

1957

The State Water Pollution Control Board of the State of Utah v. Salt Lake City : Brief of Defendant and Respondent

Utah Supreme Court

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1957

Supreme Court, Utah

THE STATE WATER POLLUTION
CONTROL BOARD OF THE
STATE OF UTAH,

Plaintiff and Appellant,

— vs. —

SALT LAKE CITY, A Municipal
Corporation,

Defendant and Respondent

BRIEF OF DEFENDANT & RESPONDENT

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IN THE SUPREME COURT of the STATE OF UTAH

THE STATE WATER POLLUTION
CONTROL BOARD OF THE
STATE OF UTAH,

Plaintiff and Appellant,

— vs. —

SALT LAKE CITY, A Municipal
Corporation,

Defendant and Respondent

Case No. 8560

BRIEF OF DEFENDANT & RESPONDENT

STATEMENT OF FACTS

The statement of procedural facts as presented in appellant's brief is substantially correct. We wish to emphasize, however, that Salt Lake City was not charged with violating any statutory provision as such, but rather, charges concern activities of the City allegedly in violation of the regulations entitled "Standards for Sewage Works" adopted by the Water Pollution Board on December 18, 1953. (See Exhibit "A.") The particular regulations sought to be enforced concern details of the construction and operation of the City's sewer system and read as follows:

“21.4: Water Supply Interconnections: There must be no permanent physical connection between a public or private potable water supply system and a sewer, sewage treatment plant, or appurtenance thereto which would permit the passage of any sewage or polluted water into the potable water supply.”

* * * *

“23.1: Size: No public sewer shall be less than eight inches in diameter.”

* * * *

“32.7: Ventilation: Adequate ventilation shall be provided for all pump stations. Where the pump pit is below the ground surface mechanical ventilation is required, so arranged as to effectively ventilate the dry well and also the wet well if screens or mechanical equipment requiring maintenance or inspection is located in the wet well. The ventilation equipment should have a minimum capacity of 6 turnovers per hour under continuous operation. With intermittent operation a 2 minute turnover should be provided.”

The Lower Court found “that the Water Pollution Board has no jurisdiction over the *sewer problems* presented in this case.” (Emphasis added.)

These observations bring us to a consideration of the activities of Salt Lake City as presented to the Water Pollution Board at the hearing on September 27, 1955. In order to recognize the nature of the power annexed by the board, a factual review of these activities is necessary.

First, the alleged violation under Section 21.4 of the regulations adopted by the Board concerns the utilization by the city of sewer manholes and flush tanks connected to the City's water mains. The particular system is utilized only in a supervised cleaning program and operates in the following fashion: At the highest elevation of every sewer line in Salt Lake City there is constructed a cement reservoir or tank that will hold approximately 100 to 200 gallons of water. A mechanical contrivance is located in the bottom of these tanks so that when in the cleaning operation water reaches a certain elevation in the tank, it will automatically dump or permit all of the water to flush out of the tank and by such force the entire sewer line is cleaned. Any solids that may have been left along the bottom or sides of the sewer lines are carried forward. This well or tank is connected with a one inch line to a city water main, having a bib or water cock into the flush tank from the said water mains. (Hearing Tr. 57, 58 & Exhibit #1.)

According to uncontradicted testimony the system is operated by two men equipped with a truck and with all proper facilities for making repairs, cleaning sewer clogs, and replacing worn parts. These men start at an initial well on a particular day, remove the manhole cover, light up the well, and carefully determine whether everything is in proper order. In a book they record the exact time that they open the valve from the water main in order to fill the flush tank. The tank will fill and will be flushed automatically approximately 4 times an hour. When the flush tank is set in operation, the

manhole cover is replaced and the workmen go to the next sewer line and continue for approximately one hour when they return to the initial well. At this point the water from the City main is turned off, which is again recorded in their book, and they once again conduct a thorough inspection to make absolutely sure that there is no evidence of any clogging or leakage of any kind. The manhole cover is replaced and the flush tank remains inactive for a period of approximately 30 days when the same operation is once again performed. (Hearing Tr. 58, 74 & 75.)

For this particular flush tank system to contaminate in any way the City's culinary water, there would have to be a simultaneous joinder of many factors. First, the sewer would have to clog some distance from the flush tank and the clogging force the sewage water back up through the sewer line into the tank, reaching a level where the sewage water would cover the end of the fresh water pipe. (Hearing Tr. 23, 24.) At the same time the water tap would have to be opened during the flushing operations and a break would have to exist in the City's water line at that particular time and place so as to cause a negative pressure in the City water main, and the experienced workmen would have to ignore the facts indicating that a negative pressure exists. (Hearing Tr. 23.) The simultaneous occurrence of all these factors is almost beyond possibility. (Hearing Tr. 26.) More than 30 years of detailed records kept in the manner and fashion indicated, conclusively show that there has never been a single failure. (Hearing Tr. 24, 76, 87.)

This point was made abundantly clear by William Tipton, a professional engineer employed by Salt Lake City for 36 years, when he stated at page 94 of the hearing transcript, as follows:

“It seems that something that has operated satisfactorily for as far as I know from the period of my experience, which has been 36 years, should continue to operate satisfactorily . . .”

It was recognized by counsel for the Water Pollution Board that Salt Lake City has a very low incidence of plugged sewer lines, i.e., two per month in over 600 miles of sewer, (Hearing Tr. 85.) and in inquiring as to the reason for the excellent record, he was informed that it was directly attributable to the effective use of the flush tank system. (Hearing Tr. 85, 86.) Other testimonies indicated that elimination of the flush tank system would result in excessive plugging of the City's sewer lines. (Hearing Tr. 56, 59, 79.)

The Water Pollution Board grounds its regulations on general standards not applicable to the particular circumstances in Salt Lake City, (Hearing Tr. 27) and as concerns operation of the Salt Lake City sewer system, Lynn Thatcher, Executive Secretary of the Board recognized that he was unable to direct the particular operating problems involved and he said at page 28 of the hearing transcript:

“I would prefer to leave the exact operation to the people in the Sewer Department who are more familiar with the details of operation of the system.”

The next alleged violation by Salt Lake City under paragraph 23.1 of the Board's regulations concerns the use of 6-inch sewer lines rather than 8-inch lines. Generally, in its sewer system the City installs 8-inch lines (Hearing Tr. 56.); however, under these particular facts, two pieces of 6-inch pipe were installed, each less than 100 feet long, serving cul-de-sac roads having a maximum total potential of 5 service connections. (Hearing Tr. 56.)

Considering the short length of pipe involved, proper and effective arrangements have been made for cleaning. (Hearing Tr. 56.)

The regulations of the Water Pollution Board absolutely bar use of 6-inch pipe under any circumstance. The regulations are based on general standards from other states and no attempt is made to consider the particular problem in the area. (Hearing Tr. 12.)

While witnesses for the Board testified that generally clogging from a 6-inch pipe is greater than when an 8-inch pipe is used, these observations did not take into consideration the particular facts involved in this case. (Hearing Tr. 12, 20, 41.)

Even the witness for the Board recognized in cross examination that particular facts such as gradings and the number of service connections are controlling factors in determining size of the pipe best suited for the specific needs (Hearing Tr. 18.); that it would be possible to use a pipe too large for existing circumstances (Hear-

ing Tr. 18.); and that as long as a 6-inch line could be cleaned properly, it would be satisfactory. (Hearing Tr. 19, 48.)

Three witnesses for the City with a combined total of 57 years' employment by Salt Lake City in this particular field, (Hearing Tr. 55, 74, 89.) and being aware of the specific needs involved, testified that in the light of the slope and the limited number of service connections, the 6-inch pipe would have greater velocity and cleaning capacity. (Hearing Tr. 91, 101, 102.) Moreover, the limited amount of water in a 6-inch pipe would have a greater tendency to push solids through the pipe, rather than to have a same quantity of water supply flow around the solids in an 8-inch pipe thereby causing dangerous accumulations in the sewer line. (Hearing Tr. 87.)

The final alleged violation under paragraph 32.7 of the Board's regulations concerns the wet well located in the City's sewer system between State and Main on 6th South Streets in Salt Lake City. This wet well was constructed to serve the needs of the American Linen Supply Co., which has a large volume of hot suds to be deposited from time to time during the day while its laundry is in operation. (Hearing Tr. 60.) In the opinion of the City Engineer it would facilitate the problem to utilize the large sanitary sewer on Main Street for the deposit of the suds from the laundry, rather than to deposit in the sewer line immediately in front of the laundry. (Hearing Tr. 61.) Therefore, the City built

a cement tank in which the suds from the washing operations are deposited. The tank is provided with a pump driven by electric power and is so equipped that when the water in this tank reaches a certain depth, the electric pump automatically forces the water into the main sewer line. The pump stands idle until the water reaches the specified depth. The objections of the Water Pollution Board are grounded solely on the lack of a ventilating fan in the well to make it more comfortable and the air less contaminated if a person should be called upon to go into this tank for purpose of cleaning and repair. (Hearing Tr. 14, 17.) The tank is provided with large manholes which are perforated to give continuous ventilation and these manholes would be removed before a person could lower himself into the tank. (Hearing Tr. 20.) A workman would not attempt to clean the tank during the day while the laundry was depositing hot suds. Should the electric pump fail in the tank, an automatic by-pass is established so that the suds would be deposited in the sewer line directly in front of the laundry. The City did not deem it advisable to ventilate the well with an electric fan because less danger from gases exist from the suds than would be the case with a regular sewer which is not so ventilated; because the heat of the wash water in the wet well would tend to destroy the fan; (Hearing Tr. 6.) and because the City has never had any difficulty or objections from workmen in cleaning existing sewer manholes having no ventilating fan. (Hearing Tr. 84.) The only possible complaint that the Water Pollution Board has is that the well may be an

unsafe place for a man to work. The Board's own witnesses recognized that the well had absolutely nothing to do with the pollution of the waters of the State of Utah or pollution of Salt Lake City's water supply. (Hearing Tr. 22, 49.) Clifford M. Stutz, Sanitary Engineer for the State Health Department (Hearing Tr. 41.) in explaining the Board's regulations, stated at page 44 of the hearing transcript, as follows:

“So it was our opinion that ventilation equipment was necessary in order to make that chamber suitable for a man to enter and perform his work.”

The principal point to be derived from the hearing is that if a contamination did occur, which is virtually impossible, as a result from any one of the three foregoing objections, the contamination would be only to the Salt Lake City culinary water system and would not contaminate any public waters of the State of Utah. (Hearing Tr. 96, 97.) The culinary water of Salt Lake City is used for bathing, washing, and for sanitary toilets in the homes. After it has been used in the home, then obviously it is contaminated far more than it could be by any conceivable difficulty arising from the flush tank system or the 6-inch sewer line. Certainly, the health of the workmen could not under any chain of circumstances, contaminate the public waters of the state or even the private culinary water of the city. The culinary water of Salt Lake City is not emptied into the streams of the State of Utah. (Hearing Tr. 97.) The Board is concerned with details concerning Salt Lake City's own

private water supply rather than with the public waters of the state. This will be the focal point of the inquiry throughout subsequent pages of this brief.

STATEMENT OF POINTS

POINT 1.

THE WATER POLLUTION CONTROL BOARD HAS NO JURISDICTION OVER THE SUBJECT MATTER INVOLVED IN THIS CASE.

POINT 2.

ACTIONS, FINDINGS, CONCLUSION, AND ORDERS OF THE STATE WATER POLLUTION BOARD INTERFERE WITH MUNICIPAL FUNCTIONS AND PROPERTY OF SALT LAKE CITY IN VIOLATION OF ARTICLE VI, SECTION 29, OF THE CONSTITUTION OF UTAH.

POINT 3.

THE DELEGATION OF POWER BY THE LEGISLATURE TO THE WATER POLLUTION BOARD IS UNCONSTITUTIONAL BEING WITHOUT PROPER STANDARDS AND PROVIDES THE BOARD WITH ARBITRARY AND UNREASONABLE DISCRETION.

ARGUMENT

POINT 1.

THE WATER POLLUTION CONTROL BOARD HAS NO JURISDICTION OVER THE SUBJECT MATTER INVOLVED IN THIS CASE.

Appellant in the initial argument under Point 1 of the brief argues that the municipalities are subject to the Water Pollution Act. We wish to point out that the issue

is not necessarily whether municipalities are subject to the act, but rather whether the statute and the constitution prevent enforcement of the particular regulations adopted by the Water Pollution Board, which are directly in issue in this case. When the activities of the city involve other than its own municipal affairs and property, then the statement of plaintiff may be properly before the court. The fact is that in interpreting the Utah Water Pollution Act, it is inconceivable that the Legislature intended to delegate to the Water Pollution Board power to control the culinary water supply of Salt Lake City while the water is retained in city property for distribution to residents of the city. In referring to the Utah Water Pollution Act, we shall utilize the code system as set forth in the *1955 Pocket Supplement* of Volume 7 of the *Utah Code Annotated*, 1953.

In the note following Title 73-14-1, *Utah Code Annotated*, 1953, appears the title of the article, which, of course, is an important aid in determining the legislative intent. The announced power is “to control, prevent and abate the pollution of *surface* and *underground* waters of the state.” (Emphasis added.) Culinary water retained by the City in its waterworks system does not fall into the foregoing classification of “surface” and “underground” water.

The policy of the act, *Utah Code Annotated*, 1953, Title 73-14-1, another important aid in determining legislative intent, clearly shows the policies for “conservation of the water systems of the state” to be used “for public

water supplies, for the promulgation of wildlife, fish and other aquatic life," and for "other legitimate beneficial uses." Here the water is retained in a private distribution system and is already being used. If the Board should determine that the wildlife to be protected is polluting the waters, may it assume control over this enormous field as well? The policy is to control the waste that may be "discharged into any waters of the state," which is certainly not the case in this action. The legislative intent is clear: To prevent unnecessary pollution of streams, rivers, canals, lakes, and underground waters so that the water may be used in the most beneficial manner. Title 73-14-1, *Utah Code Annotated*, 1953, reads as follows:

"Pollution of waters — Public policy of state. —Whereas the pollution of the *waters of this state* constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life, and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water, and whereas such pollution is contrary to the best interests of the state *and its policy for the conservation of the water resources of the state*, it is hereby declared to be the public policy of this state to *conserve the waters of the state and* to protect, maintain and improve the quality thereof *for public water supplies*. for the propagation of wildlife, fish and aquatic life, and for domestic, agricultural, industrial, recreational and other legitimate beneficial uses; to provide *that no waste be discharged into any waters of the state without first being given the degree of treatment necessary to protect the legitimate beneficial uses*

of such waters; to provide for the prevention, abatement and control of new or existing water pollution; to place first in priority those control measures directed toward elimination of pollution which creates hazards to the public health; to insure due consideration of financial problems imposed on water polluters through pursuit of these objectives; and to cooperate with other agencies of the state, agencies of other states and the federal government in carrying out these objectives.” (Emphasis added.)

Even though the definitions as set forth in *Utah Code Annotated*, 1953, Title 73-14-2, include the phrase “drainage systems” in defining waters of the state, the import of the section clearly shows the intent of the Legislature to deal with the discharge of waste into public waters as such. This intention is clearly shown by the exception that appears under subsection (f) of the above title, which reads as follows: “. . . except that bodies of water confined to and retained *within the limits of private property*, and which do not develop into or constitute a nuisance, or a public health hazard, or a menace to fish or wildlife, shall not be considered to be ‘waters of the state’ under this definition.” (Emphasis added.)

The conclusion that the Legislature intended to deal only with a classification of waters not including a private water system is substantiated by Title 73-14-4, which sets forth the powers and duties of the Water Pollution Board. Under subsection (i) of the above title the Board is given the power “to *review* plans, specifications or other data relative to *disposal* systems or any part there.

of in connection with the issuance of *such permits as are required by this act.*" (Emphasis added.)

Then the Legislature in the following subsection (j) deals specifically with the power to issue or revoke "*permits for the discharge of wastes into the waters of this state, . . .*" (Emphasis added.) Certainly, it cannot seriously be contended that any contamination of the public water supply of Salt Lake City is a "discharge of wastes into the waters of the state."

The final confirmation of this intention by the Legislature is shown by Title 73-14-5, wherein under subsection (b) the Legislature deals with the activities which are unlawful *without securing a permit* from the Board, as follows:

"Pollution unlawful — Public nuisance — Activities requiring permits. — (a) It shall be unlawful for any person to cause pollution as defined in section 73-14-2 (a) *of any waters of the state* or to place or cause to be placed any wastes in a location where they will cause pollution of any waters of the state. Any such action is hereby declared to be a public nuisance.

"(b) It shall be unlawful for any person to carry on any of the following activities without first securing such permit from the board, as is required by it, for the *disposal of all wastes which are or may be discharged thereby into the waters of the state*: (1) the construction, installation, modification or operation of any treatment works or part thereof or any extension or addition thereto; (2) the increase in volume or strength of any wastes in excess of the permissive discharges spe-

cified under any existing permit; (3) the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the *operation of which would cause an increase in the discharge of wastes* into the waters of the state or would otherwise alter the physical, chemical or biological properties of any waters of the state in any manner not already lawfully authorized; (4) the construction or use of any new *outlet for the discharge of any wastes into the* waters of the state.

“The board under such conditions as it may prescribe, may require the submission of such plans, specification and other information as it deems to be relevant in connection with the issuance of such permits.” (Emphasis added.)

Hence, the only conceivable conclusion that may be reached is that while the Legislature gave the Water Pollution Board the power *to review* plans and specifications concerning disposal systems, (Title 73-14-4 (i)) which admittedly by definition includes sewer systems (Title 73-14-2 (e)) the fact is that the power to review the plans for a sewer system would not by express language result in the necessity of a permit or be an unlawful act unless the utilization of the sewer system results in a discharge of waste into the waters of the state. As indicated in the foregoing, no stretch of the imagination could lead to this charge under the particular facts involved herein.

Accordingly, the activities of Salt Lake City would not constitute and are not directed toward disposal of waste to be discharged in the public waters of the state

(Title 73-14-5 (b)); not a treatment works under subsection 1 of the above title; not an increase in volume or strength of any waste in violation of subsection 2 of the above title; not a construction or operation which would cause an increase in the discharge of wastes into the waters of the state, under subsection 3 of the above title; and certainly not the construction of any new outlet for the discharge of any waste into the waters of the state. Where then can the activities of Salt Lake City be unlawful under an express construction of the Water Pollution Act? The Board has adopted regulations which totally disregard their power to review plans under Title 73-14-4 (i) and has interpreted this power of review to include a charge of unlawful activity without the limitations specifically set forth in Title 73-14-5 (b). It is the validity of the regulations adopted by the Water Pollution Board which are in issue which we contend totally exceed the power granted by the Legislature.

The cases cited by plaintiff on page 5 of appellant's brief exclusively deal with situations where the municipality is in fact discharging sewage into a public river or stream and the Water Pollution Board of the particular state is attempting to control this act.

In the case of *State v. City of Juneau*, 238 Wis. 564, 300 N.W. 187, the State Board of Health and the State Committee on water pollution found that the discharge of inadequately treated sewage into a drainage ditch caused a nuisance and created conditions constituting a menace to wildlife and resulting in damage to property of riparian owners along the stream.

Based upon the findings the Board entered an order requiring the construction of a *sewage treatment plant*.

The Court held the action of the Water Pollution Board lawful and indicated that Article XI, Sec. 2 of the Wisconsin Constitution did not apply. This section reads as follows:

“No municipal corporation shall take private property for public use, against the consent of the owner, without the necessity thereof being first established by the verdict of a jury.” 1 Wis. Statutes, 1955.

The only other constitutional provision that could have had any bearing on the case was Article XI, Sec. 3, as follows:

“Cities and villages organized pursuant to state law are hereby empowered, to determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village.” 1 Wisconsin Statutes, 1955.

The obvious distinctions between the Wisconsin Constitution and Article VI, Sec. 29 of the Utah Constitution, hereinafter set forth, demonstrate the inadequacy of this case as authority for plaintiff's position.

The major distinguishing factor is found in the opinion, and, indeed, in the findings and order of the Board, which deal exclusively with matters that result in the discharge of waste into public waters. No such factor exists in the present case.

The case of *City of Superior v. Committee of Water Pollution*, 263 Wis. 23, 56 N.W. 2d 501, involved an action for declaratory judgment brought by the City of Superior. The case simply holds that the procedure established by statute for judicial review was not followed by the city, and "that a review in the manner attempted in this action may not be had through the medium of a declaratory judgment action." The case does not stand as authority for the proposition maintained by plaintiff.

The case of *City of Huntington v. State Water Commission*, 137 W.V. 786, 73 S.E. 2d 833, involved a petition for review of an order of the State Water Commission requiring the city to cease and desist from polluting the Guyandotte River and Ohio River and requiring the city to construct a sewage treatment plant.

The West Virginia court reasoned in upholding the action of the Board as follows:

"The pollution of the waters of the Guyandotte River and the Ohio River, which the Commission has found is caused by the sewage from the City of Huntington, relates to and affects the health of the people of this state and is not confined or restricted to the health of the *inhabitants of that municipality*. In other words, the condition which here exists is *state-wide* and not *local*." (Emphasis added.)

The court stated that the due process clause, Article III, Sec. 10, of the State Constitution, 2 West Virginia Code of 1955, did not apply. Again the West Virginia Constitution contains no provision comparable to Article

VI, Sec. 29, of the Utah Constitution. The closest analogy is Article VI, Sec. 39 (a), 2 West Virginia Code of 1955, which simply empowers a municipal corporation "to pass all laws and ordinances relating to its municipal affairs."

Surely, the West Virginia case cannot stand as authority for the power assumed by the Water Pollution Board in the present situation involved in Salt Lake City.

The case of *City of Huntington v. State Water Commission*, 135 W.V. 568, 64 S.E. 2d 225, constituted a first review of the situation briefed in the immediately preceding paragraphs. Hence, the same distinctions set forth above apply with equal weight under this authority. The only problem before the court was the scope of judicial review allowed by the statute, and whether the statutory provision for a review was unconstitutional, thereby invalidating the entire act. Actually, the case does not pass on any of the provisions maintained by plaintiff and is not in point, except that the case does hold, which again will be of importance in subsequent sections of this brief, that "we should, if we can, interpret the statute in such a way as to render it constitutional."

The following authority cited by plaintiff, *State Water Commission v. City of Norwich*, 141 Conn. 442, 107 Atl. 2d 270, involved a situation where the defendant city had been ordered to construct a sewage treatment plant to eliminate alleged pollution of the Yantic, Shetucket and Thames Rivers. The case deals only with procedural problems and does not in any way meet the issues presented to this court. In addition, the Connecticut case

involves important factors not found in present litigation: The problem concerned construction of a sewage treatment plant for sewage that was being deposited in public waters.

The case now before the court involves the questions of sewer lines and local sanitary problems, certainly not a problem the Legislature intended to meet in the Water Pollution Act. This is truly a local problem and not a matter of state wide concern, as the case of *City of Huntington v. State Water Commission*, supra, makes clear.

In construing the Water Pollution Act, specific statutes grant to the city exclusive control over its property and must be considered in establishing the legislative intent. An unbroken chain of legislation, leading from a constitutional provision which prohibits the Legislature from delegating to the Commission control over property of a municipality, conclusively shows a legislative history and intent to leave control of city property in the hands of elective representatives.

The Constitutional provision reads as follows:

“The legislature shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, to levy taxes, to select a capitol site, or to perform any municipal functions.” Article VI, Sec. 29, Constitution of Utah.

Utah Code Annotated, 1953, Title 10-8-1, reads as follows:

“Control of finances and property. — The boards of commissioners and city councils of cities *shall* have the power to control the finances and property of the corporation.” (Emphasis added.)

It is important to note that the initial section under the general heading of Power and Duties of Cities contains the mandatory word “shall.” How may a city fulfill this mandate if the control over its property is placed in the hands of the Water Pollution Board?

Utah Code Annotated, 1953, Title 10-8-2, reads in part as follows:

“They may . . . purchase, receive, hold, sell, lease, convey and dispose of *property*, real and personal, for the benefit of the city, both within and without its corporate boundaries, *improve* and *protect* such property, and may do all other things in relation thereto as natural persons; provided, that it shall be deemed a corporate purpose to appropriate money for any purpose which *in the judgment of the board of commissioners or city council will provide for the safety, preserve the health, promote the prosperity and improve the morals, peace, order, comfort and convenience of the inhabitants of the city.*” (Emphasis added.)

Again, dealing expressly with the question of jurisdiction, *Utah Code Annotated*, 1953, Title 10-8-15, reads in part as follows:

“They may construct or authorize the construction of *waterworks* within or without the city limits, *and for the purpose of maintaining and protecting the same from injury and the water from pollution their jurisdiction shall extend over the territory occupied by such works.* . . .” (Emphasis added.)

Then concerning specifically the subject of sewers, *Utah Code Annotated*, 1953, Title 10-8-38, provides in part as follows:

“*Board of commissioners, city councils and boards of trustees of cities and towns may construct, reconstruct, maintain and operate, sewer systems, sewage treatment plants, culverts, drains, sewers, catch basins, manholes, cesspools and all systems, equipment and facilities necessary to the proper drainage, sewage and sanitary sewage disposal requirements of the city or town and regulate the construction and use thereof.*” (Emphasis added.)

And finally, concerning the construction and financing of a sewer, *Utah Code Annotated*, 1953, Title 10-7-7, allows the city to incur indebtedness only when the proposition is submitted to the voters and only when the sewer “is owned and controlled by the municipality.” See also *Constitution of Utah*, Article XIV, Sec. 4, to the same effect.

And so the important question: In a construction of the Utah Water Pollution Act, does the conclusion follow that the Legislature intended to abrogate the powers and duties of cities firmly established by constitutional and legislative history and court decisions, and by such a sweeping enactment create a law which in fact is unconstitutional, as will be subsequently shown.

The Legislature clearly intended to establish a commission of limited powers over general pollution of public waters. The Board’s attempted appropriation of

additional power, even with the sincere desire to force their questionable standards upon city property, cannot be allowed.

Moreover, a municipality could eventually become the pawn of various state agencies competing for power. If the regulations of the Water Pollution Board are interpreted as being within the power conferred upon it by the Legislature, and the City thereupon removes its flush tanks, perhaps the Street Department and Health Department would step into the picture and contend that without flush tanks public health is endangered. Or suppose the Industrial Commission desires another type of breathing fan structure in manhole tanks bordering the laundry. What then is Salt Lake City to do in governing its own property? Such a conflict makes apparent the wisdom of the framers of our Constitution in formulating Article VI, Section 29, as above set forth. To this same Constitutional provision we now turn in showing the activity of the Water Pollution Board to be unconstitutional.

POINT 2.

ACTIONS, FINDINGS, CONCLUSION, AND ORDERS OF THE STATE WATER POLLUTION BOARD INTERFERE WITH MUNICIPAL FUNCTIONS AND PROPERTY OF SALT LAKE CITY IN VIOLATION OF ARTICLE VI, SECTION 29, OF THE CONSTITUTION OF UTAH.

Article VI, Section 29, of the *Constitution of Utah* provides as follows:

“The legislature shall not delegate to any special commission, private corporation or asso-

ciation, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, to levy taxes, to select a capitol site, or to perform any municipal functions.”

While pollution of the city water system may be a proper subject for legislative action, in this situation we do not have an enactment by the Legislature, but rather a delegation of power to a commission. We are not dealing with the discharge of waste into public waters, but rather with the culinary water supply of Salt Lake City. This delegation falls squarely within the constitutional prohibition.

In this case, the issue is not necessarily the constitutionality of the act itself. The court is called upon merely to determine its scope in the light of the Constitutional provision. The act must be construed so as to deprive the Water Pollution Board of the right to control the property of Salt Lake City. This contention is substantiated by the foregoing arguments in this brief. If the statute is not so construed then to that extent it is invalid, since it is in violation of the foregoing provision of the State Constitution. The most instructive and controlling case involving this question of delegation to a commission is *Logan City v. Public Utilities Commission*, 72 Utah 536, 271 P. 961.

The Public Utilities Commission attempted to fix the rates charged by Logan City in furnishing electricity to residents of municipalities from electric power plants owned and operated by the city. The plaintiff city chal-

lenged the power and jurisdiction of the commission to interfere with its corporate affairs. The contentions of Logan City, as set out below, are identical in substance to the position held by Salt Lake City in the present case :

“That a municipality owning and operating its own plant, and furnishing electrical energy for its own use and for the use of inhabitants of the city, is not a public utility within the meaning of the Public Utilities Act, . . .”

The Supreme Court upheld this contention even in the face of a definition in the statute that “municipal corporations” were included. We maintain the same reasoning applies here. The court held as follows :

“. . . a municipality, owning and operating its own utility plant for its own use and for the use of its inhabitants, was not intended to be a public utility within the meaning of the Utilities Act, *giving the commission supervision, direction and control over such municipal corporate affairs and functions.* The act does not eo nomine declare, as do some acts, that a municipality owning and operating its own utility is a ‘public utility’ within the meaning of the Utilities Act. *It is only by considering definitions and making deductions from them that such a conclusion is reached,* and, too, one which as has been seen, is inapplicable to other provisions of the Utilities Act, inconsistent with subsequent acts of the Legislature, and, as presently will be noted, repugnant to section 29, art. 6, of our Constitution. *And on familiar rules of construction, if two meanings or constructions may fairly be given an act, one rendering it in harmony, and the other in conflict with the Constitution, the former should be adopted.*” (Emphasis added.)

We vigorously endorse the foregoing language, particularly the final sentence thereof.

Logan City also contended "that if it be held such a municipality is within the act, . . . then the act in such respects is in conflict with Section 29, Article VI, of the Constitution of the State, and constitutes an unlawful interference with the private municipal corporate affairs and functions of the city." Justice Straup and Justice Hansen in the main opinion upheld this contention by language particularly applicable to the present case:

" . . . To take such power from taxpayers and citizens of a town or city and confer it elsewhere is, as we think, an unauthorized interference with the performance of mere corporate and municipal affairs forbidden by the Constitution.

"If a municipally owned plant is included within the Utilities Act as a public utility, then, by the provisions of the act, whenever ordered by the commission, a municipality, before entering into a contract for construction work, or for the purchase of any facilities, or with respect to other expenditures, is required to submit its proposed contract, purchase, or other expenditures, to the commission for its approval, and if disapproved by it, it may order other contracts, purchases, or expenditures in lieu thereof for all legitimate purposes and economical welfare of the utility, which, as it seems to us, constitutes a direct supervision over and interference with the municipal improvements and property and the performance of municipal functions and affairs forbidden by the Constitution. . . ."

* * * *

“We think it clear that the undoubted purpose of the Constitutional provision is to hold inviolate the right of local self-government of cities and towns with *respect to municipal improvements, money, property, effects*, the levying of taxes, and the performance of municipal functions. . . .” (Emphasis added.)

* * * *

“. . . To say that the power of the commission, notwithstanding the Constitution, to supervise, regulate, and control the business and fix rates and charges of a municipally owned and operated plant is the same as that of a privately owned public utility, is to disregard or not give effect to the Constitution, for a municipality is specifically and exclusively mentioned therein, and the Constitution in such particular expressly and exclusively adopted for the benefit and protection of only municipalities.

“Analogous to this is the right and power of the commission to supervise, direct, and control the business of *waterworks*, water rights, and water sources of a municipality owned and controlled by it, and to fix rates and charges of such utilities. . . .” (Emphasis added.)

* * * *

“. . . It is hard to believe that by the Utilities Act it was intended that a municipality *owning and operating its own waterworks or system, before entering into a contract with respect to its construction or the enlargement of it, or in the purchase of facilities*, or incurring expenditures, is required to submit to the commission its proposed contract, purchase, or expenditure and, if disapproved by it, to order and direct a contract or expenditure in lieu thereof. *And still more*

difficult is it to understand that, if such a power by the Utilities Act is so delegated to the commission, why the act in such particular is not in direct conflict with the Constitution. The same reason and observation, as we think, equally apply to an electrical plant owned and operated by a municipality for its own use and for the use of its inhabitants.” (Emphasis added.)

Both Justice Gideon and District Judge Woolley in a concurring opinion recognized that the Constitutional prohibition is a part of “familiar law,” the purpose of which was to “guarantee to the municipalities local self-government, and to deny to the Legislature any power to delegate to any body other than the local government the right of *supervision over or interference with the property of the various municipalities within the state.*” (Emphasis added.)

The Supreme Court therefore has expressly covered the problems of construction, control, and operation of a water works system of the city which is now before the court. The facts concern only virtually impossible pollution of a water system which property is protected from interference by an express constitutional provision as interpreted by the *Logan City case*. In the face of this precise authority, and by torturing the legislative intent, plaintiff contends the lower court erred.

The *Logan City* case also expressly holds that the Constitutional provision applies to “general” and “special” commissions and also applies to “municipal improvements, money, *property, effects*, the levying of

taxes, and the performance of *municipal functions*.” (Emphasis added.)

The contentions of plaintiff in the Lower Court, which may be raised in a reply brief, that the Constitutional provision applies only to governmental and not the proprietary functions of the city, overlooks completely the language of the constitution and the holding of the *Logan City* case that municipal improvements and property, as well as municipal functions are included in the Constitutional prohibition. It cannot be seriously maintained that the sewage system in which Salt Lake City has invested millions of dollars, and has efficiently managed through experienced employees and expert consultants, is not an improvement, does not constitute property of the city, and is not a municipal function.

These cases cited by plaintiff in the Lower Court, we believe, should be briefed at this point in order to avoid any misunderstanding which may be created by a reply brief. In the case of *City v. Cook*, 84 Mont. 478, 276 P. 958, the State Fire Marshal brought a nuisance proceedings against a building located in Helena, Montana. The municipality had an ordinance similar to the state statute giving the State Fire Marshal the right to inspect and condemn buildings. The court distinguished between general functions and municipal functions and held that on the former concurrent jurisdiction exists. The court held that fire protection is a governmental function and therefore the Constitutional prohibition did not constitute a bar. Certainly, the *Cook* case is

easily distinguished from the present litigation involving a sewer system which unquestionably is a municipal improvement and without doubt constitutes municipal property. Additionally, the Supreme Court of Montana was not faced by a prior decision of such substantial force as the *Logan City* case decided by this Honorable Court.

In the case of *D&RG RR Co. v. The Public Utilities Commission of Utah*, 51 Utah 623, 172 P. 479, a writ of mandamus was sought by plaintiff to compel the Public Service Commission to grant a permit to construct railroad tracks in Salt Lake City without first obtaining a permit from the City Commission. The Supreme Court held that the Public Service Commission had the exclusive power to determine this point and the writ was issued. Certainly, this case does not constitute a delegation to a special commission to control, functions or property of the municipality as attempted by plaintiff in the present case.

In the case of *Pirley v. Sanders*, 168 Cal. 152, 141 P. 815, a statute created a sanitary sewer district and vested it with the powers of taxation for construction and maintenance of a sanitary system "co-extensive with the territory to be controlled." The sole issue was whether property in an incorporated city embraced in the territory of the district so formed was subject to taxation. The case affirmed the power of the Sewer District to so tax except when the district is completely absorbed by a municipality.

In the present case we do in fact have a situation where the city has actually absorbed the entire problem covering its municipal improvements. Moreover, the creation of a sanitary district with powers of taxation for construction and maintenance of a sewer is in no way analogous to a creation of a Water Pollution Board whose sole purpose is to prevent pollution by discharge of waste into the public "waters of the state," as that phrase is generally known, and not to control the property previously acquired by a municipality. The Legislature of the State of Utah did not intend to create an agency of such scope and magnitude which would have the power to determine the details of a waterworks system in every city throughout the state.

It is also important to note that Art. XI, Sec. 13, of the *Constitution of the State of California*, adopted in the year 1879, originally was virtually identical to the Utah provision which was adopted in the year 1896. Utah apparently accepted the California provision as it was originally framed. Subsequently, on November 3, 1914, California amended the said Constitutional provision by adding the following exception:

" . . . except that the Legislature shall have power to provide for the supervision, regulation and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any law of this State."

The foregoing provision may be found in 2 *California Constitution*, Mason, Article XI, Sec. 13. Under

Note 2 of the foregoing citation at page 308 thereof, appears the following language:

“The Legislature, in all matters touching regulation and conduct of affairs of irrigation districts, reclamation districts, or drainage districts, has been given an enlarged discretion by amendment of 1914 to Art. XI, Sec. 13, and very clear reasons must appear for whatever objections are urged against the particular provisions of a statute enacted subsequent to adoption of said amendment before the courts would be satisfied in declaring them void. *Wores v. Imperial Irrigation Dist.* (1924), 193 C 609, 227 P. 181; *Hershey v. Cole*, (1933) 130 CA 683, 20 P2d 972; *Los Angeles v. Los Angeles C.F.C. Dist.* (1938), 11 C2d 395, 80 P2d 479.”

Utah retains the full import of the Constitutional provision as originally adopted which must be enforced by the courts consistent with the *Logan City* case. Surely, the Board and the Legislature must abide by a Constitutional provision which the people of Utah have not seen fit to amend in order to allow encroachment upon local self-government. At 11 *Cal. Juris.* 2d, Sec. 131, the following language appears:

“As one of several devices to insure the independence of cities, counties, and public corporations, the constitution provides that the legislature shall not delegate to any special commission, private corporation, company, association, or individual any power to make, control, appropriate, supervise, or in any way interfere with any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments or

perform any municipal functions whatever. An exception added in 1914 declares that the legislature shall have power to provide for the supervision, regulation, and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts, or drainage districts, organized or existing under any law of this state.

“The primary purpose of Article XI, Sec. 13 was to prevent the state legislature from interfering with local governments by the appointment of its own special commissions for the control of purely local matters.”

Plaintiff in the Lower Court also relied upon the case of *Salt Lake County v. Salt Lake City*, 42 Utah 548, 134 P. 560, in which plaintiff brought an action to recover the costs of caring for children of Salt Lake City who were sent to a detention home administered by the county pursuant to statutory authority. In affirming judgment for plaintiff and holding that the Constitutional provision against delegation to a special commission had not been violated, the court at page 565 of the Pacific Reporter reiterated the controlling factor, as follows:

“Although it has already been intimated in this opinion, yet, in order to avoid all misconception, we desire to repeat in terms that our conclusions are based upon the express holding that the interference here involved, under the law in question, *is not an interference with any corporate rights or function of city government.*” (Emphasis added.)

The Supreme Court therefore has deemed it of fundamental importance to distinguish between situa-

tions where there is in fact an interference with corporate rights, property and functions of a municipality.

Another case cited by plaintiff in the court below is *State v. Holmes*, 100 Mont. 256, 47 P. 2d 624, in which the City of Missoula contended that a statute requiring payment for insurance on its buildings, which insurance was obtained by the State Insurance Commissioner, was an unconstitutional delegation to a special commission, interfering with the private rights of a city. The court upheld this contention and entered judgment enjoining the Insurance Commissioner from enforcing the statute involved and announced at page 629 of the Pacific Reporter:

“The care and protection of the property of a municipality is a purely municipal function. *State ex rel. Brooks v. Cook*, supra: 43 C.J. 183. In the case of *Hersey v. Nielson*, supra, this court, speaking with reference to the power of the Legislature over municipal corporation, said: ‘Because of its autonomous character—its enjoyment of a large measure of organic independence — the municipal corporation is relieved to a considerable extent from officious, meddlesome legislation which seeks to interfere with its private or proprietary functions. The theory of local self government for municipal corporations is firmly established in this state.’”

Having disposed of the cases cited by plaintiff in Lower Court, we now turn to a further analysis of Utah cases which are more directly in point and cover the particular issues involved herein. These cases are briefed to show the scope of the enforcement under the

case of *Logan City v. Public Utilities Commission*, supra, and the firm ground established by this court in enforcing the Constitutional provision against delegation to a commission.

A recent case of *County Water System v. Salt Lake City*, 3 Utah 2d 46, 278 P. 2d 285, involved a similar inroad into the basic principal of government by elected representatives. The action sought a declaratory judgment that Salt Lake City in selling and distributing water beyond its city limits was subject to jurisdiction of and regulation by the Public Service Commission. After judgment for Salt Lake City, on appeal the case was affirmed. The unanimous opinion quotes extensively from the *Logan City* case, construes the statute there involved so as to make it constitutional, and cites again the provisions of Article VI, Sec. 29, of our State Constitution.

The opinion recognizes the fundamental importance of the Constitutional provision as follows:

“Nevertheless, whatever the considerations as to the wisdom of the city’s being subject to regulation by the Public Service Commission may be, it is, perhaps fortunately, not our responsibility to here evaluate these factors and determine what is more desirable as a matter of policy. It is rather our duty to interpret what was intended by the framers of the constitution and the legislative enactments thereunder.

“. . . The same arguments presented here to the effect that the city is subject to the jurisdiction of the Public Service Commission were presented in the case of *Logan City v. Public Utili-*

ties Commission, *supra*. This court rejected them upon the reasoning that to allow the commission to exercise jurisdiction over municipal property and the management thereof would be an unconstitutional delegation of power to a special commission forbidden by Article VI, Sec. 29, hereinabove discussed. *The law as set out in that case has long been accepted and is firmly established as the law in this jurisdiction. We see no reason why the Constitutional interdiction does not apply with equal force to the instant situation.*" (Emphasis added.)

In holding that the Constitutional provision prohibited the invasion into self government the court emphatically reiterated established law, which, as stated by the court must be applied with like force to the facts of the case now before the court.

Other Utah cases have consistently added strength to the bulwark against interference with the inviolate right of government by the elected representatives of the city. See *Lehi v. Barnes*, 74 Utah 321, 279 P. 878; *Utah Power & Light Co. v. Public Service Commission*, (Utah, 1952) 249 P. 2d 951. The cases cited below while not directly in point, illustrate further application of the Constitutional prohibition: *City of Inglewood v. City of Denver*, 123 Colo. 290, 229 P. 2d 667; *Pasadena v. R.R. Com.*, 183 Cal. 526, 192 P. 25, repudiates the argument that a municipal corporation in supplying water, light or power to its inhabitants is not acting in a governmental capacity as sovereign and so must be subject to the Public Utility Act.

In each instance when an inroad into Article VI, Sec. 29 of the Constitution of Utah has been attempted, the Utah Court has taken a firm stand, indicating an appreciation of the many hidden complications which may arise if a special commission is able to control property and affairs of a municipality. Salt Lake City over the years has developed a wealth of experience in managing its water supply and sewage system. The policies are adopted and programs are instigated only after careful investigation and consultation with nationally recognized experts. We are served by trained personnel directly acquainted with the local conditions and methods best calculated to serve the local problems of the inhabitants. Conversely, the Water Pollution Board has adopted general standards which may be suited to other areas but will undoubtedly create unnecessary cost, expense and dangers if followed in Salt Lake City. In the hearing before the Water Pollution Board it was painfully obvious that its expert witnesses and members of the Board had no first hand knowledge of the local problems which allegedly are subject to the general standards adopted by the Board. Indeed, the Board did not even understand the facts of the alleged problems they are attempting to correct. (Hearing Tr. 20.) It was recognized by Lynn Thatcher that the problems of managing the sewer system should be left to the people directly involved. (Hearing Tr. 28.) This concept we heartily endorse.

Accompanying an invasion into the inviolate right of self government and the creation of a myriad of unnecessary expenses and dangers through the control of local

conditions by general standards, are the resulting legal problems of responsibility and duty.

This is illustrated by the case of *Kiesel & Co., v. Ogden City*, 8 Utah 237, 30 P. 758, involving a claim for damages arising from obstruction of a city sewer. The court recognized that "the City of Ogden possesses the power to construct and keep in repair, culverts, drains, sewers, catch basins, manholes and cesspools, and to regulate the use thereof. 1 Comp. Laws, Utah 1888, Sec. 1755." The court held that "if the sewer when built is found to be defective or inadequate and injury results from a neglect to remedy such defects, or inadequacy when discovered, an action will lie."

In affirming judgment for the plaintiff the court adopted the following quotation from 2 *Dillon Municipal Corp.*, 4th Edition, Sec. 1049, as follows:

"A municipal corporation is liable for negligence in the ministerial duty to keep its sewers (*which it alone has the power to control and keep in order*), in repair as it respects persons whose estates are connected therewith by private drains, in consequence of which such persons sustain injuries which would have been avoided had the sewers been kept in proper condition. If the sewer is negligently permitted to become obstructed or filled up, so that it causes the water to back-flow into cellars connected with it, there is a liability therefor on the part of the municipal corporation having control of it. . . ." (Emphasis added.)

The parenthetical addition by the court magnifies the problem involved in the present case. According to the experts of Salt Lake City, adoption of the general

standards promulgated by the Water Pollution Board will lead to an inadequate and dangerous condition, — dangers which the city should correct under the *Kiesel* case. See also 61 *A.L.R.* 452. If, however, the Board has the power to regulate, then may Salt Lake City rely on the Board's regulations as establishing a standard of care, thereby depriving an injured person of a remedy? Or is Salt Lake City liable for conditions over which it has no control? Or, perhaps, the Water Pollution Board will shed its cloak of immunity?

Surely, the Constitutional provision must be given continued and perpetual importance. The framers of the Constitution wisely protected basic rights which have been preserved by our courts. A misapprehension on the part of the Water Pollution Board as to the scope of its authority must be corrected before further encroachments. Only Salt Lake City and its citizens are affected, and the citizens of the city wish to rely on their chosen representatives; our citizens have no desire for mis-directed authority and control from an outside body.

POINT 3.

THE DELEGATION OF POWER BY THE LEGISLATURE TO THE WATER POLLUTION BOARD IS UNCONSTITUTIONAL BEING WITHOUT PROPER STANDARDS AND PROVIDES THE BOARD WITH ARBITRARY AND UNREASONABLE DISCRETION.

The State Legislative body cannot abdicate its responsibility and turn over to a board the power to pass regulations having the force of law which would be bind-

ing upon the Board of Commissioners and citizens of Salt Lake City and which would have the effect of extirpating local control of municipal property and affairs contrary to Article VI, Sec. 29, of the *Constitution of Utah*.

Under the Constitutional provision, the power in question is purely legislative. *Logan City v. Public Utilities Commission*, supra; *Spears Free Clinic & Hospital for Poor Children, Inc. v. State Board of Health*, 122 Colo. 147, 220 P. 2d 872; *City of Clearwater v. Caldwell*, (Fla., 1954), 75 So. 2d 765; *City of Ecorse v. Peoples Community Hospital Authority*, 336 Mich. 490, 58 N.W. 2d 159. If the statute in question is construed as granting the power to the Water Pollution Board, then the statute is void and unconstitutional. 16 *C.J.S. Constitutional Law*, Sec. 133, page 157. A state does not flourish because of its officials; it flourishes because its officials are elected.

Under Point 1 of this brief, we conclusively showed that the power sought by the Water Pollution Board would have the effect of repealing a chain of statutes granting power over local property and affairs to the city. The concise rule concerning attempted delegation under these facts is set forth in 16 *C.J.S. Constitutional Law*, Sec. 133 at page 555, as follows:

“Power, the exercise of which would affect the repeal of existing provisions of general law, may *not be delegated*, . . .” (Emphasis added.)

The Water Pollution Act provides the Board with uncontrolled and unreasonable discretion. The Board is given the power to determine "conditions" under which it will act, *Utah Code Annotated*, 1953, Title 73-14-4 (f). The power is included "to adopt, modify, repeal, promulgate and enforce rules and regulations implementing or effectuating the powers and duties of the Board," thereby giving the Board the power to increase and extend its own powers, *Utah Code Annotated*, 1953, Title 73-14-4 (g). As the power is interpreted by the Board, it constitutes a lofty engineer whose every whim must be observed and followed or it will grant no permit to the city to improve or maintain the city's own property. This is true notwithstanding the fact that the City may employ engineers of world renown far superior to the inexperienced so amply demonstrated by the so-called experts on and employed by the Board.

In discussing the arguments of valid delegation it is stated in 2 *Cal. Juris.* 2d, Sec. 49, as follows:

"A second requisite, and one of major concern in the law is that the legislature definitely limit the legislative power—that is, the discretion—which it is transferring to a subordinate agency, by clearly defining the subject of the enabling act and the objects which the legislature proposes to be attained thereunder, and by prescribing a policy, including determinate criteria standards, and guides, to control the administrative agency, so that its action cannot be arbitrary or capricious, . . ."

Another reason exists for holding the statute unconstitutional should it be interpreted as allowing the power annexed by the Board. The statute is totally silent on the standards which the Board is to follow in controlling the property of the municipality. Even the general policy announced by the statute to prevent pollution of waters of the state would not apply since no such pollution could occur under these facts. The rule is stated in 16 *C.J.S. Constitutional Law*, Sec. 133, at page 561, as follows:

“ . . . a law which vests any person with discretion which is purely arbitrary and which gives him power to determine what the law shall be in a particular case is invalid.”

The Board created by the Legislature without any standards of guidance has undertaken to itself the duties and responsibilities of designing, planning and inspecting all municipal waterworks, sewage works, drainage systems, or any activity that involves the safety of men at work. It is no small matter. The costs may run into many millions of dollars in initial cost in sanitary facilities contemplated and planned by Salt Lake City, followed by a tremendous difference in the cost of operation throughout the ages ahead. (Hearing Tr. 76.)

In fact, the power sought by the Water Pollution Board is a complete annexation of the legislative and judicial function and is therefore void. *Zehender & Factor v. Murphy*, 142 Ohio St. 506, 53 N.E. 2d 864. The

Board sat as legislator and judicial officer and promptly found the city guilty of violating its abortive regulations.

A correlary of the foregoing propositions is since the Legislature did not establish sufficient standards for control of municipal property by the Board and the statute is totally inadequate in the matter of establishing guide posts for the administrative agencies, this very inadequacy is compelling evidence that no delegation to control city property was intended by the Legislature. The rule is universal that, "delegation of the Legislator's authority will not be implied unless the intention is reasonably clear." 16 *C.J.S. Constitutional Law*, Sec. 133, at page 562. The fact is, as shown by other portions of this brief, that the statute is subject only to the construction that no delegation of the specific powers sought to be enforced under the regulations adopted by the Board was intended. If the statute is subject to different interpretations this court will construe the statute in such a way as to make it constitutional. *Logan City v. Public Utilities Commission*, *supra*.

CONCLUSION

The conclusion is inevitable that the Water Pollution Board exceeded its jurisdiction and abused its discretion. If the Board is allowed to enforce its abortive regulations which purport to control the local affairs and property of Salt Lake City, it would vest total and far reaching powers in the hands of a few and encroach

upon inviolate constitutional rights and duties. It would extirpate the requirement that elected representatives must report to their constituents and would eliminate this basic safeguard against unreasonable exercise of power. It would usurp the prerogatives of the legislative bodies, both state and city, and render self government a vacant privilege. Neither the statute, the Constitution, nor the bulwark of judicial authority permit such a determination. While we do not impune the motives of the Board, appointed officials have acted under a misconception of their duties, and we, therefore, believe that the judgment of the Lower Court must be affirmed.

Respectfully submitted,

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