

1972

Home Builders Association of Greater Salt Lake v. Provo City, A Municipal Corporation, the State of Utah : Reply Brief of Appellant

Utah Supreme Court

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In The Supreme Court of the State of Utah

HOME BUILDERS ASSOCIATION OF
GREATER SALT LAKE, a corporation,
ROBERT PEAY and DON DEAN, d/b/a
DEAN & PEAY CONSTRUCTION; C & T
CONSTRUCTION COMPANY, a partner-
ship; DUANE HERBERT, d/b/a CROWN
CONSTRUCTION COMPANY; J. S.
BRADY DIRKER, d/b/a J. S. BRADY
DIRKER CO.; CLYDE LUNCEFORD;
QUINTIN ELDER and L. G. SPARKS,
d/b/a L. G. SPARKS CONSTRUCTION
COMPANY, for themselves and others
similarly situated, and VILLA MARIA, a
partnership,

Plaintiffs and Appellants,

vs.

PROVO CITY, a municipal corporation,
the State of Utah,

Defendant and Respondent.

Reply Brief of Appellant

Appeal from the judgment of the
District for Utah County, State of Utah,
Honorable Maurice Harding, District Judge.

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In The Supreme Court of the State of Utah

HOME BUILDERS ASSOCIATION OF
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Plaintiffs and Appellants,

vs.

PROVO CITY, a municipal corporation of
the State of Utah,

Defendant and Respondent.

Case No.
12819

Reply Brief of Appellant, Villa Maria

Appeal from the judgment of the Fourth Judicial
District for Utah County, State of Utah, the
Honorable Maurice Harding, Judge, Presiding.

Appellant, Villa Maria, concurs with and joins in
the brief, statement of facts, arguments and authorities
cited by the other appellants in this case, but wishes

to file its own Reply Brief citing authorities and arguments which Villa Maria feels entitles it to judgment in this case. Appellants contend that the establishment of a mandatory sewer connecting charge by Provo City for new dwelling units is ultra vires, discriminatory, and unconstitutional.

ARGUMENT

POINT I

SEWER CONNECTION CHARGES MAY NOT BE EXACTED FROM A SINGLE CLASS OF THE POPULATION TO DEFRAY GENERAL GOVERNMENTAL EXPENSES WHICH SHOULD BE BORNE BY THE ENTIRE COMMUNITY EQUALLY.

As long ago as 1900, the Utah Supreme Court recognized that:

“One class of citizens cannot thus be compelled to bear the burdens of government, to the advantage of all other classes.” *Cache County v. Jensen*, 21 Utah 207, 61 Pac. 303, 308. (1900).

The sewer connection charges which are being exacted under Provo City Ordinances 23.20.040 to 23.20.070 are presently being used to defray such general governmental expenses as the payment of new collector trunk lines, replacement of existing sewer lines, enlargement of the sewage treatment plant, the retire-

ment of bond indebtedness, and general operating expenses of the sewer system, including employees' salaries and equipment expense. Appellants' brief correctly points out that these governmental functions are for the benefit of all of the people of Provo and should be paid for by all the people equally. The cases cited in appellants' brief have so held and need not be repeated here. Respondent's brief cites *Associated Homebuilders v. The City of Livermore*, 17 Cal. Rptr. 5, 366 P.2d 448 (1961), as being controlling. The case is distinguishable, however, since our ordinance is a revenue measure rather than a police power enactment and since defendant, Provo City, is without statutory or constitutional authority to enact such an ordinance under its taxing powers.

The Provo City ordinances are silent as to just where the money from this sewer connection fee goes. Appellants contend it could just as easily go to a general fund and be used for any purpose, as it could to said Sewer Disposal Operating Fund. A future Provo City administration could easily earmark such funds for parks, recreation, streets and roads, etc. Since the Provo City ordinance is completely silent as to the purpose of the sewer connecting fees, it seems clear that the funds could go to meet the general obligations of the municipality. The following citations lend support to appellants' contention:

"Taxes and license fees and other revenue collected by a city are primarily for the pur-

pose of paying the general expenses of operation of the city government and constitute primarily what is designated as a general fund, unless otherwise provided by ordinance or statute." 56 *Am.Jur.2d* 634, § 582. See also *Mar v. Southern California Gas Co.*, 198 Cal 278 245 Pac. 178 (1926), and *Pure Milk Producers & Distributors Assn. v. Moreton*, 125 SW.2d 216, 276 Ky 736 (1939).

The Montana Supreme Court, in *State v. Bailey*, 44 P.2d 740, 741 (1935), has also held that:

"Funds in custody of municipal functionary and subject to disbursement for various purposes at municipal officials discretion are general assets of the municipality, as in the case of cities' general fund which may be used to meet the demand for payment on account of bonds issued by special improvement districts of the city."

Likewise the Kentucky Supreme Court has expressly ruled that:

"Taxes and license fees and other revenue collected by the city are primarily for the purpose of paying general expenses of operation and constitute primarily the 'general fund' unless otherwise provided by ordinance or statute." *Pure Milk Producers and Distribu-*

tors Association v. Moreton, 276 Ky. 736, 125 SW.2d 216 (1939). (Emphasis added.)

Thus, where ordinances are silent as to the purpose for said fees exacted by the municipalities, such funds can be earmarked for the general fund for general revenue purposes regardless of what they are presently applied to. Provo City officials are under no statutory obligation to continue applying these sewer connecting charges to the sewer disposal operating fund which they have set up. Their minds could change as a need arises or upon any moment.

Furthermore, this sewer disposal operating fund is presently being used to defray such general governmental expenses as the payment of new collector trunk lines, replacement of existing sewer lines, enlargement of the sewer treatment plant, retirement of the bond indebtedness, and general operating expenses of the sewer system including employees' salaries and equipment expense, all of which are general expenses which are for the benefit of all of the people of Provo and should be borne by the entire community equally; thus, the ordinance in question violates the Utah Constitution, Article 1, Sections 2 and 7, and United States Constitution, Amendment 14.

Appellant, Villa Maria, cites as its chief authority the *Weber Basin Home Builders Association v. Roy City* case, 26 Utah2d 215, 487 P.2d 866 (1971). In this case Roy City increased its building permit fee from

\$12.00 to \$112.00 per unit for the purpose of obtaining money for their general fund, to improve the city's water and sewer systems, which was needed because of increased construction and the influx of new residents into the city. The Utah Supreme Court held that the increase placed a disproportionate and unfair burden on the new home owners as compared to the old ones in the maintenance of city government and that, therefore, the city ordinance was discriminatory and constitutionally impermissible.

The Provo City case we are concerned with here is almost identical to the Roy City case previously mentioned. What Provo City has done is establish a one-time tax rather than a connecting fee. The admitted purpose of the ordinance was not to bring the fee in line with the cost of hooking a private line to the municipal sewer line, but the purpose, on the contrary, was to finance the development, the expansion and the rebuilding of the entire sewer system. This establishes the connect-fee as a one-time tax and clearly outside the powers of the municipality under state law. See *McQuillin on Municipal Corporations*, Volume 9, § 26.15. Quoting from McQuillin:

“There is a well understood distinction between a license fee imposed under the police power for the purpose of regulation and a tax imposed under the taxing power for revenue. A license fee or tax under the police power is such a fee only as *will legitimately assist in*

regulation and will not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business or other subject that it covers, consequently, municipal police power to license as a mode of regulation is distinguished from municipal power to license for revenue. On the one hand a tax that is not in any sense regulatory and is imposed expressly for general revenue purposes is based upon the taxing power and even though a license fee, it is in truth a tax and not a regulatory exaction under the police power. On the other hand, charges to cover the cost of regulation of a business or occupation and not to raise revenue are license fees and not taxes for revenue. A revenue tax may not be imposed under the guise of police regulation or licensing.” McQuillin, Pages 31 and 32, Vol. 9. (Emphasis added.)

The Utah Supreme Court, in the Roy City case, correctly points out that it is not always easy to tell whether an ordinance is for the purpose of providing revenue or whether it is really a license fee under the police powers given to the city. In the Roy City case the Court says that it is to be recognized that “there are situations where the ordinance is neither completely fish or fowl as coming within either of the above mentioned classifications, but it is a hybrid that partakes of both.” (Page 867).

McQuillin sheds further light on this subject as to how to distinguish between the various factors bearing on whether certain ordinances exact a licensing fee for regulation or a tax for revenue purposes. Quoting from Page 33 of the previously cited volume:

“Various factors bear on the matter whether a particular exaction is a licensing fee for regulation or a tax for revenue. In general the nature and purpose of an ordinance imposing an exaction and the nature and purpose of the charter provision or statute authorizing the ordinance will determine the character of an exaction in this respect. Thus a declared or obvious purpose to regulate, though not controlling or conclusive, tends to establish an exaction as purely regulatory licensing fee. *But an ordinance having no provisions for regulation and imposing an exaction as a tax ordinance designed to raise revenue, especially when the proceeds of the licensing fee are placed in the general revenue fund or account. When levied for revenue alone, license fees or charges are revenue taxes and can be upheld only if based upon the power of taxation.*”

The Provo City charges go into a general sewer fund which includes the retirement of general obligation bonds and since the ordinance is silent as to purpose, the funds could easily be transferred to a general fund by a future administration. As appellants' brief

points out, the ordinance, Provo City Ordinance No. 248, is silent as to its purpose. The money collected from the ordinance tax goes to pay for monthly sewer service fees, enlargement and replacement of the sewer collecting system, treatment plant improvements, and a whole myriad of items connected with the sewer disposal. In addition, there is no requirement that the money collected from this fee could not go into the general fund. The money could just as easily be used for streets and roads, for development of municipal parks, etc., imposing an unfair burden upon the class of people paying the tax. Respondent's brief admits that the purpose of the ordinance was not to bring the fee for connecting to the sewer line in line with the expenses involved, but on the contrary, the purpose was to raise revenue to finance improvements in the sewer system to satisfy the needs of new residents in the community. (See page 3 of Respondent's brief.) This makes the charge under this ordinance a tax and appellant contends that this lies outside the powers of the municipal corporation. (See also Point II.)

The city has made no claim that a major purpose of the so-called connecting fee was to bring the fee into line with the costs of connecting to the sewer line and inspection, or other regulation, but the city does admit that the collection of this additional fee is necessary to improve its sewer system because of the construction of new dwellings and the growth of the city.

Quoting again from the Roy City case:

“The critical question here is whether the ordinance in its practical operation results in an unjust discrimination by imposing a greater burden of the cost of city government on one class of persons as compared to another without any proper basis for such differentiation and classification. It is not to be doubted that each new resident has its effect in increasing the cost of city government, nor that due to the steadily increasing cost of everything, including those involved in rendering such services, the city would have authority to raise the fees charged for such services from time to time, nevertheless, *in that connection the new residents are entitled to be treated equally and on the same basis as the old residents.*” 487 P.2d 866 at 868. (Emphasis added.)

Expressing a similar principle is the case of *Daniels v. Burrough of Point Pleasant*, 23 N.J. 357, 129 At.2d 265 (1959). In the Burrough of Point Pleasant case the New Jersey court struck down the same kind of ordinance involved in the Roy City case. The court said:

“What the Burrough of Point Pleasant is attempting to do here is to defray the general cost of government under the guise of reimbursement for the special services required by the regulation and control of new buildings. The philosophy of this ordinance is that the tax rate of the Burrough should remain the

same and the new people coming into the municipality should bear the burden of the increased cost of their presence. *This is so totally contrary to tax philosophy as to require it to be stricken down.*"

Merrell.

See also ~~Merrell~~ *Merrell v. City of St. Clair Shores*, 96 N.W.2d 144, 355 Mich. 575, cited in appellants' brief.

Under the undisputed facts as presented here, the establishment of a \$100.00 connecting fee, which admittedly had no relationship to increased cost of the services rendered, and more importantly, where the declared purpose was to raise revenue for the entire sewer disposal system and where the revenue could find its way into the general fund for the city, establishes appellants contention that the increase places a disproportionate and unfair burden on the builders of new dwelling units in Provo City as compared to the old ones, in the maintenance of city government and, consequently, it is a discriminatory and constitutionally impermissible tax. The opinion of the Utah Supreme Court in the *Weber Basin Home Builders Association v. Roy City* case should be upheld and the Provo City ordinance stricken for the same reasons.

Appellants recognize that the fiscal problems which are confronting our municipalities because of their rapid growth rate are grave ones and would seek to call for legislative action, however, the remedy must not come from the municipalities nor from the courts, but from the legislature. Provo City must not be allowed to exact

a discriminatory, unconstitutional, and ultra vires tax against plaintiffs-appellants.

POINT II

THE LAWS OF THE STATE OF UTAH DO NOT PERMIT PROVO CITY TO EXACT A SEWER CONNECTION FEE FOR NEW DWELLING UNITS.

The real question is whether Provo City has the authority under State enabling legislation to impose a \$100.00 per dwelling unit sewer connecting tax. The important section to be considered in this case is Section 10-8-38 of the Utah Code Annotated which reads as follows:

“Any city or town may, for the purpose of defraying the cost of construction, reconstruction, maintenance or operation of any sewer system or sewage treatment plant, make *a reasonable charge for the use thereof*. In order to enforce the collection of any such charge, the city or town operating a water works system may make *one charge* for the combined use of water and the services of the sewer system.” (emphasis added)

Appellants contend that Provo City has been and is now charging a monthly sewer service fee to all the users of its sanitary sewer system. Respondent's brief, on

page 3, admits this one-time charge is completely separate and distinct from the monthly fee for sewer service. Thus, by charging a mandatory connecting fee for new dwelling units, Provo City has exceeded the authority found in Section 10-8-38 which limits municipalities to a "reasonable charge for the use thereof" and "one charge for the combined use of water and the services of the sewer system."

Any interpretation that the 1971 Legislative Amendment to Section 10-8-38 providing for mandatory hookup permits municipalities to charge a connecting fee, should be disregarded, since the Provo City Ordinance was passed August 18, 1970, and since appellant, Villa Maria, had paid its assessed tax under protest before the date of that amendment. Even with the mandatory hookup amendment added, however, the State statute still authorizes only *a reasonable charge for the use* and does not authorize an additional fee for sewer connection to be paid by new residents. The power to impose a sewer connection tax simply cannot be inferred from 10-8-38, or any other section of the Utah Code cited by respondent. The intent of the legislature is clear.

Furthermore, the city has made no claim that a major purpose of the so-called connecting fee was to bring this fee in line with the cost of connecting to the sewer and inspection and other regulation. All the city does admit is that the collection of the additional fee is necessary to improve its sewer system because of

struction of new dwelling units and the growth of the city. Thus, appellants contend that the tax exacted here by the city is not a reasonable charge for the use thereof. A reasonable charge for the use thereof is already made under the other sewer fees which are charged by Provo City.

Respondent again cites *Associated Homebuilders of the Greater East Bay, Inc. v. The City of Livermore*, 17 Cal. Rptr. 5 366 P.2d 448 (1961), as being controlling in this case. The case mentioned is again distinguishable from the Provo City case at hand, since the California statute involved in the Livermore case, provided that the city could exact: "fees, tolls, rates, or other charges for services and facilities furnished by it in connection with its sanitation or sewage system." (p. 451) By way of comparison, the Utah statute merely provides "for a reasonable charge for the use thereof", and further, that the city may make "one charge for the combined use of water and the services of the sewer system." This one charge is presently made and applied to all homeowner or dwelling units which presently use the water and sewer system and thus the additional charge of \$100.00 is ultra vires and beyond the scope of the enabling legislation.

It is a well recognized principle that the authority of municipalities to levy a tax must be made clearly and doubts, if any, as to the powers sought to be exercised must be resolved against the municipality. See *Sanchez v. The City of Santa Fe*, 82 N.M. 322, 481 P.2d 401, (1971) where the court held that:

"Cities exist only by virtue of statutory creation and have only such power statutes expressly confer without resort to implication. Having decided that ordinances in question are not geared for regulation so as to make it a police power, it follows that such a fee requirement is in the nature of a tax. The power to tax is never inferred."

The *Burrough of Point Pleasant* case reaches the same result.

"The power to levy licenses for revenue purposes is not inherent in municipal corporations. The power of taxation is vested in the legislature. Municipalities, being creatures of the state, have no power of taxation unless it is plainly delegated to them." *Daniels v. Borough of Point Pleasant*, 129 A.2d 265, 266.

The Utah Supreme Court has held that:

"Power of a city tax is derived solely from legislative enactment and the city has only such authority as is expressly conferred or necessarily implied."

The same case held further that:

"In case of any ambiguity or uncertainty as to authority of a municipality to impose tax

doubt must be resolved in favor of the taxpayer." *Moss v. Board of Commissioners of Salt Lake City*, 1 U.2d 60, 261 P.2d 961, 962 (1953).

To summarize under Point No. II then, Provo City has been and is charging a monthly sewer service fee to all users of its sanitary sewer system. This is the reasonable charge for the use of such system contemplated by Section 10-8-38. This statute does not authorize an additional fee to be paid. Furthermore, without express legislative intent and express enabling legislation, municipalities are prevented from exacting or exercising powers of taxation. This express enabling legislation is absent in this case.

CONCLUSION

The summary of appellant Villa Maria's contention is as follows:

"The so-called hookup fee is really a tax and as a tax it is an unreasonable and unconstitutional and ultra vires exercise of the powers of the municipal corporation. The fee charged far exceeds the cost of the hookup, so it constitutes a one-time tax, the purpose of which is admittedly to finance the entire operation of the sewer disposal system in Provo City. In addition, since the city ordinance is silent as to the purpose of the fee or as to where the money goes when collected, it could go into the general fund and be used

to finance community-wide expenses. The Utah Statute 10-8-38 does not provide for a hookup charge of any kind. It provides for a *reasonable charge for the use thereof*, and the use thereof consist of the use of the sewer system for which a charge is presently made. The statute goes on to say that the city may make one charge for the combined use of water and services of the sewer sysem, not an additional charge of \$100.00 for hookup and then the charges for the services and use of the water and sewer system. Thus, the power to impose a sewer connection tax cannot be inferred from UCA 10-8-38.

Ordinance 248 should be held invalid and plaintiffs should be awarded judgment against Provo City for their respective amounts paid thereunder.

Respectfully submitted,

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