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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 Respondents

Utah Supreme Court

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,

vs.

SALT LAKE CITY, a municipal corporation,

Defendant-Respondent.

Case No. 12618

BRIEF OF RESPONDENTS

APPEAL FROM THE DISTRICT COURT
OF SALT LAKE COUNTY
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IN THE SUPREME COURT OF THE STATE OF UTAH

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BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

This is an action by the Plaintiffs and Appellants for 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 proceedings on file and a stipulation of facts entered into between the parties. After argument, 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

Defendant-Respondent seeks the sustaining of the District Court judgment and a holding that the statute and ordinance involved are constitutional and that the injunction prayed for should be denied.

STATEMENT OF FACTS

Defendant-Respondent accept the statement of facts as contained in the Plaintiff-Appellants' Brief.

The Utah Underground Conversion of Utilities Law enacted in the 1969 regular session of the Utah Legislature in Chapter 157, Laws of Utah, 1969, and compiled in the Utah Code Annotated 1953, as Sections 54-8-1 through 54-8-30, will be referred to in the Brief as "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 this Brief as "the Ordinance".

ARGUMENT

POINT I

THE STATE STATUTE AND ORDINANCE ARE CONSTITUTIONAL AND THEY DO NOT AUTHORIZE PUBLIC ACTION FOR A PRIVATE PURPOSE, NOR LEND THE CREDIT OF A MUNICIPALITY FOR A PRIVATE PURPOSE NOR DELEGATE MUNICIPAL FUNCTIONS TO PRIVATE CORPORATIONS.

The safeguards of the Act which are hereafter recited, provide more than adequate protection to the property owners in the improvement district. More hearings, more opportunities to object and eventually an opportunity to test the matter in the courts are given each property owner included in the district.

State Statutes §54-8-6; Ordinance §39-7-6, clearly indicate that only by and under the initiative of the property owners can two-thirds of those property owners commence the improvement district. Certainly then, the negative is true. If over one-third of the property owners or those who owned over one-third of the value of the property in the improvement district objected to the improvement district, at any stage, the local governing body must abandon the district no matter who instigated it. State Statute §54-8-4 and Ordinance §39-7-4 simply are but a preamble to the law indicating what the Underground Conversion of Utilities Law is about.

A. *The State Statute and Ordinance Do Not Authorize Public Action and Taxation For a Private Purpose.*

In *Wicks v. Salt Lake City, et al,* 60 Utah 265, 208 P.538 (1922) the plaintiff sought to prohibit Salt Lake City from issuing certain special improvement bonds for a street lighting district. That district was on State Street between South Temple and Fourth South. This Court concluded in that street lighting case the following:

> "In the light of these decisions and the various statutes referred to there can be no doubt as to the power of the City to light the streets of the City, or any section thereof, by draft upon the general funds. If the City elects, however, to organize a district as in the instant case, and levy a special tax on abutting property to pay the taxes, and issue bonds therefor, it is equally free from doubt that the City has the power to establish a special improvement guarantee fund to secure the payment of the bonds as provided in the Act of 1921." (page 540)

B. *The State Statute and Ordinance Do Not Authorize a Lending of Public Credit for Private Purposes Contrary to the Utah Constitution.*

A significant question is whether there is, under this Act, a lending of public credit for a private purpose. The Supreme Court of Utah looked at a similar question in 1960, in the matter of *State Road Commission of Utah v. Utah Power and Light Company,* 10 U.2d 333, 353 P.2d 171. In that case the Supreme Court reiterated the doctrine that the legislature had the power to change the common law to relieve the utilities of the obligation to pay the costs of relocating facilities and to

impose the cost on the State, for highway relocation. This became an issue by the advent of Federal highway programs which forced the relocation of utilities because of the realignment of the highways. The question arose as to who should ultimately pay for the relocation costs occasioned by the new highways. The courts found that relocations could be ordered by the police power of the State for the benefit of all the people. In *State Road Commission of Utah v. Utah Power and Light Company*, 10 Utah 2d 333, 353 P.2d 171, the Court opined:

> The legislature has determined the policy to be pursued in the relocation of utility facilities; and, mindful of the magnitude of the newly inaugurated federal program and the equitities to be adjusted as fixed in advance the terms upon which relocation shall be required. There is no gain to the utilities. They are simply protected from suffering a net loss in the relocation of their facilities all resulting from this vast and far-flung highway building program.

In the highway relocation case, the public purpose is the need of new highways; correspondingly, the need to move the utilities. In the instant case, the need is safety and aesthetics; both, the legislature has determined, are the public policy of this State In each instance the utility ends up owning the improvements, and in both cases, the measure called for money coming directly to the utility from the State. In the *Utah Power and Light* case, *supra,* payment is made directly from the State from gasoline tax revenues, to the utility; and in the case at hand, payment is made through a special improvement district, funded by bonds, which bonds are paid for out of assessments from the property owners immediately adjacent to the improvements.

The Court in the *Utah Power and Light* case, *supra*, further stated:

> The numerical weight of authority holds that under constitutional limitations similar to those in Utah the legislature has the power to change the common law to relieve the utilities of the obligation to pay the cost of relocating facilities and to impose the cost on the State. (Citations)

The Court apparently relied heavily upon Justice Cardozo's opinion in *Oswego and Syracuse R. Co. v. State*, 226 N.Y. 351, 124 N.E. 8 and quoted extensively from that opinion.

There are analogies between the relocation and burying of overhead utilities because of highway construction versus the public desire for beautification and safety which is involved in this act. In both cases, the utilities owned the facilities prior and in both cases the utilities owned the facilities at the end of the improvement. In the case of the highways, the funds to relocate the utilities came from the gasoline tax imposed on all of the citizens alike whether or not they favored relocation of the utilities or the burying of the utilities. In this act, payment is made by those who live in the improvement district and who most directly benefit from the improvement. That is not to say that in both cases those who may not pay a gasoline tax and those who may not live in the improvement district don't benefit from the improvements. They do. In both instances the unsightliness of the utilities are gone.

It may be argued that the utilities are getting a new car at no cost to them, when they only had an old car before in the form of the old utility system. By way of analogy, we urge this Court to recognize that it is not a new car the utilities are

getting but a new fender on an old car inasmuch as this district represents but a small portion of the utility systems' entire grid throughout the city and county and the State. To further the analogy we suggest that a new fender on an old car does not make for a new car.

In *Allen v. Tooele County,* 21 U.2d 383, 445 P.2d 994 (1968) the Court upheld a Tooele County plan, pursuant to legislative act, to issue bonds to finance the construction of industrial facilities. Upon their completion, the facilities were to be leased to private corporations. The bonds were to be issued under the name of the county, but were to be repaid by rentals from the constructed facilities. This public purpose directly benefited private corporations. The court said in upholding the legislation:

> The final point we comment on is the plaintiff's charge that the Act must be held invalid because of the lack of a substantial public purpose. This question has been determined at three levels preceding the prerogative of this court to make such a determination. The first is the legislature; the second is the county commission; and the third is the trial court. All of them appear to have regarded industrial development as a proper public purpose. In deference to those prior prerogations, this court would not upset such determination, except upon a persuasive showing that it was so clearly an error as to be capricious and arbitrary, a circumstance we do not find present here." See *Carmichael v. Southern Coal and Coke Company,* 301 U.S. 495, 57 Sup. Ct. 868, 81 L.Ed. 1245 (1937) and also *Lehi City v. Meiling,* 87 U. 237, 48 P.2d 530.

In the present case, both the State Legislature and the City Commission have determined that it is a desirable public purpose to remove overhead utilities. The question remains

as to whether there has been a lending of public credit. In *Allen v. Tooele County, supra,* this court said in commenting on the bonds issued by Tooele County:

> It is to be stated on the face of the bonds that in no event will they constitute an indebtedness to Tooele County or a charge against the general credit or taxing powers of the County, all of which is in accord with the provisions of the Act. Inasmuch as the bonds are payable only out of the income to be derived from the leasing of the plant, and no resort can be had against the County or its taxpayers, it is our opinion that the project is not a "lending of credit of the County as was intended to be prohibited by Sec. 31 of Article VI of the Utah Constitution.

In another case, *Utah State Land Board v. Utah State Finance Commission,* 12 U.2d 265, 365 P.2d 213 (1961), this Court, in a case involving the State Land Board who wanted to purchase securities for investment purposes, ruled that it was constitutional for them to do so. In so ruling, this court quoted the case of *Almond v. Day,* 197 Va. 419, 91 S.E. 2d 660:

> Use of the State's funds for purchase of securities for the State's benefit is not an extension of "credit" which poses any threat to the financial security or welfare of the State. Extending its credit to aid and promote private enterprise was the evil from which the State had suffered financially. The potential danger incurred in lending credit to foster and promote the interests of those who had no rightful claim, in justice or in morals, to the State's help or relief was the evil to be arrested. When the underlying and activating purpose of the transaction and the financial obligation incurred are for the State's benefit, there is no lending of its credit though it may have expended its funds or incurred an obligation that benefits another. Mere-

> ly because the State incurs an indebtedness or expends its funds for its benefit and others may incidentally profit thereby does not bring the transaction within the letter or the spirit of the 'credit clause' prohibition.

Our contention is that the utility companies are nothing more than incidental beneficiaries.

This court has deferred to a legislative determination of what is a public purpose. The interest in securing water, treating sewage or promoting industry and relocating utility lines have all been declared as needed public purposes. It is urged that the legislative determination that the safety and aesthetics of the burying of overhead utilities is a public purpose and is certainly not "arbitrary or without rational basis".

Fisher, et al vs. City of Astoria, 269 P.853, 128 Oregon 268, 60 ALR 260 was a similar case of special district for street lighting involving a change from old wood pole lights to more attractive metal pole lights, the Court said:

> The City contends that placing a lighting system in a district of municipality constitutes a local improvement, and that the property in the district may properly be assessed to pay for the benefit thus conferred; the plaintiffs take the opposite position based upon the information contained in the Complaint, we assume that the proposed lighting system eliminates the cedar poles generally employed in Oregon cities for the purpose of holding in suspense arc lights and in lieu of the method substitutes metal posts of an attractive appearance and lamps of great brilliance. Since the resolution specifies an up-to-date system, we assume that the wires which will convey the electric current to the lamps will be underground. It is common knowledge that many businessmen and property own-

> ers believe that such a lighting system renders the streets more attractive to the retail trade and thus enhance values. Before the expense of installing an improvement can be assessed against the property in a district, it is essential that improvement should confer a substantial benefit upon the property within the district. It may incidentally benefit the entire City; that wholesome effect will not destroy its use as the foundation for a local assessment, provided it brings to the proposed district a benefit substantially more intense than it yields to the rest of the municipality.

This case like our present case involves a public street to be used by the public and those immediately in the district. The fact that one is for more attractive lighting and the other is to simply do away with less attractive poles does not alter the public purpose involved.

The assertions made by the Appellant's brief on page 14 thereof is without merit. That is, that there can be no improvement district without the consent of the property owners within the district. State Statute §54-8-6; Ordinance §39-7-6, indicates as follows:

> Any governing body may, upon a petition signed by two-thirds of the owners of the real property and the owners of not less than two-thirds in value of the real property, as shown by the last assessment poles of any proposed district requesting the creation of an improvement district as provided in this chapter, pass a resolution that any regular or special meeting declaring that it finds the improvement district proposed as in the public interest.

State Statute §54-8-4; Ordinance §39-7-4, does empower the local governing body to create a special improvement district but only subject to the conditions of State Statute §54-8-6;

Ordinance §39-7-6. This is in harmony with 10-16-7(3), Utah Code Annotated, 1953, wherein the Municipal Improvement District Act makes the same provisions that two-thirds of the property owners must file objections. Furthermore, this is not a legitimate issue in this matter inasmuch as there was a petition by over two-thirds of the property owners in favor of the local improvements district.

Just as in the case of the Municipal Improvement District Act, there can in fact be created an improvement district over the objections of those who may not wish it and be required to pay for it. It makes no difference that one-third or less of the property owners in the district may not agree with the environmental objectives and public policies set by the State and by local governing body. Those same persons may not agree with the public policy of having streets or street lighting or curbs and gutters but may in a like manner be swept into the 20th century against their will if they are out voted in the project.

The Appellant's brief has raised the concern that the Public Utility hire their own contractors and supervise their own work. It would appear that this court could take judicial notice of the complexities of high powered electrical and telephone wires in and around homes and the need for the expertise and skill that the Utilities would have in seeing that the work was properly done. The implication of the Appellant's argument is that the taxpayer would suffer because there wasn't customary open competitive bidding through the local governing body with the City Engineer inspecting. By the same token, the Utility doesn't prosper under this system. They have nothing to gain. They had a satisfactory system above the

ground and all they want to see is that there is going to be a satisfactory system beneath the ground. Their objective is to have a trouble free system that will provide regular and continuous service. They submit their estimates to the local governing body based upon their judgment as to how much the work will cost without profit to themselves.

Appellant indicates that a utility is required to provide service to those who request it. The implication is that they are required to provide overhead service to those that request it. However, the Underground Conversion of Utilities Act has indicated that it now is the policy of this State to bury the overhead utilities whenever possible. The Underground Conversion of Overhead Utilities and this lawsuit deal with older residential areas where the public utilities have already been installed.

It is not true that a resident can pay cash to the utility and obtain underground utilities in an older neighborhood. What affects one resident with regard to the burying of overhead utilities, affects his neighbor. Thus, in order to accomplish this public purpose and certainly to make it economically feasible, the wires over several homes must be buried at the same time. Further, the benefit does not flow to the property owner alone and certainly not to the public utility. The public utility is more than content to leave the lines above ground. The public purpose is to bury the overhead utilities whenever possible for the safety and esthetics of everyone. This law is simply a vehicle to allow those who are willing to pay, through an improvement district, the opportunity to accomplish that purpose.

C. *The State Statute and Ordinance Do Not Delegate Municipal Functions to Private Corporations.*

Backman v. Salt Lake County, 13 U.2d 412, 375 P.2d 756 (1962) sets forth the conditions which are necessary to violate Article VI, Section 29, of the Utah Constitution. They are:

> "(1) Delegation to a private commission or power to (2) interfere with municipal property, or (3) to perform a municipal function."

Clearly the special improvement district to bury overhead public utilities does not violate any one of the three conditions herein mentioned. There is no private commission. The governing board of the municipality operates as the commission. There is no interference with municipal property other than a right-of-way which is granted whether the utility lines are above or below the ground. It does not perform a municipal function heretofore performed. It would be difficult to reason that the municipality should undertake to bury the overhead utilities or, indeed, to erect them. A long time ago that power was turned over to the utility companies under the supervision of the Public Service Commission of the State.

There is no delegation of power to a "special commission" referred to in *Lehi City v. Meiling,* 87 Utah 237, 48 P.2d 530 (1935) in the concurring opinion of Justice Wolfe. The power is clearly vested in the municipal governing body. It might be said that this is a quasi-improvement district, inasmuch as there is no governing body other than the City Commission and inasmuch as its delegated responsibility, by statute, is to cause the work to be performed, then the function is completed.

Argument is made by the Appellants that this legislative plan contemplates delegating powers to private interests. The private interests referred to are the petitioners' or property owners' affected, and the power referred to is the right to petition. This goes beyond the Municipal Improvement District Act, §10-16-1, Utah Code Annotated, 1953, wherein it states that the municipality itself may initiate the project. However, as a practical matter, in most of the improvements (namely, curb and gutter and sidewalk) the municipalities await the petition of the residents of an area rather than initiating the proposal themselves. The Act in question simply codifies that which has been done in the past and is being done under present law.

The Appellants question the fact that the utilities were charged with the responsibility of determining the feasibility and not the governing body or the municipality. It might be redundant to suggest that the average municipality is not equipped technically to review or assess the requirements of public utilities, as far as feasibility of installation is concerned. Beyond that, the feasibility studies provided by the utilities are born of their own expense, for which they are not compensated. Certainly, there is nothing in Article VI, Section 29, of the Utah Constitution requiring the governing body to initiate the proposal nor to make a determination of feasibility nor to provide continued supervision of the project. As mentioned before, the need for providing supervision of underground utilities is no greater than the need to provide supervision for overhead utilities, which this municipality is not competent to do and, by statute, has no authority to do.

Clearly there is no offense to Article VI, Section 29, of the Utah Constitution in this Act. All the power there is to have is given to the municipality, which Article VI, Section 29, seeks to protect. Simply stated, the municipality has power given to them that they did not have before, and no power taken from them which they did have before.

POINT II

THE STATE STATUTE AND ORDINANCES DO NOT VIOLATE THE DEBT LIMIT AND ELECTION PROVISIONS OF THE UTAH CONSTITUTION.

The language of the State Statute §54-8-22; Ordinance §39-7-24 is perfectly clear. It provides that bonds "shall be secured by and payable from the irrevocable pledge in dedication to the funds derived from the levy and collection of the special assessments in anticipation of the collection of which are issued." The language is unmistakable. The funds to pay these obligations are to be taken from the levy and special assessments and not from any other source.

A common rule of statutory construction in *Norville v. State Tax Commission,* 98 Utah 170, 97 P.2d 937, 126 ALR 1318, where Justice Wolfe made the following observations: "Statutes duly enacted by the lagislature are presumed to be constitutional and valid (citations). When there is ambiguity in the terms of the statute or when it is susceptible of two interpretations, one of which would render it unconstitutional and the other bring it within constitutional sanctions, the Court is bound to choose the interpretation which will uphold the statute, and to pronounce a statute unconstitutional only when

the case is so clear as to be free from doubt." (citations) Further in their opinion, the Court said, "moreover in seeking to give effect to the intent of the legislature, the Court will adopt the interpretation of a taxing statute which lowers the tax burden uniformly on all standing in the same degree with relation to the tax adopted (citations), and will avoid an interpretation which would lead to an unpractical, unfair or unreasonable result."

The Appellant's interpretation is distinguishable from the plain language of the statute, that is to tax only those who live within the district. There is likely only two interpretations available to the Court. By accepting the Appellant's interpretation, it would render the statute unconstitutional. Whereby, accepting the literal meaning of the words, would render the statute constitutional. Further, the interpretation of the Appellants would lead to an impractical, unfair and unreasonable result. That is, taxing everyone for the benefits which have been sought by a few.

Under a well settled rule of statutory construction of Statutes in pari materia, statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great, connected, homogenous system, or as a single and complete statutory arrangement. Indeed, as a general rule, where legislation dealing with a particular subject consists of a system of related general provisions indicative of a settle policy, new enactments of a fragmentary action on the subject and to be carried into effect conformally to it, and they should be so construed as to harmonize the general tenor or purport of the system and make the skeem consistent in all its parts and uni-

form in its operation, unless a different purpose is shown, 50 Am. Jur. 349, Statutes. See also *Norville v. State Tax Commission,* supra.

There is no clear and precise language in the State Statute §54-8-22; Ordinance §39-7-24 on this subject that materially differ from Sections 10-16-27 and 10-16-29, Utah Code Annotated, 1953, as amended.

In *Engelking v. Investment Board,* 458 P.2d 213, the Supreme Court of Idaho ruled that the Idaho Endowment Investment Board could invest in stocks and bonds. The Idaho court said:

> The use of the "credit" as used in the provision implies the imposition of some new financial liability upon the State which in effect results in the creation of a State debt for the benefit of private enterprise. This was the evil intended to be remedied by the Idaho Constitution, Article VIII, Sec. 2, and similar provisions in other State Constitutions. Yet that particular evil is not presented by the investment of existing State funds of the State for no new State debt is created by such action.

In the case of *Schureman v. State Highway Commission,* 377 Mich. 609, 141 N.W. 2d 62 (1966), the Supreme Court of Michigan argued that revenue bonds and special obligation bonds share an essential distinction from general obligation bonds. The credit of the State is pledged for the payment of general obligation bonds. It is not for revenue bonds and special obligation bonds. Special obligation bonds are retired from special tax revenues earmarked for that purpose.

The language of State Statutes §54-8-22, Utah Code Annotated, and Ordinance §39-7-24, is helpful in determining the nature of the bonds issued under this Act. It says:

> The bonds shall be dated no earlier than the date on which the special assessment shall begin to bear interest, and shall be secured by and payable from the irrevocable pledge and dedication of the funds derived from the levy and the collection of the special assessments in anticipation of the collection of which they are issued.

These are special obligation bonds retired by special tax revenues and would become a lien upon the adjacent property if not paid.

POINT III

THE STATE STATUTE AND ORDINANCE PROVIDE AMPLE DUE PROCESS OF LAW.

The issue raised under Point III, "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." Probably this statute, more than any other of its kind, provides ample due process. A review of that due process might be helpful to the Court.

State Statute §54-8-6; Ordinance §39-7-6 requires that two-thirds of the owners of the property in the district must petition the City for the creation of an improvement district. In those same sections, the City Commission is required to (a) seek a response from the public utilities within 120 days, of the cost of converting the overhead utilities; (b) provide a list of

the name and address of each property owner in the district, and (c) determine the square footage of each property within the district.

In State Statute §54-8-7; Ordinance §39-7-7, the utilities at their expense prepare a feasibility study indicating firstly if the project is possible or feasible and secondly, how much it would cost to convert from overhead to underground. It is well to note here that the utilities are the only entity with the available expertise and understanding of power and telephonic transmissions to either determine feasibility and cost involved in the conversion. It is not reasonable in dealing with potentially dangerous instrumentalities such as power lines, that City or County personnel attempt to make determinations about or install or repair such specialized equipment.

Statutes §54-8-8; Ordinance §39-7-8 requires that after the City has received the reports and estimates from the utilities that they consider whether or not to create a local improvement district. If the reports are favorable and all systems are go, they pass a resolution declaring their intention to create such a district, including in the resolution the cost and expenses to be levied, the need to promote the public welfare through this conversion and also include the areas and boundaries and their intention to hold a public hearing.

State Statute §54-8-9; Ordinance §39-7-9 require that after the passage of the resolution the governing body shall cause notice of the public hearing on the proposed improvement to (a) be published in a newspaper of general circulation in the district; (b) a copy of such notice shall be mailed by certified mail to the last known address of each owner of

land within the proposed district; (c) that in addition, a copy of said notice shall be addressed "Owner" and shall be mailed to the street number of each piece of improved property to be effected by the assessment in the district.

That Notice that is sent out and published not only describe the boundary but describes how the project will be carried out with an estimate of the costs and indicates that it is intended to assess the abutting property owners. In addition, it indicates the time and place for the proposed hearing and indicates that all interested persons would be heard on the matter.

State Statute §54-8-11; Ordinance §39-7-18 describe the nature of the hearing which is mainly to hear all objections, to allow the utility company to propose any changes or to allow city residents or the utility company to propose any changes in the feasibility report.

The proposed assessment list is prepared after the hearing and in State Statute §54-8-16; Ordinance §39-7-17 another notice is mailed by certified letter and by regular mail as well as published in a paper of general circulation indicating the specific assessments on each person's property involved in the improvement district. Thereafter, a public hearing is held again on the assessment resolutions as well as a Board of Equalization consisting of three members of the Commission to make any corrections in the assessment.

In *Elkins, et al v. Millard County Drainage District No. 3, et al,* 294 P. 307, 77 Utah 270, this Court looked at the formation of a drainage district. The following procedure was followed:

1. Petition by a majority of the land owners.
2. A hearing set
3. Notice of hearing
4. The Board could exclude land from the District.
5. The Board determined the benefits were in excess of the cost.
6. The Board created the District.
7. The Board of Equalization said they appeal to the Court.

In 1930 this Court held that in such procedure there was due process.

POINT IV

THE METHOD OF ASSESSMENT IS CONSTITUTIONAL

The Respondent does not argue with the proposition stated in the Appellant's brief that the "assessment should not exceed the special benefit to the property." However, this principle of law does not apply in this matter to an assessment by square footage of the property.

Sidewalks, as an example, usually go along the frontage of a property. The same is true of curb and gutter. Not so with overhead utilities. Overhead utilities can attach a man's yard from almost any direction. Go across the back line, cut diagonally across it or go along the side yard. There are certainly no limitations as to how such an overhead utility might traverse a lot.

Further, the benefit of burying the overhead utility for the assessed property owner is not the amount of electricity flowing through the wires to the home, but the sight and

safety of the wires. That concept, heretofore stated is to clean up the neighborhood and the community and make it more attractive and pleasing to the eye. This can be accomplished in part by burying of the overhead utilities. Those whose years exceed the writer of this brief probably can remember the downtown streets of Salt Lake when they were cluttered with overhead utilities. Their removal has blessed everyone, and make for a more attractive community. Not just the adjacent property owners benefit and certainly not benefit the adjacent property owners according to the amount of electrical current they utilize.

A fair and equitable way to assess the removal of overhead utilities is on a square footage basis per lot. This is particularly so for one who owns a lot on the corner. Front footage to him is onerous. Certainly, under this formula there is no gain to anyone, least of all the Utilities. The Legislature simply attempted to find an equitable way to assess those in the improvement district. The Legislature had no concept as to how each individual lot would be shaped or how the overhead utilities would cross the lot. Indeed it more fully fills the requirement of *Gast Realty Company v. Snyder Granite Company,* 240 U.S. 55, 33 S.Ct. 254, 60 L.Ed. 523, wherein the United States Supreme Court stated that "substantial justice generally will be done," and that the parties should not be taxed "disproportionately to each other and to the benefit conferred." From many standpoints this is probably more fair and equitable than any previously used method for such improvements.

In 1916 the Supreme Court of Utah held that property assessed on an acreage basis in a drainage District was constitutional. That case was *Ferry v. Corrinne Drainage District of Box Elder County,* 156 Pac. 921, 48 Utah 1.

The Appellants have dabbled in much speculation in the second point they raise in their second argument under this subsection, stating that the public utilities benefit from the underground utilities and, therefore, should pay a proportionate cost of their installation. It is pure speculation to assume that it is easier to repair the wire under the ground than it is up on top of a pole. It is speculation to assume that a transformer, several feet under the ground, is easier to get to in order to adjust, repair or replace than one three or four feet above the ground. The difference between climbing a pole or digging a trench certainly cannot affect the constitutionality of this law.

The public utilities made an investment when they first installed the overhead utilities. It is less expensive and considerably easier for the public utilities to maintain overhead facilities and considerably less expensive for them to install. It is the public, through their representatives in the legislature that sought and demanded cleaner air and less visual obstructions.

It is appropriate here to observe that utilities are governed specifically under this Act by the Uniform System of Accounts. (State Statutes §54-8-24; Ordinance §39-7-26) This is the same system of accounting required by the Public Service Commission, the Federal Communications Commission and the Federal Power Commission for the utilities. Interestingly, this formula, set forth in the Code sections above, require the util-

ities to take "the original cost less depreciation taken of the existing overhead electric and communication facility to be removed." It is clear with inflation as it is on the cost of the replacement system utilities would be much better off receiving fair market value for the existing system rather than the original cost less depreciation. Under the present conditions of inflation they could stand to lose considerably more than they would gain.

Certainly, if the public utility were a neighbor as part of a special improvement district, they, of course, would be obligated to pay their share of the cost.

POINT V

THE STATE STATUTE AND ORDINANCE PERMIT THE TAKING OF PROPERTY WITH JUST COMPENSATION.

There is a basic inconsistency in the Appellant's argument herein. State Statute §54-8-24; Ordinance §39-7-26 both provide that sufficient monies will have to be obtained from the levy and assessment to cover any additional easements that need to be acquired. Presumably, the monies in question are to purchase or acquire easements from the property owners. It is true that they are making an assessment against all the property owners for the purpose of acquiring those easements, if any there be that need to be purchased, but there is no question that those easements that need to be acquired will be paid for in full with adequate compensation. As a practical matter, it is anticipated as in the present improvement district, that most if not all of the property owners will be happy to convey an easement to the utility company to assist in getting the

project underway. Flowers can be planted over an underground utility easement as easily as they can be planted under an overhead wire and likely the flowers will prosper more.

Assuming there is no adequate easement, the Section simply allows for the assessment of sufficient funds to pay for easements.

State Statute §54-8-26; Ordinance §39-7-28 allows those who wish to make the connections with the utilities to do it themselves. The right to object in writing allows the property owner to object and to make the connections himself and the failure to object allows the utility company to enter his premises to connect the telephone and electrical power lines. It must be borne in mind that the caution with which the service lines are placed in the ground are as important to those living there as to the utilities themselves. The same expertise that requires the Utilities to bury the utilities or to supervise in burying the utilities holds true for the service line.

CONCLUSION

The State Statute and Ordinance should be held constitutional for the reasons set forth. The Legislature has been extremely careful in this law to provide for more than enough safeguards to protect the public generally and specifically those in the improvement districts. There is a significant public benefit derived from this law. Inasmuch as new construction, particularly in residential and downtown areas, is going in without overhead utilities. This is a significant step forward in cleaning up visual obstructions left by generations past. Only those in the improvement district are taxed and the credit

of the community is not pledged for this debt. The only roll the utility companies play is that of using their expertise in designing the system and seeing that it is properly constructed. They make no profit nor receive any gain. All that is accomplished is an overhead utility system being replaced by an underground utility system.

The decision below should be sustained, with instructions to enter judgment declaring the State Statute and Ordinance constitutional and for a denial of the injunction.

Respectfully submitted,

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