1983

Utah Restaurant Association, a Utah Non-Profit Corporation And Anthony's, Inc., a Utah Corporation, Dba Anthony's Restaurant : Brief of Appellant

IN THE SUPREME COURT OF THE

STATE OF UTAH

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UTAH RESTAURANT ASSOCIATION, a Utah non-profit corporation, and Anthony's, Inc., a Utah corporation, dba Anthony's Restaurant,

Plaintiffs and Respondents,

vs. Case No. 19213

DAVIS COUNTY BOARD OF HEALTH,

Defendant and Appellant.

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BRIEF OF APPELLANT

Appeal from the Judgment of the Second Judicial District Court of Utah, Davis County, State of Utah
THE HONORABLE DOUGLAS L. CORNABY
DISTRICT COURT JUDGE

GERALD E. HESS
Deputy Davis County Attorney
Courthouse Building
P.O. Box 618
Farmington, Utah 84025

Attorney for Appellant

GARY E. ATKIN
ATKINS & ANDERSON
185 South State Street
Suite 400
Salt Lake City, Utah 84111

Attorney for Respondent

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REFERENCES

[illegible] COURT OF THE

[illegible]

[illegible], :

[illegible] :

[illegible] :

Plaintiffs and :
[illegible]

: Case No. 19213

[illegible], :

Defendant and :
Appellant.

BRIEF OF APPELLANT

NATURE OF THE CASE

This is an appeal from a final judgment of the District Court of Davis County.

[illegible] OF THE CASE IN THE LOWER COURT

The [illegible] County ruled that the [illegible] fee imposed by defendant-appellant is invalid so [illegible] appellant is restrained from imposing the in- [illegible].

[illegible] ON APPEAL

[illegible] to rule that appellant [illegible] fee if the fee is adopted

[illegible] adoption of a food service inspection fee, but the Court's ruling was [illegible]. The Court [illegible] that even if appellant had followed [illegible] findings of fact and conclusions of law, appellant would not have the power or authority to impose a food service inspection fee in connection with its food service inspection program.

ARGUMENT

POINT I.

THE DISTRICT COURT ERRED IN RULING THAT THE DAVIS COUNTY BOARD OF HEALTH DOES NOT HAVE THE STATUTORY AUTHORITY TO ESTABLISH A PERMIT FEE REGULATING FOOD SERVICE ESTABLISHMENTS.

In 1981, the Utah State Legislature enacted the Local Health Department Act which is found in Chapter 24 of Title 26 of the Utah Code Annotated (1953) as amended. The statute authorizes the creation of a county-wide Board of Health to create better and more uniform public health programs and enforcement on a county-wide basis. The legislature directed that local health departments should have certain duties and responsibilities. Subparagraph 2 of Section 26-24-3 Utah Code Annotated (1953) as amended states:

> "Local health departments within their jurisdictions shall be responsible for providing directly or indirectly basic public health services consisting of, but not limited to, public health administration and support services, maternal and child health, communicable disease control, surveillance and epidemiology, food protection, solid waste management, waste water management and safe drinking water management."

The legislative enactment gave the Board of Health jurisdictional control in both incorporated and unincorporated areas of the County. Section 26-24-8 Utah Code Annotated (1953) as amended states:

> "A local health department shall have jurisdiction throughout all unincorporated and incorporated areas of the county or district in which it is established and shall enforce state health laws, rules, regulations and standards therein."

The state legislature specifically set forth the powers and duties of the local boards of health in Section 26-24-14 Utah Code Annotated (1953) as amended, parts of which are quoted below:

> 26-24-14
>
> "A local health department shall have in addition to all other powers and duties imposed on it, the following powers and duties:...
> (3) Investigate and control the causes of epidemic, infectious, communicable and other diseases affecting the public health, and investigate and control the causes of environmental and occupational health hazards affecting the public health, and provide for the detection, reporting prevention and control of communicable infectious, acute, chronic, or any other disease or health hazard considered dangerous or important or which may affect the public health;...
> (5) Enforce rules, regulations and standards adopted by the board;...
> (11) Make necessary sanitary and health investigations and inspection on its own initiative, or in cooperation with the department, as to any matters affecting the public health;...

The Court's attention is specifically directed to subparagraph 14 of Section 26-24-14 Utah Code Annotated (1953)

amended, which states that one of the specific powers of the District Health is to:

> "Establish and collect appropriate fees, to accept, use and administer all federal, state or private donations or grants of funds, property, services or materials for public health purposes, and to make such agreements, not inconsistent with law, as may be required as a condition to receiving such donation or grant..."

It is clear from a review of the entire Local Health Department Act that the legislature gave certain responsibilities to the Health Department including the responsibility to make investigations and inspections for public health purposes. As a part of the overall legislative purpose, the health department is to formulate rules and regulations for the promotion of public health which shall have the effect of law and shall supercede existing local rules, regulations, standards and ordinances pertaining to similar subject matter. The legislature authorized the Board of health to establish and collect appropriate fees to pay for services rendered by the board of health and mandated by the Local Health Department Act. To insure that any such fees would be appropriate, the legislature also included in Section 26-24-20 Utah Code Annotated (1953) as amended the procedure the board is to follow in adopting fees, rules and regulations as well as a judicial review of any final determination of the Board of health.

The District Court ruled that only a legislative body can enact a tax. The Court further indicated that Davis County is a legislative body but the Davis County Board of Health is

not such a legislative body which could impose a tax. Appellant does not question the soundness of those statements from the District Court. Appellant is also in agreement with the distinction the District Court makes between a tax and a license. The District Court indicated, "If the purpose is to raise revenue then it is a tax." (R-234) The District Court erred, however, when it determined that the inspection fee imposed by appellant was a tax.

In State vs. Double 7 Corporation, 219 P.2d, 776 (ARIZ 1950) the Supreme Court of Arizona had before it the question of the constitutionality of a livestock inspection statute. The court ruled that the State, under its police power, had the right to regulate the livestock industry and then instructed at page 779;

> "It is a general rule that a reasonable fee may be imposed for the carrying out of any law passed by virtue of the State's police power; provided the fee is of such an amount that it is obvious it is for defraying of expenses only and not in reality a revenue measure."

The Utah Supreme Court has likewise declared that money collected mainly for the purpose of regulating a business is regarded as a license fee and not a tax. In Weber Basin Home Builders Association vs. Roy City, 26 Ut.2d 215, 487 P.2d 866 (1971), the Court said at page 867;

> "If the money collected is for a license to engage in a business, and the proceeds therefrom are proposed mainly to service, regulate and police such business or activity, it is regarded as a license fee. On the other hand,

> "If the factors just stated are minimal, and the money collected is mainly for raising revenue for general municipal purposes, it is properly regarded as the imposition of a tax, and this is so regardless of the terms used to describe it."

When the above principles are applied to the facts of this case, it is clear that the inspection fee imposed by the Board of Health was simply to offset a portion of the cost of the food service inspection program mandated by the legislature and implemented by appellant. The record is without dispute that the cost of the food service inspection program is approximately $53,000.00 and that the inspection fee imposed by appellant would offset only a portion of the cost of the total program. (P-133) The inspection fee imposed by appellant was clearly not a revenue producing measure and therefore it could not be considered a tax.

Appellant urges the court to adopt the statement of law found in 39A CJS §13, "Health and Environment" page 420. There it states;

> "A board or department of health ordinarily has no authority to impose a tax, and must look to legislative bodies for the source of its operating funds. While such an agency may properly require payment of a fee for a license or permit or for an examination or inspection, the amount may be only such as is reasonable calculated to cover the cost of the operation in question."

Appellant likewise urges the court to consider the statement found at page 419 of 39A CJS "Health and Environment" wherein it states;

> "Powers conferred on boards of health to enable them effectually to perform their important functions in safeguarding the public health should receive a liberal construction."

> delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and the conferring an authority or discretion to be exercised under and in pursuance of the law.'" page 342

The Court went on to say at page 342,

> "... it cannot be said that every grant of power to executive or administrative boards or officials, involving the exercise of discretion and judgment must be considered a delegation of legislative authority. While it is necessary that a law, when it comes from the law-making power, should be complete, still there are many matters relating to methods or details which may be by the legislature referred through some designated ministerial officer or body. All such matters fall within the domain of the right of the legislature to authorize an administrative board or body to adopt ordinance, rules, by-laws, or regulations in aid of the successful execution of some general statutory provision."

The Local Health Department Act declares that the Board of Health may impose appropriate fees and make rules and regulations to carry out the law which the legislature has enacted. It has also provided a safeguard that if any fees or rules or regulations are not appropriate any person aggrieved by any action or inaction of the Board of Health may seek review through the court.

In recent years decisions of the Utah Supreme Court have favored strengthening the role of administrative bodies. In Ricker v. Board of Education of Millard County School District, 16 Ut2d 106, 396 P.2d 416 (1964) the Court upheld the Board's position that it should have a free hand in using the funds where the Board felt the most pressing needs were.

The Court declared at page 420;

> "It is the policy of the law not to favor limitations on the powers of the administrative body, but rather to give it a free hand to function within the sphere of its responsibilities."

Of similar importance is Lloyd A. Fry Co. v. Utah Air Conservation Committee, 545 P.2d 495 (Utah 1975). There an attack was made by Plaintiff against the constitutionality of the Air Conservation Act. One argument made by Plaintiff was that the Act constituted an improper delegation of legislative power to the Air Conservation Committee because there were insufficient standards to guide the committee. In upholding the legislative delegation of authority to the Air Conservation Committee the Supreme Court said at page 500;

> "In Bortz Coal Company vs. Air Pollution Commission, the court, in ruling that the Pennsylvania Air Pollution Control Act did not constitute an unlawful delegation of authority observed that if the regulatory agency sets forth unreasonable standards of air pollution, the citizens are protected through the appeal provisions of the act. This concept is in accord with the view expressed by Davis Administrative Law Treatise; Section 2.09, page 113, that the law of delegation would be strengthened if the courts were to de-emphasize statutory standards and to emphasize the degree of procedural safeguards."

The principle set forth in the above case is sound and should be applied to the facts of the present case before this Court. There is ample protection for any aggrieved person if the Board of Health should impose an unreasonable or arbitrary or inappropriate fee. The power to establish and collect appropriate fees is a part of the overall expressed

legislative purpose of the Local Health Department Act. The legislative delegation of authority to establish and collect appropriate fees is proper and should be upheld by this Court.

POINT III.

THE POWER TO MAKE INSPECTIONS BY THE DAVIS COUNTY HEALTH DEPARTMENT CARRIES WITH IT THE POWER TO IMPOSE A FEE TO COVER THE COST OF INSPECTIONS.

The Court's attention is invited to the decision of Salt Lake City v. Bennion Gas and Coal Company, 15 P.2d 648 (Utah 1932). There Salt Lake City brought an action against Bennion Gas and Oil Company to recover a judgment for an inspection fee which defendant, Bennion Gas and Coal Company had failed to pay. Salt Lake City had passed an ordinance which required the City to inspect gasoline and oil sold by various companies in Salt Lake City. The ordinance further provided that the City should collect a yearly inspection fee in advance.

Two questions were presented to the Court. The defendant complained that the power to inspect did not carry with it the power to charge for the inspection. Secondly, the defendant claimed that the inspection fee was a revenue measure and had no relationship whatsoever to the services rendered for the inspection.

In addressing the first question, the Supreme Court said at page 649;

> "Respondent in the instant case has been granted direct power and express authority

> under section 570x45, Supra, to pass inspection ordinances, and the law is that where such power has been given by the legislature, the same carries with it as an incident thereto the right to charge a fee for said inspection."

The Court went on to hold that the right to pass inspection ordinances carried with it the right to charge a fee to defray the cost of the inspection. The court noted that since there was no showing that the inspection fee was not reasonably related to the expense incurred in making the inspections, there was no basis for a ruling that the fee was excessive and unreasonable.

Appellant urges upon the Court that there is a specific legislative grant of authority to the Board of Health to impose an inspection fee. However, based upon the foregoing decision of the Supreme Court, it is urged that even absent a specific grant of authority to impose an inspection fee there is incident to the right of inspection the power to impose a fee of offset the cost of the inspection. Clearly, the legislature has authorized and mandated that the Board of Health perform inspections as to any matters affecting the public health. As an incident thereto, the Board of Health has the right to charge a fee to offset the costs of any such inspections.

POINT IV.

THE INSPECTION FEE IMPOSED BY APPELLANT IS A FEE AND NOT A TAX.

As indicated in Weber Basin Home Builders Association v. Roy, 487 P.2d 866 (Utah 1971) the basic distinction

between a license and a tax is that any funds collected from a license mainly service, regulate and police the business or activity whereas a tax raises funds for general municipal purposes. The distinction set forth in Weber Basin is consistent with prior decisions of the Utah Supreme Court.

In Best Foods Inc. v. Christenson, 285 P 1001 (Utah 1930) the plaintiff brough suit against the defendant, the Utah State Treasurer, claiming that a Utah statute was invalid. The Utah statute required manufacturers and retailers of margarine to pay an inspection fee or annual license. The plaintiff contended there was a fundamental distinction between a license fee imposed under the police power and a license fee imposed for revenue. The Court noted that a license tax upon the inhabitants of a city enacted for the sole purpose of raising revenue for the city was improper. The Court however declared:

> "On the other hand, it is well settled that a law which is enacted to protect a public interest or defend against a public wrong is not a tax, although it requires the payment of a license fee to bear the expense of carrying out its provisions." page 1004

The Court ruled that the purpose of the fee was to assist in offsetting the cost of the service rendered to the county or city and upheld the imposition of the license fee. In the ruling of the District Court dated February 18, 1983, the Court said;

> "The Davis County Board of Health passed a regulation to raise a tax even though they designated it a fee." (R-228)

By applying the principles set forth in the above cases to the present uncontested facts presented to the lower court, there can be no question that the inspection fee imposed by appellant was not a tax. The District Court simply erred in ruling that the inspection fee was a tax.

RESPECTFULLY SUBMITTED this 7th day of July, 1983.

DAVIS COUNTY ATTORNEY

By: _____
GERALD E. HESS, ESQ.
Deputy Davis County Attorney
Courthouse Building
P.O. Box 618
Farmington, Utah 84025
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Appellant to Gary E. Atkin, Attorney for Plaintiff-Respondents, 185 South State Street, Suite 400, Salt Lake City, Utah 84111, on this 29th day of July, 1983, postage prepaid.