2002

Rocky Mountain Thrift Stores v. Salt Lake City Corporation : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

20513

ROCKY MOUNTAIN THRIFT STORES, INC., et al.,

Plaintiffs and Appellants,

vs.

Case No. 20513

SALT LAKE CITY CORPORATION, et al.,

Defendants and Respondents.

BRIEF OF STATE RESPONDENTS

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE PHILIP R. FISHLER, JUDGE, PRESIDING

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PARTIES

APPELLANTS: ROCKY MOUNTAIN THRIFT STORES, INC., a Utah corporation, d/b/a HOPE OF AMERICA THRIFT STORE; SINE INVESTMENT, INC., d/b/a SCOTT'S TRAVEL MOTOR HOTELS; SITE, INC., d/b/a RANCHO 42 LANES RECREATION CENTER; JERRY SINE INVESTMENTS, a partnership, d/b/a/ SE RANCHO MOTOR MOTEL; and STOCKHOLM RESTAURANT, INC.

RESPONDENTS: SALT LAKE CITY CORPORATION, a Municipal Corporation of the State of Utah; SALT LAKE CITY MAYOR, TED WILSON; AL HAYNES, Assistant to Salt Lake City Mayor; CITY ENGINEER, MAX PETERSON; RICK JOHNSTON, Assistant City Engineer; STATE OF UTAH; SCOTT MATHESON, as Governor of the State of Utah; STATE COUNCIL OF DEFENSE; STATE ROAD COMMISSION; and SALT LAKE COUNTY, a body corporate and politic of the State of Utah.

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BRIEF OF STATE RESPONDENTS

STATEMENT OF THE ISSUE PRESENTED ON APPEAL

Was the lower court correct in granting summary judgment, in light of Governmental Immunity and other defenses asserted by the State Respondents?

STATEMENT OF THE FACTS

The year 1983 was one of extraordinary, unanticipated and unprecedented rainfall. Governor Matheson declared a State of Emergency on May 29, 1983. The State of Utah and its political subdivisions, using emergency police powers, then combined their efforts to combat the resulting runoff and to prevent flood damage.

The State was only minimally involved in flood control within Salt Lake City since flood control in that area is under the jurisdiction of Salt Lake County. The State assisted the City and County effort by allowing them the use of North Temple Street, also designated as state highway SR-186, to help control runoff. Agents for the County agreed to restore the street to its original condition after the emergency was over (Deposition of Richard T. Holtzworth, page 35, R. 581; deposition of Max Peterson, page 36, R. 582).

A two-block area between 6th and 8th West on North Temple Street was blocked off for a two-week period while crews attempted to restore drainage to the clogged North Temple Street culvert system. Access to these properties, however, was still possible during the two-week period through several backstreets and some businesses were still accessible from North Temple Street (Deposition of Albert E. Haines, III, page 33, R. 584; Deposition of Max Peterson, page 63, R. 582). Flood waters were also channeled down North Temple Street. After this time period, access to the area was impaired, but not completely restricted.

North Temple Street was chosen to carry the flood runoff because it was the most logical route. The culvert system running beneath North Temple Street did not have the capacity to handle such extraordinary amounts of water. After analyzing every possible alternative, city engineers determined that

running a temporary "river" down North Temple Street was the best method of controlling the flood in that the fewest number of people and businesses would be harmed by the decision (Deposition of Albert E. Haines, III, page 26, R. 584; Deposition of Max Peterson, page 36, 68, 73-74, R. 582).

If the decision to channel floodwaters down North Temple Street had not been made, the result would have been extensive downtown flooding (Deposition of Blaine Kay, page 34, R. 585). Since the culvert system was inadequate for such large amounts of water under the best of conditions (and conditions were terrible because of the thousands of tons of silt, dirt, and debris washed down from the mountains), manhole covers along North Temple Street would have been forced open. Floodwaters would have escaped unimpeded. Businesses along North Temple Street would have suffered the brunt of the damage. Because of the flood control effort, however, damage was reduced to mere inconvenience of access to the property.

The City and County began repair of the culvert system on June 16, 1983. A contract with Four-Way Excavating, Inc., was entered into on September 19, 1983. The contract required the contractor to complete all work within 60 days (Affidavit of Rick Johnson and Max Peterson, page 5, R. 68; Exhibit C of that Affidavit, R. 80-81). The street was completely restored to its original condition on November 14, 1983 (Deposition of Blaine Kay, page 29, R. 585).

SUMMARY OF ARGUMENT

The lower court's grant of summary judgment was correct because there is no factual issue concerning a number of affirmative defenses asserted by the State. As a matter of law, the State is immune from suit for the actions complained of under the Governmental Immunity Act. Utah Code Ann. § 63-30-1, et seq. (1953), as amended. The State's actions were governmental functions such that only governmental agencies could properly perform them, and immunity for such actions has not been waived.

Appellants' action is likewise barred by the Disaster Response and Recovery Act. Utah Code Ann. § 63-5a-1, et seq. (1953), as amended. This Act allows the governor broad discretionary powers, including the power to control ingress and egress to and from a disaster area.

Even if such statutory exemptions were not available, the State was in no way negligent in its actions. Allowing the City and County to use North Temple Street in their efforts to control flooding was both reasonable and necessary. Furthermore, given the then-existing conditions, the time frame for the repair of the road was reasonable.

The restriction of access to appellants' property does not qualify as a "taking" under the theory of eminent domain. Rather, it was a valid exercise of the State's police power, for which compensation to the landowners does not apply.

Finally, because these defenses apply to the State, and there is no genuine issue of material fact concerning them, the lower court was correct in granting summary judgment. Therefore, that decision should be affirmed.

ARGUMENT

I. THE ACTIONS OF THE STATE ARE IMMUNE FROM SUIT BY THE GOVERNMENTAL IMMUNITY ACT.

A. THE ACTIONS OF THE STATE WERE GOVERNMENTAL FUNCTIONS.

Utah Code Ann. § 63-30-3 (1953), as amended, provides in part:

> Except as may be otherwise provided in this act, all governmental entities are immune from suit for any injury that results from the exercise of governmental functions. . . .

Recent case law has narrowed the test for determining whether a function is governmental. Even under this more restrictive test, however, there can be no doubt that the alleged actions of the State in this case are governmental in nature.

In the case of Standiford v. Salt Lake City, 605 P.2d 1230 (Utah 1980) and Johnson v. Salt Lake City, 629 P.2d 432 (Utah 1981), this Court abandoned the governmental versus proprietary test, and held that the test for determining governmental functions is whether the activity under consideration is of such a unique nature that it can only be performed by a governmental agency or that it is essential to the

core of governmental activity. See also Madsen v. Borthick, 658 P.2d 627 (Utah 1983).

A brief examination of the role of the use of police power in a state of emergency leaves no doubt the State's actions were of such a unique nature that they could only be performed by a governmental agency, and are therefore governmental in nature. The State's emergency police power is defined in the State of Utah Disaster Response and Recovery Act, Utah Code Ann. § 63-5a (1983). The purpose of the act is to "assist the governor of this state and its political subdivisions to effectively provide emergency disaster response and recovery assistance in order to protect the lives and property of the people." Utah Code Ann. § 63-5a-1(2) (1983).

Response to an emergency situation could not be adequately accomplished by a private entity. A private entity simply could not marshall all the resources necessary in the short time available to combat a countywide disaster, and a statewide disaster would certainly be beyond its competence.

When the State permitted the City and County to use North Temple Street to alleviate flood damage to the greatest possible extent under the then-existing circumstances, it was performing the governmental function of protecting its citizens in an emergency. In fact, the immediate threats posed to life and property by uncontrolled flooding make such operations

uniquely governmental, almost equivalent to police and fire protection. The State made a decision that only the government can make. It was a discretionary act that was, in the words of the court in Borthick, "qualitatively different" from any decision a private entity could make. 658 P.2d at 631.

Further evidence of the governmental nature of the State's actions is provided by the Utah Legislature's enactment in the 1984 Budget Session of S. B. No. 97, which was described as "an act relating to flooding; clarifying flooding as a governmental function for purposes of governmental immunity . . . ." The act provided as follows:

> Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function. . . The management of flood waters and the construction, repair, and operation of flood and storm systems by governmental entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities.

Utah Code Ann. § 63-30-3 (1984). This amendment leaves no doubt that the State Respondents are immune from liability in the instant case.

Although this amendment was passed in January, 1984, it has retroactive effect and is therefore applicable to this lawsuit. Because the bill's stated purpose was to clarify the

definition of a governmental function, there is no problem with an ex post facto application of the law. The Utah Supreme Court held in Okland Construction Co. v. Industrial Commission, 520 P.2d 208 (Utah 1974) that the principle that one is entitled to have his rights determined on the basis of law as it existed at the time of the occurrence and that a later statute or amendment should not be applied in a retroactive manner to deprive a party of his rights or to impose greater liability upon him has no application where the later statute or amendment deals only with clarification or amplification as to how the law should have been understood prior to its enactment. This principle which allows the retroactive application of the 1984 amendment in the present case was recently reinforced in State Department of Social Services v. Higgs, 656 P.2d 998 (Utah 1982). See also Garrett Freight Lines v. State Tax Commission, 103 Utah 390, 135 P.2d 523 (1943) and Macham v. State Tax Commission, 17 Utah 2d 321,410 P.2d 1008 (1966).

B. GOVERNMENTAL IMMUNITY HAS NOT BEEN WAIVED IN RELATION TO THE STATE'S ACTIONS.

Since the alleged actions of the State Respondents were governmental functions, they are immune from suit unless immunity has been waived. The Immunity Act states: "Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed

within the scope of his employment. . . ." Utah Code Ann. § 63-30-10(1) (1983). Notwithstanding this waiver, the act continues by listing specific exceptions to the waiver. Three of these exceptions are applicable to the alleged actions of the State Respondents.

1. Discretionary Functions.

All of the alleged actions of the State are immune from suit under the discretionary function exception of the Immunity Act. Utah Code Ann. § 63-30-10(1)(a) (Supp. 1983). The Court in Frank v. State, 613 P.2d 517, 520 (Utah 1980) stated that this exception to the statutory waiver of immunity was not as broad as the common definition of "discretion," but rather "was intended to shield those governmental acts and decisions impacting on large numbers of people in a myriad of unforeseeable ways from individual and class legal actions, the continual threat of which would make public administration all but impossible."

The decision to allow the City and County to use North Temple Street in their attempt to minimize flood damage involved policy-making functions of the government; not merely operational functions. The decision of whether to allow such use had the potential of affecting many people; those located along North Temple Street as well as those who would have been damaged if such preventative measures had not been taken.

The actions of the State Respondents can also qualify as discretionary functions under the test adopted in Little v. Utah State Division of Family Services, 667 P.2d 49 (Utah 1983). Under that test, four preliminary questions must be answered affirmatively in order for the actions to be considered discretionary:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?
>
> (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?
>
> (3) Does the act, omission or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?
>
> (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Little, 667 P.2d at 51.

The State Respondents' act or decision complained of in this case involves allowing the City and County to use North Temple Street in order to minimize damage from flooding. This decision was part of a basic governmental objective. The Disaster Response and Recovery Act empowered the governor to

declare a state emergency. Utah Code Ann. § 63-5a-5 (Supp. 1983). The stated purpose or objective of the act is: "[T]o assist the governor of this state and its political subdivisions to effectively provide emergency disaster response and recovery assistance in order to protect the lives and property of the people." Utah Code Ann. § 63-5a-12 (Supp. 1983) (emphasis added). The decision to allow the use of North Temple Street was designed to achieve the basic governmental objective of protecting the lives and property of the people. Therefore, the first question of the Little test must be answered affirmatively.

The decision to allow the City and County to use the street not only involved a basic governmental objective, but was essential to it. Had that decision not been made, extensive downtown flooding would have resulted (Deposition of Blaine Kay, page 34, R. 585). Consequently, the damage caused by flooding to property and possibly even lives would have been much greater. Because the challenged decision was essential to the objective of preventing this damage, the second question is also answered affirmatively.

The challenged decision also required the exercise of policy evaluation, judgment, and expertise of the State Respondents. Only the governor is in a position to obtain the critical information, evaluate it, and make the proper judgments concerning such a wide-scale emergency. The challenged decision

likewise required the judgment and expertise of state agencies concerning the condition and capacity of state highways. The decision involved the weighing of many important factors which, especially in the context of a state of emergency, could only have been accomplished by the State Respondents. Hence, the third question in the Little test must be answered affirmatively.

As mentioned above, the State Respondents possessed the requisite authority and duty to make the challenged decision under the Disaster Response and Recovery Act. Utah Code Ann. § 63-5a, et seq. (Supp. 1983). Furthermore, the State Road Commission has the authority and duty to administer the state highways. Utah Code Ann. § 27-12-7 (1984). Thus, the fourth and final question of the Little test must be answered in the affirmative.

Therefore, the actions of the State Respondents in the instant case were, in all aspects, discretionary. For that reason, governmental immunity has not been waived. Allowing Appellants' action against the State would cause the very type of hindrance to public administration that the Immunity Act was designed to prevent. Frank, 613 P.2d at 520.

2. Issuance of a permit or approval.

Under subsection 63-30-10(1)(c) of the Governmental Immunity Act, the immunity of the State is not waived if the alleged negligent act or omission arises out of the issuance or

denial of a permit, license, approval or similar authorization. The State is immune from suit under this statutory provision on two theories: (a) the alleged injury arose out of the approval to use North Temple Street; and (b) the alleged injury caused by the excavation of the street arose out of the issuance of a permit.

Issuing approval to use North Temple Street was a discretionary function authorized by the Disaster Response and Recovery Act, Utah Code Ann. § 63-5a-1 (1983). Section 63-5a-3(a) empowers the governor to utilize all available resources of state government as reasonably necessary to cope with a state of emergency. That the approval allowing the City and County's use of the street was both reasonable and necessary is obvious from the fact that City and County engineers considered every possible alternative before determining that that particular action was the best way to control the flooding (Deposition of Albert E. Haines, III, page 26, R. 584; Deposition of Max Peterson, pages 36, 68, 73-74, R. 582).

Similarly, the State is immune from suit based on the issuance of a permit. Most of the damage the Appellants allege to have suffered was the result of the County's repair of the culvert system running beneath North Temple Street. Whenever repairs of this type are contemplated, the local governmental entity must apply for a permit before excavation may begin. Utah Code Ann. § 27-12-133 (1953).

The County did not obtain the necessary permit until after excavation had begun because of the immediacy of the situation. As soon as practical, however, the County applied for and received the permit to excavate from the Utah Department of Transportation. This is the exact type of permit covered by Utah Code Ann. § 63-30-10(1)(c) for which governmental immunity is not waived. Thus, any claim for damages based on negligence arising out of the issuance of the approval or the permit is barred by statute.

3. Natural condition.

Under Utah Code Ann. § 63-30-10(k), the immunity of the State is not waived if the alleged negligent act or omission arises from any natural conditions on state lands. Although there is no case law on this provision, a reasonable construction would allow the facts of the instant case to be included within the scope of this section.

Flooding is a natural condition. Although the diversion of the flood onto North Temple Street changed its character, it nevertheless remained a natural phenomenon. The actions by the State, City and County were merely attempts to control a natural and dangerous condition. Such constructive intervention should not be construed to take the facts of the case outside of the parameters of the statute. Therefore, the State is immune from any claim for damages arising out of its

actions due to the natural condition of flood waters being present on North Temple Street.

II. APPELLANTS' ACTION IS BARRED BY SECTION 63-5a-8 OF THE DISASTER RESPONSE AND RECOVERY ACT.

In addition to the bar of Sovereign Immunity, Appellants' claims against the State are barred by the Disaster Response and Recovery Act. Utah Code Ann. § 63-5a-8 (1983). The act grants the governor general emergency powers to declare a "state of emergency" in any part of the state in order to meet an emergency created by man-made or natural disaster.

On May 29, 1983, Governor Matheson issued an executive order declaring a state of emergency in Salt Lake County due to flooding and landslides. The declaration, under the Disaster Response and Recovery Act, gave the governor the power to:

> (a) Utilize all available resources of the state government as reasonably necessary to cope with a "state of emergency";
>
> (b) Employ measures and give direction to state and local offices and agencies which are reasonable and necessary for the purpose of securing compliance with the provisions of this act and with orders, rules, provisions, and regulations made pursuant to this act;
>
> . . .
>
> (f) Control ingress and egress to and from a disaster area, the movement of persons within the area, and

recommend the occupancy or evacuation of premises in a disaster area.

Utah Code Ann. § 63-5a-3(a) to (b), (f) (1983).

The State therefore had the power to allow the County to use the state highway in its flood control measures. It further had the power to control ingress to and egress from the area, including Appellants' property. The State could totally restrict access to the disaster area, which it did not do. The limited nature of the restriction precludes the idea that the restriction was a "taking" under the theory of eminent domain. The action was rather a temporary emergency regulation which was both reasonable and necessary.

Section 63-5a-8 of the act allows the governor to acquire private property for public use in order to meet the disaster situation. Subsection 3 provides that the owners of the property so acquired shall be compensated in accordance with applicable eminent domain procedures. The theory of eminent domain, however, is inapplicable when emergency police powers are validly exercised.

III. THE STATE DID NOT ACT NEGLIGENTLY IN THE ALLEGED FAILURE TO TIMELY RESTORE TOTAL ACCESS TO APPELLANTS' PROPERTY.

Highway officers and other public authorities are required by statute to keep highways in good repair free from obstructions, and to not unduly interfere with the ingress and egress to abutting properties. Utah Code Ann. § 27-12-134 and § 73-1-8 (1953), as amended.

The governor, under the authority vested in him by the Disaster Relief and Recovery Act, authorized the City and County to use the North Temple Street in its flood control measures. The County agreed to timely repair damage to the street (Deposition of Richard T. Holtzworth, page 35, R. 581; Deposition of Max Peterson, page 36, R. 582).

Agreements made by the governor under the Act have the force of law. The Act provides that:

> All orders, rules, and regulations, promulgated by the governor, or by a political subdivision or other agency authorized by this act to make orders, rules and regulations, not in conflict with existing laws except as specifically provided herein, shall have the full force and effect of law during the state of emergency.

Utah Code Ann. § 63-5a-7 (1953), as amended. This provision, coupled with Section 63-5a-3(a) gave the governor the power to use the highway in any manner he felt was "reasonably necessary." When the emergency ended, it was the County's, rather than the State's, duty to repair the highway.

In Andrus v. State, 541 P.2d 1117 (Utah 1975), Salt Lake County permitted the State to empty the highway drainage system into its sewer. A homeowner whose property was damaged sued the State on the theory that it negligently constructed the highway project, and sued the County on the theory that it had negligently failed to provide adequate drainage facilities to the

highway project. The court held that the County, by giving its permission to the State to empty the highway drainage system into the County's sewer, would not be liable for the acts of the State in failing to provide safeguards to prevent the obstruction of the sewer system, nor was the County responsible for the action of the State in emptying a large conduit into the County's small conduit.

The same result should be reached in the instant case. The State, in assisting the County, did not become liable for any alleged negligence on the part of the County. The State had no statutory duty to assist the County in this area, and thus could not have breached its duty, thereby becoming liable to Appellants.

Even if the State had the duty to repair the highway after the County damaged it in its flood control measures, it did not breach that duty. There was no unreasonable delay in the repair of the road. Salt Lake County contracted with Four-Way Excavating to repair the damage. The contract called for work to begin on September 19, 1983. Work was to be completed within 60 days. Considering the extensive repairs that had to be made to the drainage system under North Temple Street when the flooding finally subsided, the time frame was not at all unreasonable.

IV. APPELLANTS' ALLEGED INJURY DOES NOT CONSTITUTE A COMPENSABLE TAKING UNDER THE DOCTRINE OF INVERSE CONDEMNATION AND IS BARRED BY THE CONCEPT OF THE EMERGENCY EXERCISE OF POLICE POWER.

Appellants incorrectly allege that the State's decision to allow the use of North Temple Street to alleviate flooding "took" Appellants' property, without due process, and that compensation is now owing. As a matter of law, that claim is untenable. First, a claim of taking cannot be based on mere property damage of a temporary nature. Second, the State's actions were a valid exercise of police power, which does not rise to the level of a taking in the constitutional sense, and does not call for compensation.

A. THERE WAS NO PERMANENT INVASION OR APPROPRIATION OF PROPERTY.

The event Appellants assert as having "taken" their property was the State's decision to allow the use of North Temple Street for flood control measures. However, as a matter of law, that was not a taking. Inverse condemnation occurs and compensation is appropriate only where there is a permanent invasion or appropriation of property. Sanguinetti v. United States, 265 U.S. 146 (1924).

In Sanguinetti, the United States was sued for inverse condemnation when lands were flooded by an overflowing federal irrigation canal. The Court held that the flooding was only temporary and did not amount to a permanent taking. "[I]n order to create an enforceable liability against the government, it is at least necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the

land, amounting to an appropriation of and not merely an injury to the property." 245 U.S. at 149 (emphasis added).

The decision of the United States Court of Claims in Accardi v. United States, 599 F.2d 423 (Ct. Cl. 1979), is pertinent and persuasive. There the plaintiffs sought compensation on the assertion their riverside properties had been "taken" in a flood that resulted from the defendant's operation of a dam. The court dismissed the claim for reasons that are equally compelling in the instant case. "Where a claim of taking of private property for a public use is founded upon interference with land due to flooding, the burden of proving the claim consists of more than a mere showing that governmental action has 'interfered with property rights.'" Id. at 429. The present Appellants certainly have alleged no more than that. Temporary interference with the right of ingress and egress to one's property does not constitute a taking, and is not compensable under the well-established concepts of eminent domain.

B. THE STATE'S ACTION WAS A PROPER EXERCISE OF POLICE POWER.

Police power exists even in the absence of any statutory authority, as a necessary attribute of statehood. Therefore, even if the machinery of the Disaster Response and Recovery Act were not in place, compensation would be barred by the emergency exercise of police power.

It is clear that the action of blocking access to Appellant's property for two weeks and then regulating ingress and egress to it was an exercise of the police power rather than a "taking" of property under eminent domain. The distinction was explained by Nichols in his treatise on eminent domain as follows:

> The distinguishing characteristic between eminent domain and the police power is that the former involves a taking of property because of its need for the public use while the latter involves regulation of such property to prevent the use thereof in a manner that is detrimental to the public interest.

1 Nichols, Nichols on Eminent Domain, 1-127 (1981). The State's action in the instant case was a mere temporary regulation of property, making it an exercise of police power.

Nichols states further that under a proper exercise of police power, no compensation is required and there is no transfer of property ownership. 1 Nichols, at 1-135 to 1-136. Under this analysis, there can be no question that Appellants' action cannot be maintained.

In the past, this Court has denied the right of recovery for damages resulting from measures taken in the exercise of the police power--as long as no actual permanent, physical taking of the property or negligence was involved. In McKell v. Spanish Fork City, 6 Utah 2d 92, 305 P.2d 1097 (1957), the court said that the efforts by the City of Spanish Fork in

responding to extraordinary flood conditions did not result in the City being liable for damages resulting from the flood control measures taken. The Court states:

> It is indeed regrettable that such damages result to the plaintiff's property. But the flood itself was a great misfortune to everyone concerned. It must be expected in an organized society that collective efforts to cope with adversities may result in serious damages or sacrifice to the property of some, or that other onerous burdens must be borne, even to the extent of sacrificing the lives of some individuals for the common welfare . . . .

McKell, 6 Utah 2d at 97, 305 P.2d at 1100.

The idea that no compensation is required under the emergency exercise of the police power is fairly common. See House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 153 P.2d 950 (1944); Stahl v. Finkelstein, 189 Misc. 870, 73 N.Y.S.2d 679 (Muni Ct. 1947); and Cougar Business Owners Ass'n v. State, 647 P.2d 481 (Wash. 1982). Where the exercise of the police power is properly applicable, the constitutional provision that property shall not be taken without due process of law is inapplicable. State of Idaho v. Kellogg, 100 Idaho 483, 600 P.2d 787 (1979). Moreover, legislation enacted in the exercise of police power in an emergency is not unconstitutional merely because it necessarily works a hardship on some individuals for a period of limited duration. Stahl, 73 N.Y.S.2d at 679.

McKell is important for another reason as well. In that case the city used its police power to protect its residents from the effects of an extraordinary flood. Using the "common enemy" theory, the court held that the necessity of the situation ruled out any liability on the city, so that there was no need to even reach the question of whether the doctrine of sovereign immunity applied.

Any State liability resulting from an act taken during the exercise of emergency police powers is foreclosed as long as the action is reasonable and necessary. The State's actions in this case were both reasonable and necessary. The mere act of allowing the use of one of its highways in an emergency, in order to prevent even greater damage is a valid use of emergency police power, and should be exempt from liability.

Another Utah case making the point that there will be no compensation in the emergency exercise of the police power is Bountiful City v. DeLuca, 77 Utah 107, 292 P. 194 (1930). The court in DeLuca stated that:

> If the owner through a lawful exercise of the [police] power suffers inconvenience, injury or a loss, it is regarded as samnum absque injuria, provided as always that constitutional mandates have not been invaded by confiscation, destruction, or deprivation of property unless it is per se injurious or obnoxious to the public health or public safety or morals or general welfare, or unless under conditions similar to tearing down a

building to prevent the spread of a conflagration. (Emphasis added.)

77 Utah at 120-21, 292 P. at 200. Similar to tearing down a building to prevent the spread of the conflagration is the cutting of a street in order to prevent more serious flooding. Therefore, this is the type of case for which compensation should be barred.

Utah case law also makes it clear that the State's actions in this case and the resulting restriction of Appellants' property did not constitutes a "taking." In Bailey Service and Supply Corp. v. State Road Commission, 533 P.2d 882 (Utah 1975), this Court held that the State's erection of a viaduct on the street on which the landowner's property fronted, resulting in interference with the landowner's right of egress and ingress to its property, was not a "taking" of a property right for which the State was liable. See also Springville Banking Co. v. Burton, 10 Utah 100, 349 P.2d 157 (1960); Holt v. Utah State Road Commission, 30 Utah 2d 4, 511 P.2d 1286 (1973).

V. BECAUSE NO GENUINE ISSUE OF MATERIAL FACT REMAINS, SUMMARY JUDGMENT WAS PROPERLY GRANTED.

Despite contentions that genuine issues of material fact remain to be resolved, the court below properly granted summary judgment in the State's favor. As stated by the court in Horgan v. Industrial Design Corp., 657 P.2d 751, 753 (Utah 1982), "the mere existence of genuine issues of fact in the case as a

whole does not preclude the entry of summary judgment if those issues are immaterial to resolution of the case." The defendants in Horgan had asserted as an affirmative defense a mutual release signed by the plaintiff. Therefore the court held that the only genuine issues that were material to the case were those concerning the signing or terms of the release. Horgan, 657 P.2d at 752. The general rule is, "where an affirmative defense is stated . . . which would defeat the cause of action, it is the duty of the court to grant a judgment based thereon." Ulibarri v. Christenson, 2 Utah 2d 367, 369, 275 P.2d 170, 171 (1954).

Applying these principles to the present case, the only issues material to the resolution of this suit are those dealing with the applicability of the sovereign immunity, the Disaster Response and Recovery Act, and the emergency police power defenses. If these defenses, as a matter of law, apply to this suit, the other issues of fact are immaterial.

There are legal contentions concerning the application of these defenses. There are not, however, any factual disputes that would have prevented the lower court from resolving this case and entering summary judgment. Therefore, the lower court was correct in granting summary judgment, which action should be upheld.

CONCLUSION

For the above listed reasons, the State Respondents request that the lower court's ruling be affirmed.

DATED this 24th day of September, 1985.

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CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing BRIEF OF STATE RESPONDENTS was mailed postage prepaid to the following this 24th day of September, 1985:

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