Suite 500
Salt Lake City, Utah 84111
Attorneys for Title Insurance
Company of Minnesota

AUTHORITIES

<u>Cases</u>	<u>Page</u>
--------------	-------------

Strass et al v. District-Realty Title Insurance Co.

31 Md. App. 690, 358 A.2d, 251, (1976). 14

Statutes

Utah Code Ann. 10-10-60. 16

Utah Code Ann. 10-16-12. 12

Utah Code Ann. 57-1-12 19,20

Other Authorities

Roosevelt City Resolution, §2. 11

Roosevelt City Resolution, §4. 13

TABLE OF CONTENTS

STATEMENT OF THE NATURE OF THE CASE	1
STATEMENT OF FACTS.	1
ARGUMENT.	5
POINT I THE TRIAL COURTS HOLDING IS NOT CONTRARY TO THE STATUTE	5
POINT II AMICUS CURIAE BRIEF DOES NOT ADDRESS ITSELF TO COURT'S NARROW HOLDING.	8
POINT III THE TRIAL COURT'S DECISION DID NOT EXCEED THE PLEADINGS	10
POINT IV CREATION OF A SPECIAL IMPROVEMENT DISTRICT DID CONSTITUTE A PRESENT ENCUMBRANCE OF THE PROPERTY.	11
POINT V THE TRIAL COURT'S DECISION DOES NOT UNDERMINE THE MUNICIPAL IMPROVEMENT DISTRICT ACT AND DOES NOT ADVERSELY EFFECT CONVEYANCE OF REAL PROPERTY.	16
POINT VI RESPONDENTS SHOULD BE AWARDED THEIR ATTORNEY FEES.	19
CONCLUSION	19

GEORGE E. MANGAN, of
GEORGE E. MANGAN, A.P.C.
Attorney for Respondent
P.O. Box 246
Roosevelt, Utah 84066
801-722-2428

IN THE SUPREME COURT OF THE STATE OF UTAH

ROGER L. and SHERYL C. BREWER, husband)
and wife; TED LEE and ANNE G. DAUGHERTY,)
husband and wife; BERT L. and DIANNA L.)
DENNIS, husband and wife; ARVEL V. and)
ZELLA E. HANSEN, husband and wife; KENNETH)
R. and BARBARA A. HEATH, husband and wife;)
JAMES A. and JOANNE MOSER, husband and wife;)
C. LYNN and PAULETTE H. PATTERSON, husband)
and wife; EDWARD J. and LYNE J. PETERSON,)
husband and wife; CRAIG G. and FRED A. L.)
TODD, husband and wife; STEPHEN and KAREN)
URESK, husband and wife; and BARBARA SWAIN,)
as assignee of MAY ELLISON,)

Plaintiffs - Respondents,) CASE NO. 16027

vs.)

WILLIAM CHAD PEATROSS and CARMA S.)
PEATROSS, husband and wife,)

Defendants - Appellants.)

RESPONDENTS' REPLY TO BRIEF AMICUS CURIAE

STATEMENT OF THE NATURE OF THE CASE

Respondents reassert the position and statements made in their reply to the brief of the appellant, relative to the nature of the case, the disposition in the lower court, and the relief sought by the respondent on appeal.

STATEMENT OF FACTS

Respondent reasserts the fact that both the appellant and the Amicus Curiae have a misunderstanding as to the facts

attention Exhibit "P-2", which especially establishes:

a. The date Roosevelt City adopted its ordinance specifying its intention to create a special improvement district;

b. The date by which all protests concerning the same were to be filed;

c. The date for a public hearing concerning the same.

It is to be further noted that Exhibit "P-2" included the entire City of Roosevelt within its boundaries and made no exclusions therefrom and thus the subject property was included within said district. Subsequently, it was ascertained by the Roosevelt City Bond Attorney that certain subdivisions may have been improperly annexed to the City, and although the improvements were already installed, the City then completed proper annexation of the subdivisions and adopted Exhibit "P-3". This action was a formal attempt by the City to correct the previous oversight on annexations, before the ordinance levying the assessments was adopted.

Based on the dates specified in Exhibit "P-2", and comparing the same with the dates in Exhibits "P-4", "P-5", "P-6", "P-7", "P-8", "P-9", "P-10", "P-11", "P-12", "P-13" and "P-14" it is obvious that each of the plaintiffs purchased his property from the defendants substantially after the creation of the improvement district. In addition, it is to be noted that the improvements for which the improvement district was created were commenced to be installed prior to the sale of said properties to the defendants.

In fact, the uncontradicted testimony of the plaintiff Roger Brewer was as follows:

"...and in coming back with him, we asked him about the curb and gutter and the streets on the lots we were interested in, and because at that on that given day they were surfacing the street there by his house." (Supp. Trial Transcript p. 4, lines 1-4)

In addition Mr. Brewer's uncontradicted testimony was as follows:

Q. (Mr. Mangan) Now, Mr. Brewer, will you go ahead and tell us what was stated at the time about the payment? (sic. pavement)

A. At that time, and having asked him, he said that they would either install it or that they would have it installed through the special improvement district. (Supp. Trial Transcript, p. 6, lines 16-20)

The costs of these improvements were discussed by the plaintiff Brewer with the defendants' agent Mr. Gordon. That testimony was as follows:

Q. Go ahead and tell us what was said.

A. And at the time that we were ordering it we made sure that our understanding that these, that the curb and gutter and street was included in the total costs to us. (Supp. Trial Transcript, p. 7, lines 15-18)

Similar testimony was offered by each of the plaintiffs and each testimony is consistent with Exhibits "P-3" through "P-14", that curb, guttering and street pavement was included in the price paid by plaintiffs for the lots. (Supp. Trial Transcript, p. 4, lines 1-4)

Furthermore, in examining each of the Exhibits "P-3" through "P-14", it is obvious that the defendants or their agent did, on the property information and appraisal report (FmHA form #427-8, a copy of which is attached to each of

the lot was situated on a road that was or would be paved and that curb and gutter was or would be installed. That information, signed by defendants or their agent, was used in appraising the value of each lot. It is to be noted that the appraised value of each lot, with said improvements being installed, was the same amount that was in fact paid by the individual plaintiffs to the defendants, for their lots. In some instances the defendants also built the plaintiffs their home, but in every instance the defendants sold the plaintiffs their lot. It is more than coincidental that in each instance the appraised value of each lot was the same amount as that paid by the plaintiffs to defendants for the lot. In addition, the appraisals reflected that in each instance the lot had the curb, gutter and pavement. It is to be further noted that due to the size of the project and the weather conditions in the Uintah Basin during the fall, spring and winter, that the installation of the improvements for the entire city consumed the summers of 1974, 1975, and 1976, being completed in August 1976. It was at this time that it was ascertained that there had been improper annexations of certain subdivisions to the City, which problems with annexations were then corrected and a new notice of intention to create an Improvement District (Exhibit "P-3) was adopted, etc., relative to those areas which had previously been improperly annexed, but for which improvements had been made. The lots subject to this litigation were properly in the City in 1974, so therefore, were not included in Exhibit "P-3". After the difficulty of

annexation was corrected, then on or about October 5, 1976, Roosevelt City adopted an ordinance levying the assessments for said improvements. Said ordinance was introduced at the trial as Exhibit "D-25".

It is also to be noted that the defendants were selling numerous lots in this particular area and that the plaintiffs introduced uncontradicted testimony of one purchaser, Mr. LeMoines DuPaix, that if he would agree to pay for the curb, gutter, etc. he would receive a reduction in the price of the lot, and some extras for his home. (Supp. Trial Transcript, p. 47, lines 1-30) -

ARGUMENT

POINT ONE

THE TRIAL COURT'S HOLDING IS NOT CONTRARY TO THE STATUTE.

1. The respondents have no quarrel with the Amicus Curiae's contention that a lien does not occur until the municipality has levied an assessment.

2. The respondents have no quarrel with the Amicus Curiae's position that an improvement district lien is of statutory origin and that in order to establish the same one must strictly comply with the statute.

3. The plaintiffs assert that both the Amicus Curiae and appellants have missed the entire point of the trial court's holding, i.e., that while a lien is an encumbrance, all encumbrances are not liens. An encumbrance may arise or be created by means other than a statute providing for the same, and it may never assume the status of a perfected

"lien".

4. In creating the improvement district, the City of Roosevelt followed all of the statutory provisions concerning:

a. publishing notice of the city's intent to create an improvement district;

b. giving notice of the dates for property owners to file their protests.

c. setting a time for a public hearing or meeting for hearing protests.

5. By establishing the Improvement District Roosevelt City gave the world in general, and all of the property owners within the city in particular, full notice of the City's intentions. At that point an encumbrance came into existence. Whether that encumbrance ripened into a lien is academic and beyond the scope of this proceeding.

6. Both Amicus Curiae and appellants ignore the fact that every municipality that is properly constituted has its own recorder. (See Utah Code Annotated, Section 10-10-60, 1953, as amended.) And that the duties of said recorder are set forth in the statute as follows:

"The city recorder shall keep his office at the place of meeting of the governing body of the city or at some other place convenient thereto as the governing body may direct. He shall keep the corporate seal and all papers and records of the city and shall keep a record of the proceedings of the governing body, whose meetings it shall be his duty to attend. Copies of all papers filed in his office and transcripts from all records of the governing body, certified by him under the corporate seal be evidence in all courts as if the originals thereof were produced."

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Both appellants and Amicus Curiae miss the point that in
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

writing title insurance or in warranting title to property, that all encumbrances do not have to be of record with the County Recorder in order to be effective encumbrances. For example, a statutory right to file a mechanic's lien may exist on the date that the county records are searched by a title insurance agent at the County Recorder's office, but that right has not yet been perfected, due to the fact that the time period allowed by statute for the filing of such a lien has not expired. Only an actual examination of the property itself will reflect or reveal whether there have been improvements made on the property for which a lien might attach. In actuality there is no way one can assure the individual making the search that there is no possibility that an encumbrance exists that might ripen into a lien.

Likewise, any person or title company writing title insurance for any property situated within the boundaries of any city would not be inconvenienced by checking with the appropriate city authorities to see if there are any potential liens that might be filed against said property by said city. This would seem to be an especially good practice inasmuch as each city has an authorized recorder, whose duties are clear, and who can answer said questions or inquiries.

7. The utility of the title insurance agent or any other person making that simple inquiry, surely outweighs the risk of denying a grantee the statutory protection against all encumbrances when a grantor conveys by a Warranty Deed.

8. If Grantors do not wish to warrant against such

potential encumbrances, they can easily include a disclaimer regarding the same in the language of the Deed. The utility of requiring such a disclaimer, when weighed against the risk of limiting the right of grantee under a Warranty Deed, should resolve itself in favor of not denying grantees protection against the encumbrance existing at the time of the conveyance.

POINT TWO

AMICUS CURIAE BRIEF DOES NOT ADDRESS ITSELF TO COURT'S NARROW HOLDING.

1. Amicus Curiae and appellants missed the thrust of the holding of the trial court relative to an encumbrance. The length of time and the manner in which an improvement district encumbrance can be perfected into a lien is set forth in the statute, i.e., it is perfected by adopting the ordinance levying the assessment in the manner prescribed by statute. Once the ordinance levying the assessment is enacted, then simple inquiry of the city recorder will inform any prospective title insurance company of whether additional ordinances levying further assessments can be contemplated. Furthermore, as indicated above, a simple inquiry of the city recorder will also inform any title insurance company of whether there are any city improvement districts, not yet recorded with the county recorder, which may further encumber the property.

2. On page 6 of the Amicus Curiae Brief, it is argued that the creation of the improvement district significantly

increased the value of each lot. Respondents reply by agreeing to the same, and by pointing out as set forth in Statement of Fact above. That is why plaintiffs paid more for each lot than did Mr. DuPaix. (Op. Cit.)

3. Each of the plaintiffs purchased the property in question with the understanding that the pavement, curb, and gutter were included in the purchase price. The defendants' subsequent failure to pay for the improvements, after allegedly making representations to the plaintiffs that the same would be included in the price of the lot, appears to be a breach of both the written and verbal warranties made by the defendants, or their agent, to the plaintiffs. Specifically, it was a breach of the general statutory warranty against encumbrances when a warranty deed was utilized.

4. Amicus Curiae attempts in its brief to either distinguish or belittle most of the authorities cited in respondents' brief. However, a close examination of Amicus Curiae's arguments reveals its inability to adequately do so. The points of law argued by the respondents in their original reply brief are correct principals of law. The fact is that the Utah Statute does not address itself as to when the encumbrance arises, but merely limits itself to the question of when the lien arises.

5. Furthermore, Amicus Curiae entirely ignores the comments and conclusions reached by Thompson on Real Property, as to what an encumbrance is.

POINT THREE

THE TRIAL COURT'S DECISION DID NOT EXCEED THE PLEADING.

1. Respondents would suggest that a reading of the plaintiffs' complaint would indicate that Amicus Curiae either has not read the same, or has read some other document that was not plead by the respondents.

2. The prayer of the plaintiffs' complaint is as follows:

"Wherefore, plaintiffs' pray for relief of this Court as follows:

1. An order requiring the defendants to pay for the assessments against their individual properties by the Roosevelt City Improvement District.

2. For damages of not less than \$10,000.00 each.

3. For breach of warranty in the form of reasonable attorneys fees and costs of court."

There is no other language or verbage used by the plaintiffs in their prayer, other than as is set forth above.

3. Even if the matters were as suggested by Amicus Curiae, the provisions of Rule 15B, URCP, make it clear that said suggestion is now without merit, inasmuch as there was no objection during the trial by the defendants, as to any of the testimony offered by the plaintiffs and therefore under URCP; the same was tried by mutual consent of the parties.

4. In no event was there any prejudice or surprise worked upon the defendants by reason of the testimony offered at the trial, the same having been introduced to the defendants on numerous occasions through interrogatories.

5. The point is made on page 9 of Amicus Curiae Brief

that the defendants were further prejudiced by the court holding on a theory not contained in the pleadings, i.e., that the special improvement district was an encumbrance. Respondents would urge that a careful scrutiny of that argument will reveal that it simply won't hold water. First, attention is drawn to paragraphs 2 and 3 of the plaintiffs' complaint, which specifically set forth plaintiffs' theory that the defendants warranted title to certain lots to each of the plaintiffs, which meant that the land would be free and clear of any and all encumbrances of any kind.

6. That the defendants have never objected either at the time of the trial or in their own brief that they were surprised by plaintiffs' theory relative to encumbrances.

7. In reply to the allegations of the last paragraph on page 9 of the Amicus Curiae Brief, appellants would suggest that the notice of intent published by Roosevelt City was sufficient to inform the parties of the intent of Roosevelt City, and that the formality of the introduction of the resolution or ordinance establishing the district was unnecessary. Besides, it was counsel for the defendants that desired to stipulate as to the existence of the first improvement the trial court's decision.

POINT FOUR

CREATION OF A SPECIAL IMPROVEMENT DISTRICT DID
CONSTITUTE A PRESENT ENCUMBRANCE OF THE PROPERTY.

1. Amicus Curiae correctly quotes from section 2 of the

resolution establishing the improvement district, in that the
Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

City could at any time hereafter exclude any portion of the City from the district. (Appendix A, Appellants' Brief).

2. The respondent reasserts the fact that inasmuch as the City Recorder keeps track of and records all of the transactions of a municipality, said recorder is in a prime position to be able to inform the appellants or Amicus Curiae, or any other person or party, of whether any portion of the city had been excluded from the improvement district.

3. It was stipulated and agreed by the parties and by the Roosevelt City Attorney, Mr. Mitton, in his testimony that a bona fide improvement district did exist relative to the subject property. Counsel for the appellant questioned City Attorney as follows:

Q. (Mr. McKeachnie) All right. Then Mr. Mitton, for your information we have heretofore stipulated that the properties involved here are in special improvement district number 1.

A. (Mr. Mitton) Okay. But that would be the original improvement district then created in April of 1974. (See Transcript p. 140, lines 4-8)

4. Contrary to the representations by Amicus Curiae, the reservation on the part of the City to be able to exclude any portion of the City does not, in or of itself, negate the existence or the possibility of an encumbrance. It should merely identify for the cautious the possibility that while they may be released from an encumbrance, there is the necessity of checking with the proper authority, i.e., the City Recorder to ascertain the same.

5. It must further be noted that pursuant to the statutory authority found in 10-16-12, UCA, 1953 as amended, that Roosevelt City, from and after the creation of the

Sponsored by the S.I. Oviatt Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

district in April 1974, had the authority and right to levy an assessment against the subject property.

6. The power to levy an assessment is an encumbrance against the property, from the time the power to levy is created until it is perfected into a lien.

7. The Roosevelt City Attorney, called by the appellants as their witness, testified relative to the same as follows:

Q. (Mr. Mangan)---The statutory authority of 10-16-12 gives them (Roosevelt City) that authority at any time, doesn't it?

A. (Mr. Mitton) Yes, it does.

Q. All right, then so any time after February of 1974 and the final adoption of the improvement district in April of 1974 the city had the authority and the right to levy an assessment at that point. Is that right?

A. That's right.
(Transcript p. 148, lines 5-12)

8. The arguments raised by Amicus Curiae in the last paragraph on page 11 and in the first two paragraphs on page 12 actually beg the question. Amicus Curiae interchanges the use of the words "encumbrance" and "lien", as if they were totally synonymous. Respondents again suggest that while all liens are encumbrances, all encumbrances are not liens. The important language relative to section 4 of the resolution creating the improvement district is as follows:

"...That the City is hereby authorized in due course to levy assessments upon the property described in the notice of intention to pay for the improvements to be made and the City officials of said City are hereby directed to proceed to construct the said improvements." [Emphasis added]
(See Appendix A, Appellants' Brief)

Respondents urge that the language quoted establishes

that the city, in due course, may perfect a lien against the property, but that a diligent and accurate reading of the language would clearly indicate that from that point forward the property was encumbered.

9. Respondents do not argue or urge upon the court the proposition that the creation of an improvement encumbrance on the subject properties, notwithstanding the ordinance assessing the lien, had not then been adopted.

10. Amicus Curiae makes much of the Maryland decision of Strass et al v. District - Realty Title Insurance Corp., 31 Md. App. 690, 358 A.2d 251, (1976), to suggest that the trial court reached an incorrect conclusion. Nevertheless, Amicus Curiae's brief does reluctantly admit that the Maryland Court of Special Appeals held that the assessments of an Improvement District in that state were not encumbrances until they were inevitable, and that as long as the city had the option to levy them or not, they were not inevitable. By making this admission, the Amicus Curiae acknowledges that the Roosevelt City Special Improvement District ceased to be an optional encumbrance, and was a bona fide encumbrance against the subject property, from and after at least May, 1974, inasmuch as the Improvement District had in fact let the contract for the improvements by that date. The Trial Court specifically found that fact when it held as follows:

"2. ...In May, 1974, Roosevelt City proceeded to let the necessary contract for the constructing of the improvements."

Thus from and after May, 1974, Roosevelt City had no

discretion as to whether it would levy an assessment against the subject property, for ~~once~~ the contract was let and improvements commenced, the obligation of the improvement district to pay for the same could not be optional, but was mandatory. The mere fact that an extensive length of time was required within which to complete the improvements, should make no difference as to the legal effect of the creation of the District; the letting of the contract; or of the obligation of the Improvement District to pay for the improvements installed.

The Roosevelt City Attorney, Mr. Mitton, testified, when questioned about the advertising for the improvements and the commencement of the actual installation of the same, as follows:

A. Yes, I believe the improvements went in very quickly after the adoption of or the creation of the District.

(See Record, page 143, lines 4-6)

Mr. Mitton further explained, following the above testimony, that the work was not completed in 1974, due to weather, and the entire project was not finished until August, 1976, at which time the City elected which of the three alternatives it would follow in making assessments for the improvements, namely to make the assessments after all of the work for the improvements was completed.

11. Not only must one take a close look at the wording of the Resolution adopting the Improvement District, but one must also consider what actually happened. Regardless of the so-called "permissive" language in the Ordinance creating the Improvement District, there can be no denial of the fact that

the District was not permissive. It immediately advertised for and entered into a contract to construct and/or install the enumerated improvements. All of these relevant events occurred prior to each of the plaintiffs obtaining their deeds from the defendants.

12. An encumbrance is an encumbrance from the date a person, party or governmental entity has the right to take additional steps or otherwise effect a lien against the same. Other encumbrances may be created as particular fact situations will warrant.

POINT FIVE

THE TRIAL COURT'S DECISION DOES NOT UNDERMINE THE
MUNICIPAL IMPROVEMENT DISTRICT ACT AND DOES NOT
ADVERSELY EFFECT CONVEYANCE OF REAL PROPERTY.

1. The Municipal Improvement District Act does not specify nor limit as to when an encumbrance attaches and therefore nothing in the trial court's decision undermines it.

2. The trial court's decision actually enhances the understanding as to what a warranty is.

3. The trial court's decision does not adopt a new means of encumbering property. It merely defines when an encumbrance occurs. The statute sets forth means by which a municipality creates a lien against property and not an encumbrance.

4. The trial court's decision requires parties to clearly define what is or is not being warranted in order to

avoid difficulty over the term encumbrance. The risk of allowing a grantor to convey property subject to encumbrances and escape the liability for that conveyance versus the utility of requiring the grantor to specify what is or is not included in the warranty is such that the trial court's decision should be upheld.

5. There is no superiority to the statutory position because the statutory position is silent as to the time the encumbrance attaches. It only speaks relative to when the lien attaches, with which position the respondents and appellants have no argument.

6. Any person or party, including title insurance companies, desiring to know whether an encumbrance may exist against property can easily find out by examining the records of the City Recorder of any municipality.

7. While it is true that the parties to a real estate transaction may not know the exact amount of a potential assessment, notice of intent clearly identifies the projected cost of which the parties could at least project what they should anticipate as costs. Furthermore, the parties have the ability to contract between themselves as to which will be responsible. Respondent urges that the risk involved versus the utility of what can be done would suggest the responsibility being upon the grantor until such time as it specifically and exactly shifts to the grantee.

8. The trial court's decision should have no detrimental effect upon the issuance of title insurance within this state.

for Attorney's Title Guarantee Fund, Inc. for ALPA owner's policy as amended on October 10, 1977, which specifically points out:

"This policy does not insure by loss by reason of the following:

Part I: This part of Schedule B refers to matters which, if any such exist, may affect the title to said land, but which are not shown in this policy:

5. Proceedings for municipal improvement, which, at the date hereof, are shown by the official records of any such city, but have not resulted in the imposition of a lien upon, or establishment of an easement over, or the adjudication of the right to a public use of said land or any part thereof."
(See Appendix A)

9. Respondent would again urge that notwithstanding arguments of Amicus Curiae the fact is that other title insurance companies are coping with the problem of improvement districts. The risk of allowing such an encumbrance to interfere with a grantee's warranted title to property versus the utility of the title insurance company making the necessary checks with the City Recorder and/or maintaining a file of such activities, is such that the utility outweighs the risks in favor of the trial court's decision.

10. It is to be recalled that the appellants in this case were able to cope with the problem relative to whether the improvements would be included in the purchase price of the lot by giving Mr. Lee DuPaix a \$720 credit plus additional benefits to his home if he would pay for the improvements himself. Such ability for buyers and sellers to deal at arms length on such matters has no prime effect upon ability of persons in the market place to deal with each

other, and can in no reasonable manner be construed as being fatal to such transactions.

11. The trial court's decision does not imply nor suggest that the warranties set forth in 57-1-12, Utah Code Annotated, 1953 as amended, are intended to set forth all future potential liens. However, it does mean to suggest that as of the date of the conveyance that the grantor will warrant against all encumbrances and liens. The liens will be of records, the encumbrances may or may not be of record.

12. The respondents do not argue with the point of Amicus Curiae that future liens will not be covered by a warranty, except in the situation where the right for such a lien exists at the time of the conveyance in the form of a bona fide encumbrance and is ripened pursuant to statute or law into a perfected lien after the date of said conveyance.

POINT SIX

RESPONDENTS SHOULD BE AWARDED THEIR ATTORNEY FEES

Respondents reassert their right to be awarded by this court or to have an order issued by this court directing the trial court to fix a reasonable attorneys fee herein in favor of the plaintiffs and against the defendants for having had to bring this litigation in order to assure their protections under 57-1-12 UCA, 1953 as amended, to receive their land free and clear of all liens and encumbrances as well as for their costs in having to respond to the brief of Amicus Curiae herein.

CONCLUSION

Respondents would urge that the findings of the trial court be preserved, that the Roosevelt Special Improvement District be found to have constituted an encumbrance against said property from and after the date the Improvement District was created in April, 1974, which encumbrance continued until it was perfected to a lien in October, 1976.

In addition, respondents would respectfully suggest that this court should either enter or direct that the trial court enter a finding that the plaintiffs are entitled to a reasonable attorneys fee herein for having had to pursue this action together with its costs for having had to obtain counsel to respond to the brief of Amicus Curiae and preparing a response to the brief of Amicus Curiae herein.

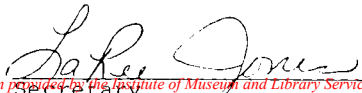
Respectfully submitted



George E. Mangan
Attorney for Respondents
P.O. Box 246
Roosevelt, Utah 84066

CERTIFICATE OF MAILING

I hereby certify that on the 14 day of April, 1979, I mailed a true copy of the foregoing Respondents' Reply To Brief Amicus Curiae to Ralph J. Marsh and Scott W. Cameron, attorneys for Amicus Curiae, 61 South Main Street, Suite 500, Salt Lake City, Utah 84111 and Gayle F. McKeachnie and Clark B. Allred, attorneys for Appellants, The Bryson Building, 53 South 200 East, Vernal, Utah 84078.



ATTORNEYS' TITLE GUARANTY FUND, INC.

Original Policy
ATA Owner's Policy
Form 8-1-70 Amended 10-17-70

SCHEDULE B

UTAH (Owner's) 510

This policy does not insure against loss by reason of the following:

PART ONE: This part of Schedule B refers to matters which, if any such exist, may affect the title to said land, but which are not shown in this policy:

1. Taxes or assessments which are not shown as existing liens by the records of any taxing agency or by the public records, and easements, liens or encumbrances which are not shown by the public records.
2. Rights or claims of persons in possession of said land which are not shown by the public records.
3. Any facts, rights, interest, or claims which are not shown by the public records but which could be ascertained by an inspection of said land, or by making inquiry of persons in possession thereof, or by a correct survey.
4. Mining claims, reservations in patents, water rights, claims or title to water.
5. Things for municipal improvement, which, at the date hereof, are shown by the official records of any such city, but have not resulted in the imposition of a lien upon, or establishment of an easement over, or adjudication of the right to a public use of said land or any part thereof.

PART TWO: This part of Schedule B shows liens, encumbrances, defects and other matters affecting the title to said land in which said title is subject:

Exhibit "K"