

2003

# Holladay City Council v. Mayor Dennis Larkin : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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HOLLADAY CITY COUNCIL,

Petitioner and Appellee,

v.

MAYOR DENNIS LARKIN,

Respondent and Appellant.

**BRIEF OF  
INTERVENOR/CO-APPELLANT**

Appeal No. 20030592

②

**AN APPEAL FROM THE DECISION OF JUDGE L.A. DEVER**

**THIRD DISTRICT COURT, SALT LAKE COUNTY**

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**UTAH SUPREME COURT**

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CLERK OF THE COURT**

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### **LIST OF PARTIES**

1. MAYOR DENNIS LARKIN is Mayor of the City of Holladay. He is the Appellant in this court and was the Respondent in the lower court.
2. HOLLADAY CITY COUNCIL is the City Council for the City of Holladay. It is the Appellee in this court and was the Petitioner in the lower court.
3. HOLLADAY PRESERVATION LEAGUE is a citizens' group. It is an Intervenor/Co-Appellant in this court and was an Intervening Respondent in the lower court.
4. HOLLADAY CITIZENS FOR PROGRESS is a citizens' group. It is an Intervenor/Co-Appellee in this court and was an Intervening Petitioner in the lower court.

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## **JURISDICTION**

The Utah Supreme Court has jurisdiction of this case pursuant to Section 78-2-2(3)(j), Utah Code Annotated.

## **STATEMENT OF ISSUE**

In a municipality operating under a council-mayor form of government, must a resolution calling a special election to propose adopting a different form of government for the municipality be passed by both the city council and the mayor?

The standard of review for this question of statutory interpretation is one of correctness, granting no deference to the trial court. *Toone v. Weber County*, 57 P.3d 1079, 1081 (Utah 2002).

The issue was preserved by the instant appellant by way of a Motion to Dismiss or in the Alternative for Summary Judgment filed in the trial court, a copy of which is contained in the Addendum to this Brief.



## **DETERMINATIVE STATUTES**

3) "Governing body" means collectively the legislative body and the executive of any municipality. Unless otherwise provided:

- (a) in a city of the first or second class, the governing body is the city commission;
- (b) in a city of the third, fourth, or fifth class, the governing body is the city council; and
- (c) in a town, the governing body is the town council. U.C.A. 10-1-104(3).

- 1) A municipality may reorganize under any form of municipal government provided for in this part or under Section 10-3-103, 10-3-104, 10-3-105, or 10-3-106, regardless of the city's class under Section 10-2-301.
- 2) Reorganization under Subsection (1) shall be by approval of a majority of registered voters of the municipality voting in a special election held for that purpose.
- 3) (a) The proposal may be entered on the ballot by resolution passed by the governing body of the municipality or by initiative as provided for in Title 20A, Chapter 7, Part 5, Local Initiatives --Procedures. U.C.A. 10-3-1203

(1)(a) The optional form of government known as the council-mayor form vests the government of a municipality that adopts this form in two separate, independent, and equal branches of municipal government: the executive branch, consisting of a mayor and the administrative departments and officers; and the legislative branch, consisting of a municipal council.

(b) The optional form known as the council-manager form vests the government of the municipality in a municipal council, which is considered to be the governing body of the municipality, and a manager appointed by the council. U.C.A. 10-3-1209

- (1) "Municipality" means any city of any class or town in the state of Utah.
- (2) "Governing body" means the legislative body of any city or town organized under this Act. U.C.A. 10-6-104 (1975) (repealed)

--The municipal council of a municipality adopting an optional form of government provided for in this act shall be the governing body of that municipality and shall pass ordinances, appropriate funds, review municipal administration, and perform all duties that may be required of them by law. U.C.A. 10-6-113 (1975) (repealed)

## **STATEMENT OF THE CASE**

This is an appeal of a final judgment entered on July 18, 2003 by Judge L.A. Dever, Third District Court. The case arose out of a Petition for Declaratory Judgment filed on July 3, 2003 by H. Craig Hall, City Attorney of Holladay City, Utah. The Petition sought a declaration as to whether the Mayor of Holladay City has the right to participate in approving and/or vetoing a resolution which was passed by the Holladay City Council on June 19, 2003 setting a special election to propose a change in the form of government for the City of Holladay. Oral arguments were held before the District court on July 15, 2003. The District Court's July 18, 2003 Order rendered judgment in favor of the Holladay City Council and against the Mayor. The District Court restyled the action as *Council of Holladay City v. Mayor Dennis Larkin*. Two citizens groups moved for, and were granted leave to, intervene in the District Court: Holladay Citizens for Progress, in support of the City Council's position; and the Holladay Preservation League, in support of the Mayor's position.

## **STATEMENT OF FACTS**

1. The City of Holladay currently operates under a council-mayor form of government, which it has utilized since the incorporation of the City in 1999. Transcript of July 15, 2003 Hearing, p. 14.<sup>1</sup>
2. The current Mayor and City Council of Holladay City have had many well-publicized disagreements over policies and practices. Transcript of June 19, 2003 City Council Meeting (attached to City Council's Petition for Declaratory Judgment), pp. 1-18.
3. At a work meeting of the Holladay City Council held on May 29, 2003, attorney Martin Banks presented to the City Council a resolution he had drafted to schedule a special election for August 5, 2003 for purposes of proposing a change in Holladay's form of government to a council-manager form. Holladay Preservation League's Motion to Dismiss, pp. 4-5.
4. Attorney Martin Banks represents Richard Beckstrand, a real estate developer who has developed commercial properties in the vicinity of Holladay City. Holladay Preservation League's Motion to Dismiss, pp. 4-5.
5. At a city council meeting on June 5, 2003, the Holladay City Council considered for adoption the resolution written by Mr. Banks and a similar

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<sup>1</sup> Due to the expedited nature of this proceeding, no record (other than transcripts of two motion hearings) has been prepared by the trial court. This brief will therefore cite, when necessary, to the parties' pleadings filed in the trial court. No factual issues were contested by any party in the trial court, and none are being challenged by Appellants on appeal.

resolution written by the City Attorney. Holladay Preservation League's Motion to Dismiss, pp. 4-5.

6. At a city council meeting on June 19, 2003, the Holladay City Council, by a vote of 3-2, passed a resolution setting a special election for August 5, 2003 to determine whether the City should adopt the council-manager form of municipal government. July 18, 2003 Order of Trial Court, p. 1.
7. The Mayor was not given an opportunity by the City Council to approve or reject the resolution. Transcript of June 19, 2003 City Council Meeting (attached to City Council's Petition for Declaratory Judgment), p. 18.
8. On July 2, 2003, the Petition for Declaratory Judgment was filed in the District Court below. July 18, 2003 Order of Trial Court, p. 2.
9. On July 18, 2003, the District Court entered its final judgment in this matter. July 18, 2003 Order of Trial Court, p. 2.

## **SUMMARY OF ARGUMENT**

Both the city council and the mayor of a Utah municipality operating under a council-mayor form of government must approve a resolution to place on the ballot at a special election the question of whether the municipality should adopt a different form of government. A few very straightforward statutes clearly establish this proposition. The evolution of the relevant statutes since 1975 demonstrate that such was the Legislature's intent. The trial court's contrary holding that the city council may unilaterally adopt such a resolution contravenes the clear statutory language and intent and undermines the principles of separation of powers and checks and balances on which the council-mayor form of government is based.

The few statutory and policy arguments raised by the trial court and the appellees to overcome the clear import of the determinative statutes are insufficient to accomplish their objective. The fact that the mayor under a council-mayor form of government is not allowed to vote in city council meetings and that his veto powers are somewhat circumscribed by statute does not alter the conclusion that his approval is required to adopt a resolution proposing a change in form of government. Finally, existing Utah case law does not answer the question of first impression presented by this case, and does not change the conclusion dictated by the determinative statutes.

## ARGUMENT

**I. IN A MUNICIPALITY OPERATING UNDER A COUNCIL-MAYOR FORM OF GOVERNMENT, A RESOLUTION CALLING A SPECIAL ELECTION TO PROPOSE ADOPTING A DIFFERENT FORM OF GOVERNMENT FOR THE MUNICIPALITY MUST BE PASSED BY BOTH THE CITY COUNCIL AND THE MAYOR.**

**A. The Relevant Statutes Unmistakably Require Approval of the Resolution by Both the City Council and Mayor Acting as the Governing Body.**

**1. Section 10-3-1203(3)(a) Requires that the Resolution be Passed by the City's "Governing Body."**

The Optional Forms of Municipal Government Act (Utah Code Ann. § 10-3-1201 *et seq.*) ("the Act") provides two methods by which the process of adopting an optional form of municipal government may be initiated:

- (1) A municipality may reorganize under any form of municipal government provided for in this part or under Section 10-3-103, 10-3-104, 10-3-105, or 10-3-106, regardless of the city's class under Section 10-2-301.
- (2) Reorganization under Subsection (1) shall be by approval of a majority of registered voters of the municipality voting in a special election held for that purpose.
- (3) (a) The proposal may be entered on the ballot by resolution passed by the governing body of the municipality or by initiative as provided for in Title 20A, Chapter 7, Part 5, Local Initiatives --Procedures. Utah Code Ann. § 10-3-1201.<sup>2</sup>

Under this statute, a proposal to adopt a new form of government may be entered on the ballot by resolution passed by the governing body of the municipality or by initiative. In the instant case, no initiative was undertaken. Rather, the Holladay City

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<sup>2</sup> Effective May 5, 2003, the City of Holladay was reclassified by the Utah Legislature from a third-class city to a fourth-class city. See U.C.A. 10-2-301 (2003). Accordingly, many of the statutes in the Utah Municipal Code, including many of those cited in this Brief, are being amended to include references to the newly-created categories of fourth and fifth-class cities. Because the amended Code is not yet available, and because the addition of the fourth and fifth class language does not in any way affect the substantive operation of any applicable statutes, this Brief simply cites the most recent codified (pre-amendment) version of the Code. See also U.C.A. 10-2-303 (all prior statutes, ordinances, etc. remain applicable to a municipality despite its change in class).

Council, by a 3 to 2 vote, passed a resolution calling for a special election to decide whether the City of Holladay should adopt a council-manager form of government.

Section 10-3-1201(3)(a) requires that the resolution be passed by “the governing body of the municipality.” Notably, the statute does not require passage of the resolution by the “city council” or “municipal council” or the “legislative body” of the municipality. If the Utah Legislature had wished to, it could easily have used one of these alternative terms. Elsewhere in the Utah Municipal Code, the Legislature has done just that. For example, in section 10-2-405 *et seq.*, the Legislature has given certain powers over annexation petitions to the “municipal legislative body.” Utah Code Ann. § 10-2-405 *et seq.* If the Legislature had similarly employed the language “municipal legislative body” in section 10-3-1201(3)(a), the City Council’s argument in this litigation would be correct: the mayor would have no role in approving a resolution calling an election to propose a change in form of government. But instead, the Legislature deliberately chose the phrase “governing body.” As discussed immediately below, the “governing body” of a council-mayor municipality such as Holladay unquestionably includes the mayor.

## **2. “Governing Body” is Defined as Both the City Council and the Mayor.**

Section 10-1-104 provides numerous definitions of terms used in “this title,” meaning all of Title 10, the Utah Municipal Code. The definition of “governing body” reads as follows:

“Governing body” means collectively the legislative body and the executive of any municipality. Utah Code Ann. § 10-1-104(3).

This sentence contains no exceptions, limitations, or caveats,<sup>3</sup> and therefore applies in all instances.

The proper interpretation of a statute is a question of law which the reviewing court examines for correctness, granting no deference to the trial court. *Toone v. Weber County*, 57 P.3d 1079, 1081 (Utah 2002). In interpreting a statute, courts must look first to the plain language of the statute to discern the legislative intent. *City of South Salt Lake v. Salt Lake County*, 925 P.2d 954, 957 (Utah 1996). Incredibly, the trial court did not discuss, cite, or even mention the all-important statutory definition contained in section 10-1-104(3). More than any other error, this failing gave rise to the trial court's incorrect decision in this case. Section 10-1-104(3) plainly provides that in all instances, "governing body" encompasses both the legislative body and the executive of a city. Accordingly, the requirement in section 10-3-1201(3)(a) that a resolution proposing a special election to change forms of government be passed by the "governing body" of the municipality means that both the city council and the mayor must pass the resolution.

An additional statutory definition, this one found in the Optional Forms of Municipal Government Act within the Municipal Code, reinforces this requirement. Section 10-3-1209(1)(b) provides that the "municipal council" in a *council-manager* form of government "is considered to be the governing body of the municipality." Utah Code Ann. § 10-3-1209(1)(b). Tellingly, however, this same statute, in describing the municipal council as constituted under a *council-mayor* form of government such as

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<sup>3</sup> The next sentence of the definition establishes the default rule that "unless otherwise provided," the combined legislative/executive body under traditional forms of Utah municipal government, such as the city commission, the city council, or town council, is the governing body. Utah Code Ann. § 10-1-104(3). Because Holladay does not operate under a traditional form of government in which the executive and legislative functions are unified in one entity, but has instead adopted an optional form of government with formal separation of powers between the legislative and executive, this default rule does not apply. Thus, reverting to the first sentence of section 10-1-104(3), the governing body of Holladay is collectively the city council and mayor.



Holladay's, omits this description of the municipal council as the "governing body." Utah Code Ann. § 10-3-1209(1)(a). This omission is obviously occasioned by the definition in section 10-1-104(3) of "governing body" as collectively the legislative and executive entities. In a council-manager form of government, the municipal council serves as both the legislative and executive entities, and hence is the governing body. In a council-mayor form of government, however, the municipal council and the mayor, representing respectively the legislative and executive branches, together comprise the "governing body." Hence, both are required to participate in passing a resolution proposing a change in form of government under section 10-3-1203(3)(a).

**B. The Statutory Evolution of the Optional Forms of Municipal Government Act Confirms that the Mayor Was Intended to Be Part of the Governing Body for Purposes of Passing a Resolution Proposing a Change in Form of Government.**

In 1977, the Utah Legislature had a perfect opportunity to adopt the position advocated by the Holladay City Council and the trial court in this case. The Legislature declined to do so, however, and thereby firmly established the mandate that the mayor must participate in passing a resolution to change from a council-mayor form of government to another form.

The operative statute in this case, section 10-3-1203 (3)(a), was patterned after a provision in the Strong Mayor Form of Government Act, Utah Code Ann. § 10-6-76 *et seq.* (1959) (repealed) ("Strong Mayor Act"), which was in effect from 1959 to 1975. Under the Strong Mayor Act, a Utah municipality of the first or second class operating under a traditional form of Utah municipal government could adopt instead a "strong mayor" form of government by election called by "a resolution passed by the governing body of the city or by initiative." Utah Code Ann. § 10-6-102 (1959) (repealed). At the

time, there was, and could be, no confusion as to the identity of the “governing body” which would pass such a resolution, because, under all traditional forms of Utah government which might have considered adopting the strong mayor form, the governing body was a unified legislative/executive entity known as the board of commissioners. See Utah Code Ann. 10-6-5 (1953) (repealed) (board of commissioners in cities of the first and second class is “legislative and governing” body).

In 1975, the Utah Legislature repealed the Strong Mayor Act and replaced it with the Optional Forms of Municipal Government Act (“the Act”). Utah Code § 10-6-103 *et seq.*, since repealed, reorganized and reenacted in part as Utah Code § 10-3-1201 *et seq.* Under the 1975 version of the Act, a Utah municipality of any class operating under a traditional form of government could adopt either a council-mayor or a council-manager form of government. As with the previous Strong Mayor Act, the new form of government was to be proposed “by resolution passed by the governing body of the municipality or by initiative.” Utah Code Ann. § 10-6-106 (1975) (now amended slightly and reenacted as Utah Code Ann. § 10-3-1203). Of utmost significance, the 1975 version of the Act added two definitions of “governing body” which are not present in today’s version of the Act. Section 10-6-104(2) of the 1975 Act provided:

“Governing body” means the legislative body of any city or town organized under this act. Utah Code Ann. § 10-6-104(2) (1975) (repealed).

Section 10-6-113 provided:

The municipal council of a municipality adopting an optional form of government provided for in this act shall be the governing body of that municipality and shall pass ordinances, appropriate funds, review municipal administration, and perform all duties that may be required of them by law. Utah Code Ann. § 10-6-113 (1975) (repealed).

These sections proclaimed unequivocally that, under the 1975 version of the Act, the municipal council was deemed the "governing body" of both the council-mayor and the council-manager forms of government. Thus, as of 1975, the lower court's ruling in this case would have been correct: as the "governing body," the city council of a municipality operating under a council-mayor form of government had authority to unilaterally pass a resolution calling for a special election to change the municipality's form of government.

This reality changed, however, in 1977. In that year, the Legislature amended, reorganized, and re-enacted vast sections of the Utah Municipal Code. In doing so, the Legislature deleted both definitions of "governing body" quoted immediately above (sections 10-6-104(2) and 10-6-113). In their place, the Legislature enacted the following two statutes:

"Governing body" means collectively the legislative body and the executive of any municipality. Utah Code Ann. § 10-1-104(3).

(1) (a) The optional form of government known as the council-mayor form vests the government of a municipality that adopts this form in two separate, independent, and equal branches of municipal government: the executive branch, consisting of a mayor and the administrative departments and officers; and the legislative branch, consisting of a municipal council.

(b) The optional form known as the council-manager form vests the government of the municipality in a municipal council, which is considered to be the governing body of the municipality, and a manager appointed by the council. Utah Code Ann. 10-3-1209.

As discussed in an earlier section of this brief, these two statutory definitions, enacted in 1977 and still present to this day, establish that in a council-mayor form of government, the mayor and council together comprise the governing body. What is noteworthy here for purposes of legislative intent, however, is that, in repealing the prior definitions and enacting the current ones, the Legislature did not see fit to alter the

requirements of section 10-3-1203, the operative statute in this case. Both before and after the 1977 amendment, section 10-3-1203 provided, and continues to provide, substantially as follows:

- (1) A municipality may reorganize under any form of municipal government provided for in this part or under Section 10-3-103, 10-3-104, 10-3-105, or 10-3-106, regardless of the city's class under Section 10-2-301.
- (2) Reorganization under Subsection (1) shall be by approval of a majority of registered voters of the municipality voting in a special election held for that purpose.
- (3) (a) The proposal may be entered on the ballot by resolution passed by the governing body of the municipality or by initiative as provided for in Title 20A, Chapter 7, Part 5, Local Initiatives --Procedures.

Thus, despite its decision in 1977 to delete the prior definitions of “governing body” and to substitute a new definition of that term, the Legislature nevertheless left intact the requirement that a resolution calling an election to propose a new form of government must be passed by the “governing body.” It strains credulity to think that the Legislature, in the midst of the largest revision and recodification of the Utah Municipal Code in history, simply overlooked the fact that it was changing the requirements for approval of a resolution proposing the adoption of a new form of government. Statutes should be interpreted so as not to render any terms superfluous. *Salt Lake v. Roberts*, 44 P.3d 767, 773 (Utah 2002). In light of the fact that the Legislature in 1977 adopted new statutory definitions of “governing body,” the most plausible interpretation of sections 10-1-104, 10-3-1203, and 10-3-1209, and the interpretation which renders none of the statutes superfluous, is that after 1977, the mayor under a council-mayor form of government is required to participate in passage of a resolution proposing an election to consider adopting a new form of government. Such an interpretation is the only logical reading of these statutes and the history of their adoption.

It should also be noted that the interpretation urged in this matter by Appellants represents a limited holding: i.e., it applies only when a city which has already adopted an optional form of government (specifically, the council-mayor form) seeks to switch to another optional form. To the best of Appellants' knowledge, this limited issue is a question of first impression in Utah. Adopting Appellants' interpretation on this issue will not affect the passage of resolutions to change the form of government in the majority of Utah cities, which do not have a council-mayor form of government and hence have a unitary governing body. Adopting the interpretation urged by Appellees, however, will drastically alter the balance of power in cities operating under a mayor-council form, as will be argued in the next section.

**C. The Trial Court's Holding that the City Council May Unilaterally Propose an Election to Abolish the Office of Mayor Is a Dangerous Conclusion That Does Not Comport with the Purposes of the Optional Forms of Municipal Government Act.**

The Optional Forms of Municipal Government Act was enacted to improve "the ability of Utah's local governments to respond effectively" to the "needs and desires" of citizens. Utah Code Ann. § 10-3-1202. One of the optional forms of government made available by the Act is the council-mayor form. The council-mayor form "is a true separation of powers form of government," *Martindale v. Anderson*, 581 P.2d 1022, 1027 (Utah 1978), "framed in the image of the federal and state systems." *Martindale*, 581 P.2d at 1024.

A fundamental principle of the separation of powers built into the federal and state constitutions is the concept of checks and balances. Throughout the United States and Utah Constitutions, many powers are shared between branches to prevent any one branch from becoming too powerful and dominating the other branches. See U.S.

Constitution, *passim*; Utah Constitution, *passim*. In this way, both the integrity of the governmental structure and the liberty of citizens are preserved. See *The Federalist*, No. 51.

The trial court's holding in this case not only ignores the clear language of the relevant statutes, it also threatens to destroy entirely the checks and balances built into the council-mayor form of government. Under the council-mayor form, the mayor is given authority to veto certain actions of the council. Utah Code Ann. § 10-3-1214. Of course, this prospect has the potential to engender conflict between the branches. In the instant case, significant tension existed between the Holladay city council and mayor just prior to passage by the city council of the resolution in question. The mayor had publicly opposed projects and policies which three members of the city council supported. Those three city council members had publicly expressed their frustration with the mayor's opposition to their policies, and their hope that eliminating his position would help to end the stalemate. See Transcript of June 19, 2003 City Council Meeting (attached to City Council's Petition for Declaratory Judgment), 14-15.

The potential for such acrimony always exists in a government based on separation of powers and checks and balances. In fact, such conflict is expected, even welcomed. "Ambition must be made to counteract ambition." *The Federalist*, No. 51. But what the trial court in this case failed to recognize is that, far from preserving the intended constitutional structure of city government, as the court purported, its holding actually removes the intended checks and balances and by so doing gives to the legislative branch an illegitimate, unfair weapon of domination over what is supposed to be an equal and coordinate branch of government. Utah Code Ann. § 10-3-1209(1)(a)

(under council–mayor form, legislative and executive are “two separate, independent, and equal branches of municipal government.”) Under the trial court’s holding, a city council upset with a mayor’s intransigence can simply schedule an election to propose abolishing the mayor’s office. The undisputed evidence suggests that that is exactly what happened in this case. Even if this weapon were not wielded by a city council, the mere threat of it would be enough to completely alter the relative balance of power between the branches, allowing the legislative branch to impose its will on the executive under duress.

Interpreting section 10-3-1203(3)(a), then, to require approval by both the city council and the mayor of a resolution proposing a special election on adopting a new form of government is dictated not only by the clear language of the relevant statutes, but also by constitutional principles of separation of powers and checks and balances, principles which the Act was meant to reinforce.

**D. The Utah Election Code Confirms that the City Council May Not Unilaterally Schedule a Special Election Proposing a Change in the Form of Government.**

Additional authority that the city council under a council-mayor form of government may not schedule a special election proposing a change in form of government without the mayor’s approval is found in section 20A-1-203 of the Election Code:

- 5) (a) The legislative body of a local political subdivision may call a local special election only for:
- (i) a vote on a bond or debt issue;
  - (ii) a vote on a voted leeway program authorized by Section 53A-17a-133 or 53A-17a-134;
  - (iii) a referendum authorized by Title 20A, Chapter 7, Part 6;
  - (iv) an initiative authorized by Title 20A, Chapter 7, Part 5; or
  - (v) if required or authorized by federal law, a vote to determine whether or not Utah's legal boundaries should be changed. Utah Code Ann. 20A-1-203.

Under this explicit grant of authority to local legislative bodies to call special elections for certain enumerated purposes, a special election to change the municipality's form of government is not one of the permissible enumerated purposes. This fact is consistent with the statutory mandate contained in section 10-3-1203(3)(a) (discussed above) that only the governing body of the municipality may call a special election to change the form of government. If "governing body" in section 10-3-1203(3)(a) meant merely "legislative body," then the calling of a special election to change the form of government would have been listed as a permissible purpose in section 20A-1-203. The fact that it is not listed demonstrates that scheduling such an election requires approval by the full governing body, not just the legislative branch.

The trial court attempted to explain away this omission in section 20A-1-203 by simply asserting that the authority of the city council to call a special election to change the form of government, while absent from this section, is nevertheless granted by section 10-3-1203(3)(a). But this contention by the trial court completely evades answering the question posed by section 20A-1-203: if the legislative branch is the governing body, why isn't an election to change the form of government listed in section 20A-1-203 as one of the permissible purposes for which the legislative body may call an election? The trial court gives no answer at all to this question, once again calling into doubt its interpretation of the phrase "governing body."

**II. NO PROVISION OR PRINCIPLE IN UTAH LAW NEGATES THE STATUTORY REQUIREMENT THAT THE MAYOR IN A COUNCIL-MAYOR FORM OF GOVERNMENT MUST PARTICIPATE IN PASSAGE OF A RESOLUTION CALLING A SPECIAL ELECTION TO PROPOSE ADOPTING A DIFFERENT FORM OF GOVERNMENT FOR THE MUNICIPALITY.**



**A. The Prohibition Against the Mayor Voting in Council Meetings Is Immaterial.**

The trial court held that the mayor in a council-mayor form of government has no role to perform in passing a resolution calling a special election to adopt a new form of government because, by law, “the mayor may not vote in council meetings.” Utah Code Ann. § 10-3-1219(g). See July 18, 2003 Order at 5. The court’s analysis is flawed in several respects. First, it is a settled rule of statutory construction that “more specific provisions take precedence over and control more general provisions.” *State v. Webster*, 32 P.3d 976, 989 (Utah 2001). Section 10-3-1203(3)(a) requires that a resolution proposing a change in form of government be passed by the “governing body” of the municipality. “Governing body” is defined as “collectively the legislative body and the executive of any municipality.” Utah Code Ann. § 10-1-104(3). Section 10-3-1219(g), which prohibits the mayor from voting in council meetings, is a general statute that has nothing to do with the adoption of a new form of government. Because section 10-3-1203 contains a specific requirement for passage of a resolution to change the form of government, it takes precedence over section 10-3-1219(g) to the extent the two statutes conflict. Section 10-3-1219(g) deals simply with run-of-the-mill, everyday decisions of the city council over which the mayor will typically have veto power anyway. For those decisions, it makes sense that the mayor would not be allowed to vote. The adoption of a resolution to change the form of government, however, is a matter of a completely different nature and magnitude, for which the statutes specifically require the mayor to participate in deciding as a member of the governing body.

Second, even if section 10-3-1219(g) does apply to the city council’s consideration of a resolution to change the form of government, there is no reason the

mayor, in exercising his or her authority to pass on the resolution, must do so by “voting in a council meeting.” The mayor’s decision on the resolution can be rendered outside a city council meeting and therefore not implicate section 10-3-1219(g).

Finally, section 10-3-1219(n) grants the mayor authority “to perform other duties as may be prescribed by this part.” Utah Code Ann. § 10-3-1219(n). This section gives a mayor power to do what is necessary to fulfill his or her responsibilities specified in “this part,” meaning Utah Code Title 10, Chapter 3, Part 12, the Optional Forms of Municipal Government Act. One of the mayor’s responsibilities imposed by the Act is to participate in considering a resolution proposing a new form of government as a member of the governing body. Section 10-3-1219(n) therefore overrides section 10-3-1219(g) and allows the mayor to vote on the resolution. The trial court incorrectly quoted section 10-3-1219(n) in addressing this argument below, holding that the statute only grants powers “not inconsistent with Part 12.” July 18, 2003 Order. This is incorrect. The statute grants power to perform “other duties as may be prescribed by this part *or may be required by ordinance not inconsistent with this part.*” Because no “ordinance inconsistent with this part” is at issue here, the final clause of the statute is inapplicable to this case. The statute simply gives the mayor authority “to perform other duties as may be prescribed by this part,” which duties include approving or disapproving a resolution to change the form of government.

**B. The Lack of Specific Mayoral Veto Power Over the Resolution is Irrelevant.**

The trial court held that the mayor in a council-mayor form of government may not stop the city council from passing a resolution proposing an election on a new form of

government because the mayor lacks specific veto power to do so. The trial court erred in so holding.

First, the action to be taken by the mayor on the resolution proposing a new form of government need not be characterized as a veto. Section 10-3-1203(3)(a) simply provides that the mayor, as a member of the governing body, must be involved in the passage of the resolution in the first instance. Hence, this is an original duty, and not a veto action.

Second, the trial court's statement that the mayor is not given specific veto authority over the change of form resolution overlooks the fact that the city council itself is never given specific authority to pass such a resolution in the first place. Section 10-3-1210, which defines the city council's powers under the council-mayor form of government, provides as follows:

The municipal council of a municipality adopting an optional form of government provided for in this part shall pass ordinances, appropriate funds, review municipal administration, and perform all duties that may be required of it by law. Utah Code Ann. 10-3-1210.

Nowhere is the power to pass resolutions, let alone a resolution to change the form of government, mentioned therein as a power of the city council. If one desired, one could just as easily imply a power on the part of the mayor to veto such a resolution as imply a power by the council to pass such a resolution.

Next, the trial court erred in interpreting section 10-3-404 as necessarily precluding mayoral veto authority over a change-in-form resolution. Section 10-3-404, as well as sections 10-3-401 through 403, are meant to apply to traditional forms of Utah local government and do not apply to optional forms of municipal government. This conclusion is dictated by the fact that all of these statutes are inconsistent with various

features of optional forms of municipal government. For example, section 10-3-401 provides that “the mayor shall vote as a member of the governing body.” Utah Code Ann. § 10-3-401. This is obviously untrue of, and hence inapplicable to, optional forms of municipal government. Similarly, section 10-3-404 provides that:

The mayor of any municipality shall have no power to veto any act of the governing body unless otherwise specifically authorized by statute. Utah Code Ann. § 10-3-404.

This statute is clearly inapplicable to optional forms of municipal government. First, it cannot apply to the council-manager form, because such a form has no mayor. Second, it also does not apply to the council-mayor form, because the statute speaks of the mayor vetoing an act of the “governing body.” Although such language makes perfect sense when applied to the traditional form of Utah government in which the council and a non-voting, non-vetoing mayor constitute the governing body, the language is completely unintelligible when applied to the council-mayor optional form of government, because the mayor himself is part of the governing body whom the statute ostensibly prevents him from vetoing. In order to apply to the council-mayor form, the statute would have to read “the mayor shall have no power to veto any act of the municipal council,” but it does not so read. Hence, it does not apply to the council-mayor form of government, and thus the possibility that the mayor could in fact “veto” a resolution to change the form of government remains open.

Finally, the fact that section 10-3-1214 does not list a change-in-form resolution as an item that may be vetoed by the mayor under a council-mayor form of government still does not preclude the possibility that a veto of such a resolution could still be validly exercised. This is because section 10-3-1203(3)(a) requires the mayor, as a member of

the governing body, to participate in passing the resolution. Section 10-3-1203(3)(a) could therefore act itself as an authorization of veto power for a change-in-form resolution.

In summary, the mayor's required participation, as a part of the governing body, in passing a resolution proposing a change in form of government, can either be characterized as an original action, in which case no veto power is necessary, or as a veto power, in which case no applicable statutes preclude its exercise.

**C. Labeling the Passage of a Resolution to Change the Form of Government as a "Policymaking Function" Does Not Answer the Question of Who Is Statutorily-Required to Approve the Resolution.**

The trial court briefly held that because the passage of a resolution is a "policymaking function," the Mayor is not required to participate in approving a resolution to change the form of government. July 18, 2003 Order, p. 8. This holding begs the very question it seeks to answer and flies in the face of the clear language of the statute.

The trial court cited *Martindale v. Anderson*, 581 P.2d 1022 (Utah 1978) for the proposition that "legislative powers are policy making powers, while executive powers are policy execution powers." *Martindale*, 581 P. 2d at 1027. The Court then went on to hold that the mayor had no power to participate in passing the resolution to change forms of government because doing so was a policymaking power. July 18, 2003 Order, p. 8.

The fatal error in this holding is that, even after one describes legislative powers as policymaking and executive powers as policyexecuting, one is still no closer to determining who is required to approve a resolution to change the form of a city's government. The trial court could give this problem short shrift only because the court

completely ignored and failed to mention the most important statute for deciding this case: the definition of “governing body” in section 10-1-104(3) as including both the legislative and executive branches. In the face of such an unambiguous statute, the attempt to draw a distinction between policymaking and policy-executing powers in order to decide this case must fail, for several reasons.

First, *Martindale* was not concerned with, and never discussed, the issue presented by this case of the proper requirements for passing a change-in-form resolution. *Martindale* simply held that certain administrative functions, such as subdivision approval, were reserved for the mayor. *Martindale*, 581 P. 2d at 1029.

Second, the policymaking/policy-execution dichotomy may prove too little in this case. Even such an important function as normal day-to-day legislative policymaking, typically reserved for the legislative branch, pales in comparison to the importance of adopting a new governmental structure for an entire city. It is entirely possible that, given the importance of the issue, the Utah Legislature wanted to include even more players in reaching such a decision than the standard policymakers in the legislative branch. Altering the form of government is the most original, fundamental, formative act that can be taken by a democracy. It may be compared to adopting a constitutional amendment. Typically when constitutional amendments are proposed, the proposals require passage by supermajorities of representatives. See U.S. Const., art. V. Because under the Utah Optional Forms of Municipal Government Act only a bare minimum of the city council is required to approve a resolution calling for a change in form of government, it is quite plausible that the Legislature intended, in a council-mayor form of government, to require passage of the proposal by the mayor as well as the council, as a

type of supermajority requirement. This especially true in light of the fact that the adoption by the City Council of a resolution proposing an election to change the form of government means that the Council has deliberately chosen not to allow the citizens of the City to pursue the change in government themselves through the initiative process, which is the other available, and more democratic, mechanism by which such a change can occur.

Finally, even if one believes that the decision to adopt a change in government resolution is purely a policymaking function and hence within the purview of the legislative branch, nevertheless, under the council-mayor form of government, standard policymaking decisions are subject to a policymaking veto by the mayor. Even under the policymaking model then, the mayor would still have the right to approve or reject the proposal.


### **CONCLUSION**

The question presented in this appeal is easily answered by reference to a few unambiguous statutes. Section 10-3-1203(3)(a) requires the “governing body” to pass a resolution placing on the ballot a proposal for a change in the form of municipal government. Section 10-1-104 defines “governing body” as collectively the legislative body and the executive of the municipality. The Utah Legislature had a clear opportunity in 1977 to alter this definition and failed to do so. The trial court’s holding that the city council can unilaterally approve a resolution proposing an election to change the city’s form of government is therefore incorrect and undermines U.S. and Utah principles of separation of powers and checks and balances.

The objections raised by the appellees against this unambiguous interpretation are insufficient. None of the statutes or cases cited by the trial court or by the appellees can disturb the conclusion that under a council-mayor form of government, the mayor must consent to a resolution calling a special election to adopt a new form of government. The judgment of the trial court should be reversed.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of August,  
2003.

TESCH GRAHAM P.C.

  
\_\_\_\_\_  
Joseph E. Tesch  
Kraig J. Powell  
Attorneys for Holladay Preservation League



## **ADDENDUM**

## Exhibit A

IN RESOLUTION NO. 03-034

AUGUST 5, 2003

SPECIAL ELECTION

CASE # 030914851

THE COURT ORDERS THAT ANY FUTURE FILLINGS IN THIS CASE BE STYLED:

COUNCIL OF HOLLADAY CITY,  
Petitioner

vs.

MAYOR DENNIS LARKIN,  
Respondent

**THIRD DISTRICT COURT, STATE OF UTAH**  
**SALT LAKE COUNTY, SALT LAKE DEPARTMENT**

IN RE: RESOLUTION NO. 03-34  
AUGUST 5, 2003  
SPECIAL ELECTION

ORDER  
CASE NO. 0309 14851  
JUDGE L.A. DEVER

This matter came before the above entitled Court pursuant to Intervenor's Motion To Intervene, Mayor Dennis Larkin's Motion To Dismiss, Intervenor Holladay Preservation League's Motion To Dismiss and Holladay City's Petition For Declaratory Judgment. Oral arguments were held on July 15, 2003, after which the Court took the matter under advisement. Now, having fully considered the arguments of counsel, the memoranda submitted by the parties and the relevant legal authority the Court rules as stated herein.

I. Background

The relevant facts are as follows: On June 19, 2003, the Holladay City Council approved, by majority vote, Resolution 03-34, calling for a special election to determine whether Holladay City should change its current form of government from a "council-mayor" form to a "council-manager" form. Voting on the resolution is slated for a Special Election to be held on August 5, 2003.

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03-34

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A week after passage of the resolution, on June 27, 2003, the Mayor of Holladay, Dennis Larkin, wrote a letter to the City Council purporting to vote against and ultimately veto the Council's resolution. Consistent with his attempt to veto the resolution, Mayor Larkin excised all funds earmarked for the election and suspended City Administrator Jerry Medina, the individual in charge of election preparations.

The City Council reviewed the Mayor's action and voted on July 10, 2003, to reinstate the funds for the election. The vote was unanimous.

In response to the Mayor's action relating to the election itself, the City of Holladay filed a "Petition For Declaratory Judgment." Petitioners are joined by Intervenor Holladay Citizens For Progress. Mayor Larkin, by and through counsel, filed a Motion To Dismiss. The mayor is joined by Intervenor, Holladay Preservation League.

## II. MOTIONS TO INTERVENE

Holladay Citizens For Progress and Holladay Preservation League's Motions To Intervene are granted. Relying upon Section 78-33-11 of Utah's Declaratory Judgment Act, both sets of intervenors shall be allowed to intervene based upon their claims of an "interest which would be affected by the declaration."

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### III. MOTIONS TO DISMISS

Mayor Larkin and Intervenor Holladay Preservation League both argue that the current matter should be dismissed based upon the Court's lack of jurisdiction and Holladay City's failure to name necessary parties. As to the first argument, this Court concludes that it has jurisdiction over the pending matter pursuant to Section 78-33-1 of Utah's Declaratory Judgment Act. Specifically, the Declaratory Judgment Act provides this Court with jurisdiction to determine whether or not Mayor Larkin has the authority to prevent the election from proceeding by opposing or by vetoing the resolution. The current posture of this case is ripe for declaratory action.

Second, the parties argue that the petition fails to name any parties against whom relief is requested. While the heading of the action does not denominate the parties, the body of the petition does identify them. The Court finds that the proper parties have been named and placed on notice. Additionally, it is not disputed that Mayor Larkin received and signed an acceptance of service of the petition for declaratory relief.

For these reasons, the Motions to Dismiss are denied.

### IV. DECLARATORY JUDGMENT

With respect to Holladay City's "Petition For Declaratory Judgment", two main issues are currently before the Court: 1) can Mayor Larkin vote against or veto Resolution 03-34; and 2) can the Holladay City Council call for a special election via

passage of a resolution?

**A. Can Mayor Larkin Vote Against And/Or Veto The Resolution?**

As an initial issue, the parties encourage the Court to define the term "governing body." Indeed, a majority of the parties' arguments focus on utilizing principles of statutory construction to determine whether the mayor, along with the City Council, is a member of the governing body and thereby entitled to vote against the resolution.

Utah Code Ann. § 10-3-105 defines the term governing body for those third class cities<sup>1</sup> which have not adopted an optional form of government. That section further states that the third class cities which have adopted an optional form of government, such as Holladay, are governed by the Optional Forms of Municipal Government Act, UCA § 10-3-1201 et. seq.

Section 10-3-1209 of the Optional Forms of Municipal Government Act states that:

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<sup>1</sup>Effective May 5, 2003, the City of Holladay was reclassified by the Utah Legislature from a third class city to a fourth class city. However, because the amended Code, which incorporates the newly created categories of forth and fifth class cities, will not affect the substantive operation of any applicable statutes, this Order relies upon and cites the most recent codified version of the Code.

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[t]he optional form of government known as the council-mayor form vests the government of a municipality that adopts this form in two separate, independent, and equal branches of municipal government: the executive branch, consisting of a mayor and the administrative departments and officers; and the legislative branch, consisting of a municipal council.

This section designates the executive and legislative branches as separate, but equal and independent branches of municipal government. Mayor Larkin and Intervenor Holladay Preservation League rely heavily upon this provision along with Section 10-3-1203 which states, in relevant part, that reorganization of municipal government "may be entered on the ballot by resolution passed by the governing body of the municipality." The Mayor and the League claim these provisions show that Mayor Larkin as a member of the separate but equal executive branch has the authority to vote against and veto the resolution.

The Court, however, is unable to accept the Mayor and Holladay Preservation League's interpretation of the Act without considering several additional provisions. These additional provisions recognize that the authority of both the legislative and executive branches is not unfettered. In fact, the Legislature has placed specific and explicit limitations upon a mayor's authority which must be considered.

The first limitation is set forth in Section 10-3-1219, which generally addresses the powers and duties of a mayor under a council-mayor form of government. Of specific relevance is the prohibition set forth in subsection (g) which states that "the mayor may not vote in council meetings." Thus, while a mayor does have the authority to do those acts enumerated under Section 10-3-1219, his power is limited



such that he may not vote at a city council meeting. According to the plain language of the statute, Mayor Larkin does not have the authority to vote on the Resolution. Finally, the Court notes that even *if* the Mayor had the authority to vote on the resolution, which the Court concludes he does not, he failed to vote at the June 19, 2003, City Council meeting and has, therefore, waived any right to do so now.

The City argues that the Mayor cannot veto the Resolution. The Court has previously determined that Part 12 of Chapter 3, Optional Forms of Municipal Government, is the primary source to be reviewed to determine what authority is granted to the Council and the Mayor. The Legislature in section 1219 outlines the powers and duties of the Mayor. Nowhere in that section is the Mayor granted the right to "veto" any action of the Council. Section 1214, however, does address the authority of the Mayor to disapprove actions of the Council. According to section 1214, that right to disapprove is limited to ordinances and tax levies and appropriations. No other authority to disapprove actions of the Council is granted. Council for the League argues that 1219 (2)(n) can be used as a catchall section by the Court to justify the Mayor's right to "veto" the Resolution. The Court does agree that (2)(n) is a catchall but it only grants the right to perform other duties not inconsistent with Part 12. A veto of the Resolution would be inconsistent with the rights and duties granted to the Mayor by statute.

Additionally, Section 1204 provides that "[a]ll existing statutes governing municipalities shall remain applicable except as provided in this part." Section 10-3-404

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states "[t]he mayor of any municipality shall have no power to veto any act of the governing body unless specifically authorized by statute." Council for the League argues that all of part 4 should be inapplicable to cities organized under part 12. The Court agrees that sections 401-403 are inconsistent with the provisions of part 12. However, section 404 contain nothing inconsistent with part 12 and therefore can be considered as an additional basis to support the proposition that a mayor only has veto powers as authorized by statute. The Court has found no authority in the statutes granting Mayor Larkin such a power.

**B. Must The Mayor Approve The Resolution?**

The Mayor and the League argue that the Court should interpret governing body as a singular term and find that the Mayor and the Council must operate as one and both pass and/or approve the resolution. The Court finds nothing in the statute that supports this interpretation.

The Utah Supreme Court in *Martindale v. Anderson*, 581 P.2d 1022 (1978), does give some guidance on powers granted to the two branches under the Optional Forms of Government Act. The Court stated that

We agree with the conclusion that the Council is vested with all legislative powers, and find full support for it in those provisions of the Act which specifically deprive the Mayor of Council membership or a vote thereon.

...

Simply stated, legislative powers are policy *making* powers, while executive powers are policy *execution* powers.

...

The Act, by direct implication, confers policy-making functions upon the Council . . . .

Martindale at 1027.

The passing of a resolution is clearly a legislative or policy-making function and, as such, the authority to do so rests with the Council and not the Mayor. Therefore, the "governing body" in section 10-3-1203 (3)(a) must mean the legislative branch since the Mayor has no authority to veto and has no authority for policy-making.

Even if you accept the Mayor's view that he has the right to approve or withhold approval, he clearly gave it when he stated in the Council meeting on June 16, 2003, "Anyhow, I will abide by the decision of the Council. If you want to put it on the ballot, let's do it." Holladay City Council Minutes, June 19, 2003, pg 17, lines 30-31

but the election  
is an execution  
function

Is it a Mayor's  
State? In work in  
Mayor Council  
Manager

Cannot waive it  
Most difficult

### C . Can The City Council Call A Special Election?

The final issue to be addressed is whether UCA § 20A-1-203 limits the Council's ability to call a special election via a resolution, provided that such an election is not specifically enumerated under that statute.<sup>2</sup> While UCA § 20A-1-203 does not address

<sup>2</sup>UCA § 20A-1-203(5)(a) states in relevant part,  
[t]he legislative body of a local political subdivision may call a local special election only for:

- (i) a vote on a bond or debt issue;
- (ii) a vote on a voted leeway program authorized by Section 53A-17a-133 or 53A-17a-134;
- (iii) a referendum authorized by Title 20A, Chapter 7, Part 6;
- (iv) an initiative authorized by Title 20A, Chapter 7, Part 5; or

the Council's's ability to call a special election by resolution, the Court relies upon the Optional Forms of Municipal Government Act, UCA § 10-3-1201 et. seq. Specifically,

Section 10-3-1206(3)(a) of the Act states that the proposal for reorganization of a municipal government "may be entered on the ballot by resolution passed by the governing body of the municipality or by initiative." Furthermore, UCA § 10-3-1204 of the Act states that "[a]ll existing statutes governing municipalities shall remain applicable *except as provided in this part*" (Emphasis added). Read together these two provisions provide the City Council with the power to call a special election by Resolution and clarify any apparent inconsistency the Act's provisions may appear to have with UCA § 20A-1-203.

As mentioned in the previous section the Court interprets "governing body" for purposes of UCA 10-3-1203(3)(a) as that portion of the governing body that has the authority to vote on or pass an initiative—the City Council and not the mayor.

#### V. Conclusion

In conclusion, while the council-mayor form of government vests the power

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(v) if required by federal law, a vote to determine whether or not Utah's legal boundaries should be changed.

between the executive and legislative branches, that power is not unfettered. Specific limitations set forth in the Act prohibit Mayor Larkin from voting on, disapproving or withholding approval of, or vetoing the resolution.

Furthermore, the Holladay City Council has the authority to call a special election via Resolution 03-34 and therefore the election shall proceed as scheduled on August 5, 2003.

This is the final Order of the Court and no further Order is necessary.

Dated this 18<sup>th</sup> day of July, 2003.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'L.A. Dever', is written over a horizontal line.

L.A. DEVER

DISTRICT COURT JUDGE

## Exhibit B

Joseph E. Tesch, #3219  
Kraig J. Powell, #8929  
**TESCH GRAHAM P.C.**  
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Park City, Utah 84060  
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*Attorneys for Intervenor Holladay Preservation League*

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**IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

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In re HOLLADAY CITY COUNCIL  
RESOLUTION NO. 03-34

**MOTION TO DISMISS OR, IN THE  
ALTERNATIVE, FOR SUMMARY  
JUDGMENT**

Case No. 0309014851

Honorable L.A. Dever

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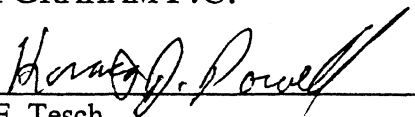
COMES NOW INTERVENOR HOLLADAY PRESERVATION LEAGUE, by  
and through its counsel of record TESCH GRAHAM P.C., and moves to dismiss this  
action pursuant to Rule 12(b), Utah Rules of Civil Procedure, or in the alternative, moves  
for entry of summary judgment against Petitioner. For the reasons in support of this  
Motion, please see the accompanying Memorandum.

Due to the extreme shortness of time allowed for the formation of issues, study, research and drafting of the Memorandum prior to hearing, the Holladay Preservation League also incorporates all of the following issues in this Motion:

1. All of the issues raised by the pleadings of the Mayor of Holladay;
2. All of the Preservation League's procedural issues raised previously; and
3. All of the Preservation League's objections set forth on the record July 7, 2003.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of July, 2003.

TESCH GRAHAM P.C.

  
\_\_\_\_\_  
Joseph E. Tesch  
Kraig J. Powell  
Attorneys for Holladay Preservation League




**CERTIFICATE OF SERVICE**

I, Kraig J. Powell, hereby certify that on the 17<sup>th</sup> day of July, 2003, I caused  
to be hand-delivered the foregoing Motion to:

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*Attorneys for Intervenor Holladay Preservation League*

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**IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

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In re HOLLADAY CITY COUNCIL  
RESOLUTION NO. 03-34

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO DISMISS OR, IN THE  
ALTERNATIVE, FOR SUMMARY  
JUDGMENT**

Case No. 0309014851

Honorable L.A. Dever

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**INTRODUCTION**

Obviously, the circumstances and posture of this case are extraordinary. No parties have been named as plaintiffs or defendants. No summonses have been issued. No causes of action have been pled. No order has been requested. Under such conditions, citizens of Holladay, Utah interested in the subject matter of the Petition for Declaratory Judgment ("Petition") filed in this case, such as the members of Intervenor Holladay Preservation League ("Preservation League"), are left with little or no guidance

as to how to advance and defend their interests in this matter consistent with the Utah Rules of Civil Procedure. Despite these serious defects of the Petition, the great significance of the facts recited therein has led the Preservation League to request that it be allowed to intervene in this action. For all of the reasons set forth below, the Preservation League now moves that the Petition be dismissed pursuant to Rule 12(b), Utah Rules of Civil Procedure, or in the alternative, that summary judgment be entered against Petitioner.

#### **STATEMENT OF UNDISPUTED MATERIAL FACTS**

1. On June 19, 2003, the City Council of the City of Holladay passed Resolution Number 03-34 ("the Resolution") scheduling a special election for August 5, 2003 to propose reorganization of the City of Holladay under a council-manager form of government.
2. The City of Holladay is presently governed by a council-mayor form of government.
3. The Mayor of the City of Holladay has not approved the Resolution.

#### **ARGUMENT**

##### **I. THE PETITION MUST BE DISMISSED BECAUSE IT FAILS TO NAME ANY PARTIES AGAINST WHOM RELIEF IS REQUESTED.**

Under Rule 12(b), a claim may be dismissed for the following reasons (among others): lack of jurisdiction over the person, insufficiency of process, insufficiency of service of process, failure to state a claim upon which relief can be granted, and failure to

join an indispensable party. The Petition filed in this case on its face violates each of these requirements.

By failing to name any defendants, and also by failing to request that relief be entered against any party, Petitioner has not met the most fundamental requirements for commencing a civil action. The fact that an action is filed as a declaratory judgment action does not obviate the need for the naming and service of parties defendant. On the contrary, section 78-33-11 of the Utah Declaratory Judgments Act requires that “all persons shall be made parties who have or claim any interest which would be affected by the declaration.” Utah Code Annotated § 78-33-11.

Petitioner’s failure to follow these procedural formalities in commencing this action has caused, and continues to cause, prejudice to the interests of the Preservation League. Because no parties were named and no relief was requested in the Petition, the Preservation League was unable to adequately prepare for the *in camera* conference with the Court held July 7, 2003. The Preservation League continues to be uncertain as to the real parties in interest to this action and the potential legal consequences, if any, of the case. The Preservation League contends that, at a minimum, the Mayor and City Council of the City of Holladay should have been named as parties to this action. The proper naming of such parties and the ensuing service of summons(es) would have set in motion a process for answering upon which the Preservation League could have relied to define the issues in the case and identify the alignment of its interests. Naming of parties in this manner also would have led to the filing of motions requesting relief against specific

parties, which in turn would have triggered rights of time periods to respond and reply. The failure to follow such procedural requirements violates the Preservation League's rights of due process to participate meaningfully in this action and mandates dismissal of the Petition. Although the Preservation League will proceed to address to what it understands to be the substantive issues and ramifications of this case, the Preservation League does not thereby waive any of the aforementioned errors of Petitioner in commencing this action.

II. THE MAYOR OF THE CITY OF HOLLADAY IS A MEMBER OF THE GOVERNING BODY OF THE CITY AND THEREFORE HIS APPROVAL IS REQUIRED IN ORDER TO PASS THE RESOLUTION CALLING FOR A SPECIAL ELECTION TO CHANGE THE FORM OF CITY GOVERNMENT.

Utah Code Annotated section 10-3-1203 states that a proposal to change a municipality's form of government may be entered on the ballot at a special election by citizen initiative petition or by a "resolution passed by the governing body of the municipality." UCA 10-3-1203(3)(a). No citizen initiative petition was submitted in the current Holladay matter. Instead, on June 19, 2003, the Holladay City Council voted 3 to 2 in favor of a resolution calling for a special election to propose changing Holladay's form of government from a council-mayor form to a council-manager form. Although the resolution voted on by the City Council on June 19, 2003 was written by the City Attorney, the original version of the resolution calling for the election, which was considered by the City Council at its previous meeting on June 5, 2003, was written and submitted to the City Council by Martin K. Banks, an attorney of the law firm Stoel

Rives representing Holladay-area real estate developer Richard Beckstrand. See Minutes of June 5, 2003 City Council Meeting (in custody of Petitioner) and fax cover sheet of Resolution sent to City Council members attached hereto as Exhibit A.

Utah Code Annotated section 10-3-1209(1)(b) states that “the optional form [of government] known as the council-manager form vests the government of the municipality in a municipal council, which is considered to be the governing body of the municipality, and a manager appointed by the council.” UCA 10-3-1209(1)(b). The previous paragraph of the same statute, however, in describing the contrasting council-mayor form of government, under which Holladay currently operates, does not state that the municipal council is the governing body under the council-mayor form. Instead, it states that “the optional form of government known as the council-mayor form vests the government of a municipality that adopts this form in two separate, independent, and equal branches of municipal government: the executive branch, consisting of a mayor and the administrative departments and officers; and the legislative branch, consisting of a municipal council.” UCA 10-3-1209(1)(a). The presence of the phrase “a municipal council, which is considered to be the governing body of the municipality” in section (1)(b) describing the council-manager form, and the absence of that phrase from section (1)(a) describing the council-mayor form, demonstrates that in a council-mayor government, the city council is not the governing body, or else the Legislature would have simply used the same language in 1(a) as in 1(b).

Additional, decisive statutory authority that both the mayor and city council in a council-mayor form of government together comprise the governing body is found in Utah Code section 10-1-104: “‘Governing body’ means collectively the legislative and the executive of any municipality.” UCA 10-1-104. Because section 10-3-1209 (1)(a) (quoted above) describes the legislative branch as the city council and the executive branch as the mayor, it is clear that in a council-mayor form of government, such as Holladay’s, the mayor and the council together make up the governing body.

It should also be noted that when the Utah Legislature wishes to refer to the legislative branch of municipal government alone, it knows how to do so. For example, section 10-2-405 and neighboring sections, in discussing annexation powers, refer repeatedly to the “legislative body” of a municipality. Similarly, the Election Code in section 20A-1-203 refers to the election powers possessed by the “legislative body” of a local political subdivision. If the Legislature had intended for only the “legislative body” to pass the resolution calling for the change in form of government, it clearly could have said so. Instead, it used the phrase “governing body” deliberately and highly specifically.

Certain statutes in the Utah Municipal Code do describe the city council as the “governing body” of a municipality. These statutes do not affect in any way the fact that Holladay’s governing body is both the mayor and council collectively, and it is extremely crucial to understand why. Section 10-3-105 provides that “the governing body of each city of the third class *that has not adopted an optional form of government under Part 12, Alternative Forms of Municipal Government Act*, shall be a council composed of six

members, one of whom shall be the mayor and the remaining five shall be council members.” UCA 10-3-105 (emphasis added).<sup>1</sup> This provision does not apply to Holladay because Holladay has adopted an optional form of government (the council-mayor form) under the statute mentioned.

Similarly, section 10-1-104(3) states that “*unless otherwise provided*, in a city of the third-class, the governing body is the city council.” UCA 10-1-104(3) (emphasis added). The sentence immediately preceding this in the statute, however, states (as mentioned previously) that: “Governing body means collectively the legislative body and the executive of any municipality.” UCA 10-1-104(3). It is clear then, that the phrase “*unless otherwise provided*” in 10-1-104(3) contemplates other situations, such as the adoption of alternative forms of government, thus echoing the exception from section 10-3-105 (see above). When read in totality, then, all of the above-quoted statutes establish beyond a doubt that in the alternative form of government known as the council-mayor form, the governing body is the executive (mayor) and legislature (city council) collectively.

The above analysis means that in any other form of government besides that which Holladay currently has, the Holladay City Council would have been perfectly

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<sup>1</sup> Effective May 5, 2003, the City of Holladay was reclassified by the Utah Legislature from a third-class city to a fourth-class city. Accordingly, many of the statutes in the Utah Municipal Code, including many of those cited in this Memorandum, are being amended to include references to the newly-created categories of fourth and fifth-class cities. Because the amended Code is not yet available, and because the addition of the fourth and fifth class language does not in any way affect the substantive operation of any applicable statutes, this Memorandum simply cites the most recent codified (pre-amendment) version of the Code. See also UCA 10-2-303 (all prior statutes, ordinances, etc. remain applicable to a municipality despite its change in class).



within its rights to pass the resolution and schedule the special election to propose changing the City's form of government. But the City Council is not allowed to do so under Holladay's current form of government. This may seem as simply an incredibly bad piece of luck for the current Holladay City Council, but upon reflection, the purpose behind this differential treatment is obvious, as well as eminently logical and essential.

In any other form of Utah government besides the council-mayor form, the executive and legislative powers are combined – there is no separate executive. See *Martindale v. Anderson*, 581 P.2d 1022, 1024 (Utah 1978). Therefore, there is no counterweight authority to the City Council whose approval must be obtained. But in a council-mayor form of government, which is also known as the “strong-mayor” form, the executive is a “separate, independent, and equal” branch of government (UCA 10-3-1209; see also *Martindale*, 581 P.2d at 1024), much like the U.S. President. It would be absurd to think that the U.S. Congress could unilaterally vote to hold an election to propose abolishing the office of President. Such a provision would be an overwhelming weapon of domination by one branch against another. It is similarly absurd to think that a city council in a strong mayor form of government can unilaterally vote to hold an election to propose abolishing the office of mayor. Such a provision would be a guaranteed recipe for tyranny of one branch over the other. Whenever conflict and tension between the two branches was high, the city council could simply eliminate the mayor's opposition by arranging to eliminate the mayor completely. The history and statements of City Council members in the current controversy in Holladay show that in

fact that is exactly what is now occurring. The members of the City Council who voted for the resolution calling for a vote on a change in form of government have stated on the record that they did so to overcome the stalemate caused by their conflicts with the mayor. See Transcripts of June 5, 2003 and June 19, 2003 Holladay City Council Meetings, in custody of Petitioner. Allowing such a result, however, would not be consistent with the American doctrines of separation of powers and checks and balances. Fortunately, allowing such a result also is not consistent with the Utah statutes and case law on this subject, as shown in detail above. Those statutes and cases, as well as common sense and logic, conclusively dictate that, absent a citizen initiative petition (which is always an option, and which could have been used instead for the current Holladay change of government proposal, and which can still be used if anyone desires), only a resolution passed by both the city council and the mayor can authorize an election to propose a change in a council-mayor form of government. Since the current resolution was not approved by the mayor, the resolution is invalid.

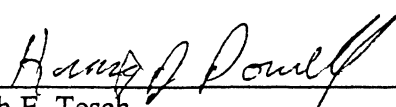
Under Rule 56, Utah Rules of Civil Procedure, summary judgment may be entered when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Based on the undisputed facts and the legal principles set forth above, the Preservation League requests that summary judgment be entered against Petitioner on the grounds that the resolution has not been approved by the mayor.

## CONCLUSION

The haste and recklessness with which the special election was scheduled, which has led in turn to the harried pace and course of this litigation, exposes this effort for what it really is: an illegitimate power grab by an unrepresentative portion of government officials in the City of Holladay. Three council members, representing only narrowly-confined geographical districts, and aligned with the interests of local developers, have attempted a palace coup to throw out the mayor of Holladay in the middle of the four-year term to which he was elected in a city-wide race by a majority of all voters. Whether one likes the current mayor or not, nothing can justify discarding the current constitutional structure of Holladay City to serve illegitimate purposes by unauthorized means. The Petition should be dismissed, or in the alternative, summary judgment should be entered against Petitioner. The Preservation League also requests that it be awarded its costs and attorney fees in this matter.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of July, 2003.

TESCH GRAHAM P.C.

  
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Joseph E. Tesch  
Kraig J. Powell  
Attorneys for Holladay Preservation League

**CERTIFICATE OF SERVICE**

I, Kraig J. Powell, hereby certify that on the 11<sup>th</sup> day of July, 2003, I caused  
to be hand-delivered the foregoing Memorandum to:

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William R. Hyde  
1450 Harvard Ave.  
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A handwritten signature in black ink, appearing to read "Kraig J. Powell", is written over a horizontal line.