

1972

I. J. Wagner and Ilene J. Wagner, Husband and Wife,
and Wallace A. Wright, Jr., and Jeralyn T. Wright,
Husband and Wife v. Salt Lake City, A Municipal
Corporation : Brief of Appellants

Utah Supreme Court

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in the Supreme Court State of Utah

WAGNER and ILENE J.

WAGNER, husband and wife,

vs. ELLACE A. WRIGHT, JR.

and MALYN T. WRIGHT,

husband and wife,

Plaintiffs-Appellants

vs.

LAKE CITY, a municipality

Defendant - Respondent

Defendant - Respondent

BRIEF OF

Appellants

Defendants

By the Court

The Honorable

BOSTON CREEK

Country Club Building

South Temple

Salt Lake City, Utah 84111

Attorney for Respondent

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IN THE SUPREME COURT OF THE STATE
OF UTAH

I. J. WAGNER and ILENE J.
WAGNER, husband and wife,
and WALLACE A. WRIGHT, JR.,
and JERALYN T. WRIGHT,
husband and wife,

Plaintiffs - Appellants,

CASE NO. 12618

vs.

SALT LAKE CITY, a municipal
corporation,

Defendant - Respondent.

BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

This is an action by the Plaintiffs and Appellants for a declaratory judgment that a State statute, the Utah Underground Conversion of Utilities Law, and an ordinance of Salt Lake City enacted pursuant to such statute, are each invalid and unconstitutional and for an injunction against the Defendant from undertaking any further proceedings in connection with Underground Conversion of Utilities District Number 8-F-1A.

DISPOSITION IN THE LOWER COURT

Both parties filed motions for summary judgment based upon the pleadings on file and a stipulation of facts entered into between the parties. After argu-

ment, the District Court determined that there was no dispute as to any material facts, that the statute and ordinance were constitutional and that the injunction requested should be denied.

RELIEF SOUGHT ON APPEAL

Plaintiffs-Appellants seek reversal of the District Court judgment and a holding that the statute and ordinance involved are unconstitutional and accordingly that the injunction prayed for should be granted.

STATEMENT OF FACTS

The 1969 regular session of the Utah Legislature enacted in Chapter 157, Laws of Utah, 1969, a comprehensive statute entitled the "Utah Underground Conversion of Utilities Law". This has been compiled in Utah Code Annotated 1953, as Sections 54-8-1 through 54-8-30, both inclusive. (This statute is sometimes referred to in the pleadings and in this Brief as the "State Statute"). The Board of Commissioners of Salt Lake City, by ordinance passed October 27, 1970 which became effective on its publication on November 18, 1970, adopted an ordinance which substantially re-enacts for Salt Lake City the provisions of the State Statute. Such ordinance is found as Chapter 7 of Title 39 of the Revised Ordinances of Salt Lake City, Utah 1953. (This ordinance is sometimes referred to in the pleadings and in this Brief as the "Ordinance").

Commencing in September of 1970, a series of actions were taken and procedures followed by Salt

Lake City, Utah Power and Light Company (the "Power Company") and Mountain Bell Telephone Company (the "Telephone Company") leading to the establishment on February 3, 1971, of Underground Conversion of Utilities District Number 8-F-1A (the "Utilities District") comprising all of Lots 14 to 19, inclusive, of Plat "C", North Hills Subdivision. Included in the Utilities District is the property owned by Plaintiffs I.J. Wagner and Ilene J. Wagner. Immediately adjacent to the Utilities District but not included within its boundaries is the property owned by Plaintiffs Wallace A. Wright, Jr. and Jeralyn T. Wright. Both sets of Plaintiffs are residents of Salt Lake City and property taxpayers.

The Utilities District was established for the purpose of removing overhead electric and telephone wires and other facilities from the property within the District and replacing the same with underground electric and telephone communication facilities to serve each of the six lots within the Utilities District. The Power Company and the Telephone Company provide electric and telephone service respectively, to all properties within the Utilities District.

In accordance with the State Statute (54-8-6), the Board of Commissioners of Salt Lake City received a petition signed by two-thirds of the owners of the real property and by the owners of not less than two-thirds in value of the real property within the proposed District, and adopted a Resolution that the proposed District would promote the public convenience, necessity and welfare. A study was provided

the unpaid balance of the assessments (54-8-22) but as yet no bonds have been issued.

Within the period prescribed by 54-8-23 of the State Statute, Plaintiffs filed this action seeking in their First Count on behalf of themselves and in their Second Count on behalf of themselves and all other residents and taxpayers of Salt Lake City as a class, to obtain a declaratory judgment pursuant to the Declaratory Judgments Act of Utah, determining that the State Statute and the Ordinance and each of them are invalid and unconstitutional and also seeking an injunction against Salt Lake City from undertaking any further proceedings in connection with the Utilities District.

From a summary judgment holding that the State Statute and Ordinance are constitutional, this appeal is prosecuted.

ARGUMENT

POINT I

THE STATE STATUTE AND ORDINANCE ARE UNCONSTITUTIONAL IN THAT THEY AUTHORIZE PUBLIC ACTION FOR A PRIVATE PURPOSE, LEND THE CREDIT OF A MUNICIPALITY FOR A PRIVATE PURPOSE AND DELEGATE MUNICIPAL FUNCTIONS TO PRIVATE CORPORATIONS.

Preliminary to our discussion of this point, an understanding of the framework of the State Statute and Ordinance is appropriate.

On the petition of two-thirds of the property owners within a given area of a county, city or town, the

governing body of such municipality may form a special improvement district for the purpose of converting overhead electric and telephone communication facilities to underground facilities. While it is clear that the governing body can act on a petition of the property owners (State Statute, §54-8-6; Ordinance §39-7-6), it is possible to construe the act to permit the governing body to act on its own initiative (see State Statute, §54-8-4 and Ordinance, §39-7-4). At any rate, when the initial action is taken the next step is to refer the matter to the public utility corporations involved for a study of the feasibility of the project and of the cost of the work to be done. Based upon this report and not on the report of any public official or employee, the city may then give notice of its intention to create the improvement district and hold a hearing at which real property owners within the district may attend. If the owners fail to attend and object, they waive any further objection to the creation of the district, the making of the improvements and the inclusion of their real property within the district (State Statute, §54-8-12; Ordinance, §39-7-13). After the hearing, and making such adjustments to the size of the district as may be appropriate, the governing body may proceed with the creation of the district by adoption of a resolution.

The next step is the preparation of an assessment list followed by the adoption of a resolution declaring the entire cost of the improvement "including the cost of construction *as determined from the cost and*

feasibility report [of the utilities]. . . ." The resolution also constitutes an approval of the assessment list subject to adjustment by a board of equalization and review. Notice of the proposed assessments are given to each of the real property owners within the district and a hearing is held where real property owners are heard "on the question of whether his property will be benefited by the proposed improvement to the amount of the proposed assessment against his property and whether the amount assessed against his property constitutes more than his proper proportional share of the total cost of the improvement." (State Statute, §54-8-16; Ordinance, §39-7-17). Assessments may be adjusted at the hearing and after all adjustments are made, the governing body then levies an assessment against the property within the district. The assessment is payable immediately or in installments over a period of time specified in the assessment resolution not exceeding twenty years. (State Statute, §54-8-19; Ordinance, §39-7-21).

At this point the governing body may issue bonds of the county, city or town involved, secured by a pledge of the assessments and payable over the period of time the assessments are payable (State Statute, §54-8-22; Ordinance, §39-7-24).

To this point with exceptions to be noted later, the legislation follows the pattern of special improvement district legislation for general county, city and town purposes such as paving of streets, building of sidewalks, curb and gutter, sewers and the like. Compare the State Statute with the general legislation

authorizing improvement districts in counties (Chapter 7 of Title 17, U.C.A. 1953) and cities and towns (Chapter 16 of Title 10, U.C.A. 1953). But an important deviation is made in that the actual work to be done within the district is done solely by the public utilities involved rather than through competitive bids let by the municipality and supervised by public officials. (Compare the State Statute, §54-8-25 and the Ordinance, 39-7-27 with §17-7-16 through 17-7-20, relating to counties, and §10-16-8 and §10-16-9 relating to cities and towns.) Furthermore, ownership of the facilities thus constructed is specifically made the property of the public utility corporations and not the property of the property owners or even of the municipality which has created the district, levied the tax and issued the bonds (State Statute, §54-8-25; Ordinance, §39-7-27). Furthermore, the costs of the work to be included in the cost and feasibility report and on which the assessments are based must be in such an amount that the utility corporations involved are guaranteed a recovery out of the assessment monies of the cost to utility corporation (less depreciation) for the overhead facilities which are being removed plus the cost of the removal itself, any additional cost of constructing the underground facilities over the investment in the removed facilities and the cost of obtaining new easements if deemed necessary (State Statute §54-8-24; Ordinance §39-7-26). In addition, the public utility corporation is authorized to impose an additional cost on the property owner for providing underground service from its normal easement across the land in-

volved to other parts of the property and this becomes a part of the assessment and constitutes a grant of easement to the utility corporation (for which the property owner receives no compensation) unless the property owner has made written objection to the imposition of such costs at the time of the initial hearing on the district (See State Statute §54-8-26; Ordinance §39-7-28). When the work is done, the public utility corporation presents its bill which the municipality is commanded to pay "within thirty days" (State Statute §54-8-27; Ordinance §39-7-29).

A. The State Statute and Ordinance Authorize Public Action and Taxation for a Private Purpose.

It is a fundamental principle of our law that public action cannot be taken and taxes imposed for private purposes.

For a statute or tax to be lawful, it must be enacted for a valid public purpose. See 51 Am. Jur., Taxation, §321, p. 372; 16 McQuillan, Municipal Corporations, 3rd Ed. Rev., §44.35, p. 116. The basis for this rule was perhaps most eloquently stated by Mr. Justice Miller in *Citizens Savings & Loan Assoc. v. City of Topeka*, 21 Wall. 655, 22 L. Ed. 455 (1874) where he discussed the constitutionality of a state statute authorizing a direct grant of public funds and the issuance of government bonds to provide funds to donate to a private corporation. After stating the rule that a tax which does not have a public purpose "was beyond the legislative power, and was an un-

authorized invasion of private right", he goes on to state:

"It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you chose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

"The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.

". . . To lay with one hand the power of the government on the property of the citizen,

and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

See also Utah Constitution, Article VI, Section 26.

These principles have been recognized by this Court. See for example, *Denver & Rio Grande Rwy. Co. v. Grand County*, 51 Utah 294, 170 P. 74, 3 A.L.R. 1224; *Wicks vs. Salt Lake City*, 60 Utah 265, 208 P. 538; *Pearson v. Salt Lake County*, 9 U.2d 388, 346 P.2d 155. Applying this principle, it has been held that a city cannot levy taxes and issue bonds for the construction and operation of a hotel (*Nash v. Town of Tarboro*, 227 N. Car. 283, 42 S.E. 2d. 209); a public parking garage could not be erected from tax money (*Cleveland v. Rutle*, 130 Ohio St. 465, 200 N.E. 507, 103 A.L.R. 853) and land could not be condemned for parking lots (*Barker v. Kansas City*, 146 Kan. 347, 70 P. 2d. 5).

We have found no cases precisely involving conversion of overhead utility lines to underground lines to the direct benefit of private utility corporations. Perhaps the closest case is *Fisher v. Astoria*, 126 Ore. 268, 269 Pac. 857, 60 A.L.R. 260, where the Oregon Supreme Court held it was a proper public purpose to levy assessments for ornamental lighting posts and underground wires to light streets in a business section of the city of Astoria. The case is distinguishable because it was involved with a lighting

system for streets enjoyed by the public and furthermore streets in a business area of the city. There was no provision mentioned that the underground facilities or the ornamental lighting poles would become the property of the private utility involved. The case seems to assume this would be public property because the opinion points out that the improvement did not become private in nature where only the electricity distributed was privately manufactured. The case of *Irish v. Hahn*, 208 Cal. 339, 281 Pac. 385, 66 A.L.R. 1382, involved a street lighting district in downtown Pasadena and is likewise distinguishable because only lighting of public streets was involved and that by a publicly owned electric distribution system.

In this case the State Statute can be used, and most commonly would be used, not for converting overhead street lighting to street lighting provided through underground wires and facilities, but primarily for electrical and telephone service of all types to residences and business establishments. This is the concern of the public. While the municipality may be and the utility corporations and is not the proper concern of the public ~~particular property owners involved~~ ~~the public~~ ~~while the municipality may be~~ interested in aesthetics and perhaps might encourage public utilities and property owners to install underground facilities rather than have overhead wires, this is not such an interest that should permit the use of the taxing power and the public credit for these purposes at least in the absence of consent by the owners involved.

The vice of the State Statute and Ordinance is its mandatory requirement that owners can be included in the district without their consent. The municipality can create an improvement district even if up to one-third of the property owners fail to sign the petition. Indeed, if we are correct that 54-8-4 authorizes the governing body to act on its own initiative without petition from the property owners, the district could be created and the tax imposed notwithstanding the number or kind of objections. At least it is apparent that the governing body can, after a petition from property owners, create the district and impose the tax notwithstanding the number of objections. Note that the signing of the petition does not foreclose the property owner from thereafter objecting nor should it because the initial petition precedes the cost and feasibility report and the public hearing where information is available on which the property owner can make an intelligent decision.

Contrast this result with the Municipal Improvement District Act where assessment districts for improvements to be publicly owned and to be installed under the supervision and control of public officers can be prevented if two-thirds of the property owners file objections. 10-16-7 (3) U.C.A. 1953. Under this statute, the municipality has no jurisdiction to proceed with the district if the necessary protests are filed. *Armstrong v. Ogden City*, 12 Utah 476, 43 Pac. 119; *aff'd* 168 U.S. 224, 18 S. Ct. 98, 42 L. Ed. 444.

But both the State Statute and the Ordinance permit a district to be created and a tax imposed not-

withstanding objections by a large number of the property owners affected - even though they do not agree that their property would be beautified or enhanced by the removal of the wires - even though they feel the cost is too high or that a tax lien on their property is an unwise encumbrance. See *Pearson v. Salt Lake County*, *supra* (concurring opinion). If the principal basis for justifying public action of this type is beautification of the environment, the property owners who may have a different aesthetic sensibility or who may wish to preserve their pocketbooks or property rights can find their wishes overridden by the governing body at the instance of the despotic majority of which Mr. Justice Miller speaks.

But the State Statute goes further and authorizes these severe results for the benefit of the public utility corporations involved. The Power Company and the Telephone Company in this case and similar utility corporations in other districts are guaranteed that they will not lose anything but indeed are guaranteed that they will gain full reimbursement for the corporations' investment in the overhead facilities, all costs of removal thereof, all costs of constructing underground facilities in excess of their original cost of the overhead facilities, costs of obtaining new easements and finally, title to all of the new facilities including a new easement for service lines extending from the underground distribution lines to the building or facility to be served with the electric or telephone service. Furthermore, the work is done en-

tirely as the utility corporations determine using their own contractor. The normal protection which the public expects of contracts let on competitive bids is not provided for and apparently there is no authorization and certainly no requirement that public officers (such as the City Engineer) supervise and approve the work that is done. The work when done becomes the property of the utilities and any title in the municipality is expressly denied. From the point of view of the citizens of the city within and without the district and particularly those owners who did not consent to the formation of the district, the public power of taxation is being used for the private benefit of the utility corporations involved and those owners within the district who have consented to the tax or to the formation of the district.

**B. The State Statute and Ordinance Authorizes
a Lending of Public Credit for Private Purposes
Contrary to the Utah Consitution.**

Article VI, § 31 of the Utah Constitution prohibits the legislature from authorizing either the state or any of its political subdivisions including counties, cities and towns from lending its credit "in aid of any railroad, telegraph or other private individual or corporate enterprise or undertaking." Because the state statute and ordinance authorize the issuance of bonds to pay the utility corporations the costs guaranteed to them and described above, we contend that this section of the Constitution is violated.

This Court has construed this Constitutional provision in several cases. In *Lehi City v. Meiling*.

87 Utah 237, 48 P. 2d 530, the section was held not violated by the Metropolitan Water District Act authorization to such districts to join with other corporations to carry out its functions. There was no lending of credit so long as the district limited its cooperation with other corporations to securing water for public purposes. Similarly, in *Barlow v. Clearfield City Corp.*, 1 Utah 2d. 419, 268 P. 2d. 682, and *Bair v. Layton City Corp.*, 6 Utah 2d. 138, 307 P. 2d. 895, municipal contracts for obtaining water and sewer services were upheld because of the public importance and public use of the water and sewer facilities thus obtained.

Somewhat closer to the present situation is *State Road Commission vs. Utah Power & Light Co.*, 10 Utah 2d 333, 353 P. 2d. 171. There reimbursement to utility corporations for the removal of utility facilities necessitated by highway construction was upheld. There, however, utilities were only being reimbursed for costs incurred as a result of needed public highways. Here the costs involved are to be reimbursed for a private benefit, that of the property owners and utilities involved. The public as such will not benefit from the underground facilities for they cannot be used as a highway is used. Only the property owner and the utility corporation will use the facilities once they are relocated underground.

In *Allen v. Tooele County*, 21 U. 2d. 383, 445 P. 2d. 994, this Court upheld the validity of bonds issued under the Utah Industrial Facilities Development Act. There as here, the proceeds of the bonds end up dir-

ectly or indirectly in the hands of private parties. But this Court held that the constitutional provision is not violated because the obligation to pay the bonds was only out of the rentals paid by the private company for the use of the facilities constructed. It was a limited obligation of the public agency issuing the bonds and did not involve its "credit" in the constitutional sense. Here, however, bonds are issuable by the city, county or town involved which are apparently not limited solely to payment from a special fund as was the situation in the Allen case. Section 54-8-22 of the State Statute and the corresponding provision of the Ordinance, Section 39-7-24, simply authorizes bonds to be issued to the extent of the unpaid balance of the assessments for the period of time over which the assessments are payable and secured by and payable from a pledge of the assessment money. The customary prohibitions on the collection of bonds issued from funds other than assessments is missing from the State Statute and Ordinance. See Point II of this brief for a more extended discussion of this omission.

A further distinction from the *Tooele County* case is the important fact that while the bonds remained outstanding title to the property involved remained in the public agency issuing the bonds, subject to the lease to the private corporation. The private corporation was required to pay rental for the use of the facilities developed with proceeds of the bonds. Here, the title to the facilities is expressly denied to the public agency involved. At no time does the county,

city or town own or have the right to own either the overhead facilities which are removed or the underground facilities which are constructed. See State Statute, § 54-8-25; Ordinance, § 39-7-27.

Finally, the effect of the statutory scheme is to lend public credit to the private utility. But, for the State Statute, a property owner desiring underground facilities across his property would contract with the utility for such service. While a public utility corporation must provide service to those who request it, we know of no provision which *requires* the utility to serve by underground facilities. Accordingly, the property owner would have to bargain with the utility for this type of special service. Unless the property owner paid cash to cover the cost of the underground facility, the utility corporation would use money obtained from issuance of securities, debt obligations or from rate revenues relying on the property owner to reimburse it for its costs over a period of time. The State Statute and Ordinance arrive at the same result: The property owner pays the assessments over a period of time, but the utility company, instead of using its own funds or funds obtained from issuance of securities or debt obligations, uses funds obtained from the issuance of debt obligations of the municipality. The proceeds of the bonds will be used by the city to pay the bills submitted by the utility companies. It is a plan to use public credit supported by public taxes for the purpose of financing conversion of privately owned overhead lines to privately owned underground facilities for

the benefit of the private utilities and private property owners. This is clearly a use of the public credit for private purposes.

C. The State Statute and Ordinance Constitute an Unlawful Delegation of Municipal Functions to Private Corporations.

Article VI, § 29 of the Utah Constitution provides 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.

This section has been construed in numerous cases by this Court, but always in cases involving "special commissions" which have been claimed to interfere with powers of local government granted to cities, towns and counties. In *Tygesen v. Magna Water Co.*, 119 Utah 274, 226 P. 2d 127; *Lehi City v. Meiling*, *supra*; *Backman v. Salt Lake County*, 13 U. 2d 412, 375 P. 2d 756; *Carter v. Beaver County*, 16 U. 2d 280, 399 P. 2d 440 and *County Water System v. Salt Lake City*, 3 U. 2d 46, 278 P. 2d 285, the Court was concerned with state statutes authorizing the creation of various types of special public agencies or political subdivisions. There are no Utah cases involving the delegation to a strictly private corporation such as is here involved, perhaps because it is so obviously contrary to this provision of the Constitution.

The cases, however, do indicate clearly that the purpose of the Constitutional provision is to preserve local self-government to cities, towns and counties with respect to its proper municipal functions. See *Logan City v. Public Utilities Commission*, 72 Utah 536, 271 Pac. 961 at 972. In *Backman v. Salt Lake County*, *supra.*, this court stated as follows:

“Three conditions are necessary to violate this provision: (1) delegation to a private commission of power to (2) interfere with municipal property or (3) to perform a municipal function.”

That there is a delegation involved in the State Statute and Ordinance seems plain for the utility corporations are involved from the beginning with their cost and feasibility report. If the project is continued beyond that stage, the utility corporations take over the construction of the new improvements and the removal of the old overhead wire. The public agency is not involved even in a supervisory capacity as pointed out above. The public agency whose duty it is to protect the citizens of the city, including the property owners within the district, from the abuse of public credit and improper expenditure of tax funds must stand aside while the utility corporation hires its own contractor at such cost as the utility corporation thinks is proper and then passes this cost on to the property owners.

There is no “municipal property” involved which is interfered with in violation of this section because as we have pointed out above, title to all of the

have an unusual omission. The bonds may be issued for the unpaid balance of the assessments levied and for the period of time over which the assessments are payable. Otherwise, they are in such form as the issuer determines. While it is true that the State Statute in §54-8-22 and Ordinance in §39-7-24 provides that the bonds "shall be secured by and payable from the irrevocable pledge and dedication of the funds derived from the levy and collection of the special assessments in anticipation of the collection of which they are issued", there is nothing that limits the bondholder to the assessment monies as the sole source of payment, nor is the issuer prohibited from obligating the full faith and credit of the municipality. Compare these provisions with the statute authorizing assessment bonds in cities and towns, §10-16-27 and 10-16-29, U.C.A. 1953. §10-16-27 provides for the issuance of "special improvement bonds to pay the costs of the improvements in the district *against the funds created by the assessment.*" The latter section specifically states that such bonds "are not a general obligation of the municipality" and then goes on to make this fact certain by stating "no municipality shall be held liable for the payment of any special improvement bond except to the extent of the funds created and received by assessments against which the bonds are issued and to the extent of its special improvement guaranty fund. . . ." Under such provisions it is plain that any bond issued must be limited in payment to the special fund creat-

ed by the assessment and accordingly no "debt" in the constitutional sense is involved. Here, however, the State Statute does not provide that assurance and thus debts will or may be created with no election having been held and without regard to the constitutional debt limits. The taxpayers throughout the city could conceivably be taxed to pay a defaulted bond. The risk of this should not be tolerated and the State Statute and Ordinance should be declared unconstitutional.

POINT III

THE STATE STATUTE AND ORDINANCE UNCONSTITUTIONALLY DENY DUE PRO- CESS OF LAW

The State Statute and Ordinance have the appearance of affording ample due process in the procedural sense by the series of notices and hearings required. However, hearings which are merely an empty formality and where no real determinations of the merit of objections are considered, does not constitute due process of law.

The initial hearing is perhaps the most important because, at this time, a determination is made to create the district or to make changes in the original proposal with respect to the size of the district. Here the law is deficient in two respects.

First, there is no provision setting forth the time prior to the hearing when the mailed, published and posted notices must be given. The State Statute in 54-8-10 simply provides that the notice be published "one time" in a newspaper of general circulation in

the district or of general circulation in the county, city or town in which the district is located. While posting and mailing is also required, there is no time specified prior to the hearing within which these actions must be completed. For all that appears from the statute, notice could be given the day of the hearing or what might be just as defective, several months prior to the hearing. Procedural due process seems to demand that notice be given a reasonable time prior to the hearing, but not an unreasonably long time prior to the hearing. Commonly, statutes of this type set forth these requirements. See for example, 10-16-6, U.C.A. 1953 where publication is required once during each week for four successive weeks with the last publication "to be at least five days and not more than twenty days prior to the time fixed in the notice as the last day for the filing of protests." See also, 11-14-3, U.C.A. 1953, relating to notices of bond elections. Without standards as to time provided by the law, arbitrary action and proceeding without a notice that is in fact adequate, is permitted. That this is a vital requirement is emphasized by the provisions of the State Statute in §54-8-12 and the corresponding provision of the Ordinance, §39-7-13 that real property owners who fail to appear at the hearing and make objection "shall be deemed to have waived every such objection."

In the second place, the hearing once held seems to be merely a perfunctory matter and too much dependent on the reports and actions of the public uti-

lity corporations. §54-8-11 of the State Statute (Ordinance, §39-7-12) states that representatives of the utility corporations "shall be present at all such hearings." One wonders if the county or city commission or town board has the right or jurisdiction to proceed if the power company and telephone company representative fails to appear. Even if the governing body decides to make a change in the proposed improvements or the proposed district which "appear" to affect the feasibility or cost of the improvements proposed (which determination can be made *only* after consultation with the utilities), then the same sections, in mandatory language, require that the hearing be adjourned until a new cost and feasibility report can be prepared by the utilities.

The fundamental problem, however, is the cost and feasibility report itself. As previously noted, the cost formula of §54-8-24 is a rigid one designed to guarantee to the utility full reimbursement of its investment plus costs of the changed facilities. It is not designed to minimize costs to the property owner. Indeed, since there is no assurance of the lowest cost by competitive bids and because the utility is permitted to pass on to the property owners all costs, whatever they may be, there is really no incentive to the utility to minimize costs. There is no real opportunity for the property owners or for the governing body of the municipality involved to inquire into the basis of the costs. In effect, the choice is accept the cost and feasibility report of the utility or discontinue all work in the district. This is not really changed by the pro-

visions of 54-8-11 permitting the governing body to make changes in the district or in the improvements because this must be followed by a new cost and feasibility report from the utility. That the utility corporation will tend to be generous in its estimates of cost seems assured by the provisions of § 54-8-27 (Ordinance, § 39-7-29) which limits the utility reimbursement for cost to not more than its original estimate.

All of these factors separately, and certainly taken together, constitute a denial of due process in fact even though appearances of fairness are maintained.

POINT IV

THE METHOD OF ASSESSMENT CONSTITUTES A DENIAL OF DUE PROCESS AND THE EQUAL PROTECTION OF THE LAWS

The guiding principle and the theory justifying the imposition of special assessments is benefit to the property owner from the improvements for which the assessment is made and a proper apportionment of that benefit among all property owners affected by the making of the improvement. A leading text writer has stated the rules as follows:

"Assessments, as distinguished from other kinds of taxation, are those special and local impositions upon the property in the immediate vicinity of municipal improvements, which are necessary to pay for the improvements, and are made with reference to the special benefit which the property is supposed to have derived therefrom." (McQuillen, *Municipal Corporations*, 3rd Edition Revised, Vol. 14, § 38.01).

"Special assessment or special taxation, therefore, is lawful and constitutional only when founded upon special benefits accrued from the improvement for which the tax or assessment is laid. In other words, the test in all special taxation or assessment proceedings which is constantly invoked by the courts, is that the assessment should not exceed the special benefit to the property." (Op. cit., § 38.02).

"To be valid and constitutional the special assessment or tax must be fairly within the limits of the benefits conferred, and just and uniform throughout the assessment, the benefit or taxing district, or applicable alike to those compelled to pay who are similarly situated." (Op. cit., § 38.05).

The leading case on the subject is *Norwood v. Baker*, 172 U.S. 269, 19 S. Ct. 187, 43 L. Ed. 443. See also *French v. Barber Asphalt Paving Company*, 181 U.S. 324, 21 S. Ct. 625, 45 L. Ed. 879; *Louisville and Nashville Railway Company v. Barber Asphalt Paving Company*, 197 U.S. 430, 25 S. Ct. 466, 49 L. Ed. 819. In *Gast Realty Co. v. Schneider Granite Co.*, 240 U.S. 55, 36 S. Ct. 254, 60 L. Ed. 523, the United States Supreme Court stated, ". . . if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand. . . ."

The State Statute recognizes, as it must, the principle of benefit as being the basis for the assessments to be levied in the improvement district created under

the act. (See State Statute, § 54-8-5, 54-8-15, 54-8-16, 54-8-17). However, the State Statute is deficient in two respects and fails to comply with the constitutional principles applicable to such taxation.

First, the basis for the assessment is the square footage of the lots within the district. § 54-8-5 provides in part, "Each lot and parcel of the land shall be separately assessed for the cost and expenses thereof in proportion to the number of square feet of such lands and lots abutting, adjoining, contiguous and adjacent thereto or included in the improvement district, and in proportion to the benefits derived to such property by said improvements."

Other methods of determining benefits and apportioning costs are not authorized. Apportionment, according to frontage or the length of the distribution lines within the particular property or according to assessed valuation of the property or according to the service supplied through the facilities, is not authorized. Square footage is the sole method permitted and this can lead to inequitable results. The owner of a smaller lot than his neighbors, although receiving exactly the same electric and telephone service, would be assessed a smaller amount. A property owner who uses large amounts of electric or telephone service would pay the same as his neighbor whose needs are smaller simply because the size of their lots are the same or similar. The method of assessment thus becomes arbitrary by its very mechanical application. It cannot be said to equitably apportion benefits. In contrast, and no doubt in recognition of

the many problems involved in apportioning special assessments fairly, the Municipal Improvement District Act authorizes assessments according to frontage, according to area, according to assessed valuation or by any combination of such methods. See 10-16-16 U.C.A. 1953. Note also, that the requirement that assessments must be *equal* and *uniform* according to the benefits received as stated in §10-16-16 is missing from the State Statute and Ordinance in question here.

A second problem with the State Statute and Ordinance is the failure to recognize the benefit to the public utility corporations involved by either apportioning a part of the cost to the utility corporations or permitting assessments on them. The statutory scheme is designed to guarantee return to the utilities of all of their costs and it is only the property owners within the district that are assessed. It is obvious that underground facilities do benefit the utilities. Falling wires due to wind, ice, falling trees and the like are avoided. Transformers are placed on or below the ground and danger of lightning damage to such equipment is lessened. Maintenance is made easier and very likely less expensive because it can be conducted from ground level. Expensive equipment to elevate men and facilities on poles and wires is no longer needed. Injury to personnel from falls is minimized. Weathering of wires and other equipment is virtually eliminated. Undoubtedly, there are other utility company benefits from underground facilities. However, the State Statute and Ordinance

recognize none of these benefits and apportion to the utilities none of the costs of the improvements in recognition of these benefits. Instead, it is assumed that all benefits are received by the property owners within the district.

By failing to apportion assessments fairly and uniformly and by failing to take into account the benefits to all persons "affected or benefited" by the improvements, the State Statute and Ordinance are contrary to principles of due process and uniform operation of the laws and deny to property owners within the district the equal protection of the laws. Utah Constitution, Article I, Sections 2, 7 and 24; United States Constitution, Amendment XIV.

POINT V

THE STATE STATUTE AND ORDINANCE PERMIT THE TAKING OF PROPERTY WITHOUT JUST COMPENSATION.

Fundamental to our society is the principle that property of citizens cannot be taken for use by others without just compensation. Utah Constitution, Article I, Section 22. Portions of the State Statute and Ordinance permit and even require that property be taken without any provision being made for compensation to the property owners for the taking.

Consider first the fact that the utility easement which was originally established for poles and overhead wires and lines is converted into an underground easement over such property. Even if the underground facilities traverse the same area of property

as the overhead wires formerly occupied or are contained within the vertical limits of the utility easement commonly established at the time subdivisions are created or when the first utility service is supplied, there is still such a substantial change resulting from the conversion to underground that in effect, a new easement is created. What was formerly wires strung across a backyard under which trees and flowers could be planted, fences placed, sprinkling systems installed, out buildings erected and other improvements made, now becomes a dedication to the use by the utilities of a portion of the ground itself. Surely it was not within the contemplation of the property owner who may have granted an original easement for overhead lines that a subsequent conversion to underground would permit the tearing up of a fence, the destruction of trees and shrubs, the interference with his gardening activities and the like. It is apparent that this drastic a change constitutes a new and different property interest.

No provision is made for compensation to the property owner except "when technical considerations make it reasonably necessary to utilize easements for the underground facilities different from those used for aboveground facilities, or where the pre-existing easements are insufficient for the underground facilities," (State Statute, §54-8-24; Ordinance, §39-7-26). Even if it is necessary to obtain such a "new" easement, its cost becomes one of the costs of making the improvement for which the utility company is reimbursed. This is a reverse twist on normal prin-

ciples of eminent domain because these same costs are apportioned back to the property owner from whom the easement is obtained. Not only does he lose a portion of his property, but in effect he must pay himself for this loss.

The second failure of the State Statute and Ordinance in this regard involves the easement for the service lines from the residence or building on the property to the underground lines serving the neighborhood. Here the State Statute and Ordinance go one step further because the easement for such service lines is obtained not only without compensation, but also without any written grant or authorization from the property owner. See § 54-8-26 of the State Statute and § 39-7-28 of the Ordinance. There it is provided that the simple failure by the property owner to file "written objection" is considered as the owner's consent and grant of easement to the utility. This same failure to act is also treated as authority to the utility to trespass on the property owner's land. (It should be noted also that notice to the property owner of his right to make such an objection is not required to be stated in the notice of intention for the creation of the district). Even if the objection is filed, its only effect appears to be to avoid inclusion of the costs in the special assessment. The costs must still be paid because the State Statute provides that the owner becomes responsible for doing the work himself and "*shall be billed*" by the utility for whatever work the utility company does on his property. There appears to be no other conclusion

but that the substance and effect of these provisions is to permit the utility companies to take private property without payment of just compensation therefor.

CONCLUSION

The State Statute and Ordinance should be held unconstitutional for the reasons noted. These laws are too heavily laced with private interest to withstand judicial scrutiny. While permitting private property owners and utility companies to finance improvements to their property, the slight public benefit does not justify public action for this purpose nor the use of mandatory powers to force improvements on unwilling property owners. This also adversely affects taxpayers throughout the city, town or county. If the public credit and the tax power can be used for the benefit of a few, it is that much less available for the benefit of the public at large. When one also considers that the utility companies largely determine the manner in which these powers are used, the constitutional infirmities of the law become apparent.

For the reasons stated in this brief, the decision below should be reversed, with instructions to enter judgment declaring the State Statute and Ordinance unconstitutional and for an injunction against the taking of further proceedings in the improvement district involved in this case.

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