

1978

Salt Lake City, Corp., A Munciple Corporation of the State of Utah v. D. William Layton and Helen Layton, His Wife : Respondent's Brief

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

SALT LAKE CITY CORPORATION,)
a municipal corporation)
of the State of Utah,)
)
Plaintiff-Respondent,)
)
vs.)
)
D. WILLIAM LAYTON and)
HELEN LAYTON, his wife,)
)
Defendants-Appellants.)

Case No. _____

RESPONDENT'S BRIEF

Appeal from an Order of the Third
District Court in and for Salt Lake
The Honorable David K. Winder, Judge

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IN THE SUPREME COURT
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SALT LAKE CITY CORP., a)
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the State of Utah,)
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Plaintiff-Respondent)
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vs.)
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D. WILLIAM LAYTON and)
HELEN LAYTON, his wife,)
)
Defendants-Appellants.)

Case No. 16128

RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

Plaintiff-Respondent, Salt Lake City (hereinafter referred to as "Respondent-City" or "City") brought this action in the lower court to obtain injunctive relief to refrain Mr. and Mrs. Layton from obstructing and encroaching upon a portion of a platted and dedicated street. Mr. and Mrs. Layton, Defendants-Appellants (hereinafter referred to as "Appellant-Laytons" or "Laytons"), who had erected a fence across the street exercising exclusive control and possession, now claim the public's interest in the City street had been abandoned.

DISPOSITION IN LOWER COURT

After an Order to Show Cause proceeding and review of

memoranda, the lower court ruled, as a matter of law, that the public's interest in the street was a fee interest under applicable subdivision law; therefore, it was not subject to abandonment. In so ruling, it held that the common law highway provisions of Chapter 12, Laws of Territory of Utah 1886, as amended, were not applicable because the street had been dedicated as a subdivision in 1897, subsequent to the subdivision provisions of Chapter 50, Laws of Territory of Utah 1890, as amended.

The lower court, so ruling, therefore granted the City's prayer for injunctive relief. It ordered Appellant-Laytons to remove their obstructing fence and personal property from the street, without taking evidence or making a factual determination regarding the allegations of abandonment.

RELIEF SOUGHT ON APPEAL

Respondent-City, seeks to have the lower court's order confirmed.

Respondent-City, would further desire an order clarifying what appears to be conflicting statutes and case law. This court should rule that the public's interests in streets, formally dedicated by way of subdivision plats after 1894, may be relinquished only by formal legislative vacation act. This is, such dedicated streets are not subject to claims of abandonment under the provisions of

general highway law, but are controlled by comprehensive subdivision laws enacted in 1890 as amended in 1894.

In the alternative, if this Court should find that a dedicated subdivision street prior to the 1911 statutory amendments, may be subject to a claim of abandonment by non-use for five years, under the facts of this case, this matter should be remanded to the lower court for a factual determination of Appellant-Laytons' claim of abandonment.

STATEMENT OF THE FACTS

The undisputed facts of the case demonstrate the following:

1. The area in question is a portion of a dedicated and platted subdivision street identified and known as "Pearl Street". (R-2).

2. Pearl Street is a thirty-three foot (33') side street located at approximately 980 West at 1700 South in Salt Lake City, Salt Lake County, Utah (R-2, 6, 7). It runs south on the eastern boundary of the following described subdivision approximately 721 feet. (R-6, 7).

3. Said Pearl Street was platted as a part of the development of five acre parcels located outside of the corporate limits of Salt Lake City known as "Lots 20 and 21 of the Riverside Plat" of Salt Lake County. (R-7).

4. The two parcels or lots were developed and subdivided in the "Subdivision of Lots 20 and 21, Riverside

Plat" which included four blocks, each containing interior lots and inter-connecting streets and alleys, of which Pearl Street is one street being situated on the eastern boundary of said subdivision. (R-7).

5. Said subdivision was originally located outside Salt Lake City's corporate boundaries but was formally dedicated and recorded in May of 1897 (R-7, 18) and subsequently in 1968 was annexed into Salt Lake City.

6. Pearl Street has long been used by the public and improved between 1700 South and Quayle Avenue, or approximately three-quarters of its platted distance. (R-2, 3, 6). South of Quayle Avenue, the street is also platted; however, it is unpaved. (R-2, 6).

7. The portion of Pearl Street in dispute hereinafter referred to as "Street", is the unpaved portion south of Quayle Avenue. At this intersection Appellant-Layton erected a fence in approximately 1976 thereby prohibiting the public or abutting property owners from any use or access to, through or from said Street. (R-2, 6, 7, 9, 10, 18) No vacation of this portion of the Street has been alleged and the Street still appears as a platted dedicated street on the official maps of the Salt Lake County Recorder's office. (R-6).

ARGUMENT

POINT I

AFTER 1890, THE ACT OF PLATTING AND FORMALLY DEDICATING STREETS IN A RECORDED SUBDIVISION PLAT TRANSFERS TO THE PUBLIC AN INTEREST IN THE FEE TITLE, RATHER THAN A RIGHT-OF-WAY, THEREFORE, APPELLANT-LAYTONS' CLAIM OF ABANDONMENT THROUGH NON-USE BY THE PUBLIC WAS PROPERLY REJECTED BY THE LOWER COURT.

Traditionally, there have been two methods by which public roads are established: (a) formally, through governmental dedication, including subdivision platting, where landowner desires to develop or subdivide his property, and (b) informally, where the roadway has evolved by necessity, with or without the landowner's consent.

Historically, the latter method of creating roads occurs first. As unpopulated areas (such as Utah) became settled with pioneers, trails were broadened to accomodate wagons, creating roads. As these roads generated traffic, they were improved by widening, grading and eventually hardsurfacing to accommodate the common mode of transportation and, thus, became our modern public road system.

Such roads were generally located in unincorporated rural areas and reflected the need to travel from point "A" to point "B". These roads created a prescriptive easement or right-of-way for the public, with or without consent of the original owner, under common law principles.

Utah recognized this common law and ruled that the public's interest in such public roads was a right-of-way. Eventually, as Utah's demand for highway improvement increased, the territorial legislature formally dealt with public highways in Chapter 12, Laws of Territory of Utah of 1886. This law enabled the public to establish, survey and even condemn rights-of-way for public highways and specified the types of interests, rights and consequences of establishing such highways. Specific provisions, which Appellant-Laytons argue are applicable to this controversy, include Sections 2, 6 and 7; those sections read as follows:

"Section 2. All roads, streets, alleys and bridges laid out or erected by others than the public and dedicated or abandoned to the use of the public, are highways. A highway shall be deemed and taken as dedicated and abandoned to the use of the public when it has been continuously and uninterruptedly used as a public thoroughfare for a period of ten years.

"Section 6. A road not worked or used for a period of five years ceases to be a highway.

"Section 7. By taking or accepting land for a highway, the public acquire only the right-of-way and incidents necessary to enjoying and maintaining it. A transfer of land bounded by a highway, passes the title of the person whose estate is transferred, to the center of the highway." Chapter 12, Laws of Utah 1886 (Emphasis added).

Said sections provided that a road became a public highway: (a) when offered or devoted to use as a public thoroughfare, by means other than acquisition, and (b) where accepted by the public by actual use, through formal

acceptance, or otherwise. Such public acts create a presumption of public acceptance, after ten years of actual use. Specifically, it is to be noted that there is no requirement or procedure requiring formal dedication.

The public's right-of-way interest in such highways continued, subject to a claim of abandonment. However, to demonstrate an "abandonment", it was necessary to establish "non-use" for a period of at least five years; further, it was the county court's duty, by regulation, to abolish or abandon an unnecessary road.

Subsequently, said sections 2, 6 and 7 and were respectively renumbered as Sections 2066, 2070 and 2071 in the Compiled Laws of Utah, 1888. Later, these were amended and renumbered in the recodification of Revised Statutes of Utah of 1898 - the date most applicable to the establishment of Pearl Street, commencing in 1897. Significantly, Sections 2 and 7 were adopted respectively as Sections 1114, 1115 and 1120, R.S., 1898; however a material 1898 amendment to Section 6 was adopted.

This 1898 amendment emasculated the 5 year abandonment provision by eliminating the purported self-executing language. The new statutory language created a rebuttable presumption in favor of the continuity of the public's interest. The law specifically read as follows:

"1116. Continue until abandoned. All highways once established continue to be

highways until abandoned by order of the board of county commissioners of the county in which they are situated, by operation of law or by judgment of a court of competent jurisdiction; provided, that a road not used for a period of five years ceases to be a highway." (Emphasis added).

In 1911 this section was amended again. This change eliminated the five year non-use period altogether, as a claim against the presumption of continued public interest. The law reads as follows:

"1116. Continue until abandoned. All highways once established must continue to be highways until abandoned by the order of the Board of County Commissioners of the county in which they are situated, or by judgment of a court of competent jurisdiction." §1116 Compiled Laws of Utah 1907, as amended.

Said Sections 1114, 1115, 1116 as amended in 1911, to eliminate the rebuttable presumption claims of non-use, were later succeeded (with minor amendments) by Sections 2801, 2802 and 2806, Compiled Laws of Utah of 1917, Sections 36-1-2, 36-1-3 and 36-1-7 in the Revised Statutes of Utah, 1933. They were later included in the Utah Code Annotated, 1953 in Title 27, but repealed in 1963.

However, the legislature reenacted the presumption of public use after ten years in Sections 27-12-89 and 27-12-90, Utah Code Ann., 1953, as amended. This law now still requires a formal vacation or abandonment action by applicable public entities or by the courts. Further, Section 27-12-101 of the present law now clarifies the

legislative interest and specifically states that the public's property interest may be fee simple or any lesser interest.

Consequently, had the unimproved portion of Pearl Street been platted as a highway prior to 1890, rather than as a subdivision street after 1890, it would have been possible for the County Commission to vacate the highway. The road also could have been vacated by court order. However, such action could only have been taken if it were factually established that the public had failed to accept the dedication through actual use or improvement. Such non-use or improvement may have constituted an "abandonment" of the public's interest, as Appellant-Laytons assert in the case before the bar.

However, the subdivision in the instant case was filed after 1890. Further, the Appellant-Laytons' predecessors did not obtain such a declaration or vacation action during the following century. In addition, they did not pay taxes on the property.

As early as 1890 the Utah legislature did recognize the increasing demand for urbanization and municipal-type services, which resulted in the subdivision development of agricultural parcels of land. That body understood the state's growth would be best served by subdivision platting, where the interest dedicated to the public, by operation of

law, was an interest in the fee title. Hence, it enacted a second and more comprehensive formal procedure for subdivision development. This procedure deviated from the common law applicable to highways and provided:

"Such maps and plats when made, acknowledged, filed and recorded with the county recorder, shall be a dedication of all such avenues, streets, lanes, alleys, commons, or other public places or blocks and sufficient to vest the fee of such parcels of land as therein expressed, named or intended, for public uses for the inhabitants of such town and for the public for the uses therein named or intended." Section 4, Chapter 50, Laws of the Territory of Utah, 1890 (Emphasis added).

Said statute was subsequently renumbered as Section 2014 of the Revised Statutes of Utah, 1898 and Compiled Laws of Utah of 1907; Section 5024 of Compiled Laws of Utah, 1917, Section 78-5-4 of Revised Statutes of Utah, 1933 and Utah Code Annotated 1943, and is found today almost verbatim at Section 57-5-4, Utah Code Annotated, 1953, as amended.

Therefore, as a matter of law, the recording of the "Subdivision of Lots 20 and 21, Riverside Plat" and the concurrent formal dedication of Pearl Street in May of 1897, transferred to the public a fee interest, under the subdivision laws enacted in 1890. This dedication occurred under the operation of statutory law and not the operation of common law principles, reflected by the statutes relating to highways as urged by Appellant-Laytons.

The nature of the public's interest in a platted

subdivision street, which has not been developed or improved, has also been addressed by this Court in the case of North Temple Investment Corporation v. Salt Lake City, 26 U.2d 306, 489 P.2d 106 (1971). In this case, the plaintiff desired to quiet title of unimproved roads dedicated in a subdivision which was recorded in 1889. The Court found that the street had been platted and dedicated prior to the effective date of said Section 4 of Chapter 50 of the Laws of the Territory of Utah of 1890. Therefore, it held that the subdivision provisions of the 1890 statute were not applicable. Thus, the court ruled the right-of-way offered to the public under the highway provisions had not been validly accepted by the public, as a matter of law, because there had been no actual use. Therefore, the public's interest was lost.

In comparing the laws dealing with dedication of highways to the method of formal subdivision dedication, the Court indicated the result would have been different, if the street had been platted after 1890 because of the application of the subdivision law. It explained:

"A comparison of the two statutes clearly indicates that the earlier enactment required the actual establishment and opening of a street to common or public use, which would be the equivalent of an acceptance by the public user. The subsequent enactment by Section 4, designated an additional means of dedication, whereby upon the making and filing of a plat, the title to land vested immediately in the public for uses specified, and no acceptance

was necessary. Implicit within the earlier statute was a requirement of an acceptance to have a valid dedication." North Temple Investment Corp. v. Salt Lake City, supra at p. 107 (Emphasis added).

This language of the North Temple, supra, case together with the case of Tooele v. Elkington, 100 U. 485 116 P.2d 406 (1941), clearly demonstrates that Appellant-Laytons' argument on page 5 of their Brief is in error and without merit. The subdivision and street dedication was accepted as a matter of law under the applicable statutory law. Therefore, Judge Winder's decision that the common law provisions relating to highways are not applicable to this subdivision Street should be affirmed.

POINT II

THE FEE SIMPLE INTEREST TRANSFERRED TO THE PUBLIC BY FORMAL DEDICATION OF A SUBDIVISION STREET IS DETERMINABLE BY THE POWERS GRANTED AND THE MANNER PROSCRIBED BY STATUTE.

The specific extent or nature of the ownership interest vested in the public, by operation of law, upon the recording of an approved subdivision plat was interpreted by this Court as being "determinable" in nature, as early as 1909 when the court ruled:

"While the word 'fee' is used in the section [Section 4, Chapter 50, Laws of Utah 1890], it is clear from what follows that it was not intended that the fee of the corpus or land itself should pass, but only the fee to the surface, and this only for public purpose for a street or highway. The fee mentioned in the statute was thus what is known as a limited or

determinable fee, and was created for a special purpose or purposes only, and hence subject of abandonment." Sowadzki v. Salt Lake County, 36 U. 127, 104 P. 111 at 116 (1909). See, also Mallory v. Taggart, 24 U.2d 267, 470 P.2d 254 (1970). (Emphasis added).

It should be noted, however, that the restrictive language above quoted has subsequently been distinguished and explained by the Court in White v. Salt Lake City, 121 U. 134, 239 P.2d 310 (1952). In this case an owner of property abutting a dedicated subdivision street in Salt Lake County, sued Salt Lake City for wrongfully laying pipes for a water system in the public roadway; the suit was filed notwithstanding the fact that the act was done with the permission of the county commission.

Importantly, the Court found the "fee interest" extended beyond the surface and distinguished Sowadzki. The Court held that the modern evolution of public utilities, together with the widespread and ever-increasing use and demand for public utilities, have led to varied uses of the streets and highways. It found that such adaptations and more extensive uses may not have been contemplated by the original dedicator, but they are the natural progression and development of maintaining streets for public purposes and satisfying the legitimate public need. The Court succinctly held:

"But as long as the dedicated street remains platted as a public thoroughfare, the statutory provision that the fee is vested in

the county commissioners can only be interpreted to mean that the rights of the county, acting through its commissioners, are superior to those of the abutting property owner insofar as the normal use of the street is concerned. We have clearly changed by statute the old common-law rule insofar as streets in platted subdivisions are concerned." White v. Salt Lake City, supra at p. 213. (Emphasis added).

It is also a well established principles that any public interest acquired or public power vested in the State's political subdivisions may only be retained, exercised or relinquished only in strict conformity with the applicable state enabling authority and procedures. See White v. Salt Lake County, supra, and Tooele v. Elkington, supra.

Respondent-City submits that the lower court was correct in finding that the public's interest in the subdivision street was a fee interest determinable only by affirmative actions that would conform to the statutory requirements governing the relinquishment of interests in subdivisions. We suggest the Court must direct itself to the power and manner in which the public's vested fee interest in a subdivision street could be terminated or abandoned under the subdivision laws and determine if such action occurred.

POINT III

APPELLANTS' ALLEGATION THAT THE PUBLIC'S
INTEREST IN THE DEDICATED SUBDIVISION
STREET WAS ABANDONED BY NON-USE IN 1902,

BASED ON SECTION 6, CHAPTER 12, LAWS OF TERRITORY OF UTAH, 1886 FAILS TO CONSIDER: APPLICABLE LAW; THE STATUTORY FORMAL PROCEDURE FOR CREATION AND TERMINATION OF DEDICATED SUBDIVISION STREETS; THE ABSENCE OF PUBLIC ENTITY'S ACT TO VACATE OR OTHERWISE DISPOSE OF PUBLIC'S INTEREST IN SUBDIVISION STREETS IN CONFORMITY WITH STATUTORY POWERS AND PROCEDURES.

- A. SECTION 6, CHAPTER 12, LAWS OF TERRITORY OF UTAH, 1886, CITED AS BEING SELF EXECUTING AND DETERMINATIVE OF THE PARTIES' PROPERTY RIGHTS WAS NOT IN EFFECT IN 1897 OR 1902; FURTHER IT IS NOT RELEVANT.

On pages 2 and 3 of Appellant-Laytons' Brief, it is argued that Section 6 of Chapter 12 of the Laws of the Territory of Utah of 1886, which provided a highway not used for five years ceased to be a highway, was self-executing in nature. It is further argued that the law automatically divested the public in 1902 of any rights transferred by the formal dedication. This argument may have had some application to a case where a street had been laid out (but not formally platted as a subdivision) but had no actual use prior to 1898. However, such argument has no validity after 1898.

Said Section 6, codified as Section 2070, Compiled Laws of Utah, 1888, was not in effect in 1897. It had been amended in Section 1116, Revised Statutes of Utah 1898 and the amendment eliminated any reference to the self-executing clause. This amendment reversed the law creating a

presumption in favor of continued use and made "non-use" a conditional exception to rebut the presumption. To overcome the presumption, an affirmative act of a court or the board of county commissioners was required; the law provided:

"Section 1116. Continue until abandoned. All highways once established continue to be highways until abandoned by order of the county commissioners of the county in which they are situated, by operation of law or by judgment of a court of competent jurisdiction; provided, that a road not used, worked for a period of five years ceases to be a highway."

The following cases cited by Appellant-Laytons in support of the argument on page 3 of their Brief, are clearly distinguishable on their facts. Each involved streets where the alleged 5 years of non-use accrued prior to 1898. Thus, they are controlled by a different statute than applicable to the case before the bar. Therefore, the cases are not in point and are irrelevant; to-wit: Mallory v. Taggart, supra, (platted in 1890 - 5 year period ending 1895 and disputed opening in 1907); North Temple Investment Corporation v. Salt Lake City, Utah, supra, (streets platted in 1889 - 1894, quiet title action in 1971); Ludlow v. Salt Lake County, 28 U.2d 139, 499 P.2d 283 (1972), (platted in 1890 - 1895, disputed opening in 1968); Sowadzki v. Salt Lake County, supra, (platted in 1890 - 1895, disputed opening 1907); Howell v. King County, 16 Wash.2d 557, 134 P.2d 80, 150 ALR 540 (1943), (statute similar to Section 6 platted in 1891 - 1895, disputing vacation prior to 1909

amendment); Hislop v. County of Lincoln, 249 Ore. 259, 437 P.2d 847 (1967).

Each of the foregoing cases may, also, be distinguished from the case at bar because they involve subdivision streets platted and remaining in unincorporated areas - not property subdivided in the county, later annexed to a city. It is interesting to note that each of the above mentioned Utah cases imply the public's interest in subdivision streets would not be subject to abandonment if they had been a city street.

Consequently, Appellant-Laytons' argument relies on a prior statute, not in effect in 1897, and must fail as irrelevant.

B. CONSIDERATION OF THE APPLICABLE LAW REFLECTS TWO SEPARATE, DISTINCT AND MUTUALLY EXCLUSIVE METHODS FOR ESTABLISHING AND RELINQUISHING THE PUBLIC'S INTERESTS IN STREETS.

As set forth earlier, the trial court correctly found that in 1897, there were two different statutory methods for recognition and dedication of highways or streets in Utah. Each statutory scheme was distinct and mutually exclusive in the manner by which a dedication may occur. The law was also specific regarding the nature of the public's interests and the procedure or method of changing or terminating such an interest.

The common law scheme presumed that a road, used for

ten years, transferred a right-of-way to the public. Thus, it was available to the public for continued use, unless abandoned for 5 years. This rule was reflected in Sections 1114, 1115, 1116 and 1120 of the general provisions of Chapter 1 Title 25 R.S. 1898.

However, Section 1134 of said statute also vests the responsibility in the board of county commissioners to acquire and condemn highways. It, additionally, gave the county the power and the duty to "abolish and abandon streets unnecessary for the public's use". Importantly, the duty and power to "abolish" found in Section 1134 was consistent with the 1898 amendment of Section 1116, which provided that the public's right-of-way continued, until set aside by an affirmative action of the commission or a court. It is obvious that this procedure of commission or court review was designed to formalize a standard method for adjudicating a dispute over the public's interest in highways, created by informal methods.

However, this scheme was entirely distinct and exclusive from the formal subdivision provisions found at Section 2011 et seq. in Chapter 6 of the Real Estate Law in Title 56, R.S. 1898. This law reflected demands of urban development. A qualifying developer could plat out and dedicate the fee interest to streets for orderly growth. Thus, a developer could sell lots and obtain public

services, if he followed designated subdivision approval procedures. The buying public was likewise protected through the platting procedure.

Sections 2016-2020 (originally enacted in Chapter 18, Laws of Territory of Utah, 1894) established enabling authority for cities and counties to vacate portions or all of formal subdivisions. This law created a procedure by which the earlier dedication could be modified or abandoned, with an act having the equal dignity of the original dedication. The requirement of a formal vacation action to vacate subdivision streets of Section 2016 R.S. 1898 was analogous to the requirements of Section 1134 and are harmonious with the affirmative acts required under Section 1116.

The Respondent-City submits that this requirement of an official public action to vacate the public's interest in a subdivision street, applied to the street in question in 1897 as well as today. The position was partially clarified (at least for cities) in 1898. In this law the legislature clarified that a city's interest in land could not be adversely possessed, notwithstanding the duration of the encroachment by an abutting property owner. It reads as follows:

"No person shall be allowed to acquire any right or title in or to any lands held by any town or city, or the corporate authorities thereof, designated for public use as streets,

lanes, avenues, alleys, parks, public squares or for other purposes, by adverse possession thereof for any length of time whatsoever." §38-1 Laws of Utah, 1899. See, also Tooele v. Elkington, supra, 409.

Utah case law has, also, interpreted the laws providing for public highways, until affirmatively vacated in unincorporated areas, to prohibit abutting property owners from obtaining rights in public rights-of-way by adverse possession. At point is the case of Clark v. Erekson, 9 U.2d 212, 341 P.2d 424 (1959). Here the Court held that a lane used by the public for at least 50 years could not be claimed as abandoned due to a 30 year presence of obstructions which the Court ordered removed.

The Respondent-City respectfully submits that Appellant-Laytons' argument that methods of dedication were interchangeable in terms of impact and legal consequences simply is not supported by the law. After 1890, street dedication by formal subdivision plat, created an entirely new, separate and distinct area of property law. This new concept was mutually exclusive of general highway laws and continues to this day. It has provided predictability and efficiency in the delivery of public services and aided urban growth

In the instant case, the predecessors-in-interest of Appellant-Laytons selected a method of property development by platting and dedicating a formal subdivision, including

Pearl Street. They reaped the benefits of that formal subdivision platting and, likewise, are bound by the consequences and provisions of the method selected. Thus, Appellant-Laytons cannot now assert common law abandonment of this Street.

As an aside, it is also important to note that one substantial advantage gained by a developer who selects formal subdivision, is the removal of the dedicated street system from the tax rolls. Since 1897 no property taxes have been assessed or paid upon this property. This fact suggests the public's continued investment in keeping this area public by waiving taxes otherwise attributable to it. The Appellant-Laytons should not reap such a tax windfall and the public investment should not be lost, without a knowing and formal action undertaken as required in the statutes.

Respondent-City submits that Utah law and cases clearly demonstrates that the public's fee interest in a dedicated subdivision, after 1894, could only be relinquished by a formal action of the city or county. Such a knowing vacation of a road can then be done under a reasoned analysis and after a finding that the public's interest will best be served. It is respectfully submitted that the applicable statutes so provide and this court should so rule. For authority see Tooele v. Elkington, supra; White

v. Salt Lake City, supra; Boskovich v. Midvale, 212 U.2d 445, 243 P.2d 435 (1952); Ercanbrack v. Judd, 524 P.2d 595 (1974); Sears v. Ogden, 533 P.2d 118, (1975), affirmed on rehearing, 537 P.2d 1029 (1975) and reversed by implication 572 P.2d 1359 (1977).

POINT IV

PUBLIC POLICY CONSIDERATIONS AND WEIGHING OF INTERESTS SUPPORT THE SUPERIORITY OF THE PUBLIC'S FEE DETERMINABLE INTEREST OVER THE REVERSIONARY RIGHTS OF APPELLANT-LAYTONS.

The Appellant-Laytons claim that the public's interest in the Street may have been informally abandoned by non-use in 1902. Even if one accepts, arguendo, that this position has a glimmer of merit, the writer submits public policy and equity require the Court to affirm the superiority of the public's interest in this Street. The following reasons are respectfully submitted; to-wit:

1. After 1898, the statutory presumption against abandonment by non-use would prohibit any reversionary rights from becoming superior to the public's interest, without affirmative action by county or court. In 1902, only a claim would have existed - not a self-executing vested right. After 1911, the five year "non-use" provision was completely eliminated and any unexercised claim was extinguished, in a statutory provision similar to

establishment of a statute of limitations.

2. The statutory subdivision dedication was a voluntary and affirmative act of the Appellant-Laytons' predecessor-in-interest. He selected the method of formal subdivision dedication with the attendant laws, benefits and restrictions. These benefits included the bargained for tax relief, through the elimination of property taxes on the dedicated streets. Furthermore, the developer sold lots and improved the north portion of Pearl Street.

It is important to note that Appellant-Laytons had actual notice that their property was subdivided lots with frontage on dedicated roads. Thus they succeeded to the benefits afforded to their predecessor-in-interest. In addition, Appellant-Laytons have known since acquisition that they purchased subdivision lots, without title or tax to the platted streets.

It is respectfully submitted that said parties should be estopped by equitable doctrine of laches from challenging the public's interest in this street, especially since such claim is over 80 years old.

3. It is clearly established that had the subject Street been annexed prior to platting in 1897 or before 1899, that the public's interest in the streets would not be subject to such a claim of abandonment or informal vacation. See Sowadzki v. S.L. County, supra; Tooele v.

Elkington, supra; White v. Salt Lake City, supra; and Mallory v. Taggart, supra. This property is within the Plaintiff-Respondent's corporate limits and the reasoning supporting the finding of the above cases would apply to the controversy before the court.

The Utah legislature in 1911 recognized that the public purpose and policy for cutting off claims of non-use or "abandonment" of platted dedicated streets applied equally to cities and to counties, as indicated in the White case. It attempted to clarify any ambiguity by eliminating the language creating claims.

4. Any adverse impact of this statutory amendment on property owners is either non-existent or is diminimus, when compared to the value received by these property owners. For example, in the intervening 80 years since the legislation, the property owners have had unfettered control and use of the undeveloped dedicated roadway property so long as it did not conflict with public rights or needs. Further, they have had such use without paying any taxes. In addition, they have had all of the benefits that came from the subdivision platting itself.

5. Recognition and preservation of the public's interest in a street benefits all parties concerned. This fact is particularly true where an abutting land owner desiring development, may bear the expense of improving the

street because, by improving access and increasing the opportunity for development of Appellant-Laytons' property, their property values are enhanced.

6. With the increasing and continuing demand by unincorporated areas for annexation to enable them to receive urban services, chaos and substantial disruption to both cities and counties may occur, if the claims of Appellant-Laytons are allowed to prevail.

The natural extension of street improvements would be jeopardized because every unimproved, but platted subdivision street would be vulnerable to attack for abandonment. This result could be disastrous to the orderly development of these platted subdivision areas as economies make such development feasible. Approving construction and obtaining financing in these platted subdivision areas would easily be thwarted, cutting off natural, logical growth and development of the city or county.

Such may be the impact of a reversal of the trial court's order, as demonstrated by this case. Here the owner of a lot, abutting the Street to the east (part of an adjoining subdivision), would not have the benefit of building any projected building because of a lack of access from Pearl Street. Thus, if Appellant-Laytons' position were adopted by this Court, the City will lose the chance of increasing the business tax base, increasing employment

opportunities, etc.

Contrarywise, Appellant-Laytons will lose a 33 foot strip of land, wrongfully possessed, which is diminimis to its substantial holdings at that location. However, they would gain a great deal by improved access and possibilities of future development.

Respondent, Salt Lake City, respectfully submits that if this Court reaches the point where it must consider such issues that, like the Court in the Tooele v. Elkington case, it will conclude the balance of justice tips the scales in the favor of the public's interest in its streets.

POINT V

THE ALLEGED RIGHTS WHICH MAY ACCRUE TO A NON-CONTRIBUTING PROPERTY OWNER ABUTTING A DEDICATED SUBDIVISION STREET, SEPARATE AND APART FROM THE PUBLIC'S INTEREST IS MISSTATED BY DEFENDANTS-APPELLANTS, BUT IS IRRELEVANT AND NOT IN CONTROVERSY.

Appellant-Laytons have devoted nearly one-third of their brief to support the position that owners of property, having frontage on but not contributing to the property dedicated for street purposes, may not acquire interests in the use of said street, separate and apart from the public's interest (which they assert was abandoned). In reaching this position, the Laytons inconsistently attempt to evade the provisions of the common law they rely upon to support their claim of common law abandonment. They jump to the principle of subdivision law regarding the effect of street

vacations.

Such a selective jump between two separate and very different set of property laws, demonstrate their existence as argued above under Point IIIB. More importantly, however, the argument is incorrect and distortion of the property law principles established.

In making this argument, opposition relies upon a Kansas case, where subdivision laws relating to the effect of a vacation of the public's fee interest are similar to Utah law. The case, Neil v. Independent Realty Company, 317 Mo. 1235, 298 S.W. 363 (1927) 70 ALR 550, involved a dispute over rights to a road which was vacated, but where one abutting property owner's predecessor-in-interest had not contributed to the dedication.

The writer submits that the case does stand for the proposition that, when a platted and dedicated subdivision street is formally vacated, that statutory vacation procedure supercedes the common law provisions. This statutory method relinquishes the public's interest, without disturbing the underlying reversionary fee interests of the dedicator. In a case where abutting property owners do not share a common chain of title with the dedicator, then non-contributors gain nothing from the vacation, however, neither do they lose any private rights which may have been established, which would survive vacation or abandonment.

See Sears v. Ogden, (1977 case) supra; Ercanbrack v. Judd, supra; White v. S.L.C., supra and Boscovich v. Midvale, supra.

Although non-contributing owners of property abutting this street may or may not have private rights in the Street, this matter is not in controversy and the Court has no jurisdiction over that issue where the owner is not a party of this litigation.

CONCLUSION

The public's interest in said dedicated subdivision Street - in the nature of a fee simple determinable - is superior to the Appellant-Laytons' reversionary interest as an owner of abutting subdivision property under the property law applicable to subdivisions. Respondent-City submits it is entitled to an order confirming the lower court's order preserving the public's interest and requiring the removal of Appellant-Laytons' obstructing fence and encroaching personal property; specifically:

1. The public's interest in subdivision streets or highways may be created and terminated only in compliance with applicable statutory enabling authority.
2. In 1890, the State legislature adopted a second method for local entities to accept formally the dedication of streets for public use upon the recording an approved subdivision plat map. Said laws of 1890 as later amended in

1894 establish a separate system of property laws applicable to the procedure and legal consequence of subdividing land which substantially deviates from the common law principles reflected in the property law applicable to general highways. A developer could select a method of dedication, but he and his successors are bound by the legal consequences of such choice.

3. In 1897, when Pearl Street was dedicated as part of a recorded subdivision, the applicable subdivision property law provided that a fee interest was transferred to the public which could only be relinquished or terminated by a vacating act of the local municipality or court which has not occurred. Consequently, assuming arguendo the claim of non-use for five years by 1902, could be proven, the claim alone without formal vacation is inadequate to divest the public of its superior interest in the dedicated road, being contrary to applicable statutes; to-wit, subdivision laws and laws prohibiting the adverse possession of public property.

4. The existence or non-existence of private property rights that would survive any alleged abandonment of the public's interest in the street are not at issue or relevant herein nor may such rights be adjudicated without jurisdiction over the abutting property owner.

5. In the event, this Court were to find that

notwithstanding the foregoing arguments, that prior to 1911 Section 1116 of Revised Statutes of Utah of 1898 as amended, at least created a claim or defense to a dedicator's reversionary interest which could divest the public of its interests in subdivision streets in contravention of the statutory procedure, Respondent-City submits the principles of equity and public policy, laches and estoppel, require that such claims be cut off as stale, and offensive to the stability of property law, equity and public interests. The property owners and their predecessors have knowingly received the benefits of urban subdivision for 80 years, shall receive future benefits to their property by the improvement of Street, and shall not be damaged to any extent by an order to remove the obstructions and personal property from said Street. On the other hand to allow Laytons' claim any success would open up uncertainty and vulnerability of attack to any subdivision street to century old claims thereby inappropriately chilling or stopping the natural progress of heavily demanded public services and utilities. Such a result would be inimical to the public and contrary to the purposes and provisions of the laws under which the Street was dedicatd.

It is, therefore, respectfully submitted that the Court should uphold the lower court decision and rule that said Street is a dedicated road which should be free from the

encroaching or obstructing activities of Appellant-Laytons. Respondent-City submits this Court should also affirm the lower court's order to Appellant-Laytons to remove the obstructions from the Street within ten (10) days with the Respondent-City being authorized to complete the removal upon failure to Defendants-Appellants to comply with such order and be awarded a judgment for any expense involved in such work.

Respectfully submitted,

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