

1979

## Roger L. Brewer et al v. William Chad Peatross : Brief Amicus Curiae

Utah Supreme Court

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IN THE SUPREME COURT

ROGER L. and SHERYL C. ARNETT and wife; TED LEE and ANNE C. husband and wife; NERI L. DENNIS, husband and wife; ZELLA E. HANSEN, husband and wife; KENNETH R. and BARBARA J. husband and wife; JAMES A. and wife; G. L. PATTERSON, husband and wife; LYNE J. BEVERSON, husband and wife; CRAIG G. and FRANKIE L. husband and wife; STEPHEN A. and wife; and JAMES H. and wife of MAY ELLISON.

**Plainsville, Ind.**

WILLIAM CHAD PEATROSS  
PEATROSS, husband and

**Defendants:**

Appeal From the  
of the  
The Honorable

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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

vs.

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

Defendants - Appellants

CASE NO. 16027

BRIEF AMICUS CURIAE

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

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## NATURE OF THE CASE

Respondents are the owners of certain building lots located in Roosevelt City, which were conveyed by the appellants. Respondents claim that appellants breached their covenant against encumbrances by their failure to pay the assessments for curb, gutter, and paving improvements levied by Roosevelt City.

## DISPOSITION IN THE LOWER COURT

The lower court held that the creation and functioning of Roosevelt Special Improvement District No. 1 in April of 1974 established an encumbrance on the property, even though said encumbrance was two years prior to the earliest date that the Special Improvement District could levy an assessment under §§10-16-12 and 10-16-23, Utah Code Ann., 1953 as amended.

## RELIEF SOUGHT ON APPEAL

Amicus Curiae, Title Insurance Company of Minnesota seeks to have the Judgment of the District Court reversed and the provisions of the Municipal Special Improvement District Act established as the sole procedure whereby property within a Special Improvement District may be encumbered.

## STATEMENT OF FACTS

Amicus Curiae agrees with the statement of facts as it is presented in the Appellants' Brief.

### POINT I. THE TRIAL COURT'S HOLDING IS CONTRARY TO STATUTE

In 1969, the Utah State Legislature passed the Municipal Improvement District Act, hereinafter "Act", with the following stated purpose:

...to revise, codify and improve existing laws relating to Municipal Special Improvement Districts, to recognize existing practices relating to such districts and to modernize and improve such laws in light of such practice...§10-16-2, Utah Code Ann., 1953, as amended.

Part of the clarification provided by the Act is the specific procedure to be followed by municipalities to encumber real property in order to pay for improvements. Since the statute establishes a given procedure for placing an encumbrance or lien against property within the District, it is inappropriate for the trial court to hold in direct opposition to the statute.

One of the most important parts of the Act, and one of the points of greatest concern because of the likelihood of potential litigation, is the procedure whereby money may be collected to finance improvements made by a District. The legislature, in an attempt to give the maximum guidance to

the municipalities, specifically enumerated the events which must occur before a District may levy an assessment. Section 10-16-12, Utah Code Ann., 1953, as amended, provides three alternative times when a municipality may levy:

WHEN ASSESSMENTS MAY BE LEVIED - Assessments for improvements in a Special Improvement District may be levied:

(1) At any time after all contracts for the making of the improvements have been let, the property price for all property acquired to make the improvements has been finally determined and the reasonable cost of any work to be done by the municipality has been determined; or

(2) For light service or park maintenance, at any time after the light service or park maintenance has commenced; or

(3) At any time after all of the improvements in the Special Improvement District are entirely completed and accepted.

After listing these three alternatives when the municipality may levy, the legislature explained the consequences of levying an assessment in §10-16-23, Utah Code Ann., 1953, as amended:

ASSESSMENT CONSTITUTES LIEN AGAINST PROPERTY - PRIORITY - An assessment, any interest accruing on the assessment and the cost of the assessment shall constitute a lien on and against the property upon which the assessment is levied on the effective date of the ordinance levying the



assessment, which lien shall be superior to the lien of any trust deed, mortgage, mechanic's or materialman's lien, or other encumbrance and shall be equal to and on a parity with the lien for general property taxes. Such lien shall continue until the assessment and any interest on the assessment is paid notwithstanding any sale of the property for or on account of a general property tax, special tax, other assessment or the issuance of an auditor's deed. (emphasis added)

The Special Improvement District does not have any monetary control over the property until an assessment has been levied. Prior to the levy there is no way for the District to effect the property right of an owner whose property is located within the District.

In the instant case, the ordinance levying the assessment was adopted subsequent to the conveyance of the real property by the appellants. It is also significant to note that the conveyance took place before any of the three alternative events authorized by §10-16-12 Utah Code Ann., 1953, as amended, had occurred.

The trial court in its fifth conclusion of law held in direct opposition to the aforementioned statute:

5. That by reason of said Special Improvement District existing and functioning at the time the defendants conveyed to each of the plaintiffs or their predecessors in interest, defendants breached their covenant against encumbrances as provided for in §57-1-12, notwithstanding the provisions of §10-16-23.

In an attempt to support the holding of the Court, which is in direct opposition to the statute, the respondents employ two lines of argument. The first line attempts to distinguish an encumbrance from a lien and thereby circumvent §10-16-23. The second line cites cases from other jurisdictions which allegedly support the trial court. The respondents fail in their first attempt because they cannot establish that there was either an encumbrance or a lien on the property at the time of the conveyance. They fail in their second attempt because the cases from other jurisdictions are either inapposite or they are from jurisdictions that do not have a statute like the Utah Municipal Improvement District Act.

In analyzing the respondents' first line of reasoning, it is necessary to ask, "How does the existence and functioning of a Special Improvement District encumber the property?" The respondents admit there was no lien, but say there was an encumbrance. The definition of an encumbrance used by respondents in their argument undermines rather than sustains their point. The respondents quote from Black's Law Dictionary, revised fourth edition, which defines encumbrances as:

Any right to or interest in, land which may subsist in another to the diminution of its value, but consistent with the passing of fee. (Respondents' Brief, p. 4)

There is no evidence to show that the existence of the District caused a diminution in value of the property, and, if it did not lessen the value of the property, it has not encumbered the property according to respondents' definition.

In fact, according to respondents' definition, the creation of a District no doubt significantly increased the value of land. Property improved with curb, gutter and a paved road is more valuable to the respondents than the same property without these improvements. This increase in value because of the improvements would more than offset the monetary burden placed on the property to pay for the improvements. That monetary burden could only be effective after an assessment had been levied pursuant to §10-16-23.

In answer to the respondents' second line of reasoning, the cases which the respondents cite are either inapposite or distinguishable. In Clark v. Fisher, 54 Kan. 408, 38 P 493 (cited at page 5 of Respondents' Brief), the Kansas Court concerns itself with the enforcement of a lease provision which survives the sale of the real property. The provision was a part of the agreement between the parties and did not constitute a lien which the buyer had to pay. In the instant case there is a specific finding that there was no meeting of the minds concerning payment for the improvements (Finding of Fact11).

In O'Shay v. Chandoir, 104 So. 59(Ky) the Court held that the "vendee contracted to purchase a lot of ground on a paved street." The Kentucky Court's holding was based on contract. The Court held that the vendee should get what he bargained for and what the vendor said he had to convey. In the instant case there was no meeting of the minds regarding who would pay for the improvements and no evidence on the question of who would pay the assessment and how that would affect the purchase of the lot.

Respondents then cite two Massachusetts cases, Cotting v. Commonwealth, 205 Mass. 423, 91 N.E. 900, and Engel v. Thompson, 146 N.E. 2nd 657 (Mass.), and claim they constitute the majority rule. Massachusetts does not have a statute equivalent to Utah's Municipal Improvement District Act, therefore the Massachusetts cases and the rule they represent are not relevant. The legislature has decided what the policy should be in the State of Utah. It has mandated to municipalities when an assessment may be levied (§10-16-12) and the effect of the levy (§10-16-23). Courts without such a clear statutory injunction may be persuaded that property is encumbered before an assessment is levied. However, the Utah law is clear on the events which must occur before a Special Improvement District may encumber real property located within the District.

POINT II. THE TRIAL COURT'S DECISION WENT BEYOND THE PLEADINGS.

The plaintiff's Complaint for Declaratory Judgment was based on the theory that the defendants had agreed to pay for curb, gutter and paving improvements and their failure to so pay was a breach of the covenant against encumbrances in the warranty deeds. The plaintiffs' prayer was that the defendants be required to fulfill their verbal agreement and pay for the improvements. The evidence introduced by the plaintiffs was also based on this theory.

Although the trial court found that the defendants had not represented, promised or agreed to pay for such improvements, the court went beyond the pleadings and held that the property had been encumbered since April 1974 when the Roosevelt Special Improvement District had been created. Thus, the trial court's holding was based on a theory neither contained in the pleading nor directly addressed by either the plaintiffs or the defendants.

Rule 15(b), Utah Rules of Civil Procedure provides:

When issues not raised by the pleadings are tried by express or imply consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

The purpose of an amendment to conform to the proof is to bring the pleadings in line with the actual issues upon which the case is tried. However, the rule does not cover a situation like the one in the present case. Such an implied amendment of the pleadings should only be allowed when it is not prejudicial to either party.

In determining whether or not there has been an implied amendment to the pleadings 3 Moore's Federal Practice, para. 15.13, page 847 states:

The test should be whether the defendant would be prejudiced by the implied amendment, i.e., whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory.

In this case the defendants were prejudiced by the court's holding being based on a theory not contained in the pleadings. If the case were to be retried on the theory that the mere creation and functioning of the Special Improvement District created an encumbrance on real property within the District, the defendants could present the Resolution itself as evidence.

The trial court did not have before it a copy of the Resolution creating a Special Improvement District. If the case were retried, the court would have the language of the Resolution and be able to determine the intent of Roosevelt

City. This additional evidence could have been introduced at the trial court by the defendants and have been a significant aid to the Judge in making a decision with regard to the Resolution.

The court erred in going beyond the pleadings. There was no implied consent on behalf of the defendants to allow the pleadings to be treated as if they raised the issue of the encumbrance attaching as of the creation and functioning of the Special District. The plaintiffs should not be able to recover where the evidence establishes a wholly different case from that which they alleged, and where the defendants, have been misled and prejudiced thereby. See, Mile v. California Growers Wineries, 114 P.2d 651 (Ca. 1941); Reilly v. Maw, 405 P.2d. 440 (Mont. 1965).

POINT III: THE CREATION OF A SPECIAL IMPROVEMENT DISTRICT DID NOT CONSTITUTE A PRESENT ENCUMBRANCE OF THE PROPERTY.

The District Court of the Fourth Judicial District Court in and for Duchesne County, State of Utah, held in its second conclusion of law:

"That the creation and functioning of the Roosevelt City Special Improvement District No. 1 from and after April, 1974, created an encumbrance on the subject properties, notwithstanding that the Ordinance assessing the lien had not been adopted.

In order to determine whether the court erred in the aforementioned conclusion of law, it is necessary to examine the Resolution itself. If the Resolution merely created the possibility of an encumbrance, then there would be no breach of the covenant against encumbrances in the warranty deeds from the defendants to the plaintiffs and the defendants would not be liable for the assessment on the respective properties.

Section 2 of the Resolution provides:

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

This reservation within the Resolution itself negates the possibility that all property was immediately encumbered. The properties to be assessed under the Resolution were not determined by the Resolution itself since it provided that some parts of the City may be excluded from the District. The assertion of future intent to assess some properties and levy on them is not the equivalent of a present encumbrance, nor could it have established present liability to an eventual lien on all properties in Roosevelt City.

Another section of the Resolution is also essential in determining whether or not it created a present encumbrance. Section 4 provides in part:



...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.

Again the intent of the Resolution is discernible on its face. The City was authorized in due course to levy assessments. The statutory authority granted by the Resolution is permissive rather than mandatory. It relates to the future and indicates that the property will be encumbered "in due course" rather than relating to the present and to an immediate encumbrance.

The language of the Resolution itself coincides with the procedure set up by the Utah State Legislature for establishing a lien for municipal improvements, Section 10-16-23, Utah Code Ann., 1953, as amended. The "in due course" language would be equivalent to the statute which indicates the property would be encumbered"... on the effective date of the ordinance levying the assessments..."

In a recent Maryland decision, Strass et al v. District-Realty Title Insurance Corporation, 31 Md. App 690, 358A. 2nd (1976), the Court of Special Appeals of Maryland had to determine when assessments levied by the City of Rockville for the construction of water and sewer lines became liens or encumbrances on real property. This case had a similar factual

situation to the instant case except that the suit was on the covenant against encumbrances in the Title Insurance policy rather than the covenant against encumbrances in a warranty deed. The Court of Special Appeals held that the assessments 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. In the Strass case the court determined that a close look at the Ordinance granting the City Authority to assess liens was essential. Since the language of the Ordinance was permissive rather than mandatory, the court held that the property was not encumbered until the assessment was inevitable and the assessment was not inevitable until the date that it was levied.

The language of the Resolution passed by Roosevelt City in the instant case was permissive in the same way that the Ordinance of the City of Rockville was permissive in the Strass case. The decision of the Maryland court was based on strict statutory interpretation. A close look at the wording of the Resolution of Roosevelt City itself demonstrates that it was in fact permissive and not mandatory and the Fourth Judicial District Court in and for Duchesne County, State of Utah, erred in holding that the properties involved were immediately encumbered on the passage of the Resolution.

POINT IV: UPHOLDING THE TRIAL COURT WOULD UNDERMINE THE MUNICIPAL IMPROVEMENT DISTRICT ACT AND ADVERSELY EFFECT THE CONVEYANCE OF REAL PROPERTY.

In an area of law as fraught with the possibility of litigation as the conveyance of real property, statutes and decisional law should promote clarity and lessen the need for litigation. If the law defines the parameters within which people can convey real property and determine who will be responsible for certain payments at the time of conveyance, there will be less litigation. In the instant case, if the trial court's holding were to be sustained, it would establish a second method for a Special Improvement District to encumber real property. Property would become encumbered on the creation of the Special Improvement District, although the amount of the encumbrance would be unknown. Rather than clarifying the law, this decision undermines the statutory procedure for encumbering real property under the Municipal Improvement District Act and significantly interferes with the conveyance of real property.

The superiority of the statutory position is obvious. It establishes a date certain for the creation of a lien and an amount certain. If anyone is interested in finding out whether or not certain property is encumbered by a lien and the amount of that lien, they can check the County Recorder's

Office. Any purchaser of real property can have the title to the property searched to determine if there are any special assessments and any assessment can be paid at the time of purchase.

If the trial court were to be sustained, purchasers and sellers would not be certain of their positions as of the date of conveyance. When two and one-half years pass between the creation of a Special Improvement District and the levy of the assessment, as in this case, real estate closings may not become final for two and one-half years or more. If a closing is handled by a realtor or title insurance company, money, in an undetermined amount, would have to be held in escrow awaiting the time when the assessment would be levied. It is almost certain to create litigation in sales handled by the owner himself. The existence of a Special Improvement District would probably remain unknown until the assessment is levied.

The trial court's decision, if upheld, would also have a detrimental effect on the issuance of title insurance within the state. Until a Special Improvement District assessment is levied, it is not of record and will not be revealed by a title search. At the present time title insurers are charged with knowledge of record title and must insure against any and all encumbrances of record. Under the trial court's holding

title insurance companies would be forced to keep a record of the actions of every municipality and every district with authority to levy an assessment against real property. A list of the types of districts with authority to levy against real property appears at page 16 and 17 of Appellants' Brief.

Respondents have argued in their reply to Title Insurance Company of Minnesota's Motion for Leave to File Brief, that title insurance companies should except this possible encumbrance from the coverage of their policies. If respondents' reasoning were followed, insurance companies would make exceptions for anything which might create a risk and thereby would defeat the purpose of insurance. A better reasoned approach would be to sustain the procedure outlined in the Municipal Special Improvement District Act for establishing a lien on real property. This procedure removes uncertainty and reinforces the certainty that a title search of the record title will accurately reflect the status of title at the time of closing.

Another untenable situation would exist with respect to land which is ostensibly within a newly created Special Improvement District wherein the Resolution creating the District contains a reservation similar to the one in the instant case:

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

It would be unjust to deprive an owner of part of the selling price for a two and one-half year period on the mere possibility that there may be an assessment on property he has sold which may or may not be within the boundaries of the Special Improvement District. There would also be frequent disagreements as to the amount escrowed, the purchaser wanting a higher amount than the seller. As there is no formula for arriving at a just figure to cover assessments to be levied in the future, the possibility for difficulties at a closing would be increased.

A seller of real property would also be disadvantaged in setting a price on a presently unimproved lot which is located within a Special Improvement District. He would be in the position of trying to raise his asking price commensurate with monies he would be required to pay in the future when the assessment is finally levied.

The statutory procedure established by the State Legislature is also superior in that the party who gets the benefit of the improvements also has the burden of paying for them. Under the Municipal Improvement District Act the reasonable cost of the work to be done has to be determined or the

improvement has to be made before the assessment can be levied. Consequently, the person who has possession when the assessment is levied either has the benefit of the improvements for his own use, or, if he wishes to sell, he has the benefit of the improvements to increase the fair market value of the property.

If the trial court were sustained, an owner who gets no benefit from the improvements personally would have the burden of paying for them. Even if he were to advertise that the lot was within a Special Improvement District and that at some future time would have curb, gutter and paving, he could not guarantee how many years it would be before said improvements would be made. He could not ask the same price as if the improvements had already been installed.

Respondents argue that their rights are rights founded in warranty and not in fairness. They argue that the covenant against encumbrances in a warranty deed mandated by §57-1-12, Utah Code Ann., 1953, as amended, covers this situation. It is important to note that the covenant in a warranty deed is a covenant in praesenti. The covenant against encumbrances says there are no liens or encumbrances on the date of conveyance. The warranty does not cover all potential future liens. It is broken, if at all, at the time of conveyance.

Since the legislature has provided that a lien for the Improvement District, as provided by the Act, is created only at the time of assessment, it is a future lien, which is not covered by the warranties in the deeds.

When the legislature has enacted a detailed method for encumbering real property within a Special Improvement District, and that method provides for certainty between a buyer and a seller as to the date that the encumbrance comes into effect and the amount of that encumbrance, it would be unwise to cloud that procedure by establishing a second means for encumbering real property located within such a district. The decision of the trial court in this case, if sustained, would have an unfortunate effect on the conveyance of real property within the State of Utah.

### CONCLUSION

The Municipal Special Improvement District Act was passed by the Utah State Legislature with the intent to clarify and modernize procedures followed by such districts. The Act provides a specific procedure for encumbering real property located within the District. This procedure is definite in stating when a District may assess property within it, and it is definite in stating how the assessment



may be levied. The trial court acknowledged the procedure outlined by the Act but decided that in this case the property was encumbered upon the creation and functioning of the Roosevelt Special Improvement District No. 1.

Amicus Curiae, Title Insurance Company of Minnesota, submits that the trial court should be reversed because its holding is contrary to statute. Further, the decision of the trial court obscures rather than clarifies the respective rights of parties involved in the conveyance of property situated within Special Improvement Districts. Amicus Curiae would also urge the Court to recognize §§10-16-12 and 10-16-23 Utah Code Ann., 1953, as amended, as the sole method for encumbering real property located within Special Improvement Districts in the State of Utah.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing BRIEF  
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