

1992

# West Valley City v. Dennis Streeter : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 920349

IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,

Plaintiff, Appellee,

vs.

DENNIS STREETER,

Defendant/Appellant.

REPLY BRIEF OF APPELLANT

Case No. 920349-CA

Priority No. 2

REPLY BRIEF OF APPELLANT

On Appeal from the Third circuit Court, West Valley Department, in  
and for Salt Lake County, State of Utah; the Honorable WILLIAM  
A. THORNE, Presiding

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DEC 10

CLERK OF COURT  
UTAH COURT OF APPEALS

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WEST VALLEY CITY, )

Plaintiff, Appellee, )      REPLY BRIEF OF APPELLANT  
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**vs.** ) **Case No. 920349-CA**  
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TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . .	ii
DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES . . . . .	1
ARGUMENT . . . . .	1
I.    REVISED WEST VALLEY CITY ORDINANCE IS VOID AS ULTRA VIRES AND AS IN CONFLICT WITH GENERAL LAW AND CONSTITUTES AN UNAUTHORIZED USE OF WEST VALLEY CITY'S POLICE POWERS	
CONCLUSION AND RELIEF SOUGHT . . . . .	7

## TABLE OF AUTHORITIES

### CASES

<u>Banana Co. v. United Fruit Co.</u> , 213 U.S. 347 (1909) . . . . .	6
<u>Gronlund v. Salt Lake City</u> , 194 P.2d 691 (1948) . . . . .	2
<u>Parker v. Provo City Corp.</u> , 543 P.2d 769 (1975) . . . . .	2, 3
<u>Ritholz v. City of Salt Lake</u> , 284 P.2d 702 (1955) . . . . .	2
<u>Salt Lake City v. International Ass'n of Firefighters,</u> <u>Locals 1654, 594 &amp; 2064</u> , 563 P.2d 786 (Utah 1977) . . . . .	1, 2
<u>State v. Hutchison</u> , 624 P.2d 1116 (1980) . . . . .	2, 6
<u>State v. Salt Lake City</u> , 445 P.2d 691 (1968) . . . . .	2

### STATUTES

Utah Code Ann. S10-8-84 . . . . .	2
Utah Code Ann. S10-8-47 . . . . .	4
Utah Code Ann. S10-8-59 . . . . .	4
West Valley City Municipal Code S 23-5-104(8) . . . . .	1, 4, 5, 6

### OTHER AUTHORITIES

U.S. Const. Amend. XIV. . . . .	6
Utah Const. Art.. XI, Section 5 . . . . .	1

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IN THE UTAH COURT OF APPEALS

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WEST VALLEY CITY,	)	
	)	
Plaintiff, Appellee,	)	REPLY BRIEF OF APPELLANT
	)	
vs.	)	Case No. 920349-CA
	)	
DENNIS STREETER,	)	Priority No. 2
	)	
Defendant/Appellant.	)	

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Defendant/Appellant, DENNIS STREETER, hereby replies to certain arguments raised by Plaintiff/Appellee's in Appellee's brief:

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES  
AND ORDINANCES

United States Constitution, Article I, Section 14:  
(Please see Addendum for text)

Utah Code Ann. Section 10-8-47  
(Please see Addendum for text)

Utah Code Ann. Section 10-8-59  
(Please see Addendum for text)

Utah Code Ann. Section 10-8-84  
(Please see Addendum for text)

Section 23-5-104(8), West Valley City Municipal Code  
(Please see Addendum for text)

ARGUMENT

I. REVISED WEST VALLEY CITY ORDINANCE IS VOID AS ULTRA VIRES AND AS IN CONFLICT WITH GENERAL LAW AND CONSTITUTES AN UNAUTHORIZED USE OF WEST VALLEY CITY'S POLICE POWERS

Appellant acknowledges its error in asserting that West Valley City is a chartered city subject to the language of Article XI, § 5 of the Utah Constitution and submits its apology for the error to

the court. However, the origin of West Valley City's creation is immaterial as the enactment of Revised West Valley City Ordinance 23-5-104(8) exceeds the statutory authority conferred West Valley City under the General Welfare Clause. See e.g, Salt Lake City v. International Ass'n of Firefighters, Locals 1654, 594 & 2064, 563 P.2d 786, 789 (Utah 1977)(Cities. . . are . . . political subdivisions of the state, and, in the absence of an adopted charter under the constitutional provision for home rule, are subject to full legislative control). Accordingly, when, as here, a municipal ordinance exceeds the authority conferred by statute, it is invalid as ultra vires and unconstitutional as in conflict with general law, (Ritholz v. City of Salt Lake, 284 P.2d 702(1955); Gronlund v. Salt Lake City, 194 P.2d 691 (1948); State v. Salt Lake City, 445 P.2d 691 (1968))), regardless of the origin of West Valley City. International Firefighters, 563 P.2d at 789.

An ordinance enacted under the General Welfare Clause, will be upheld as a valid exercise of West Valley City's police powers only if the ordinance bears a substantial and reasonable relationship to the objects of protecting the general welfare of the inhabitants of West Valley City. State v. Hutchison, 624 P.2d 1116, 1126 (1980); Parker v. Provo City Corp., 543 P.2d 769 (1975). The ordinance at issue bears no reasonable relationship to the protection of the moral well being of the citizenry of West Valley. Therefore, the ordinance at issue is void as ultra vires and as an improper exercise of police powers conferred West Valley City pursuant Utah Code Ann. §10-8-84.

It is undisputed that West Valley City has the authority to

enact ordinances under the General Welfare Clause that are reasonably related to providing for the public safety, health, morals and welfare. (Appellee's Brf. at pg. 12). The cases cited by Streeter in support of his argument are consistent with this premise, despite West Valley City's assertion that the decisions cited by Streeter in support of its argument rely upon Dillon's rule of strict statutory construction. See e.g. State v. Hutchison, 624 P.2d 116, 1126 (1980) (When the state has granted general welfare powers to local governments, those governments have .....authority to pass ordinances which are reasonably and appropriately related to the objectives of that power, i.e. providing for the public safety health, morals and welfare); Parker v. Provo City Corp., 543 P.2d 769 (1975) (Municipal ordinances enacted to protect public health, safety, welfare and well-being must bear reasonable relation to purposes). West Valley City attempts to establish that the ordinance meets the "reasonable relationship" standard by suggesting that the ordinance "specifically relates to and furthers the goal of the city to prevent cockfights." (Appellee Brf. p. 12)

West Valley City asserts that since cockfighting is illegal in Utah, it is within West Valley City's power under the General Welfare Clause to prohibit activities which support cockfighting in order to protect the safety, health, and welfare of its citizenry. (Appellee's Brf. at p. 12). While that statement is logical on its face, its application to Streeter rises to the level of absurdity. First, the game fowl raised by appellant is not fought in West Valley City or Utah. (Appellant's Brief at p. 16) Therefore, the



prevention sought by West Valley City has no reasonable relationship whatsoever to the protection of the citizenry which it is empowered to protect. Taken to its logical conclusion, Appellee's argument suggests that West Valley City has the authority to prevent the manufacture of gaming devices such as playing cards and poker chips in the city of West Valley in order to prevent illegal gambling in Utah. There is always the remote possibility that gaming devices manufactured in Utah may be used for illegal enterprise in Utah, but it cannot seriously be asserted that the mere availability of gaming devices in West Valley City which are manufactured for gambling in jurisdictions where gambling is legal has any conceivable detrimental effect upon the general welfare of the inhabitants of West Valley City.

Unlike the possession of marijuana, the possession of game fowl which may be raised and used to fight in foreign jurisdictions at some time during its life cannot in and of itself constitute possession of an illegal substance. Accordingly, West Valley City's attempt to analogize Streeter's possession of gamefowl, (which is bred and raised as potential fighting stock), to the possession of marijuana which may legally be possessed elsewhere is simply ridiculous and without merit. (See Appellee's brief at p. 14). Revised West Valley City ordinance 23-5-104(8), as applied to Streeter, bears no reasonable relationship to the prevention of cockfighting in Utah, nor is it reasonably related to promoting the public health, safety and welfare of West Valley City.

While it is true that West Valley City has the authority to

prevent cockfights<sup>1</sup> and cruelty to animals <sup>2</sup> by creating additional regulations under the General Welfare clause, there is no evidence in this record that appellant has engaged in cruelty to animals or utilized the game fowl raised by him for the purpose of cockfighting in West Valley City. To the contrary, the record reflects that Streeter has utilized the fowl raised by him in West Valley City for cockfighting in jurisdictions far beyond the boundaries of West Valley City and outside the State of Utah. (Appellant's brief at pg. 16). In addition, the record reflects that the act of raising game fowl to be utilized for fighting does not in and of itself constitute cruelty to animals, which may be morally detrimental to West Valley citizens, since the raising of fighting fowl does not require that the birds be fought in order to be trained to do so. (Appellant's brief at p. 16, fn.5). Rather, the specific breeds utilized for cockfighting engage in combative behavior instinctively and must be kept separated to prevent injury.(Id.) Nor is there any evidence in this record that cutting the waddles of game birds used for fighting constitutes cruelty to animals any greater than docking a dogs tail or clipping their ears which unarguably occurs frequently in the state of Utah without threat of prosecution. Therefore, the mere act of raising, keeping, or possessing game fowl in West Valley City which may be utilized for the purpose of fighting outside of Utah has no direct or indirect impact upon the general welfare of West Valley City.

To the contrary, it is inconceivable that raising, keeping or

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<sup>1</sup> See Utah Code Ann. 10-8-47.

<sup>2</sup> Utah Code ann. §10-8-59.

possessing game fowl utilized for fighting outside the State of Utah could have any affect whatsoever on the citizenry of West Valley City. The act of raising, keeping, or using fowl or birds for the purpose of fighting outside the geographical boundaries of West Valley City has no tenable relationship whatsoever to the general welfare of West Valley Citizens. Accordingly, the proscribed activity does not so effect the morals and welfare so as to justify the interdiction imposed by Revised West Valley City Ordinance 23-5-104(8). Despite, West Valley City's assertion, any other finding would unquestionably constitute extraterritorial application of the ordinance in violation of the due process clause of the Fourteenth amendment of the U. S. constitution. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (A statute must be limited in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power).

Based on the foregoing, it is clear that the ordinance at issue is not reasonably related to preventing cockfighting in West Valley City nor is it reasonably related to protecting the general welfare of its citizenry. Because the ordinance fails to meet the "reasonable relationship" test, it is an arbitrary use of Appellee's police power and therefore unauthorized and void. State v. Hutchison, 624 P.2d at 1126. The ordinance is also inconsistent with the United States and Utah Constitution as is set forth more particularly in Appellant's brief at Sections I(B), I(C) and I(D).

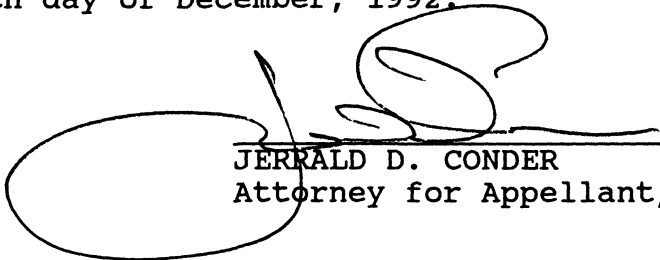
Accordingly, Revised West Valley City Ordinance 23-5-104(8) exceeds the authority granted Appellee under the General Welfare Clause and the ordinance is void as ultra vires and as in conflict

with general law.

CONCLUSION

For the reasons advanced above, the trial court's denial of Defendant's Motion to dismiss and denial of Defendant's Motion to Reconsider Motion to dismiss should be overturned in all respects and § 23-5-104(8) of the West Valley City Municipal code should be found void as ultra vires, as in conflict with state law and with the Utah and United States Constitutions.

DATED this 9th day of December, 1992.



JERRALD D. CONDER  
Attorney for Appellant/Defendant

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the \_\_\_\_ day of December, 1992, I served four (4) copies of the attached Reply Brief of Appellant upon Paul T. Morris and J. Richard Catten, counsel for the Appellee in this matter, by mailing said Briefs to them by first class mail, with sufficient postage prepaid, to the following address:

Paul T. Morris  
Richard J. Catten  
West Valley city  
3600 Constitution Blvd.  
West Valley City, Utah 84119

ADDENDA

Addendum A: Utah Code Ann. Section 10-8-84  
Utah Code Ann. Section 10-8-59

Addendum B: Utah Code Ann. Section 10-8-47

Addendum C: West Valley City Municipal Code  
Section 23-5-104(8)

Addendum D: U.S. Const. Amend. XIV

Addendum E. Utah State Constitution, Article XI, Section 5

Utah Code Ann. § 10-8-59:

10-8-59. Cruelty to animals.

They may prohibit cruelty to animals.

1953

Utah Code Ann. § 10-8-84:

10-8-84. Ordinances, rules and regulations -- Passage --  
Penalties.

They may pass all ordinances and rules, an [and] make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort, and convenience of the city and its inhabitants, and for the protection of property in the city; and may enforce obedience to the ordinances with fines or penalties as they may deem proper, but the punishment of any offense shall be by fine not to exceed the maximum class B misdemeanor fine under Section 76-3-301 or by imprisonment not to exceed six months, or by both the fine and imprisonment.

1986

**History:** R.S. 1898 & C.L. 1907, § 206, subd. 49; L. 1911, ch. 120, § 1; 1915, ch. 100, § 1; C.L. 1917, § 570x48; R.S. 1933 & C. 1943, 15-8-46.

**Compiler's Notes.** — "They," as used at the

beginning of this section, refers to boards of commissioners and city councils of cities See § 10-8-1

**Cross-References.** — Registration of plumbers, § 58-18-1 et seq

## COLLATERAL REFERENCES

**Am. Jur. 2d.** — 58 Am. Jur 2d Occupations, Trades, and Professions § 5

**C.J.S.** — 62 C J S Municipal Corporations § 286

**Key Numbers.** — Municipal Corporations ⇐ 613.

**10-8-47. Intoxication — Fights — Disorderly conduct — Assault and battery — Petit larceny — Riots and disorderly assemblies — Firearms and fireworks — False pretenses and embezzlement — Sale of liquor, narcotics or tobacco to minors — Possession of controlled substances — Treatment of alcoholics and narcotics or drug addicts.**

They may prevent intoxication, fighting, quarreling, dog fights, cockfights, price fights, bullfights, and all disorderly conduct and provide against and punish the offenses of assault and battery and petit larceny; they may restrain riots, routs, noises, disturbances or disorderly assemblies in any street, house or place in the city; they may regulate and prevent the discharge of firearms, rockets, powder, fireworks or any other dangerous or combustible material; they may provide against and prevent the offense of obtaining money or property under false pretenses and the offense of embezzling money or property in all cases where the money or property embezzled or obtained under false pretenses does not exceed in value the sum of \$100 and may prohibit the sale, giving away or furnishing of intoxicating liquors or narcotics, or of tobacco to any person under twenty-one years of age; cities may, by ordinance, prohibit the possession of controlled substances as defined in the Utah Controlled Substances Act, provided the conduct is not a class A misdemeanor or felony, and provide for treatment of alcoholics, narcotic addicts and other persons who are addicted to the use of drugs or intoxicants such that they substantially lack the capacity to control their use of the drugs or intoxicants, and judicial supervision may be imposed as a means of effecting their rehabilitation.

**History:** R.S. 1898 & C.L. 1907, § 206, subd. 50; L. 1911, ch. 120, § 1; 1913, ch. 86, § 1; 1915, ch. 100, § 1; C.L. 1917, § 570x49; R.S. 1933 & C. 1943, 15-8-47; L. 1967, ch. 22, § 1; 1977, ch. 49, § 1; 1981, ch. 50, § 1.

**Amendment Notes.** — The 1981 amendment inserted "under false pretenses" near the middle of the section, increased the maximum value for property embezzled from \$50 to \$100, and made minor changes in phraseology and punctuation

**Utah Controlled Substances Act.** — The Utah Controlled Substances Act referred to in this section is codified at § 58-37-1 et seq

**Compiler's Notes.** — "They," as used at the beginning of this section, refers to boards of commissioners and city councils of cities See § 10-8-1

**Cross-References.** — Alcoholic beverages, § 32A-1-1 et seq  
Animal fighting, § 76-5-2  
Assault, § 76-5-102.

Section 23-5-104(8), West Valley City Municipal Code:

23-5-104. CRUELTY TO ANIMALS PROHIBITED.

(8) Animals for fighting:

- (a) It shall be unlawful for any person or corporation to raise, keep or use any animal, fowl or bird for the purpose of fighting or baiting; and for any person to be a party to or be present as a spectator at any such fighting or baiting of any animal or fowl; and for any person, firm or corporation to knowingly rent any building, shed, room, yard, ground or premises for any such purposes as aforesaid, or to knowingly suffer or permit the use of his buildings, sheds, rooms, yards, grounds or premises for the purposes aforesaid.
- (b) Law Enforcement Officers or Office of Animal Control officials may enter any building or place where there is an exhibition of the fighting or baiting of a live animal, or where preparations are being made for such an exhibition, and the Law Enforcement Officers may arrest persons there present and take possession of all animals engaged in fighting, or there found for the purposes of fighting, along with all implements or applications used in such exhibition. This provision shall not be interpreted to authorize a search or arrest without a warrant when such is required by law.



United States Constitution, Article I, Section 14

All persons born or naturalized in the united States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the united States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Sec. 5. [Municipal corporations — To be created by general law — Right and manner of adopting charter for own government — Powers included.]**

Corporations for municipal purposes shall not be created by special laws. The legislature by general laws shall provide for the incorporation, organization and classification of cities and towns in proportion to population, which laws may be altered, amended or repealed. Any incorporated city or town may frame and adopt a charter for its own government in the following manner:

The legislative authority of the city may, by two-thirds vote of its members, and upon petition of qualified electors to the number of fifteen per cent of all votes cast at the next preceding election for the office of the mayor, shall forthwith provide by ordinance for the submission to the electors of the question: "Shall a commission be chosen to frame a charter?" The ordinance shall require that the question be submitted to the electors at the next regular municipal election. The ballot containing such question shall also contain the names of candidates for members of the proposed commission, but without party designation. Such candidates shall be nominated in the same manner as required by law for nomination of city officers. If a majority of the electors voting on the question of choosing a commission shall vote in the affirmative, then the fifteen candidates receiving a majority of the votes cast at such election, shall constitute the charter commission, and shall proceed to frame a charter.

Any charter so framed shall be submitted to the qualified electors of the city at an election to be held at a time to be determined by the charter commission, which shall be not less than sixty days subsequent to its completion and distribution among the electors and not more than one year from such date. Alternative provisions may also be submitted to be voted upon separately. The commission shall make provisions for the distribution of copies of the proposed charter and of any alternative provisions to the qualified electors of the city, not less than sixty days before the election at which it is voted upon. Such proposed charter and such alternative provisions as are approved by a majority of the electors voting thereon, shall become an organic law of such city at such time as may be fixed therein, and shall supersede any existing charter and all laws affecting the organization and government of such city which are now in conflict therewith. Within thirty days after its approval a copy of such charter as adopted, certified by the mayor and city recorder and authenticated by the seal of such city, shall be made in duplicate and deposited, one in the office of the secretary of State and the other in the office of the city recorder, and thereafter all courts shall take judicial notice of such charter.

Amendments to any such charter may be framed and submitted by a charter commission in the same manner as provided for making of charters, or may be proposed by the legislative authority of the city upon a two-thirds vote thereof, or by petition of qualified electors to a number equal to fifteen per cent of the total votes cast for mayor on the next preceding election, and any such amendment may be submitted at the next regular municipal election, and having been approved by the majority of the electors voting thereon, shall become part of the charter at the time fixed in such amendment and shall be certified and filed as provided in case of charters.

Each city forming its charter under this section shall have, and is hereby granted, the authority to exercise all powers relating to municipal affairs, and to adopt and enforce within its limits, local police, sanitary and similar regulations not in conflict with the general law, and no enumeration of powers in this constitution or any law shall be deemed to limit or restrict the general grant of authority hereby conferred; but this grant of authority shall not include the power to regulate public utilities, not municipally owned, if any such regulation of public utilities is provided for by general law, nor be deemed to limit or restrict the power of the legislature in matters relating to State affairs, to enact general laws applicable alike to all cities of the State.

The power to be conferred upon the cities by this section shall include the following:

(a) To levy, assess and collect taxes and borrow money, within the limits prescribed by general law, and to levy and collect special assessments for benefits conferred.

(b) To furnish all local public services, to purchase, hire, construct, own, maintain and operate, or lease, public utilities local in extent and use; to acquire by condemnation, or otherwise, within or without the corporate limits, property necessary for any such purposes, subject to restrictions imposed by general law for the protection of other communities; and to grant local public utility franchises and within its powers regulate the exercise thereof.

(c) To make local public improvements and to acquire by condemnation, or otherwise, property within its corporate limits necessary for such improvements; and also to acquire an excess over than [that] needed for any such improvement and to sell or lease such excess property with restrictions, in order to protect and preserve the improvement.

(d) To issue and sell bonds on the security of any such excess property, or of any public utility owned by the city, or of the revenues thereof, or both, including, in the case of public utility, a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate such utility.

History: Const. 1896.

Compiler's Notes. — The bracketed word "that" in Subsection (c) of the last paragraph appeared in this section as published in the Revised Statutes of 1933.

Cross-References. — Incorporation of cities and towns, § 10-2-101 et seq.

Local improvements, § 10-7-20.

Miscellaneous powers of cities and towns, § 10-1-202.

Municipal Code, home rule exceptions to, §§ 10-1-106, 10-3-818.

Powers and duties of all cities, § 10-8-1 et seq.

## NOTES TO DECISIONS

### ANALYSIS

Classification of cities  
Debt limit.  
Improvement districts  
Initiated ordinance.  
Legislative power  
Mass transportation system.  
Municipal power.  
Ordinance licensing nonprofit clubs.  
Police power  
Power versus right to operate public utility.

Repeal of council-manager charter of city.  
Sewage disposal  
Water conservancy districts.  
Withholding tax provision  
Cited.

### Classification of cities.

The power of the legislature to classify cities according to population is expressly conferred by this section, and statute passed to enable cities of first class to meet needs and requirements of larger municipalities was general, in