2001

Utah Housing Finance Agency v. Herbert L. Smart : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH HOUSING FINANCE AGENCY, Plaintiff-Respondent, v. HERBERT L. SMART, individually and as Director of Finance of the State of Utah, and DAVID SMITH MONSON, individually and as Auditor of the State of Utah, Defendant-Appellants.	Case No. 14924

BRIEF OF RESPONDENT UTAH HOUSING FINANCE AGENCY

Appeal from the Judgment of the Third District Court
for Salt Lake County, Honorable Bryant H. Croft, Judge

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BRIEF OF RESPONDENT
UTAH HOUSING FINANCE AGENCY

STATEMENT OF THE KIND OF CASE

This is an action for declaratory judgment, declaring the constitutionality of a state statute, the Utah Housing Finance Agency Act, Utah Code Annotated §63-44a-1, et seq. (Supp. 1975) (hereinafter the "Act"), and for mandamus ordering the defendant state officials to honor the Utah Housing Finance Agency's (hereinafter the "Agency") request for funds appropriated to it under the Act.

DISPOSITION IN LOWER COURT

This matter was argued to the Court upon cross motions for summary judgment, supported by affidavits and memoranda. The Court determined that the Act was in all respects constitutional, and issued the requested writ of mandamus. Subsequently, the writ was stayed pending the prosecution of this appeal.

RELIEF SOUGHT ON APPEAL

Plaintiff-appellee seeks affirmance of the judgment below as to each and every issue presented to the trial court, the lifting of the stay imposed pending the appeal, and enforcement of the writ.

STATEMENT OF FACTS

The statement of facts contained in defendant-appellants' brief is adequate.

ARGUMENT

POINT I.

THE UTAH HOUSING FINANCE AGENCY ACT SERVES A PUBLIC PURPOSE.

Defendant-appellants claim (Point IB, Appellants' Brief) that the Act and appropriations thereunder, are

unconstitutional because the Act does not serve a public purpose. It is not questioned that public funds may not be spent for other than public purposes. However, the question whether such legislation as the Utah Housing Finance Agency Act serves a public purpose has been litigated in numberous sister states, and on this ground the constitutionality of the legislation invariably has been sustained. California Housing Finance Agency v. Elliott, 131 Cal. Rptr. 361 (Calif. 1976); Rich v. State of Georgia, et al., 227 S.E.2d 761 (Ga. 1976); In Re Constitutionality of ORS 456.720, 537 P.2d 542 (Ore. 1975); State ex rel Warren v. Nusbaum, 59 Wis. 2d 391, 208 N.W.2d 780 (1974); West v. Tennessee Housing Development Agency, 512 S.W.2d 275 (Tenn. 1974); State ex rel West Virginia Housing Development Fund v. Waterhouse, 212 S.E.2d 727 (W. Va. 1974); Opinion to the Governor, 112 R.I. 151, 308 A.2d 809 (1973); Johnson v. Pennsylvania Housing Finance Agency, 453 Pa. 329, 309 A.2d 528 (1973); Minnesota Housing Finance Agency v. Hatfield, 297 Minn. 151, 210 N.W.2d 298 (1973); Maine State Housing Authority v. Depositors Trust Co., 278 A.2d 699 (Maine 1971); Martin v. North Carolina Housing Corp., 277 N.C.29, 175 S.E.2d 665 (1970); New Jersey Mortgage Finance

Agency v. McCrane, 56 N.J. 414, 267 A.2d 24 (1970); Massachusetts Housing Finance Agency v. New England Merchants Nat'l Bank, 356 Mass. 202, 249 N.E.2d 599 (1969); Walker v. Alaska State Mortgage Association, 416 P.2d 245 (Alaska 1966). Vermont Home Mortgage Credit Agency v. Montpelier National Bank, 262 A.2d 445 (Vt. 1970).

The Act contains a declaration of public purpose in Section 63-44a-2. In that section, the legislature declares it the policy of the State to assist the provision of decent, safe, sanitary housing for the citizenry where private institutions fail to do so. There is then contained a finding that such a failure has occurred in that a lack of available financing has caused a decrease in housing starts and in the transferability of existing housing, with a resulting serious shortage of decent housing for persons of low and moderate income. Such a shortage, the legislature finds, leads to unemployment in the housing industry and to the creation of blight and slums. The legislature therefore specifically declares it a public purpose for the State to cooperate with private institutions to increase the amount of reasonably available financing for the construction, purchase, and rehabilitation of decent, low and moderate income housing.

Such legislative findings are entitled to great respect, and may be disregarded only to the extent that they are incorrect or unreasonable on their face. E.g., Allen v. Tooele County, 21 U.2d 383, 445 P.2d 994 (1968); Thomas v. Daughters of the Utah Pioneers, 114 Utah 108, 197 P.2d 477 (1948); Lehi City v. Meiling, 87 Utah 237, 48 P.2d 530 (1935).

In the Court below, plaintiff submitted the affidavits of officers of four major Utah lending institutions and of an official of the Department of Community Affairs of the State of Utah, attesting the kind of facts upon which the Legislature based its findings. No counter affidavits were submitted, and no question was raised by defendants as to the truth or validity of the affidavits submitted by plaintiff. Where the problem described by the legislature so plainly exists, the concern of the courts is merely whether the problem falls within an area of legitimate legislative concern, and whether the method adopted by the legislature for dealing with the problem is reasonably calculated to have the desired effect. Thomas v. Daughters of the Utah Pioneers, supra; Lehi City v. Meiling, supra; West v. Tennessee Housing Development Agency, supra.

The matter of a serious shortage of safe, sanitary, decent housing for a large segment of the citizenry falls squarely within the police power of the legislature to deal with the health, safety, and morals of the populace. E.g., Rich v. State of Georgia, supra; State ex rel Warren v. Nusbaum, supra; Maine State Housing Authority v. Depositors Trust Co., supra; Martin v. North Carolina Housing Corp., supra; Walker v. Alaska State Mortgage Association, supra. Courts which have discussed the matter indicate numerous ways in which making decent housing more readily available beneficially effects the health, safety and morals of the public.

Making it possible for a greater number of low and middle income persons to purchase homes gives a greater number a stake in society, and encouragement to be productive wage earners, and thus tends to stabilize society. State ex rel Warren v. Nusbaum, supra; Martin v. North Carolina Housing Corp., supra.

Increasing the transferability of low and middle income housing by increasing financing therefor, and increasing the availability of funds for home improvements on such housing, tends to prevent the creation of blight and slums and the consequent unsafe, overcrowded and unsanitary

conditions which breed crime and disease. State ex rel Warren v. Nusbaum, supra; Maine State Housing Authority v. Depositors Trust Co., supra; Martin v. North Carolina Housing Corp., supra.

The Utah Supreme Court has held that the redevelopment of blighted and slum areas is a public purpose for which public funds may be spent. Tribe v. Salt Lake City, Corp., 540 P.2d 499 (Utah 1975).

It cannot be said that the finding of the legislature that a public purpose is served by increasing the availability of financing for construction, purchase, and rehabilitation of low and moderate income housing, is incorrect or unreasonable on its face. Regarding defendants' objection that the Act does not serve a public purpose, then, it reamins only to be seen whether the method chosen by the legislature to remedy the problem defined is reasonably calculated to have the desired effect.

The general scheme chosen by the legislature, discussed in detail in the Facts section of Appellants' brief, is a common one. Stated briefly, the Agency is authorized to obtain tax free funds by the issuance of bonds and notes, which it uses to provide low interest financing for low and moderate income housing. Debt created by the sale of notes,

bonds, and other obligations is payable only out of funds of the Agency, so that such obligations are self-liquidating. At least one court has specifically addressed the problem whether such a method is reasonably calculated to serve the public purpose of increasing financing for low and moderate income housing, holding that it is. West v. Tennessee Housing Development Agency, supra. Generally the same method was employed by the agencies involved in all of the other sister state cases cited above, so that insofar as each finds that a public purpose is served by the legislation there involved, each implicitly finds that raising low interest funds for financing by sale of tax exempt self-liquidating bonds is an acceptably effective means of accomplishing the public purpose. The method is familiar in Utah, where it has been approved for various public purposes. E.g., Tribe v. Salt Lake City Corp., supra (city urban renewal bonds); Allen v. Tooele County, supra (county bonds for industrial development); Conder v. University of Utah, 123 Utah 182, 257 P.2d 367 (1953) (University bonds for dormitory construction); Spence v. Utah State Agricultural College, 119 Utah 104, 225 P.2d 18 (1950) (State College bonds for construction).

The Housing Finance Agency Act serves a public

purpose in that it is intended, and reasonably designed, to alleviate an actual and existing problem having a significant effect upon the public health, safety, and welfare.

POINT II.

ANY PRIVATE BENEFITS CONFERRED BY THE ACT ARE MERELY INCIDENTAL TO ITS DOMINANT PUBLIC PURPOSE.

Appellants assert (Point IB, Appellants' Brief) that the Act is constitutionally offensive because its operation will confer certain private benefits. There is an obvious private benefit to persons who are able to obtain housing financing through the Agency who would not have been able to obtain it elsewhere. There is a less substantial benefit to mortgage lenders who participate in the Agency's mortgage transactions. These benefits, however, are merely incidental to the dominant purpose of the Act to alleviate a serious statewide shortage of decent low and moderate income housing, with its consequent ill effects. While it is improper to spend public funds for private purposes, such private benefits incidental to a dominant public purpose do not detract from the constitutionality of the legislation.

In Tribe v. Salt Lake City Corporation, supra, it was charged that urban renewal legislation was unconstitutional insofar as the proposed renewal projects would confer benefits upon adjoining private landowners. The Court held that these private benefits were incidental to the public purpose of clearing slums and blight, and thus not dispositive of the question of constitutionality. The legislation was held constitutional. See also Thomas v. Daughters of the Utah Pioneers, supra.

It is immaterial, of course, whether the incidental private benefits conferred by the legislation are viewed as particularly "personal". What could be more "personal" than the education provided by public universities, the food and clothing provided by public welfare subsidies, the medical attention underwritten by public medicare programs, all of which have been found constitutionally proper?

The private benefits which may result from the operation of the Housing Finance Agency Act are not different in kind from those described in Tribe. They are equally incidental to the main public purpose of the Act, and do not affect its constitutionality. This question has been discussed and decided in favor of similar legislation

in many of the sister state cases previously cited. See, State ex rel Warren v. Nusbaum, supra; Massachusetts Housing Finance Agency v. New England Merchants Nat'l Bank, supra; Vermont Home Mortgage Credit Agency v. Montpelier National Bank, supra; Opinion to the Governor, supra; New Jersey Mortgage Finance Agency v. McCrane, supra; West v. Tennessee Housing Development Agency, supra.

POINT III.

THE ACT INVOLVES A MATTER OF STATEWIDE CONCERN, PROPERLY DELEGATED TO A STATE AGENCY.

Appellants claim (Point IV, Appellants' Brief) that the Act violates Article VI, §28 of the Utah Constitution, which prohibits delegation to a "special commission, private corporation or association, any power to make, supervise, or interfere with any municipal improvement, money, property or effects . . . or to perform any municipal functions." See Tribe v. Salt Lake City Corp., supra. The question central to such a claim is whether the Agency, in assisting in providing low and moderate income housing, is performing an essentially municipal function rather than dealing with a matter of statewide concern, properly delegated to a state agency. It cannot be seriously contended

that the Agency can make or supervise municipal improvements or interfere with municipal money, property, or effects.

In Carter v. Beaver County Service Area No. 1, 16 U.2d 280, 399 P.2d 440 (1965), the Court struck down, as violative of Article VI, §29 (now §28), legislation allowing counties to create a "service area", an agency of the state, to provide numerous extended services, including "without limitation" the following:

> . . .extended police protection; structural fire protection; culinary or irrigation water retail service; water conservation; local park, recreation or parkway facilities and services; cemeteries; public libraries; sewers, sewage and storm water treatment and disposal; flood control; garbage and refuse collection; streetlighting; airports; planning and zoning; local streets and roads; curb, gutter and sidewalk construction and maintenance; mosquito abatement; health department services; hospital service . . .

The Court found that in the form enacted the County Service Area Act would allow the creation of a state agency which could perform peculiarly municipal functions. However, as subsequently amended to avoid being overly inclusive, the legislation was subsequently upheld under Section 29 (now Section 28) of Article VI, in Branch v. Salt Lake County Service Area No. 2, 23 U.2d 181, 460 P.2d 814 (1969).

The purpose of Article VI, Section 28, is to preserve the right of local self-government to the localities, and to prevent the state from interfering in the internal affairs of cities and towns. Carter, supra; State Water Pollution Control Bd. v. Salt Lake City, 6 U.2d 247, 311 P.2d 370 (1957). In Water Pollution Control Bd. v. Salt Lake City, the Court held that while the Board had a legitimate function of preventing pollution of the state's waters on a statewide basis, it could not prescribe the internal operation of a pre-existing city sewage system. In that case, the Court defined "municipal functions", for the purposes of Section 28, as being any and all functions in which a city or town may properly engage, whether proprietary or governmental.

It seems clear at once that expanding the credit market for home financing for low and moderate income persons is not a regular internal function of cities and towns. The present case does not present the Carter situation in which, due to overbreadth of the legislation, the agency might usurp an ordinary city function such as construction of sidewalks or streetlighting. This is not the Water Pollution Control Board case, in which a state agency seeks to

supervise an existing municipal improvement performing a historically municipal service. There appears no historic precedent in Utah for municipalities engaging directly in the housing credit market. It does not appear how participation by a state agency in home financing has any tendency to interfere with the right of local self government.

Tribe, supra, holds that urban renewal is a matter of statewide concern within Article VI, §28. Certainly the strongly related function of preventing shortages of decent, safe, sanitary housing is equally a matter of statewide concern. State ex rel Warren v. Nusbaum, supra, the only case appellee has found which considers the question under a provision such as Section 28, specifically so holds.

The Housing Finance Agency Act does involve a matter of statewide concern properly delegated to a state agency. It has no tendency to invade any right of any municipality to govern its internal affairs. It does not violate Article VI, Section 28 of the State Constitution.

POINT IV.

THE HOUSING FINANCE AGENCY CANNOT CREATE STATE DEBT OR PLEDGE THE CREDIT OF THE STATE.

Appellants allege (Points I and II, Appellants' Brief) that the sale of bonds and notes by the Housing Finance Agency will result in the lending of state credit in favor of the Agency in violation of Article VI, Section 29 of the State Constitution and the creation of state debt in violation of Article XIV, Section 1 of the State Constitution.

Debts and obligations of the Agency are payable solely out of funds of the Agency, ordinarily comprising proceeds from bonds and notes and payments on loans. Section 63-44a-15 (1). The Act specifically provides that debts of the Agency cannot become debts of the state, that the credit of the state cannot be lent in favor of the Agency, and that funds of the state cannot be obligated to pay debts of the Agency. Section 63-44a-15. All notes and bonds of the Agency must bear a disclaimer to such effect. Id. The Utah law is very plain that such self-liquidating notes and bonds of state agencies are not debts of the state and do not effect a lending of the state's credit. Spence v. Utah State Agricultural College, supra; Tribe v. Salt Lake City Corp., supra; Allen v. Tooele County, supra.

Spence considered legislation authorizing the State College to issue bonds to raise construction funds. The legislation provided that the bond debt should be payable only out of revenue of the buildings constructed, and not out of tax revenue of the state, and that the bonds should bear a legend to that effect. The Court held that plaintiff's claim of creation of state debt was controlled by the "special fund doctrine": where bonds of a state agency are payable only out of a special fund comprised of revenues of a facility to be constructed with the bond proceeds, there is no creation of state debt because tax monies are not obligated. See also Conder v. University of Utah, supra. In short, unless the legislation creates a binding obligation upon state revenues raised by taxation, there is no creation of state debt.

Tribe reaches the same conclusion with regard to notes and bonds of a quasi-municipal corporation: where the legislation provides that the notes and bonds shall be payable out of revenue of facilities to be constructed, and shall not be city debt, and the bond resolution and ordinance, and bond form, all prohibit the use of city credit to pay the bonds, no city debt is created and there

is no lending of city credit in violation of the applicable constitutional provisions. See also Allen v. Tooele County, supra, regarding county obligations.

An agency which supports itself by the sale of self-liquidating notes and bonds in no way obligates the state to raise or spend tax revenues, and therefore creates no state debt.

The Housing Finance Agency Act also provides, however, that the Agency must maintain a capital reserve fund sufficient to cover currently maturing obligations. Section 63-44a-12. Should current income be insufficient to meet this requirement, an additional appropriation may be sought from the legislature to cover the deficit, and the legislature may make such an appropriation. Sections 63-44a-12, 66-44a-19. In short, the legislature may make future appropriations to defray the obligations of the Agency. It has been charged in a number of the housing finance agency cases from sister states that such provisions constitute a lending of state credit and the creation of state debt because they indicate that recourse may be had to state funds to pay agency obligations where agency funds are insufficient. It does not appear that such

provisions have been considered in a Utah case.

The courts which have considered the question uniformly base their decisions on a distinction whether the legislation obligates the state to make future appropriations to pay agency debt, or merely permits it to do so. If the legislation requires the legislature to make future appropriations to defray agency obligation, the legislation may be invalid as lending state credit and creating state debt. See In Re Constitutionality of ORS 456.720, supra, distinguishing Gibson v. Smith, 531 P.2d 724 (Ore. 1975); Casey v. South Carolina Housing Authority 264 So. C. 303, 215 S.E.2d 184 (1975). (But see Massachusetts Housing Finance Agency v. New England Merchants Nat'l Bank, supra, and Maine State Housing Authority v. Depositors Trust Co., supra, holding that legislation mandatory in form is permissive in effect, insofar as one legislature has no power to bind a future legislature to appropriate.) If, on the other hand, the legislation merely permits the legislature to make such appropriations, without requiring it to do so, it creates no binding obligation upon the state, and thus results in no lending of state

credit or creation of state debt. California Housing Finance Agency v. Elliott, supra; State ex rel Warren v. Nusbaum, supra; Massachusetts Housing Finance Agency v. New England Merchants Nat'l Bank, supra; Maine State Housing Authority v. Depositors Trust Co., supra; Opinion to the Governor, supra; State ex rel West Virginia Housing Development Fund v. Waterhouse, supra; Martin v. North Carolina Housing Corp., supra; Minnesota Housing Finance Agency v. Hatfield, supra; Walker v. Alaska State Mortgage Assoc., supra; In Re Constitutionality of ORS 456.720, 537 P.2d 542 (Ore. 1975).

The Utah statute is of the latter type. It permits, but does not require the legislature to make future appropriations to the Agency. (Nor would it be appropriate to imply any requirement in the Act despite its language, since it also appears to be the Utah rule that one legislature has no power to bind a future legislature. See the discussion of the prohibition of irrepealable laws in Thomas v. Daughters of Utah Pioneers, supra, 197 P.2d at 497.) That being so, the legislation creates no binding obligation upon future tax revenues, and thus cannot result in the lending of state credit or the creation of state debt.

Supposing that the capital reserve fund provisions of the Act are not unconstitutional insofar as they create no binding obligation of the state to pay future debts of the Agency, some question may still be raised whether any actual future appropriation made by the legislature in response to a felt "moral obligation" would be constitutional. It appears that they would be entirely proper.

Certainly the fact that the Act may be interpreted as creating a "moral obligation" of the state to pay future debts of the Agency does not make it unconstitutional as lending state credit or creating state debt. See Conder v. University of Utah, supra, 257 P.2d at 370. So long as the legislature, at the time an appropriation is sought, is not legally bound to appropriate but may make an independent decision, no state debt or commitment of state credit is involved. Otherwise, the question appears to be controlled by the rule that the legislature may appropriate for any public purpose. The Agency, as discussed heretofore, serves a public purpose, and any appropriation to the Agency for that purpose is valid. Retirement of Agency debt serves that purpose. The specific question was presented in Maine State Housing

Authority v. Depositors Trust Co., supra, Massachusetts Housing Finance Agency v. New England Merchants Nat'l Bank, supra, and State ex rel West Virginia Housing Development Fund v. Waterhouse, supra, under similar constitutional provisions, and in each case the court held that such future appropriations would be valid. See 278 A.2d at 709; 249 N.E.2d at 609-610; 212 S.E.2d at 731. This Court should rule that any future appropriation of the Utah legislature to the Utah Housing Finance Agency, whether to retire bond debt or for any other end in furtherance of the Agency's public purpose, would be constitutionally proper.

Appellants base their claim that the Act will affect a lending of the state's credit in large part upon the idea that "the appropriation of state funds constitutes a 'lending of credit'." This argument is said to be based upon a "line of cases" represented by Button v. Day, 208 Va. 494, 158 S.E.2d 735 (1968). In fact, the argument appears to be nothing more than a misreading of the somewhat confusing opinion in Button v. Day. Appellees are unable to find any other case which takes such an extreme position.

In fact, Button v. Day itself does not take the extreme position alleged by appellants. If mere appropriation

were an unconstitutional lending of credit, then, of course, the legislature could never appropriate. What was (properly) found offensive in Button v. Day is that the legislation created a "guarantee fund", of public tax monies, to pay off private loans for the construction of privately owned industrial plants, where the private borrowers defaulted. The legislation contained an initial appropriation for the guarantee fund. Obviously, and as the Virginia Court found, this legislation bound the state in future (when there was a default) as a guarantor of private debts. In defense of the legislation it was urged that it permitted only a single, present appropriation, for the public purpose of stimulating industrial growth. The Court found this distinction immaterial: the purpose was to guarantee private debts with public monies, and that was unconstitutional whether the money was appropriated now or in future when the loans went bad. The Court merely held that the "one shot" appropriation was not a defense in that case, not that present appropriation in and of itself violates the lending of state credit prohibition found in most state constitutions.

Button v. Day has no bearing upon the present case, because the present Act provides for no guarantee

fund. None of the public funds appropriated under this Act, or which can be appropriated under this Act, can be applied on any private debt under any circumstances.

POINT V.

PROPERTY OF THE HOUSING FINANCE AGENCY IS PROPERLY EXEMPT FROM TAXATION.

Article XIII, Section 2, of the Utah Constitution provides generally that all tangible property in the state not constitutionally exempt, shall be taxed in proportion to its value. Section 3 of Article XIII requires the legislature to enact uniform rates of assessment and taxation on such property. Section 10 of Article XIII subjects corporations and persons presently doing business in the state to taxation on their property owned or held locally. Appellants claim (Point III B, Appellant's Brief) that the Housing Finance Agency Act violates these provisions of the State Constitution insofar as it provides, in Section 63-44a-16, that all Agency property, and all notes and bonds thereof, together with interest payable thereon and income derived therefrom, shall be exempt from all forms of taxation.

The answer to this contention, however, is found in Article XIII, Section 2 itself, which also provides that "The property of the state . . . shall be exempt from taxation." Property held and used by an agency of the state

for a public purpose is state property exempt from taxation. In short, this contention is answered by the prior discussion of the public purpose of the Act: since the public purpose of the Act is clear, Agency property used for such purpose is exempt. See Allen v. Tooele County, supra, holding that county industrial development bonds, proceeds therefrom and payments thereon, are properly tax exempt as public property serving a public purpose. Such tax exemption has frequently been alleged in opposition to similar housing finance agency acts, but the statutes have been upheld by every court which has ruled on the matter. Rich v. State of Georgia, supra; State ex rel Warren v. Nusbaum, supra; West v. Tennessee Housing Development Agency, supra; Johnson v. Pennsylvania Housing Finance Agency, supra; Martin v. North Carolina Housing Corp., supra; Minnesota Housing Finance Agency v. Hatfield, supra.

POINT VI.

THE ACT DOES NOT INVOLVE AN IMPROPER DELEGATION OF LEGISLATIVE AUTHORITY.

No doubt, and as appellee has argued earlier herein, the matters with which the Housing Finance Agency Act deals are matters of statewide concern, as to which only the legislature has power to make laws under Article V, Section 1 and Article VI, Section 1 of the State Con-

stitution. Appellants allege (Point V, Appellant's Brief) that the Act is an improper attempt by the legislature to delegate its law making authority as to such matters to the Agency.

The legislature may not, of course, simply cede to an agency its authority to make law on any subject. See State v. Goss, 79 Utah 599, 11 P.2d 340 (1932); Clayton v. Bennett, 5 U.2d 152, 298 P.2d 531 (1956). On the other hand, authority to make rules and regulations for the carrying into effect of a policy prescribed by the legislature may be conferred upon an administrative agency. In such a case, the legislation will be upheld if the legislature has provided sufficient standards for procedure and decision as to confine the potential action of the agency within the bounds of the legislative policy. State v. Goss, supra; Clayton v. Bennett, supra; Western Leather & Finding Co. v. State Tax Commission, 87 Utah 277, 48 P.2d 526 (1935).

The Housing Finance Agency Act accords the Agency power to make rules and regulations for the implementation of the Act. The Act, however, also contains comprehensive standards confining Agency power to implementing a clearly and completely defined legislative purpose. The authority

granted the Agency to make rules and regulations -- found in Section 63-44a-9(a), 63-44a-5(3), and 63-44a-10 -- is authority to regulate the conduct of the business of housing finance specifically prescribed to the Agency by the legislature and to control and dispose of the property of the Agency. The power and duties of the Agency are set out in comprehensive detail in Sections 63-44a-4, 5, 9, 10 and 11. No authority is conferred upon the Agency to regulate the property or conduct of third persons, as is ordinarily complained of in cases arising under these provisions of the Utah Constitution. E.g., State v. Goss, supra; Clayton v. Bennett, supra; Western Leather & Finding Co. v. State Tax Commission, supra.

The authority of the Agency to internally regulate the disposition of its own business and property, as clearly defined by the legislature, does not involve any power to make law as to any subject. The detailed specification by the legislature of the business in which the agency may engage and the property it may hold provide ample standards of conduct and decision to avoid a bare delegation of legislative power.

Section 63-44a-3(6) does permit the Agency to determine who are "low and moderate income persons" entitled

to the benefits of the Act. The decision, however, is to be made based upon specific criteria set forth. The legislature may commit to administrative agencies factual decisions as to the applicability of legislation, so long as the standards for decision are spelled out. Clayton v. Bennett, supra.

The objection that housing finance agency legislation such as Utah's involves an improper delegation of legislative power was made and disposed of in favor of the legislation in Rich v. State of Georgia, supra; State ex rel Warren v. Nusbaum, supra; Vermont Home Mortgage Credit Agency v. Montpelier Nat'l Bank, supra; Johnson v. Pennsylvania Housing Finance Agency, supra; Opinion to the Governor, supra; State ex rel West Virginia Housing Development Fund v. Waterhouse, supra; Martin v. North Carolina Housing Corp., supra; New Jersey Mortgage Finance Agency v. McCrane, supra; West v. Tennessee Housing Development Agency, supra.

POINT VII.

THE ACT DOES NOT CREATE A CORPORATION BY SPECIAL ACT.

Article XII, Section 1, of the Utah Constitution provides that corporations may be created under general law, but may not be created by special law. Appellants

allege (Point III A, Appellant's Brief) that the Housing Finance Agency Act violates this section because it creates an agency in corporate form by special act.

In fact, the Agency is a "body corporate and politic" of the State. It is not an ordinary corporation in the sense of the constitutional prohibition. While there appear to be no cases in point under Article XIII, Section 1, there are dispositive rulings under the related provision of Article XI, Section 5, which forbids the legislature to create "corporations for municipal purposes" by general law.

In Tygesen v. Magna Water Co., 119 Utah 214, 226 P.2d 127 (1950), it was claimed that creation of an improvement district by a county pursuant to statute violated Article XI, Section 5. The Court questioned whether the improvement district in fact performed municipal functions and whether the legislation in question was a "special law." In any case, the Court said, the improvement district was not a corporation under the constitutional provision. Since the improvement district operated separately and independently of any municipal authority, and had no control over municipal property or functions, it was to be considered a separate arm of the state government performing a public

purpose. As such, it was not within the constitutional prohibition. The same result was reached in Freeman v. Stewart, 2 U.2d 319, 273 P.2d 174 (1954).

As discussed earlier herein, the Housing Finance Agency has been created to perform a statewide function and a public purpose. It is an independent arm of the state government, not a corporation. It is, therefore, not within the prohibition of Article XIII, Section 1.

POINT VIII.

THE ACT DOES NOT CREATE A CORPORATION FOR MUNICIPAL PURPOSES BY SPECIAL ACT.

The foregoing discussion is also dispositive of appellants' contention that the Housing Finance Agency Act creates a municipal corporation by special act.

POINT IX.

THE ACT IS A GENERAL, NOT A SPECIAL, LAW.

No special law may be enacted where a general law would be applicable. Article VI, Section 26, State Constitution. Appellants claim (Point IV, Appellant's Brief) that the Housing Finance Agency Act is a special law. The Housing Finance Agency Act is a general law within the meaning of the constitutional provision.

The leading Utah case on the subject appears to be State v. Kallas, 97 Utah 492, 94 P12d 414 (1939)

concerning the Liquor Control Act of 1935. As against the contention that the act in question was a "special law", the Court set forth the following definitions:

> Laws which apply to and operate uniformly upon all members of any class of persons, places, or things requiring legislation peculiar to themselves in the matters covered by the laws in question, are general and not special . . . Special legislation is such as relates either to particular persons, places, or things, or to persons, places, or things which, though not particularized, are separated by any method of selection from the whole class to which the law might, but for such legislation, be applied, while a local law is one whose operation is confined within territorial limits, other than those of the whole state or any properly constituted class or locality therein.

94 P.2d 414 at 420. See also Tygesen v. Magna Water Co., supra.

Under these definitions, it is immaterial that in a given instance a law may apply to a narrow group or locale. The law is a special and not a general law only if by its terms, it must apply only to a particular limited class or locale.

The Housing Finance Agency Act applies uniformly to all low and moderate income persons. It contains a specific finding of the legislature that the legislation is

required for this particular class. It contains no special or local limitations confining its operation to particular persons, places, or things. It applies likewise to all persons and all parts of the state. It is clearly a general rather than a special law.

POINT X.

THE ACT CREATES NO IRREVOCABLE FRANCHISE, PRIVILEGE, OR IMMUNITY.

The Housing Finance Agency Act provides in Section 63-44a-14 that the State shall not interfere with the rights granted the Agency to fulfill its contracts with bond holders, or impair the right of bond holders thereunder, until the obligations are discharged. It has occasionally been argued as to such legislation, as appellants assert here (Point VI, Appellant's Brief), that such a pledge of the State confers an "irrevocable franchise, privilege, or immunity" upon bond holders in violation of such a provision as Article I, Section 23 of the Utah Constitution. See, Johnson v. Pennsylvania Housing Finance Agency, supra.

In fact, the benefit conferred by this provision is neither irrevocable, nor a "franchise, privilege, or immunity." The benefit, by its terms, terminates when the Agency's obligation is discharged. It is, therefore, not irrevocable. The provision in fact, merely implements

Article I, §18 of the Utah Constitution and Article I, Section 10, Clause 1 of the United States Constitution prohibiting the State from enacting any law impairing the obligation of contracts. The result under the Housing Finance Agency Act would be precisely the same if it did not contain Section 63-44a-14, because of the State and federal constitutional provisions to the same effect. The benefit conferred by Section 63-44a-14, therefore, cannot be a "franchise, privilege, or immunity" in violation of Article I, §23 of the State Constitution.

POINT XI.

THE ACT DOES NOT PERMIT IMPOSITION OF TAXES FOR THE PURPOSES OF ANY COUNTY, CITY, OR TOWN.

Finally, Appellants contend (Point IV, Appellant's Brief) that the Housing Finance Agency Act permits the legislature to impose taxes for the purposes of a county, city, town, or other municipal corporation in violation of Article XIII, Section 5, of the State Constitution.

Clearly the Act permits (rather than requires) the legislature to appropriate tax monies to the purposes of the Agency. To the extent, however, as discussed earlier, that such purposes are statewide, public purposes, it is clear that the Act does not permit taxation for county, city, town, or municipal purposes in violation of the State

Constitution.

POINT XII.

DEFENDANTS HAVE A DUTY TO PROCESS PLAINTIFF'S REQUEST FOR FUNDS.

The Housing Finance Agency Act is constitutional in all respects. The appellants have each a statutory duty, which may be compelled by mandamus, to process the Agency's request for funds, and, if the same is in proper form and within the appropriation, to issue a warrant upon the Treasury for the funds.

The duty of the Director of Finance is defined by Section 63-38-11, Utah Code Annotated (Supp. 1969), which provides:

> The director of finance shall exercise budgetary control over all state departments, institutions and agencies . . . The director shall examine and approve or disapprove all requisitions and requests for proposed expenditures of the several departments . . . and no requisitions of any of the departments shall be allowed nor shall any obligation be created without the approval and the certification of the director.

Under the same section, the Director shall approve the disbursal of funds upon request if the request is within the budget of the agency and current appropriations therefor. See also Section 63-38-10.

The duty of the State Auditor in this regard substantially antedates the creation of the office of

Director of Finance, since it derives from Article VII, §17 of the Utah Constitution, which provides the "The Auditor shall be Auditor of Public Accounts . . . and . . . shall perform such other duties as may be provided by law." In Preece v. Rampton, 27 U.2d 56, 492 P.2d 1355 (1972), it was held that the latter part of this provision includes the duty to approve or disapprove warrants upon the Treasury, which duty the Auditor had performed as of the date of adoption of the State Constitution.

No funds may be obtained from the State Treasury except upon presentation of a warrant therefor to the Treasurer. See Section 67-4-1, Utah Code Annotated (1953). By Section 67-4-4, enacted in 1963, it was attempted to consolidate the function of issuing warrants upon the Treasury with the budgetary functions of the Department of Finance. The section was held unconstitutional in Preece v. Rampton, supra, which held that while the Auditor could not be divested of his constitutional function of approving or disapproving warrants, the clerical function of drafting warrants for approval could be conferred upon the Department of Finance. The modern practice under the foregoing authorities is that requests for funds are directed to the Department of Finance, where they are reviewed for compliance

with the budgets and appropriations, and, if the request is approved, a warrant is drafted and conveyed to the Auditor for approval. If the Auditor concurs that the request is within budgets and appropriations, the warrant may be presented to the Treasurer. No valid warrant may be obtained without the approval of both the Director of Finance and the Auditor. In short, what had been the historic function of the Auditor -- to examine and approve requests for funds and issue warrants therefor -- is in modern practice shared by the Auditor and the Director of Finance.

When the function was performed by the Auditor alone, it was held that mandamus would lie to compel performance of the function. Nelson v. Clayton, 2 Utah 299 (1878-1879). In that case, the Auditor refused to audit the accounts of the warden of the penitentiary or to issue a warrant on the Treasury for the sum shown by such accounts, though there was a current appropriation to defray the warden's costs of operating the penitentiary. The Court found that the duty to audit the account, and, if the account were found correct, to issue the warrant, was statutorily required, and issued the writ of mandamus to the Auditor accordingly.

No claim has been raised in this matter that the Agency's request for funds is outside its budget or appropriation. The Agency has sought only the specific amounts appropriated to it by the legislature. Appellants' response is merely that the Agency is not constitutionally created. Appellants are incorrect in the latter regard: they have each a statutorily imposed, ministerial duty to review and approve the Agency's request for funds and issue a warrant therefor on the Treasury.

CONCLUSION

The Utah Housing Finance Agency Act is in all respects constitutional. Particularly, it is constitutional under each and every provision of the Utah Constitution asserted by appellants. The Court should affirm the judgment below so declaring.

Appellants have each a statutory, non-discretionary, ministerial duty to review the Housing Finance Agency's request for funds appropriated to the Agency, and if the request is proper and within the appropriation, to approve the same and issue a warrant upon the State Treasury for the funds. Appellants do not claim that the request is improper or not within the appropriation. They merely assert that the Act is unconstitutional. The request is proper

and within the appropriation. The Act is constitutional. The Court should sustain the issuance to the defendants of a writ of mandamus ordering them forthwith to review and approve the Agency's request for funds, and to issue a warrant for such funds upon the State Treasury.

RESPECTFULLY submitted this 4th day of February, 1977.

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CERTIFICATE OF MAILING

THIS IS TO CERTIFY that a copy of the foregoing Brief of Respondent, was mailed, postage prepaid, this 4th day of February, 1977, to Robert B. Hansen, Attorney General and William T. Evans, Assistant Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, Attorneys for Defendants-Appellants.