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Sherman Carter v. Beaver County Service Area No. One : Brief of the Attorney General By Special Appearance

Utah Supreme Court

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IN THE SUPREME COURT

of the

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STATE OF UTAH

SHERMAN CARTER, a Tax-
payer, for himself and all others
similarly situated,

Plaintiff and Appellant,

vs.

BEAVER COUNTY SERVICE
AREA NO. ONE, a body cor-
porate and politic, *et al*,

Defendants and Respondents.

FILED
JUL 27 1964
Case No. 10136
Clark St. Utah

BRIEF OF THE ATTORNEY GENERAL
By Special Appearance

Appeal from the Judgment of the Fifth
District Court for Beaver County
Hon. C. Nelson Day, Judge

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10136

BRIEF OF THE ATTORNEY GENERAL

NATURE OF THE CASE

This is an action for a declaratory judgment wherein a taxpayer has challenged the constitutionality of the Service Area Act (Chapter 29, Title 17, Utah Code Annotated).

DISPOSITION IN LOWER COURT

The lower court rejected plaintiff's arguments, and sustained the act as constitutional.

RELIEF SOUGHT ON APPEAL

The Attorney General requests affirmance of the judgment of the lower court, but urges that Service Areas be judicially limited to the performance of essential governmental functions.

STATEMENT OF FACTS

The Attorney General accepts the statement of facts as set forth in the briefs of appellant and respondents.

AUTHORITY FOR APPEARANCE

The Attorney General did not appear in the lower court, but has appeared on appeal by virtue of the statutory authority granted in Section 78-33-11, Utah Code Annotated (1953). The Attorney General argues neither in support of appellant nor respondent, but in support of the public, and public agencies, of the State of Utah.

ARGUMENT

COUNTY SERVICE AREAS ARE QUASI-MUNICIPAL PUBLIC CORPORATIONS, PERFORMING GOVERNMENTAL FUNCTIONS FOR THOSE SITUATED WITHIN THE AREA.

A. *Service Areas do not violate constitutional debt limitations.*

Because of the serious significance of the questions related to debt limitations, it is deemed advisable to set forth all of Article XIV of the Constitution of Utah, consisting of Sections 1 through 7.

ARTICLE XIV — Public Debt

Section 1. To meet casual deficits or failures in revenue, and for necessary expenditures for public purposes, including the erection of public buildings, and for the payment of all Territorial indebtedness assumed by the State, the State may contract debts, not exceeding in the aggregate at any one time,

an amount equal to one and one-half per centum of the value of the taxable property of the State, as shown by the last assessment for State purposes, previous to the incurring of such indebtedness. But the State shall never contract any indebtedness except as in the next Section provided, in excess of such amount, and all monies arising from loans herein authorized, shall be applied solely to the purposes for which they were obtained. (As amended November 8, 1910.)

Section 2. The State may contract debts to repel invasion, suppress insurrection, or to defend the State in war, but the money arising from the contracting of such debts shall be applied solely to the purpose for which it was obtained.

Section 3. No debt in excess of the taxes for the current year shall be created by any county or subdivision thereof, or by any school district therein, or by any city, town or village, or any subdivision thereof in this State; unless the proposition to create such debt, shall have been submitted to a vote of such qualified electors as shall have paid a property tax therein, in the year preceding such election, and a majority of those voting thereon shall have voted in favor of incurring such debt.

Section 4. When authorized to create indebtedness as provided in Section 3 of this Article, no county shall become indebted to an amount, including existing indebtedness exceeding two per centum. No city, town, school district or other municipal corporation, shall become indebted to an amount, in-

cluding existing indebtedness, exceeding four per centum of the value of the taxable property therein, the value to be ascertained by the last assessment for State and County purposes, previous to the incurring of such indebtedness; except that in incorporated cities the assessment shall be taken from the last assessment for city purposes; provided, that no part of the indebtedness allowed in this section shall be incurred for other than strictly county, city, town or school district purposes; provided further, that any city of the first and second class when authorized as provided in Section three of this article, may be allowed to incur a larger indebtedness, not to exceed four per centum and any city of the third class, or town, not to exceed eight per centum additional, for supplying such city or town with water, artificial lights or sewers, when the works for supplying such water, light and sewers, shall be owned and controlled by the municipality. (As amended November 8, 1910.)

Section 5. All monies borrowed by, or on behalf of the State or any legal subdivision thereof, shall be used solely for the purpose specified in the law authorizing the loan.

Section 6. The State shall not assume the debt, or any part thereof, of any county, city, town or school district.

Section 7. Nothing in this article shall be so construed as to impair or add to the obligation of any debt heretofore contracted, in accordance with the laws of Utah Territory, by any county, city, town or school district, or to prevent the contracting of any

debt, or the issuing of bonds therefor, in accordance with said laws, upon any proposition for that purpose, which, according to said laws, may have been submitted to a vote of the qualified electors of any county, city, town or school district before the day on which this Constitution takes effect.

It is obvious that the framers of the Constitution were concerned with the debt limitations of the State and subordinate levels of government. Section 1 of Article XIV initially placed a debt limit upon the State of \$200,000 over and above the territorial indebtedness which was assumed by the State. In 1910 the section was amended to increase the limit to permit the State to contract debts not exceeding in the aggregate at any one time an amount equal to one and one-half per centum of the value of the taxable property of the State. This appears to be an all inclusive limitation which would be a limit against any and all contracted indebtedness of the State of Utah, at least so far as such indebtedness is to be paid from tax revenues. This Court has held that revenue bonds or other indebtedness to be paid through a self-liquidating program or operation and not out of tax monies are not within the limitation (*University of Utah v. Candland*, 36 Utah 406, 104 P. 285, 24 L.R.A.; *Spence v. Utah State Agricultural College*, 119 Utah 104, 225 P.2d 18). Section 2 of Article XIV apparently makes a further exception if the purpose of the contracted indebtedness of the State is to repel invasion, suppress insurrection, or to defend the State in war.

Having placed a limit on the indebtedness which could be contracted by the State, the framers of the Constitution then proceeded in Section 3 to place a limit upon subordinate levels of local government. The language used was very broad and would appear to include every level of local government which at that time was conceivable. The limit applied to "any county or subdivision thereof, or . . . any school district therein, or . . . any city, town or village, or any subdivision thereof in this State; . . ." This general limitation was to prevent any debt in excess of the taxes for the current year of such particular political subdivision, unless a greater debt had been properly approved by a vote of the taxpayers owning property within the political subdivision. But this Court has held that the purchase or construction of public property, when payment therefore is to be made exclusively from revenues derived from such property, is exempt from the constitutional limitation by virtue of the special fund doctrine (*Utah Power and Light Company v. Provo City*, 94 Utah 203, 74 P. 2d 1191). This Court has further held that the word "taxes" in the above provision includes all revenues theoretically collectible even though not in fact collected (*Scott v. Salt Lake County*, 58 Utah 25, 196 P. 1022). It has further been held that the word "taxes" includes all revenues other than taxes, such as license fees, waterworks income and department fees (*Fjeldsted v. Ogden City*, 83 Utah 278, 28 P. 2d 1144).

Section 4 of Article XIV serves as a limitation upon the authority granted in Section 3, at least to the extent that it places a ceiling upon the extra indebtedness which may be created through a vote by the qualified voters who have paid property taxes. Section 4 thus places a limit upon counties so that through an election whereby property taxpayers approve additional indebtedness, such additional indebtedness cannot exceed two per centum; cities, towns, school districts and other municipal corporations are limited to four per centum; and cities of the first and second class may incur a larger indebtedness through the procedure outlined in Section 3 with a limit of an additional four per centum, and cities of the third class and towns may incur by the same procedure an additional indebtedness not to exceed eight per centum, providing that such additional indebtedness is for the purpose of supplying such city or town with water, artificial lights or sewers, and when the works for such supply are municipally owned and controlled.

In summary, then, counties have a present constitutional limit on their indebtedness of taxes for the current year plus two per centum of the present fair market value of the taxable property within the county; school districts and municipal corporations (other than cities and towns) have a present constitutional limit on indebtedness of taxes for the current year plus four per centum of the current fair market value of the taxable property within

such district or municipal corporation; cities of the first and second class have a present constitutional limitation upon indebtedness of taxes for the current year plus eight per centum of the present fair market value of the taxable property within their boundaries; and cities of the third class and towns have a constitutional debt limit of taxes for the current year plus twelve per centum of the fair market value of the taxable property within their boundaries. This, of course, is the maximum indebtedness which can be incurred, assuming that the proper elections and other procedures are followed and assuming that the funds created by the indebtedness are used for the proper purpose. As pointed out earlier, this Court has held that the limitations and procedures of Sections 3 and 4 do not apply when the indebtedness is to be liquidated by funds or revenue to be derived from the facility which was constructed or acquired by creating such indebtedness. (It will be noted that Section 4 was amended in 1910 to add the eight per centum limitation for cities of the third class and towns.)

In 1932, Article XI, Section 5 of the Constitution of Utah was amended, adding certain provisions with reference to the powers of cities. Subsection (d) provides that the power therein conferred upon cities included the power:

(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.

In *Wadsworth v. Santaquin City*, 83 Utah 321, 28 P.2d 161 (1933), this Court held that Article XI, Section 5 extended the constitutional debt limitation to permit the issuance and sale of bonds on the security of any public utility owned by the city or on the revenues to be derived from such utility:

The amendment is of equal dignity with the provisions in article 14, sections 3 and 4. These provisions must be read and construed with relation to each other so as to give a meaning to each. The powers enumerated in the amendment [Article XI, Section 5(d)] must be given full significance and force as intending to grant, subject to acceptance or limitation by charter, or delegation by legislative act, the power to borrow money on the security of a utility or its income. It is an addition to the other provision relative to the limitation of municipal indebtedness.

This Court has also held that the constitutional debt limitations above discussed did not apply to Metropolitan Water Districts, since such entities are special political subdivisions not covered by the constitutional language (*Lehi City v. Meiling*, 87 Utah 237, 48 P.2d 530). This Court further held that the constitutional debt limitations did not apply to water conservancy districts, since they, too, were a special type of political subdivision not within the constitutional definition (*Patterick v. Carbon Water Conservancy District*, 106 Utah 55, 145 P.2d 503).

In *Condor v. University of Utah*, 123 Utah 182, 257 P.2d 367, this Court refused to extend the rationale of the "restricted special fund theory" to State institutions, thereby concluding that the pledge of funds to be derived from the operation of dormitories to repay monies borrowed to construct such dormitories resulted in the creation of a debt which was not within the constitutional limitation.

It has also been held that special improvement districts created under Title 17, Chapter 7 (permitting the levying of special taxes to pay for improvements constructed), do not create a debt within the constitutional debt limitation for counties or municipalities (*Pearson v. Salt Lake County*, 9 Utah 2d 388, 346 P.2d 155). It has further been held that a 50 year contract obligating a city to make payments over that period of time is not an indebtedness within the constitutional limitation where the monthly or annual payments vary with the amount of service received pursuant to the contract, and where the money to make the payments is to be derived from operating proceeds (*Bair v. Layton City Corporation*, 6 Utah 2d 138, 307 P.2d 895).

In *Tygesen v. Magna Water Corporation*, 119 Utah 274, 226 P.2d 127, this Court further held that improvement districts created under Title 17, Chapter 6, were special arms of the State of Utah which were not included within the constitutional debt limitations for counties or municipal corporations, and that legislation authorizing indebtedness

in excess of such constitutional limitations was therefore valid. See, also, *Freeman v. Stewart*, 2 Utah 2d 319, 273 P.2d 174.

In the instant case the Court now is called upon to determine whether the debt limitations of the Constitution are applicable to Service Areas created under Title 17, Chapter 29, Utah Code Annotated. It is perhaps advisable to take a brief survey of what is happening and can happen to the debt limitations placed upon governmental units by the framers of the Constitution and the citizens and tax payers who adopted it.

The Attorney General cannot quite support the argument by Appellant (Brief, Page 6) that:

The majority could then declare that the county or parts thereof constituted any number of districts and thereby create enough taxing units that the result could be any amount of indebtedness even up to 100 per cent. If these constitutional sections are given effect, the total of authorized indebtedness of the county and any district therein should not exceed 2 per cent of [*sic* (and)] that of a town or city of the third class should not exceed 4 per cent.

The proper debt limitations of counties and cities are discussed above. Service Areas could not be formed to authorize an aggregate indebtedness up to 100 per cent. Section 17-29-5 (as amended), provides in part that:

County service areas may overlap if the service area which overlaps is entirely within

the boundaries of the service area which it overlaps, provided not more than two (three, if one is county wide) service areas occupy the same area in the same county and no overlapping areas may perform the same service.

It will thus be observed that the 12 per cent debt limitation authorized by Section 17-29-21 could be applied no more than three times, and no more than twice unless one Service Area encompassed the entire county. There could thus be a maximum debt limit under the Service Area Act of 36 per cent of the reasonable fair cash value of taxable property so situated as to be included within three separate Service Areas. While this is not so disturbing as the 100 per cent possible indebtedness claimed by appellant, it is sufficiently substantial as to justify a careful study. When one considers the possible indebtedness which might be placed against particular property by its inclusion within school districts, conservancy districts, improvement districts, cemetery districts, mosquito abatement districts, Service Areas, and any number of other special political subdivisions, in addition to the authorized indebtedness which may be incurred by the State, county or city, it is at once obvious that the aggregate indebtedness might approximate 100 per cent of the fair cash value of such property.

This concern was expressed in the dissenting opinion of Justice Moffat, concurred in by Justice Ephraim Hanson, in *Lehi City v. Meiling*, cited

supra, wherein he said at page 289 of the Utah Reporter:

If constitutional limitations may thus by a process of definition be eliminated, evaded, or evaporated out of the Constitution, the stabilizing purposes and restraints of constitutions intended to tide the people over periods of emergency, excitement, or trouble until calm reflection may analyze and measure the needs, will cease to accomplish the purposes for which they are intended. Constitutions are drawn during sober hours, upon careful and painstaking consideration. It is beside the question to say the framers of the Constitution did not anticipate an offer of large governmental allowances or bounties for such beneficial purposes. *It is certain, however, that the framers of the Constitution and the people who adopted it intended that certain fixed debt policies and limitations should be maintained.*

It is not contended that the variety of special political subdivisions whose creation has been authorized by legislation are products of "emergency, excitement or trouble" as feared by the dissent. But it is contended that any fair reading of Article XIV would place debt limitations on every level of government, whether quasi-municipal or not. The only authority of the Legislature to authorize or create indebtedness beyond the specific limitations of that Article is when the purpose for such debts is to repel invasion, suppress insurrection or defend the State in war. It is admitted that it is now too late in the day to cast clouds upon the various dis-

tricts which have been authorized by legislation, judicially approved, created locally, taxed locally, and which have bonded and created indebtedness beyond apparent constitutional debt limitations. This Court has consistently said that such entities are quasi-municipal corporations, distinguishable from cities or counties or any subdivision thereof, and thus not within the debt limitations of the Constitution. But it is submitted that the current trend of judicially validating such entities ought not be continued ad infinitum without a review by the people of the meaning and intent of their constitutional debt limitations. Perhaps all of the quasi-municipal agencies so created are beneficial, worthwhile and desired by the people receiving benefits therefrom. If so, the people should amend Article XIV of their Constitution either to increase the debt limitations, or to provide that any specially created quasi-municipal corporation is exempt from any debt limitation whatsoever.

Any reasonable reading of the proceedings of the Constitutional Convention clearly demonstrates the accuracy of the dissenting opinion in *Lehi City v. Meiling*, cited *supra*, where it was observed that it was "certain" that the debt limitations were intended to apply to Metropolitan Water Districts. There was considerable discussion of the debt limitation provisions, and substantial difference of opinion as to what the provisions should be, but certainly no question but that the limitations would

apply to all types of state and local government, so that the aggregate indebtedness could in no circumstance exceed the constitutional authorizations and limitations.

In the proceedings of the Constitutional Convention, Volume I, Page 777, the members of the Convention seemed to believe that they were as bright a group as would ever be assembled:

Mr. Buys . . . We have a better representation here of this State, of the future State, than we will ever have in the Legislature. There are more men here and know just as well what we want as the Legislature will know, and if this is not what we want let us make it what we want, but certainly have some guaranty in this Constitution guaranteeing the citizens of this State against arrest, and I think it is just what we want as it is, and I shall certainly vote for it.

Mr. Thurman. I will ask you if you don't think it is altogether improbable that there will ever be as bright a lot assembled together again?

Mr. Buys. Yes, sir; I do.

Pages 781 through 782 of Volume I, proceedings of the Constitutional Convention, make clear the feeling of the framers of the Utah Constitution to the effect that there should be strict debt limitations applicable to all levels of local government.

This is further illustrated on Pages 1137-41 of Volume II. Then on Pages 1184 through 1201 of Volume II, which is a report of the debate during

the 47th day on the question of public debt, there was considerable discussion as to the number of electors which should be required to authorize indebtedness. In other words, while the constitutional debt limitation cannot be exceeded by any means, it cannot even be reached unless the taxpayers authorize contracting indebtedness through the means of an election called for that purpose. There was much discussion in favor of requiring a majority of qualified electors to vote in approval of such debt as opposed to requiring only a majority of the electors who actually voted. By a close vote, the framers of the Constitution rejected the proposition that a majority of qualified electors would have to approve the debt and simply provided that a majority of those voting would be sufficient.

After this action, the convention then revised downward some of the earlier propositions as to what the debt limitations should be. In particular, Pages 1188 through 1196 of Volume II show the general feeling of members of the convention in their opposition to high debt limitations and their strict feeling that the public and taxpayers should be protected against themselves by binding limitations. Otherwise, the framers were concerned that a current feeling in favor of a new school or a hospital or a library or some other facility would cause each successive election to carry, and a new indebtedness would be created for each new public facility until the taxpayers had voted themselves into a position

of hopeless debt. These limitations on public debt were intended to prevent the public from voting themselves into that type of situation.

It is difficult to perceive any limit to the variety of services that could be provided by Service Areas created under Title 17, Chapter 29. Such services may include, but are not limited to, police protection, structural fire protection, culinary or irrigation water retail service, water conservation, park and recreation and parkway facilities and services, cemeteries, public libraries, sewers, sewage and storm water treatment and disposal, flood control, garbage and refuse collection, street lighting, airports, planning and zoning, streets and roads, curb and gutter and sidewalk construction and maintenance, mosquito abatement, health department services and hospital services. The above services are specifically authorized by Section 17-29-3, which section also provides that such services and facilities are by no means exclusive, and that Service Areas may provide other services not limited to those enumerated. It is difficult to see where the ends and limits of Service Areas are. It raises a sobering question in view of the strict constitutional debt limitations—at what point, if ever, should a judicial rein be placed upon the Legislature? Or should there be an unlimited number of districts or areas to perform any conceivable service or function, with no debt limitation, save that which may be provided from time to time by the Legislature?

Should not this Court place a judicial limitation upon at least the nature of those entities which may be created to operate free and clear of constitutional debt limitations? In this regard, it is suggested that only those entities which perform essential governmental purposes should be so recognized. Perhaps the Court should conclude that a Service Area created to perform a hospital service is a constitutional entity because such service is a vital governmental service, of critical importance to the welfare of the citizens within the area. It is questionable whether the same result should obtain if the Service Area were created for an elaborate recreational facility as authorized by the act.

The position of the Attorney General is not to seek a reversal of the lower court, nor to urge the Court to declare the instant Service Area to be an unconstitutional entity. It is believed that this Court should sustain Chapter 29, Title 17 so far as it authorizes Service Areas to perform hospital functions. But it is believed that the Court should use cautious language with respect to the other types of Service Areas that might conceivably be created within the broad language of the statute. There is always a danger in friendly lawsuits which seek a hurried judicial whitewashing of statutes so that entities created thereunder can procure immediate financing to proceed with some contemplated facility. The urge of the Attorney General upon this Court is simply that a comprehensive view be taken of the

nature and extent to which quasi-municipal corporations are being formed, and the almost unlimited debt that can accumulate against the property of a taxpayer who may or may not favor such debt. Perhaps the time has come to afford some protection to such taxpayers, even against themselves, at least until such time as the people of the State of Utah have an opportunity to review the debt limitations of Article XIV of their Constitution and determine whether or not such limitations on governmental agencies shall be meaningful or meaningless.

B. *Service Areas are not special commissions.*

Article VI, Section 29 of the Utah Constitution provides that ;

The legislature shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, to levy taxes, to select a capitol site, or to perform any municipal functions.

It is believed that Service Areas do not violate the prohibition of the above section of the Constitution. The Service Area Act is not a delegation of anything to anyone, but is simply permissive legislation which allows certain things to be performed by local government. It is clear that the board of county commissioners of any particular county may initiate the formation of a Service Area, but the Service Area is locally formed, locally controlled, locally

operated and locally taxed.

It is true that cities of the third class and towns may be included in a Service Area, but cities of the first and second class cannot. Therefore, the only possible conflict would be if a Service Area performed municipal functions which otherwise should and could have been performed by cities of the third class or towns which were included within the Service Area. But in this regard, it will be observed that such cities or towns are authorized to have representation on the governing board of the Service Area, and if any such city or town were performing the same municipal function which the Service Area sought to perform, then the city or town could be excluded from the Service Area because it would not be benefited by receiving a duplication of services already rendered by the municipality.

Backman v. Salt Lake County, 13 Utah 2d 412, 375 P.2d 756 (1962), which invalidated the Civic Auditorium and Sports Arena Act of 1961, is distinguishable from the present case. In the *Backman* case the Court found that the act created a special commission and empowered it to interfere with a municipal function, and, further, that the act was arbitrary in that it was designed to apply to Salt Lake County only. It is submitted that the *Backman* decision was sound, but simply is not applicable to a Service Area. It must be recognized that the services authorized by Section 17-29-3 are, in the main, legitimate areas justifying police power legis-

lation (particularly when such legislation simply authorizes localities to create such entities and then establish their own governing boards).

The explanation by Justice Wolfe in *Lehi City v. Meiling*, 87 Utah 237, 84 P.2d 530, though a special concurring opinion, succinctly discusses authorization by the Legislature for the creation of units of local government to perform certain functions which might conceivably have been performed by municipalities, had they been financially able:

That is not the same as saying that an entity could not be formed to do that which the city could not do because of the magnitude or character of the project or because it was such a project which must necessarily serve more than one city. Thus, if an agency were constituted to aid and not to interfere with the performance of a municipal function, the case might well be different. An illustration is at hand in the very case under consideration. Any one of the cities or towns, perhaps all of them, included in the water district sought to be formed, cannot perhaps undertake to carry through a project of the magnitude which the Legislature had in mind when this act was passed. It may even require the combined resources of several of these water districts, and extraneous financial aid, to accomplish it. Yet the end to be accomplished, to wit, furnishing the inhabitants of each city or town with water, is in itself a municipal function. But the building of an immense project to serve many cities is in itself of a magnitude and character as to take it out of the category of municipal functioning. It is certainly not the

ordinary function of a municipality in this state to construct immense engineering projects for the bringing of water from long distances. A "municipal function" is that which municipalities ordinarily do, or are capable of doing, or which they may by the Legislature be permitted to do. Supplying water to its inhabitants and building appropriate water-works to do this is a municipal function. Engaging in some vast engineering project far beyond its financial powers, and perhaps its legal powers, but ultimately designed to supply its inhabitants, together with inhabitants of other cities, with water may be something more than a municipal function. If the building of the Boulder Dam was necessary to give the city of Los Angeles a water supply, it might still be a national rather than a municipal function, not only on account of the legal complications due to its interstate nature, but because of the magnitude of the project being such as to be beyond the capabilities of even a city of that size, or even of a state.

A final note with reference to the Service Area-county relationship compels the observation that Service Areas are designed to be very closely connected with the county level of government. The board of county commissioners can make a determination that a Service Area is needed and proceed to establish the same [Section 17-29-4 (1)]. The Legislature has declared that a Service Area shall be deemed "a body corporate and politic and a quasi-municipal public corporation. . . ." (Section 17-29-10.2). But the board of trustees of the Service Area can utilize "any existing county offices, officers or employees

for purposes of the service area when in the opinion of the board of trustees it is advisable to do so. . . .” [Section 17-29-10.2 (7)]. Apparently the Board of County Commissioners has nothing to say about the use of its officers or facilities by the Service Area; but, on the other hand, the Board of County Commissioners has the exclusive say as to how much money it shall take from Service Area funds, and the Service Area has nothing to say about the amount so taken by the county (Section 17-29-15). About the only limitation is the implied concept that everyone will be reasonable about the whole thing. One cannot help but wonder, however, whether a county wide Service Area would not be, in effect, the alter ego of the county. This not only casts shadows as to the type of entity the Service Area is, but it further shows the thin veil used to escape the constitutional debt limitations applicable to counties (and as discussed under Point A, *supra*).

C. *Service Areas perform essential governmental services.*

Much uncertainty exists with respect to whether governmental immunity is a defense to tort claims asserted against the variety of quasi-municipal corporations organized pursuant to laws similar to the Service Area Act. This Court has applied a test as to whether a particular function of a government subdivision is proprietary or governmental, permitting suit in former but denying it in the latter.

As recently as April 27, 1964 this Court handed

down its opinion in *Gordon v. Provo City Corporation*, Case No. 9992, in which the city was held liable for injury sustained by the plaintiff arising out of the operation of a municipal water system. Liability was based upon the observation that the water system was a commercial venture engaged in by the city in a proprietary capacity. In so holding, the Court followed earlier Utah Cases, such as *Brown v. Salt Lake City*, 33 Utah 222, 93 P. 570 and *Burton v. Salt Lake City*, 69 Utah 186, 253 P. 443.

The distinction of proprietary versus governmental is not ordinarily applied to the State of Utah or its agencies, such as the Department of Highways or the Department of Fish and Game. It is unclear to what extent the distinction would be applied to counties or to governmental public corporations such as metropolitan water districts, improvement districts or Service Areas. The language in *Lund v. Salt Lake County*, 58 Utah 546, 200 P. 510, suggests that the distinction may be applied to counties. In that case Salt Lake County was engaged in an operation whereby it supplied water for rental to certain persons, and the Court concluded that such a practice was *ultra vires* because the county was not authorized to engage in the water business. The Court therefore refused to apply the governmental v. proprietary test, saying that such a test would be moot since the act or practice was *ultra vires*:

If they (Salt Lake County) were organized to engage in such business, as was Salt Lake City in the Brown case, cited by plain-

tiff, we see no objection to applying the common-law doctrine of *respondeat superior*, and holding the municipality liable. On the other hand, if they are entirely without authorization to engage in private business we do not understand upon what principle they could be held liable, whether the business was profitable or not. . .

Prior to disposing of the case by holding that the water business was an *ultra vires* act of the county, the Court indicated its approval of the theory that the doctrine of *respondeat superior* would apply to make the county liable for negligent acts of its employees when performing a proprietary service, and a great many authorities are cited on Page 560 of the Utah Reporter to justify such a holding. But on Page 562 the Court seemed unsure as to whether the county in fact should be liable if the revenue derived from a proprietary function was incidental rather than substantial:

Even if such condition existed (existence of the power by the county to engage in the water business), and the power so exercised, the revenue derived therefrom would be purely incidental. In such circumstances we know of no reason why plaintiff's right to recover damages should be different from what it is in the case as it now stands. (citing cases)

So it is unclear as to what the dictum of the Lund case really says. It suggests that the governmental versus proprietary distinction should apply to counties, but at the same time suggests that if the proprietary function is only incidentally profitable

rather than substantially profitable, even a proprietary function will be protected by governmental immunity. This would mean that only those proprietary functions yielding a substantial profit to the county would be truly proprietary in the sense that governmental immunity would not be a defense. Compare *Davis vs. Provo City Corporation*, 1 Utah 2d 244, 265 P.2d 415.

The Federal Government, as a government of delegated power only, has been recognized as being able to perform only governmental functions and without power or authority to exercise proprietary functions (although the United States has consented to suit in certain areas). This is so because all powers of the Federal Government are those expressly granted by the Federal Constitution or those powers necessarily implied from powers expressly granted. As such, the Federal Government can only act in a governmental capacity. Anything beyond that would be an *ultra vires* act. The State of Utah is a government having a residuum of governmental power, and in this regard is more comparable to a municipality ("home rule" city) than it is to the Federal Government. Despite this, the State of Utah and its agencies have been held to act in only a governmental capacity, while municipalities (and perhaps counties) are considered to act in proprietary as well as governmental capacities.

This raises the question as to whether quasi-municipal corporations, such as Service Areas, act

only in governmental capacities or whether they also act in proprietary capacities. The possibility of anomalous results has already been suggested by this Court. This can be illustrated by examining two cases. In *Cobia v. Roy City*, 12 Utah 2d 375, 366 P.2d 986 this Court said that the operation of a sewer is a governmental function:

It seems to us that the operation of a sewer more nearly is governmentally charged than are most or all of those situations we have reviewed, as reflected in the cases just mentioned. To exclude the operation of sewers from this field reasonably would seem unjustifiable in logic or otherwise. To do so would do violence to our concept of separation of powers, we believe. We have left to the Constitution and legislature the matter of waiver of immunity in such cases.

But in *Gordon v. Provo City Corporation*, cited *supra*, the Court unhesitatingly reaffirmed earlier cases concluding that the operation of a water system was a proprietary function wherein governmental immunity could not serve as a defense. Thus, the *Cobia* case and the *Gordon* case clearly set forth the rule that a sewer system is a governmental function but a water system is a proprietary function, at least so far as municipal operations are concerned. Consider the problems that such holdings pose. Title 17, Chapter 6, Utah Code, provides for the creation of improvement districts for the operation of water or sewage systems. A district authorized under that chapter could be for either purpose, and the method

of creating and operating such a district would be the same without regard to whether the district was organized for the purpose of operating a water or a sewer system. In either instance revenues would be derived both from the sale of the service and from taxation, and in neither case could the district operate for a profit. Would this Court hold that an improvement district authorized for the purposes of operating a sewage system operates in a governmental capacity, while another improvement district authorized in an identical manner under the very same chapter but for the purpose of operating a water system would be a proprietary creature, having no governmental immunity at all. The Court would have to so hold if it followed the municipal corporation distinction applied in the *Cobia* and *Gordon* cases, but if the Court applied a different test because improvement districts are quasi-municipal corporations, then both water and sewage districts might be treated the same.

This problem assumes considerable importance. Should Service Areas procure liability insurance policies to protect against tort claims? They should if their functions are proprietary, but they should not if their functions are governmental. But if liability insurance is obtained and the function is governmental, then the payment of the premium for such insurance would be "a waste of taxpayers' money" as observed by the Court in the *Cobia* case, and would perhaps be an illegal expenditure of pub-

lic funds as ruled by the Attorney General in a number of opinions (Opinion Nos. 54-022, 54-035, 54-004, 53-127 and 54-058, Biennial Report of the Attorney General, June 30, 1954).

On the other hand, if the Service Area does not wish to waste taxpayers' money, nor to make an illegal expenditure of public funds, and so refrains from securing liability insurance on the assumption that its conduct is governmental, and then finds, when a substantial tort claims is asserted, that its function is in fact proprietary, it is too late to obtain insurance, and the service area may find itself in a position where it is unable to pay a substantial judgment.

It is significant to note that the Legislature has concerned itself, and is presently concerning itself, with a means of legislatively permitting some recovery against governmental units by tort claimants. A tort claims act was passed in 1961 but was vetoed by the Governor. In 1963 the Legislature in H.J.R. No. 21 resolved that the Legislative Council:

... investigate and study the effects upon the state and its political subdivisions of immunity from suit and consent to be liable for the torts of their officers, employees and agents, together with the most workable statutes and procedures for carrying out such legislation and to make recommendations to the 36th Legislature. (Laws of Utah 1963, Page 685)

In order to finance this study, the Legislature

appropriated to the Legislative Council the sum of \$25,000 (Item 4, Section 13, Chapter 198, Laws of Utah 1963). While it is not clear when or under what circumstances the Legislature will provide for tort claimants to realize a recovery against the State or its political subdivisions, it is clear that the Legislature is vitally concerned with the problem and is working diligently toward a practical solution. Since the Court has repeatedly observed that this problem is a legislative one to be solved by the Legislature, this Court should give a broad application to governmental immunity until such time as a tort claims act is passed. It is likely that such legislation will include metropolitan water districts, improvement districts, Service Areas and related entities, and those entities should therefore be considered to be governmental in nature and to have the defense of governmental immunity until such time as the Legislature enacts tort claims legislation.

It is realized that no specific issue is presented on appeal relating to the question of governmental immunity. But this Court is called upon to speak for the first time concerning the nature of the entities created as Service Areas under the Service Area Act, and this Court should have in mind the application of any language used in describing Service Areas. It is submitted that if this Court holds that the only quasi-municipal corporations which can be created to operate free and clear of the constitutional debt limitations are those which perform

essential governmental functions, then it is both reasonable and proper to assume that such quasi-municipal corporations enjoy governmental immunity from tort suits. This would serve as a guide to such subdivisions of government in determining whether public liability policies should be secured. This would also be consistent with the Legislature's declaration in Section 17-29-26 to the effect that Service Areas perform "essential governmental functions."

CONCLUSION

The Attorney General has appeared in this appeal pursuant to Section 78-33-11, not in support of the appellant or the respondent, but in support of the taxpayers in general throughout the State of Utah as well as in support of quasi-municipal corporations of various designations which have been created and are operating under a variety of statutes. It is believed that the time is now ripe for this Court to carefully consider the nature and extent to which quasi-municipal corporations can be created to contract indebtedness free and clear of any constitutional limitations. As the various statutes authorizing the organization of quasi-municipal corporations have been presented to the Court, the Court has followed a step-by-step pattern of validating these entities. If when the first such case had been presented to this Court, it would have been foreseeable that such a great number of similar entities would later be authorized by the Legislature,

it is likely that the Court earlier would have suggested some limitations. But at this point we are a long way down the road, and even with the benefit of hindsight to guide foresight, it is not possible to foresee how many new but similar entities will yet be authorized by the Legislature. In order not to disturb prior decisions of this Court, and yet to give some sober protection to taxpayers and the public in general, it is submitted that this Court should rule that the only quasi-municipal corporations which may be created are those that perform essential governmental purposes which cannot reasonably be performed by an existing level of government in the particular area.

This language would suggest to the Legislature that there are limits to which quasi-municipal corporations can be created, and it would further suggest to such existing entities that they perform services as a governmental function and are immune from tort liability until the Legislature enacts some specific legislation with reference to tort claims, thus, for the present, guiding such political subdivisions in their decision whether to insure or not to insure against tort liability claims.

Respectfully submitted,

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