

1989

# W. & G. Company v. Redevelopment Agency of Salt Lake City : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

A16

DOCKET NO.

**89-0735 CA**

~~W. & S. COMPANY~~, a Utah general partner-  
ship; Darol Krantz, an individual,  
d/b/a BROADWAY MUSIC; J. ROSS TRAPP,  
Trustee of the Ross Trapp Trust and  
Trustee of the June Trapp Trust;  
NATIONAL DEPARTMENT STORE, a Utah corp-  
oration; ROBERT C. NELSON, d/b/a THE  
MAGAZINE SHOP; and DOWNTOWN ATHLETIC  
CLUB, a Utah corporation,

Plaintiffs/Respondents,

vs.

REDEVELOPMENT AGENCY OF SALT LAKE CITY,  
SALT LAKE CITY CORPORATION, TED L.  
WILSON, in his official capacity as a  
member and chief operating officer of  
the Board of Directors of the Redevelop-  
ment Agency of Salt Lake City, RONALD  
J. WHITEHEAD, GRANT MABEY, SIDNEY R.  
FONSBECK, EARL S. HARDWICK, IONE M.  
DAVIS and EDWARD PARKER in their offi-  
cial capacities as members of the Board  
of Directors of the Redevelopment  
Agency of Salt Lake City, and MICHAEL  
CHITWOOD, in his official capacity as  
the Executive Director of the Redevelop-  
ment Agency of Salt Lake City,

Defendants/Appellants.

Appeal No. 860539

OPENING BRIEF OF APPELLANTS

On Appeal from the District Court of Salt Lake County  
HONORABLE RAYMOND S. UNO, District Judge

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Attorneys for Respondents

**FILED**

IN THE SUPREME COURT OF THE STATE OF UTAH

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W. & G. COMPANY, a Utah general partner-:  
ship; Darol Krantz, an individual, :  
d/b/a BROADWAY MUSIC; J. ROSS TRAPP, :  
Trustee of the Ross Trapp Trust and :  
Trustee of the June Trapp Trust; :  
NATIONAL DEPARTMENT STORE, a Utah corp- :  
oration; ROBERT C. NELSON, d/b/a THE :  
MAGAZINE SHOP; and DOWNTOWN ATHLETIC :  
CLUB, a Utah corporation, :

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Agency of Salt Lake City, and MICHAEL :  
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IN THE SUPREME COURT OF THE STATE OF UTAH

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W. & G. COMPANY, et al.,	:	
	:	
Plaintiffs/Respondents,	:	
	:	
vs.	:	
	:	
REDEVELOPMENT AGENCY OF SALT LAKE CITY,	:	
et al.,	:	Appeal No. 860539
	:	
Defendants/Appellants.	:	

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OPENING BRIEF OF APPELLANTS

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LISTING OF ALL PARTIES TO THE APPEAL

All of the parties are listed in the caption of the case.

NATURE OF THE CASE

This is an action filed by several Landowners in Block 57 of the downtown Salt Lake business district against the Redevelopment Agency of Salt Lake City, et al., wherein said Landowners sought and obtained from the District Court an Order determining that certain ordinances adopted by the Salt Lake City Commission were improper and, as a consequence thereof, an injunction was issued enjoining the Redevelopment Agency from condemning any of the Plaintiff's properties pursuant to the ordinances.

DISPOSITION OF CASE IN LOWER COURT

The matter was submitted to the District Court on Motions for Summary Judgment filed by both respective parties. The District Court denied the Defendants' Motion for Partial Summary Judgment and the District Court granted the Plain-

tiffs' Motion for Partial Summary Judgment. The Court determined that the Agency and Salt Lake City had failed to comply with the requirements of the Utah Neighborhood Development Act, determined that those requirements were jurisdictional in nature, and entered an Order that the Agency may not acquire the Plaintiff's Block 57 properties by condemnation or by threat thereof.

#### STATEMENT OF ISSUES PRESENTED ON APPEAL

##### ISSUE I

IS THE LANDOWNERS' ACTION BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS?

##### ISSUE II

IS THE 'NOTICE' OF THE PUBLIC HEARING WHEREIN THE ADOPTION OF THE SUBJECT ORDINANCES WAS CONSIDERED SO INADEQUATE AS TO DENY THE LANDOWNERS DUE PROCESS AND CAUSE THE LEGISLATIVE ACTION TAKEN DURING SAID MEETINGS TO BE NULL AND VOID?

##### ISSUE III

IS THE REDEVELOPMENT AGENCY REQUIRED BY STATUTE TO MAKE A PROPERTY-BY-PROPERTY SPECIFIC FINDING OF "BLIGHT" OF EACH PARCEL WITHIN A PROJECT AREA?

##### ISSUE IV

WERE THE LANDOWNERS ENTITLED TO A SUMMARY DETERMINATION THAT THE ORDINANCES IN QUESTION WERE ARBITRARY, CAPRICIOUS, OR FRAUDULENT IN THEIR NATURE OR FORM?

#### RELIEF SOUGHT ON APPEAL

The Appellants seek an Order reversing the District Court's Order granting a partial summary judgment in favor of the Landowners and denying the Appellants' Motion for Partial Summary Judgment.



## STATEMENT OF FACTS

In 1969, the Utah Legislature adopted the Utah Neighborhood Development Act, UTAH CODE ANNO. §11-19-1 et seq. The Defendant, Salt Lake City Redevelopment Agency, (hereinafter AGENCY) is a duly created agency organized and functioning under the provisions of the Utah Neighborhood Development Act.

The Plaintiffs are seven property owners having separate interests in real properties situated in Block 57 of the downtown business district of Salt Lake City, Utah (see map of the properties, Exhibit 1 to Complaint and Affidavits of Plaintiffs D. Krantz, R. Nielson, R. Tannenbaum, J. Trapp and E. Wolf, R. 27)

On February 4, 1971, the AGENCY adopted the "C.B.D. WEST NEIGHBORHOOD DEVELOPMENT PROGRAM" which originally included a project area of approximately 2½ blocks of the downtown Salt Lake City business district. (Deposition of M. Chitwood, Executive Director of the Redevelopment Agency, page 14). In May of 1975, the AGENCY passed a Resolution to consider the adoption of an ordinance amending the Plan to include an additional 11 blocks of the downtown Salt Lake City business district, including Block 57. (Deposition of M. Chitwood and Second Affidavit of M. Chitwood, Exhibit B, R. 758). Accordingly, a Notice of Public Hearing of meetings scheduled before the AGENCY to be held on July 31 and August 4, 1975 and before the Board of Commissioners of Salt Lake City on September 3, 1975, was mailed to each Landowner in the project area and was

duly published as required by law. (Second Affidavit of M. Chitwood, Exhibit C, R. 771-796).

Subsequent to said meetings, the Salt Lake City Board of Commissioners, by Ordinance dated September 10, 1975 adopted the C.B.D. NEIGHBORHOOD DEVELOPMENT PLAN, dated August 6, 1975 (Second Affidavit of M. Chitwood, Exhibit H, R. 842). A copy of the Ordinance and Notice of its Adoption was mailed to each Landowner in the project area on September 15, 1975 (Second Affidavit of M. Chitwood, Exhibit J, R. 870). No action contesting the Ordinance was filed by the Landowners until the present matter was filed on February 14, 1985.

#### ARGUMENT

##### ISSUE I

IS THE PLAINTIFFS' ACTION BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS?

The Landowners below complained of inadequacies within 1977 and 1982 Ordinances adopted by the AGENCY relative to Block 57. Those Ordinances are the yearly implementation plans of the previously described Redevelopment Plan of 1975. The actual Plan under which the property in question became a part of a redevelopment project occurred in 1975. But even under the best possible scenario from the Landowners' position, this matter is clearly barred by the applicable statute of limitations. The Utah Legislature knew at the time of the enactment of the Redevelopment Act that once the detailed process set forth in the Act and discussed hereinafter had been followed by the Agency relative to the selection of a

"project area", preparation of a "preliminary plan" for redevelopment, and "public hearings" and meetings regarding the same and the findings of "blight" by the Commission and the adoption by "Ordinance" of a "redevelopment plan", that in implementing such a plan a city would, of necessity, be obligating and committing itself in land acquisition and other development activities to substantial expense, exposure, and liability. Therefore, to prevent the very type of claim that has been filed here - one challenging the validity, sufficiency, and adequacy of ordinances adopted ten years prior to filing of the lawsuit and after years of development activity had occurred under the Redevelopment Plan, the Legislature provided, by statute of limitation, that all such claims, including those raised by the Landowners in this matter, are barred unless raised and asserted within 30 days\* from publication of the Ordinance finding "blight" and adopting a "redevelopment plan".

" . . . for a period of 30 days after publication of the Ordinance adopting the redevelopment plan, any person in interest may contest the regularity, formality, or legality of the Ordinance. After the 30 day period, no person may contest the regularity, formality or legality of the Ordinance *for any cause whatsoever*. (UTAH CODE ANNO. §11-19-20. Emphasis added)

Because this case was not filed within the prescribed time period for asserting said claims, the Complaint challeng-

\* This Statute was enlarged to 60 days by amendment effective June 1983, but in 1975, 1977 and 1982, the 30 day provision was applicable.

ing the sufficiency of the findings of "blight" within the Ordinances and the request of the District Court to invalidate such findings and Ordinances should have been dismissed summarily.

One cannot avoid a statute of limitations bar by asserting the claim as one for a Declaratory Judgment, as was done in this case, and the Courts have uniformly held that where the statute of limitations would bar a suit directly on the merits, the statute of limitations would bar a Declaratory Judgment as well. Normally the statute of limitations does not start to run in matters where a Declaratory Judgment is sought until the "controversy" occurs.

Since no cause for Declaratory Relief accrues until there is an actual controversy, the Statue of Limitations does not begin to run until such controversy occurs." (22 Am Jur 2d "DECLARATORY JUDGMENTS" §78 Page 941)

But in cases where legislation provides for a timely filing of a direct challenge as to the validity of the Ordinance, the statute of limitation commences to run at the adoption of the Ordinance.

"Where a special Statute of Limitations applies to a Special Statutory Proceeding, it will be applied when a Declaratory Judgment is sought to achieve the same result as the Special Proceeding." (22 Am Jur 2d "DECLARATORY JUDGMENTS" §78 Page 940-41)

In *Campbell v. Nassau County, et al.*, 273 App. Div. 785 (N.Y. Sup. Ct. 1947) the New York Supreme Court held, in an action which sought to declare void certain resolutions and an Ordinance made and passed by Nassau County, that since the

Plaintiff did not file his Verified Complaint until 18 months after the Ordinance was adopted while the Civil Practice Act required such contest to be made ". . . within 30 days from the date of the adoption of the Ordinance . . . ," an action in equity for a Declaratory Judgment could not be maintained.

In *Sweetwater Valley Clinic Association v. National City, et al.*, 133 Cal.Rptr. 859, 555 P. 2d 1099 (Cal. 1976) the National City Redevelopment Agency declared certain lands "blighted" under a California Act basically similar to the Utah Neighborhood Development Act. In the California Act, a similar statute of limitation provision is set forth, and the Court, after setting forth the definition therein contained, held:

" . . . no Action attacking or otherwise questioning the validity of . . . any of the findings or determinations of the Agency or legislative body . . . shall be brought . . . after the elapse of 60 days from and after the date of adoption of the Ordinance adopting the plan. The negative implication of the Statute of Limitation provision is that judicial review of the findings is available when sought within the 60 day period." (555 P.2d at 1102-03)

This Court has noted the significance of such timely filings and challenges to Redevelopment Ordinances. In *Salt Lake County v. Murray Redevelopment Agency*, 598 P.2d 1339 (Utah 1979), this Court allowed a successful challenge to a Redevelopment Agency's Ordinance, but made *specific notation* in the factual recital of the case that the matter *had been timely filed*.

"Plaintiffs did not appear at the hearing or file written objections to the plan, but on October 8,

1976, it filed a Complaint in the District Court of Salt Lake County challenging the constitutionality of the Act and charging that the plan and the Ordinance adopting it are not in conformity with the Act." (598 P.2d at 1344. Emphasis added. The Ordinance was enacted on September 8, 1976 and published thereafter.)

Because this matter was not filed within the prescribed and allowed period it should have been summarily dismissed and the Trial Court erred in not doing so.

## ISSUE II

IS THE 'NOTICE' OF THE PUBLIC HEARING WHEREIN THE ADOPTION OF THE SUBJECT ORDINANCES WAS CONSIDERED SO INADEQUATE AS TO DENY THE LANDOWNERS DUE PROCESS AND CAUSE THE LEGISLATIVE ACTION TAKEN DURING SAID MEETINGS TO BE NULL AND VOID?

The Landowners' argument is that the Notice of a Public Hearing prescribed by the UTAH CODE ANNO. §11-19-16 was inadequate, ambiguous or misleading. In support of that position, they attached a copy of the "Notice" they challenged as well as a copy of a letter of transmittal of that Notice, both dated in May of 1982. The fallacy of such a position is that the public meetings in 1982 are not the public meetings at which a legislative finding was made that the subject properties were located in a "blighted area". After taking the deposition of the executive director of the AGENCY on October 9, 1985, that fact, i.e., that the 1982 public meeting was not the meeting in which the subject Ordinance being challenged was passed, was known, *unmistakably*, by the Landowners herein. (See Chitwood Deposition pages 13-14). Yet, notwithstanding the Landowners' knowledge and understanding of that historical

fact, they nevertheless persist in arguing and, indeed, exclusively directing their challenges in the District Court toward the 1982 public meetings, which is merely an annual implementation proposal of a previously (1975) adopted Plan. By such action the Landowners' attempt to diffuse the antiquity and untimeliness of this action by *reducing* the gap between the Ordinance and their filing a "declaratory judgment" regarding the same.

The content of the required Notice has been specifically prescribed by statute:

"(1) Notice of the public hearing on a project area redevelopment plan shall be given by publication not less than once a week for four successive weeks in a newspaper of general circulation published in the county in which the land lies. The notice shall:

(a) Describe specifically the boundaries of the proposed redevelopment project area; and

(b) State the day, hour and place in which persons objecting to the proposed project area redevelopment plan or denying the existence of blight in the proposed project area or denying the regularity of any of the proceedings, may appear before the legislative body and show cause why the proposed plan should not be adopted."

(UTAH CODE ANNO. §11-19-16.)

The actual notice of the 1975 public meetings followed precisely, the statutory requirements and, in pertinent part, *verbatim*, the language the legislature mandated. After giving the full legal description of the properties affected by and included within the proposed project area, the notice provided:

"Persons having objections to the proposed redevelopment plan or who deny the existence of blight in

the proposed project area, or the regularity of prior proceedings, may appear at the hearing or may file written objections prior to the hearing with the Salt Lake City Recorder showing cause why the proposed plan should not be adopted.

A copy of the proposed redevelopment plan with amendments and modifications is on file for public inspection in the office of the Salt Lake City Planning Department, Room 414, City and County Building, Salt Lake City, Utah." (R. 772)

The proposed redevelopment plan referred to in the written notice was kept on file and open to the public for inspection for 10 days prior to the first public meeting (see Second Affidavit M. Chitwood, Exhibit D, minutes of the Agency meeting, paragraph 6, R. 798).

In that Plan, a "Statement of Development Objectives" provides as follows:

"B. Statement of Development Objectives

- a. Removal of structurally substandard buildings to permit the return of the project area land to economic use and new construction.
- b. Removal of impediments to land disposition and development through assembly of land into reasonably sized and shaped parcels served by improved public utilities and new community facilities.
- c. Rehabilitation of buildings to assure sound long term economic activity in the core area of the City." (R. 761)

It further provides how those objectives would be achieved:

"D. Techniques to Achieve Plan Objectives

Activities contemplated in carrying out the program in the Area include the acquisition, clearance and redevelopment of those properties



shown in the Clearance and Redevelopment Area on the Clearance and Redevelopment Map, included as an exhibit and made a part of this Plan, and the rehabilitation of other properties in the renewal area as shown on the Clearance and Redevelopment Map." (R. 764)

No plans were made for "acquisition and clearance" in the expanded area (which included Block 57) "during the first year of the plan" but it is inconceivable that as a result of the adoption of said Plan a property owner within the boundaries of the project area would not comprehend and understand that an ordinance adopting the 1975 C. B. D. Neighborhood Development Plan may subject his property, in subsequent years, to acquisition and clearance for redevelopment purposes.

It is respectfully submitted that by giving the statutorily mandated notice, *verbatim*, and by fully advising the public within the text of the proposed Plan of the ultimate objective of acquisition of properties located within the "project area", constitutionally mandated due process was afforded each Landowner. Attestation of the reasonableness or effectiveness of the "notice" can be found in the fact that public attendance at the noticed meetings and their participation, input, hue and cry both for and against the adoption of an amendment to the Plan was *substantial!* (See Minutes of Meetings, R. 797-815; 816-840.)

### ISSUE III

IS THE REDEVELOPMENT AGENCY REQUIRED BY STATUTE TO MAKE A PROPERTY-BY-PROPERTY SPECIFIC FINDING OF "BLIGHT" OF EACH PARCEL WITHIN A PROJECT AREA?

The gravamen of this Declaratory Action is the validity of the "area" concept in the determination of "blight". Succinctly stated, the Landowners argue that the Utah Neighborhood Development Act requires a property-by-property, lot-by-lot, parcel-by-parcel, and, projected to the absurd, a room-by-room\* evaluation of property or buildings to be included within a project "area" and a specific finding that each and every property, lot, parcel, building, or room thereof is "in fact" blighted.

It is conceded that no such individual "blight" analysis was undertaken by the AGENCY. The AGENCY focused on the issue of "blight" on an "area" basis, looking at the overall condition of a limited geographic area which included parcels in varying stages of deterioration or repair. The Landowners do not maintain that the "area" is not blighted, only that the AGENCY did not specifically and separately find their individual buildings to be "blighted". A careful scrutiny of the Utah Neighborhood Development Act clearly indicates that the legislature intended that Redevelopment Agencies consider the

\* While ostensibly this statement may appear as argumentum *ad horrendum*, the fact is that within Block 57 are office structures which have been converted to individual office condominiums, each of which, under the Landowner interpretation of the Act, require a specific finding of blight, literally "room-by-room".

existence of "blight" on an "area" basis-not an individual building basis or on an individual component or room-by-room basis as argued by the Landowners. In the definitional portion of the Act, the following provisions appear.

"(8) 'Redevelopment' means the planning, development, replanning, redesign, clearance, reconstruction, or rehabilitation, or any combination of these, of all or part of a project area, and the provisions of such residential, commercial, industrial, public, or other structures or spaces as may be appropriate or necessary in the interest of the general welfare, including recreational and other facilities incidental or appurtenant to them. Redevelopment includes:

(a) The alteration, improvement, modernization, reconstruction, or rehabilitation, or any combination of these, of existing structures in a project area;

(b) Provision for open space types of use, such as streets and other public grounds and space around buildings, and public or private buildings, structures and improvements, and improvements of public or private recreation areas and other public grounds;

(c) The replanning or redesign or original development of undeveloped areas as to which either of the following conditions exist:

(i) The areas are stagnant or improperly utilized because of defective or inadequate street layout, faulty lot layout in relation to size, shape, accessibility, or usefulness, or for other causes; or

(ii) The areas require replanning and land assembly for reclamation or development in the interest of the general welfare.

Redevelopment shall include and encourage the continuance of existing buildings or uses whose demolition and rebuilding or change of use are not deemed essential to the development, redevelopment or rehabilitation of the area." UTAH CODE ANNO. §11-19-21 (emphasis added).

In describing "blight" the statute consistently refers exclusively to "area" or "areas" and not individual parcels.

"(9) A 'blighted area' is an area used or intended to be used for residential, commercial,

industrial, or other purposes or any combination of such uses which is characterized by two or more of the following factors:

\* \* \*

(10) 'Project area' means an area of a community which is a blighted area within a designated redevelopment survey area, the redevelopment of which is necessary to effectuate the public purposes declared in this chapter and which is selected by the redevelopment agency pursuant to this chapter.

(11) 'Redevelopment survey area' means an area of a community designated by resolution of the legislative body or the governing body of the agency for study by the agency to determine if a redevelopment project or projects within the area are feasible.

(12) 'Redevelopment plan' means a plan developed by the agency and adopted by ordinance of the governing body of a community to guide and control redevelopment undertakings in a specific redevelopment project area." UTAH CODE ANNO. §11-19-21 (9), (10), (11), (12), (emphasis added).

The legislature expressly provided that a "blighted area" is one which is "characterized by" certain factors which evidenced blight and not, as Plaintiffs would argue, are *restricted* to certain types of buildings.

Moreover, the required findings by the legislative body to become part of the ordinance are not required to be parcel-by-parcel but, by statute, are designated to be on an "area" basis.

"(5) The findings and determinations of the legislative body based upon fact that:

(a) The project area is a blighted area, the redevelopment of which is necessary to effectuate the public purposes declared in this act." UTAH CODE ANNO. §11-19-21.

There is not one single usage of the word "blight" in the Utah Neighborhood Development Act which is not modified by

"area" within the same sentence. That is not just coincidental, but is consistent with the entire concept of urban renewal, which, by its very nature requires the dealing with properties and parcels as a "group" or "area" and not individually.

Challenges to the "area" concept of finding and dealing with "blight" by redevelopment are not new, but they have been consistently rejected as antithetical to the concept of urban renewal.

It must be borne in mind that the determination of the existence of "blight" and the desirability of redevelopment are "political" and "public policy" questions which are reserved by and repose exclusively with the legislative body. Therefore, the public hearings attendant the adoption of the Redevelopment Project Plans are not "trial-type hearings" but are merely legislatively created public hearings which are restricted in scope and formality specifically by the statute under which they are proscribed:

"It seems plain that so far as the investigation of the matter of blight is concerned, the demands of due process did not call for a hearing at all. *David Jeffrey Co. v. City of Milwaukee*, 267 Wis. 559, 66 N.W.2d 362, 380 (Sup.Ct.1954); *Robinette v. Chicago Land Clearance Commission*, 115 F.Supp. 669, 672 (D.C.Ill. 1951). That determination might constitutionally have been left for ex parte action by the governing body or the planning board. Of course, the Legislature in its discretion may, as was done here, lay down a mandate for a particular type of hearing. In this event, the procedure must be followed. But having in mind the nature of the public use involved and the fact that ordinarily the subject matter of the hearing is within the legislative domain, the language employed should be

scrutinized carefully to determine if the lawmakers intended to yield the normal prerogative and function of their branch of the government.

The argument that a trial type hearing was intended is predicated largely upon the direction, in section 6, supra, that among other factors, the board 'shall consider \* \* \* any evidence which may be adduced in support of the objections, \* \*.' The idea is that the word 'evidence' connotes proof conforming to the rules of evidence applicable to a judicial proceeding and submitted through the avenue of direct and cross examination in the formal setting of a trial type hearing. But a doctrinaire formalism cannot be applied in the consideration of a problem like this. The legislative intent can only be gathered by a study of the entire enactment. The significance of the word 'evidence' must then be drawn from its position and association in the framework fashioned by the makers.

As has been shown above, investigation or study of the desirability of acquiring private property for public use, as well as the decision to take, are preliminary matters which have always been regarded as legislative in character and not subject to the hearing requirements of due process. If this were not so, government could not function effectively. We must assume that the Legislature, in adopting the Blighted Area Act, knew the state of the law and the difference between a legislative and a judicial hearing. No sound argument can be made that, when the Legislature in writing the section directed the planning board to consider 'any, and all, written objections that may be filed,' it intended to limit the proof to facts admissible under the rules of evidence. The very words 'any, and all,' clearly point away from such a conclusion. The mandate to consider such objections is followed immediately by the crucial language 'and [shall consider] any evidence which may be adduced \* \* \*.' In context, it would be inconsistent and illogical to say that this clause contemplates a judicial hearing. The embrative word 'any' before 'evidence' 'manifests a design to permit the introduction of any factual data or argument which an objector feels bears upon his position and the question to be reported upon by the board. The purpose is to give objecting property owners unlimited and unhampered scope in the presentation of material which they deem to be in support of their opposition. The language fairly breathes such an objective. Note that the board is

ordered to consider any and all written 'objections' and 'any evidence which may be adduced in support of the objections.'

The imposition of a duty on a legislative agency to receive and consider evidence in connection with a hearing provided for in a statute, does not *per se* signify that the hearing is to be of the trial type."

*Wilson v. City of Long Branch*, 27 N.J. 360, 142 A.2d 837, 851-52 (1958) is one which is "characterized by" certain factors which evidenced blight and not, as Plaintiffs would argue, are restricted to certain types of buildings.

Moreover, the required findings by the legislative body to become part of the ordinance are not required to be parcel-by-parcel but, by statute, are designated to be on an "area" basis.

"(5) The findings and determinations of the legislative body based upon fact that:

(a) The project area is a blighted area, the redevelopment of which is necessary to effectuate the public purposes declared in this act." UTAH CODE ANNO. §11-19-21.

A. Scope of Judicial Review of "Blight"

It is important to note at the outset, concerning the issue of the existence or nonexistence of "blight", the Courts have consistently determined that such questions are "political" and "public policy" matters which are the exclusive and sole province of the legislature. The Court's inquiry is restricted to whether or not the legislature was "guilty of bad faith or arbitrary or capricious action", and not to review whether, in the Court's opinion, the area is in fact "blighted". (See *Grubstein v. Urban Renewal Agency of City of Tampa*, 115 So. 2d 274, 748 (1959).

"It has been the uniform holding of these courts that the designation of the area to be taken for the renewal project is a legislative function, political in nature, and that the function of the court is limited to ascertaining whether or not the function has been exercised in a legal manner and that there has been no fraudulent, arbitrary or capricious action." *R. B. Davis et al., Appellants, v. City of Lubbock*, 326 S.W.2d 699, 712 (Tex. 1959).

" In passing both the Blighting Ordinance and the Development Ordinance, the Board of Aldermen acted in its legislative capacity. We are bound by the ligatures of review to a determination of whether the action was arbitrary, the result of fraud, collusion, or bad faith, or whether the City exceeded its power. The issue of whether a legislative determination of blight is arbitrary turns upon the facts of each case. And, the burden of proving that it is arbitrary is on the party so charging." *Maryland Plaza Development v. Greenberg*, 594 S.W.2d 284, 287 (Mo. App. 1979) (citations omitted).

The landmark case involving the question and validity of the area blight concept is the decision by Justice Douglas in *Berman v. Parker*, 346 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954) wherein the Court held:

"In the present case, Congress and its authorized agencies attack the problem of the blighted parts of the community on an area rather than on a structure-by-structure basis. That, too, is opposed by appellants. They maintain that since their building does not imperil health or safety nor contribute to the making of a slum or a blighted area, it cannot be swept into a redevelopment plan by the mere dictum of the Planning Commission or the Commissioners. The particular uses to be made of the land in the project were determined with regard to the needs of the particular community. The experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole. It was not enough, they believed, to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums - the overcrowding of dwellings, the lack of parks, the lack of adequate



streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns. It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative. The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented. \* \* \* Such diversification in future use is plainly relevant to the maintenance of the desired housing standards and therefore within congressional power.

\* \* \* Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. But we have said enough to indicate that it is the need of the area as a whole which Congress and its agencies are evaluating. If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. But as we have already stated, community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis - lot by lot, building by building.

It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." 346 U.S. at 34-36.

Berman has been cited and followed universally by every Court which has considered the "area" vs. "parcel-by-parcel" issue. In *Wilson v. City of Long Branch*, 142 A.2d 837, (N.J. 1958) the Court cited the Berman text above and held:

"Denial of the right of the municipality to draw within a blighted area certain houses or buildings

which are in good condition, would be in some instances to defeat the overall legislative purpose, namely, the redevelopment of blighted areas." 142 A.2d at 849.

See also the following cases:

"If the Project plan, as a whole, is valid, then the inclusion therein of sound structures or vacant land does not necessarily invalidate the Project. This is so because the purpose of the Urban Renewal Law is to transform an entire slum area into a wholesome section of the community; and to deny to the city the right to include within the area certain houses or buildings in good condition would, in some instances, defeat the over-all purpose of the statute and the Project. Thus, it is universally held that if an area as a whole is subject to clearance and rehabilitation, the condition of a single structure located therein is immaterial." *Grubstein v. Urban Renewal Agency of City of Tampa*, 115 So.2d 745, 748 (1958).

"Plaintiff's property is a sound and safe structure. It is to be taken by the Authority only because it is within the slum area as defined in the plan. Plaintiff accordingly argues that even if the Authority may condemn and raze sub-standard structures, it may not lawfully take and destroy a building that is neither sub-standard nor unsanitary.

This argument overlooks the fact that in condemning property to eliminate a slum the act requires the Authority to deal with an area, not with separate individual buildings. The test of the existence of a slum is the substantial preponderance of unsafe and unsanitary structures in the area. That the application of this test bears hardly upon an owner of sound property is undoubtedly true; but hardship may always exist when the power of eminent domain is exercised. The legislature has determined that the feasible method of accomplishing slum clearance is by clearing an area; and we cannot say that such a determination is manifestly unreasonable." *Randolph v. Wilmington Housing Authority*, 139 A.2d 476, 484 (Dela. 1958)."

V. May a standard building within a slum area be taken for the project?

Appellant Johnson takes the position that, in any event, his property may not be taken because the

structure located upon his property is standard and meets the minimum requirements of the City's building code.

[9] The answer to the contention, according to the uniform holdings of the highest courts of other states and of the Supreme Court of the United States, is that in condemning property to eliminate a slum, the act requires the city to deal with an area, not with separate individual holdings. One of the major tests of the existence of a slum is the substantial preponderance of unsafe and unsanitary structures in the area. The Legislature has determined that the feasible method of accomplishing slum clearance is by clearing an area, and we cannot say that such a determination is manifestly unreasonable.

The extensive annotation in the American Law Reports, reviewing the many cases on this point, states:

'One point which does appear to be firmly established \* \* \* is that under the statutory 'area concept,' whereby whole areas are selected for redevelopment, the statute will not be invalidated, nor will the particular projects be held illegal, because some properties within the 'area' are by no means substandard or blighted.'

The principle was recognized by this Court in the Dallas Housing Authority case where it was said:

'When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance.'

*R. B. Davis v. City of Lubbock*, 326 S.W.2d 699, 710-11 (Tex. 1959).

" It is to be noted that the plaintiff Velishka's property is not blighted property and it is urged that the act thereby allows the power of eminent domain to be employed for uses inconsistent with the purposes of the act. The intent of the act was to acquire and prevent recurrence of 'blighted areas.' Experience has shown and the facts of this case indicate that the area must be treated as a unit and that a particular building either within or near the blighted area may have to be included to accomplish the purposes of the act. It is not necessary that every building in such an area be in a blighted

condition before the whole area may be condemned. It is sufficient that the taking as a whole is reasonably necessary to the clearance of blighted areas and prevention of their recurrence." *Miller v. City of Tacoma*, 378 P.2d 464, 475 (Wash. 1963).

<sup>of</sup>  
B. Effective §11-19-9 on the "Area" Concept of Redevelopment

The Utah Neighborhood Development Act provides as follows:

"A project area must be restricted to buildings, improvements, or lands which are detrimental or inimical to the public health, safety, or welfare." (§11-19-9).

The Landowners argue that the inclusion within the Act of Section 9 requires the AGENCY to find "blight" on an individual property basis and is legislative abandonment or repudiation of the "area" concepts heretofore discussed. Said argument fails for two reasons:

1. To construe §11-19-9 as an abandonment of the "area" concept of blight and redevelopment is diametrically contrary to every other statutory reference to "blight" and "redevelopment" in the Act; and,

2. §11-19-9 does not address the issue of "blight" but is far less restrictive.

This Court, in interpreting and construing the Utah Neighborhood Development Act must do so liberally so as to affect the objects and purpose of the statute:

"The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of the state. The statutes establish the laws of this state respecting the subjects to which they relate, and their

provisions and all proceedings under them are to be liberally construed with a view to affect the objects of the statutes and to promote justice." (UTAH CODE ANNO. §68-3-2).

See also *Stanford Transportation Co. v. Davis*, 9 Utah 2d 184, 341 p.2d 207 (1959).

" It may be noted from the above that the legislative purpose in enacting the related 1949 statutes was not solely to provide for slum clearance. It was to authorize the public agencies to function for slum clearance and urban, suburban and rural redevelopment, to acquire land for that purpose and to make it available for redevelopment by private enterprise or by public agencies in accordance with approved redevelopment plans. Another purpose was to authorize cooperation with and the obtaining of funds from federal agencies. Obviously these enactments are *in pari materia* and warrant liberal judicial construction in order to effectuate the beneficent legislative design." 57 N.J. 506, 274 A.2d 1, 4 (1971).

Since every single reference to "redevelopment" and "blight" within the Act is couched in terms of "area", it is clear that the legislature recognized the principles of *Berman* and the decisions which followed that case, i.e., that Redevelopment can *only* be accomplished by dealing with the problem of its existence and the treatment of the problem on an "area" concept. Moreover, examination of Section 9 reveals that the word "blight" does not appear within said Section, even though the Landowners argue that that's what the legislature meant to say. It is submitted that if the legislature had intended to provide, as the Landowners argue, that "blight" must exist in every single piece or foot of property included within a redevelopment project area, then Section 9 should have read as follows:

"A project area must be restricted to buildings, improvements, or lands which are *blighted*."

However, the legislature did not use the word "blight" at all in Section 9, but, instead, used a far less restrictive definition by requiring that the property not be within the project area unless it was " . . . detrimental or inimicable to the public health, safety, or welfare."

Consistently the Landowners below argued and convinced the District Court that the Act required a specific "blight" finding as to each property; but the Act makes *no such provision*. The "area" must be "blighted" and the area must include buildings or property which, if not included, would be detrimental or inimicable to the health, safety, or "welfare". What is in the public's "welfare" is far less restrictive than the necessity to find property "blighted". See, *Berman v. Parker*, 348 U.S. 26, 99 L.Ed. 27, 75 S.Ct. 98 (1954).

The Landowners interpretation that each and every property or building within a project area must be found to be blighted is also blatantly contradictory with the definition of an indicia of "blight" as provided within the Act:

"(9) A 'blighted' area is an area used or intended to be used for residential, commercial, industrial, or other purposes or any combination of such uses which is characterized by two or more of the following factors:

- (a) Defective design and character of physical construction,
- (b) Faulty interior arrangement and exterior spacing,
- (c) High density of population and overcrowding,
- (d) inadequate provision for ventilation,

light, sanitation, open spaces, and recreation facilities,

(e) Age, obsolescence, deterioration, dilapidation, mixed character, or shifting of uses.

(f) Economic dislocation, deterioration, or disuse, resulting from faulty planning,

(g) Subdividing and sale of lots of irregular form and shape and inadequate size for proper usefulness and development,

(h) Laying out of lots in disregard of the contours and other physical characteristics of the ground and surrounding conditions,

(i) Existence of inadequate streets, open spaces, and utilities, and

(j) Existence of lots or other areas which are subject to being submerged by water."

UTAH CODE ANNO. §11-19-2(9)(a)-(j).

An "area" that has two or more of the above "characteristics" is, by definition, "blighted". Only subsections (a), (b), (d), (e), and (f) refer or describe conditions which customarily exist or are attendant older buildings. Conditions described in subsections (c), (g), (h), (i) or (j) indicate factors which have nothing to do with the physical condition of any individual building or property. Hypothetically, a brand new building could be within a "blighted" area because it is surrounded or serviced by "inadequate streets, open spaces, and utilities", (subsection (i)), and is "laid out on a lot of irregular form and shape", (subsection (h)).

#### ISSUE IV

WERE THE LANDOWNERS ENTITLED TO A SUMMARY DETERMINATION THAT THE ORDINANCES IN QUESTION WERE ARBITRARY, CAPRICIOUS, OR FRAUDULENT IN THEIR NATURE OR FORM?

Under the restricted review powers of the District Court to review and pass upon the finding of "blight" (see Scope of

Judicial Review herein), it is clear that the finding of "blight" by the Salt Lake City Commission in 1975 was amply supported by competent evidence and was, therefore, neither arbitrary nor capricious in any manner.

The evidence in this case is that in April, 1975, the planning department of Salt Lake City conducted a building by building survey of all of the properties located within the proposed project area. Those findings were summarized in a Report to the C. B. D. Neighborhood Development Plan which was presented at the public hearings in 1975 wherein the question as to the adoption of the subject project area was considered. Examination of that report indicates that there was substantial evidence on which a finding that the area was blighted could reasonably have been made by the legislative body:

" Physical: In April, 1975, the Planning Department conducted an external condition survey of the expanded NDP downtown area. The survey measured conditions for buildings and street improvements including sidewalks, curb and gutters, street, alleys, etc. In addition, lots without structures were identified by use.

Each building was evaluated in terms of its foundation, exterior walls, windows, doors, stairways, and trim features. Using these measurement categories each building was categorized into one of four condition classes: satisfactory, minor repair required, major repair required, and beyond repair.

A building established upon a foundation which is settled or is deflected or is bulging to an extent where it has a severe negative impact on the exterior walls above it was considered to be economically beyond repair. Five percent of the buildings in the expanded NDP area (12 buildings) were identified as having this condition.

An exterior wall which is bulging or is out of



plumb also causes the building involved to be deemed economically beyond repair.

A building which has a foundation with severe erosion, holes, or cracks or an exterior wall with cracked, rotted, or worn bricks or severe water stains was scheduled for rehabilitation. Broken windows, sashes, or sashes out of square or missing; doors with frames broken or missing also were elements noted which show a need for rehabilitation. In total, 94 buildings or 43% of the NDP structures were identified as requiring rehabilitation.

The remaining 99 target area buildings were identified as either satisfactory or as needing minor repair. Forty-six of these need minor repair while 53 are satisfactory according to our study.

Minor repair is defined as painting, pointing, patching, etc., needed for foundations or exterior walls; painting, repairing or glazing windows; painting or repairing doors; painting, repairing or replacing exterior stairways; and painting, repairing or replacing building trim features.

In addition to the 22 buildings identified and classified, there were 19 lots without structures. All 19 are parking lots. Thirteen are hardsurfaced while the remaining 6 are not.

Street improvement conditions were noted for each property location. For 19 properties the sidewalk condition was shown to have drainage problems. In 69 cases the sidewalk was identified as broken, missing or uneven. In 45 of the property areas the sidewalk was noted to have cracks. Seventy-five cases were noted to be in good condition.

Poor drainage was noted to be the problem for 19 sections of curb and gutter development. Broken, missing or uneven places were identified for 28 more. Eighty-three curb and gutter sections were judged to have minor problems while 67 were judged to be in good shape.

Street problems were noted for 9 percent of the entries. Nine entries or 4 percent were noted to be high crown streets. Eleven entries or 5 percent were shown to be in a broken or uneven condition. One hundred and twenty-eight street entries noted minor cracks. The remaining 61 were deemed to be

high crown streets. Eleven entries or 5 percent were shown to be in a broken or uneven condition. One hundred and twenty-eight street entries noted minor cracks. The remaining 61 were deemed to be satisfactory. (Second Affidavit of Michael Chitwood, Exhibit H, Pages 1 and 2 R. 853-54).

In addition, an economic evaluation was made concerning the proposed redevelopment area and examination of the report further concludes that the legislative body considered those factors:

" Economic: The economic analysis of the Urban Renewal Plan is based upon the basic data found in two economic studies. These studies are: "Final Report, Economic and Market Analysis, Central Business District West, Neighborhood Development Program" prepared by Development Research Associates, 1972; and This is a Community? Salt Lake City, 1971 prepared by Claron E. Nelson, Ph.D., Department of Economics, University of Utah." (Second Affidavit of Michael Chitwood, Exhibit H, Page 3, R. 855).

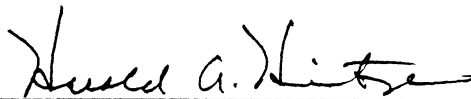
The finding of "blight" in the project area is a legislative finding, based upon facts and evidence considered by the legislative body. Having made that determination, it is not the prerogative of the Court to pass judgment on the wisdom or validity of such findings. (See *Davis, Maryland, Plaza Development and Berman, supra*).

#### CONCLUSION

A challenge of the Ordinance declaring the subject property blighted is barred by the applicable statute of limitations. The Notice to Landowners of the public meetings wherein blight was presented was sufficient and cannot be held as a matter of law to be so inadequate as to constitute a denial of due process. The Agency is not required by statute

to make a property by property specific finding of blight of each parcel within the project area, but is required merely to include only those buildings which are detrimental, inimicable or harmful to the public health, safety and welfare. The Landowners did not establish facts sufficient to allow the Court to enter a summary determination that the Ordinances in question were arbitrary, capricious, or fraudulent in their nature or form.

RESPECTFULLY submitted,

A handwritten signature in cursive script, reading "Harold A. Hintze". The signature is written in dark ink and is positioned above a horizontal line.

Harold A. Hintze  
Attorney for Defendants

CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the  
OPENING BRIEF OF APPELLANTS have been delivered to

Robert S. Campbell  
E. Barney Gesas  
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on this the 19th day of November, 1987.

  
\_\_\_\_\_  
Secretary