IN THE UTAH SUPREME COURT

SALT LAKE CITY CORPORATION, a political subdivision existing under the laws of the State of Utah, Plaintiff/Appellant, v. UTAH INLAND PORT AUTHORTY, a political subdivision existing under the laws of the State of Utah; STATE of UTAH, GARY R. HERBERT, in his official capacity as the Governor of the State of Utah; and SEAN D. REYES, in his official capacity as the Attorney General of the State of Utah. Defendants/Appellees.	**BRIEF OF APPELLANT** Appeal No. 20200118 District Court No. 190902057 Judge James Blanch

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INTRODUCTION

This case concerns a dispute between the State of Utah and Salt Lake City about which entity holds the power to make decisions regarding the spending of municipal tax monies. The parties also dispute which political entity holds the power to adopt local zoning ordinances and other land use regulations that control a private property owner's use of land within municipal boundaries. These disputes stem from a proposal by two private property owners to develop an inland port in the City's Northwest Quadrant. Specifically, shortly after the State of Utah announced its decision to relocate the Utah State prison to the City's Northwest Quadrant, Kennecott Utah Copper, LLC and NWQ, LLC, approached the City with the concept of developing an inland port on property they own in the Northwest Quadrant. The proposed inland port is a railyard facility that these property owners envision will facilitate the transportation of goods from coast-to-coast and the transfer of goods from trains to trucks. In other words, the inland port is a private development, proposed to take place on private property, that will be owned by private concerns. The City was supportive of the proposal and executed standard development agreements with these property owners, providing them vested rights in the City's existing land use ordinances and standard assurances with respect to the supply of water and sewer services.[1]

After signature of these agreements, and during the 2018 legislative session, state

[1] Specifically, the City committed to providing these services if the property owners construct pipelines that connect their properties to the existing infrastructure and deed those pipelines to the City.

legislators informed the City and these private property owners that they intended to pursue legislation to govern the development of an inland port in the City's Northwest Quadrant. A bill was introduced and adopted in the closing hours of the 2018 legislative session, over the objection of every legislator that represents residents of Salt Lake City, which enacted the Utah Inland Port Authority Act. This Act creates a new entity that is controlled by an eleven-member unelected board that is not accountable to the Salt Lake City electorate. This unelected board is given jurisdiction over one-fifth of the geographic area of Salt Lake City, which is equal to one-third of the City's developable area, and delegated power to make spending decisions with respect to a substantial portion of City tax monies generated from development of this land. The Act also instructs the City what zoning to adopt for this vast geographic area and requires the City to allow transportation, unloading, transfer, or temporary storage of natural resources anywhere in this area. The 2018 legislation has undergone several amendments since it was first enacted, but these provisions remain, which the City contends violate Utah's "ripper clause" and its prohibitions on interference with local control.

In addition to its ripper clause violations, the Act violates the uniform operation of laws provision. Specifically, the Act does not apply uniformly to all Utah municipalities and its disparate treatment of Salt Lake City, West Valley, and Magna is not reasonably related to achievement of the Act's stated legislative purpose. The Act violates at least two provisions of the Utah constitution and should be stricken.

STATEMENT OF ISSUES

Issue One: Do the provisions of the Utah Inland Port Authority Act that (1) delegate power to the Utah Inland Port Authority to make decisions regarding the spending of municipal monies; (2) mandate the zoning the City must adopt for one-fifth of its geographic area; and (3) require the City to permit transporting, unloading, transfer, or temporary storage of natural resources anywhere within this one-fifth area, violate Article VI, Section 28 of the Utah Constitution?

Applicable Standard of Review: "A constitutional challenge to a statute presents a question of law, which [the Court] review[s] for correctness."[2]

Preservation: These issues were raised by the City in its motion for summary judgment and argued to the district court.[3]

Issue Two: Does the Utah Inland Port Authority Act's disparate treatment of Utah municipalities violate Article I, Section 24 of the Utah Constitution?

Applicable Standard of Review: "A constitutional challenge to a statute presents a question of law, which [the Court] review[s] for correctness."[4]

Preservation: This issue was raised by the City in its motion for summary judgment and argued to the district court.[5]

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[2] *I.M.L. v. State*, 2002 UT 110, ¶ 8, 61 P.3d 1038.
[3] R. 00550-1673.
[4] *I.M.L*, 2002 UT 110, ¶ 8.
[5] R. 00550-1673.

STATEMENT OF CASE

A. Municipal Monies and the Allocation of a Municipality's Budget.

Like any Utah municipality, Salt Lake City's general fund is the source of funding for most City expenditures.[6] For Fiscal Year 2019, the City operated with a general fund of just over $300M.[7] The monies for this fund are primarily generated through City property tax and City sales and use tax.[8] For Fiscal Year 2019, this amounted to just over $93M from property tax and just over $93M from sales and use tax.[9] These funds are appropriated by the City Council to, among other things, pay for costs associated with the construction and maintenance of public infrastructure, provision of police and fire services, ownership and maintenance of parks and open space, administration of permits, planning and business licensing, and the implementation of the City's policy objectives for its citizens, including affordable housing, economic development, and youth programs.[10]

B. Municipal Zoning and the Regulation of Private Property.

Regulation of the use of private property is a function that is performed by local governments throughout the State of Utah.[11] Municipalities regulate the use of private property first and foremost through zoning.[12] Areas of a municipality are zoned for specific uses based on the nature and characteristics of the area and to avoid conflicting uses.[13] Salt

[6] R. 01244 (Fact No. 60).
[7] R. 01244 (Fact No. 61).
[8] R. 01244 (Fact No. 62).
[9] R. 01244 (Fact Nos. 63-64).
[10] R. 01244 (Fact No. 65).
[11] R. 01230-31 (Fact No. 12).
[12] R. 01230 (Fact No. 13).
[13] R. 01231 (Fact No. 14).

Lake City has more than sixty-seven categories of zoning, which include residential use, agricultural use, open space, industrial or manufacturing uses, and overlay zones.[14] The zoning of an area may allow a use as a permitted use or a conditional use.[15] Long-term general plans, master plans and/or neighborhood plans are also developed by municipalities to guide future development in a particular area or neighborhood.[16] Any use or development of property must comply with applicable zoning and be approved by the municipality.[17]

C. How the Inland Port Authority Act Interferes with Municipal Monies, Municipal Zoning, and Other Municipal Functions.

With respect to municipal monies, the Utah Inland Port Authority Act identifies an area of Salt Lake City that is equal to one-fifth of the entire geographic area of the City (and one-third of its developable area), and much smaller portions of West Valley and Magna, and designates this area as the "jurisdictional land."[18] It then delegates power to a newly created body, the Authority, to make decisions regarding the spending of certain municipal monies.[19] It achieves this by redirecting to the Authority 75% of all property tax revenue that is the result of new growth for property located on this jurisdictional land.[20] In the absence of this redirection provision, these monies are simply property tax monies

[14] R. 01231 (Fact No. 15).
[15] R. 01231 (Fact No. 16).
[16] R. 01232 (Fact No. 20).
[17] R. 01232 (Fact No. 21).
[18] UTAH CODE § 11-58-102(2); R. 01228-29 (Fact Nos. 9-11); R. 00069.
[19] UTAH CODE §§ 11-58-601 & 602.
[20] UTAH CODE § 11-58-601.

that flow to the City and become part of the City's general fund.[21] This redirection of municipal funds began in November 2019 and will continue for 25 to 40 years, and potentially in perpetuity.[22] A percentage of the City's sales and use tax for this area is being redirected in a similar way.[23] The Utah League of Cities and Towns estimates the redirection of these monies will amount to losses of revenue of upwards of $360 million for Salt Lake City and $581 million for the Salt Lake City School District.[24]

With respect to municipal zoning, the Act mandates the zoning the City must adopt for one-fifth of the geographic area within its municipal boundaries.[25] Specifically, it requires Salt Lake City to adopt zoning that allows an "inland port use" as a permitted or conditional use anywhere in this vast geographic area, which notably includes land that is developed and residential or abuts developed and residential areas.[26] It also prevents the City from prohibiting the transportation, unloading, transfer, or temporary storage of natural resources anywhere in this one-fifth area.[27]

D. The Case Before the District Court.

The case before the district court involved the City's challenge to the provisions of the Utah Inland Port Authority Act, as they were at the conclusion of the 2019 legislative

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[21] R. 01246 (Fact No. 72); R.00713, ¶ 14.
[22] UTAH CODE § 11-58-601; R. 01250-52, Fact Nos. 80-90.
[23] UTAH CODE § 11-58-602(6); UTAH CODE § 59-12-205(2)(b)(iii); R. 01246 (Fact No. 74).
[24] R. 00449. ¶ 91; R. 00500, ¶ 91.
[25] UTAH CODE § 11-58-205(5).
[26] *Id.*
[27] UTAH CODE § 11-58-205(6); R.00069.

session.[28] As the Court is likely aware, the Act was first passed in 2018 and was amended in a 2018 special session, 2019 general session, and the 2020 general session.[29] At the conclusion of the 2019 legislative session the Act delegated power to the Authority to make spending decisions for 100% of the property tax revenue that is the result of new growth on the jurisdictional land, directed the City what zoning to adopt for one-fifth of the City, and prevented the City from prohibiting the transportation, unloading, transfer, or temporary storage of natural resources in that area.[30] The Act also delegated power to the Authority to hear all appeals from City administrative land use decisions where a private property owner had applied for a permit to develop their property for an "inland port use."[31] The power delegated effectively gave the Authority the ability to veto any administrative land use decision made by the City regarding an "inland port use."[32]

The City challenged these provisions claiming they were a violation of Utah's Ripper Clause.[33] The City also argued the Act violated Utah's uniform operation of laws provision because it does not treat Utah municipalities equally.[34] The district court ordered expedited briefing on cross motions for summary judgment, which were prepared without

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[28] R. 00436-72.

[29] *See* S.B. 234 (4th Substitute) 2018 Leg., Gen. Sess. (2018 Utah), available at https://le.utah.gov/~2018/bills/static/SB0234.html; H.B. 2001, 2018 Leg. Sess., 2nd Special Sess. (2018 Utah), available at https://le.utah.gov/~2018S2/bills/static/HB2001.html; H.B. 433, 2019 Leg. Gen. Sess. (2019 Utah), available at https://le.utah.gov/~2019/bills/static/HB0433.html; H.B. 347, 2020 Leg. Gen. Sess. (2019 Utah), available at https://le.utah.gov/~2020/bills/static/HB0347.html.

[30] UTAH CODE §§ 11-58-205(5)-(6) & 601(1)(a) (2019).

[31] UTAH CODE §§ 11-58-401-403 (2019).

[32] UTAH CODE §§ 11-58-403(2)(b)(ii) & 403(5)(b)(i)-(ii)(2019); R. 01243, ¶ 57.

[33] R. 00436-72.

[34] R. 00436-72.

conducting any discovery.[35] The district court heard oral argument on November 18, 2019 and issued a decision on January 8, 2020, finding no violation of the ripper clause or the uniform operation of laws provision.[36] Specifically, the district court found the provisions of the Act that delegate power to the Authority to make decisions regarding municipal monies are mandates, which it found escape scrutiny under the ripper clause.[37] The district court proceeded to find that even if its mandate conclusion was incorrect the provisions diverting the City's tax monies to the Authority did not violate the ripper clause because the State has the power to divert tax revenue from municipalities and counties.[38] It found the provisions mandating the adoption of certain zoning and the allowance of certain land uses were similarly permissible because the Act contains self-serving and conclusory statements that it was passed for a statewide purpose.[39]

Finally, the district court analyzed the zoning and land use provisions, including the now removed provisions regarding the Authority's ability to veto the City's administrative land use decisions, under the three-factor test developed by this court for determining if a particular function is municipal.[40] It found one factor weighed in favor of finding these functions municipal and two factors weighed in favor of finding these functions were not municipal.[41] Notably, the district court did not analyze the diversion of municipal funds

[35] R. 00422-23.
[36] R. 01488-1539.
[37] R. 01511-12.
[38] R. 01526-28.
[39] R. 01514-15, R. 01526-28.
[40] R. 01515-24.
[41] R. 01515-24.

and the delegation of power to the Authority to make decisions regarding the spending of these municipal funds under this three-factor test.[42]

E. The Issues on Appeal.

Additional amendments were made to the Act during the 2020 legislative session.[43] These amendments took place after issue of the district court's opinion and results in a narrowing of the issues presented to the Court in this appeal.[44] Specifically, during the 2020 legislative session the Act was amended to remove the delegation of power to the Authority to reverse or veto the City's administrative land use decisions.[45] The Act was also amended to reduce the amount of money the Authority is delegated the power to spend from 100% of the growth-related property tax from the jurisdictional land to 75% of the growth-related property tax from this land.[46] Some already developed property on the jurisdictional land has now also been exempted from the scope of the redirection provision.[47] Despite this reduction in amount, the Act continues to redirect large sums of municipal monies to the Authority, and direct the zoning the City must adopt and certain land uses it must permit for one-third of its developable area and one-fifth of its geographic area.[48] These provisions are violative of the ripper clause and the uniform operation of laws provision and are the subject of this appeal.

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[42] R. 01526-28.

[43] H.B. 347, 2020 Leg. Gen. Sess. (2019 Utah), available at https://le.utah.gov/~2020/bills/static/HB0347.html.

[44] *See supra* n.43; R.01488-1539.

[45] *See supra* n.43.

[46] *See supra* n.43; UTAH CODE § 11-58-601.

[47] UTAH CODE § 11-58-601(5)(b).

[48] UTAH CODE §§ 11-58-205(5)-(6) & 601.

SUMMARY OF ARGUMENT

Utah's ripper clause prohibits delegating to a special commission, private corporation or association the power "to make, supervise or interfere with any municipal improvement, money, property, or effects" or to "perform any municipal functions."[49] The Utah Inland Port Authority Act violates this provision in three different ways. First, the Act delegates power to the Authority to supervise and interfere with municipal monies and to perform the municipal function of spending or appropriating municipal funds.[50] Specifically, the Act redirects to the Authority a significant portion of the City's municipal property tax monies and a portion of the City's sales and use tax monies, together with the exclusive authority to spend those funds.[51] This delegation of power to the Authority to spend municipal funds is in direct contravention of the plain language of the ripper clause, which expressly prohibits delegating power to a body like the Authority to supervise or interfere with municipal money, property or effects.[52] Decisions regarding the spending of municipal monies is also the performance of a municipal function. Thus, these diversion provisions also violate the ripper clause's prohibition on delegating power to perform a municipal function.[53]

Second, the Act mandates the zoning the City must adopt for one-fifth of the land that lies within its geographic boundaries.[54] Like decisions regarding the spending of

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[49] UTAH CONST. ART VI, § 28.
[50] UTAH CODE §§ 11-58-601 & 602.
[51] UTAH CODE §§ 11-58-601 & 602.
[52] UTAH CONST. ART VI, § 28.
[53] UTAH CONST. ART VI, § 28.
[54] UTAH CODE § 11-58-205(5).

municipal monies, adopting local zoning ordinances that regulate the use of private property is the performance of a municipal function. Thus, provisions, like this, that remove a municipalities ability to exercise judgment and discretion in its performance of a municipal function are subject to scrutiny under the ripper clause and necessarily fail. Third, the Act directs the City it must permit the land use of transporting, unloading, transfer, or temporary storage of natural resources on any property in the one-fifth geographic area of the City identified in the Act.[55] Like zoning, decisions regarding what land uses are permitted on private property is a municipal function and this provision also violates the ripper clause.

In addition to violating Utah's ripper clause, the Act also violates Utah's uniform operation of laws provision.[56] Specifically, it creates two classes of municipalities. One class consists of three municipalities that are mandated to be subject to the provisions of the Act and the other class consists of Utah's remaining 244 municipalities that are only subject to the provisions of the Act if the municipality and applicable property owner expressly consent. These two classes of municipalities are treated differently. Namely, the three municipalities that are mandatorily subject to the provisions of the Act lose the ability to make spending and appropriation decisions regarding large portions of their municipal budgets, and the ability to make decisions with respect to the zoning and certain permitted land uses for large areas within their geographic boundaries. Powers all other Utah municipalities retain.

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[55] UTAH CODE § 11-58-205(6).
[56] UTAH CONST. ART I, § 24.

The mandatory and non-mandatory classifications created by the Act are unfairly discriminatory, which alone renders the classification unreasonable and a violation of the uniform operation of laws provision. There is also no reasonable relationship between the disparate treatment of these municipalities and the expressly stated purpose of the Act, which is to promote economic growth statewide. Controlling the spending of large portions of the municipal budgets of Salt Lake City, Magna, and West Valley is not reasonably related to statewide economic growth. Likewise, the State's promise that development of an inland port will create between 4,000 and 24,000 jobs over the next thirty years does not show a *reasonable* relationship between stripping Salt Lake City of its ability to make zoning and certain land use decisions for one third of its developable area. For these reasons, the Act also violates the uniform operation of laws provision.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING NO VIOLATION OF UTAH'S RIPPER CLAUSE PROVISION.

A. The History and Purpose of Utah's Ripper Clause.

Ripper clauses, including Utah's ripper clause, were enacted to constitutionally protect local control of uniquely local matters.[57] In the years following the Civil War, there was an alarming trend that saw state legislatures increasingly giving power to private and

[57] *See generally* David O. Porter, *The Ripper Clause in State Constitutional Law: An Early Urban Experiment Part I*, 1969 UTAH L. REV. 287, 297-306 (hereinafter "Porter"). A copy of this article is contained in the record at R. 00751-832 and attached to the Addendum to this brief. *See also, City of W. Jordan v. Utah State Ret. Bd.*, 767 P.2d 530, 534 (Utah 1988) ("[A] paramount purpose of the ripper clause, as it has been interpreted in Utah: [is] to prevent interference with local self-government.").

public bodies (often for pecuniary gain) that removed important local governmental functions from local municipal control.[58] Municipalities were left helpless to respond because it was generally considered that the power of the legislature over municipalities was "plenary and complete, limited only by provisions in the state and federal constitutions."[59] Ripper clauses, which secured constitutional protection for local control over matters of local concern, were a response.[60] Pennsylvania ratified the first such clause through its constitutional convention in 1874,[61] which became the model for other states, including Utah.[62]

Utah's ripper clause is set forth in Article VI, section 28 of the Utah Constitution. It was included in Utah's first constitution,[63] adopted in 1895, and provides:

> 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.[64]

As aptly stated by this court, a "paramount purpose of the ripper clause, as it has been interpreted in Utah: [is] 'to prevent interference with local self-government.'"[65] This is accomplished by "protect[ing] local government councils from having their particularly

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[58] Porter, at 297-306.
[59] *Id.* at 287.
[60] *Id.* at 297-311.
[61] *Id.* at 306-11.
[62] *Id.* at 310-11.
[63] *See* UTAH CONST. ART VI, § 29 (1895). The provision was renumbered in 1972, but no other changes were made.
[64] UTAH CONST. ART VI, § 28.
[65] *City of W. Jordan*, 767 P.2d at 534 (quoting *Mun. Bldg. Auth. of Iron Cty v. Lowder*, 711 P.2d 273 (Utah 1981)).

local functions usurped by special boards or commissions that [are] unrepresentative and [are] often created by the state legislature at the behest of special interests."[66]

Utah jurisprudence recognizing the right of local government to manage matters of local concern is not limited to its adoption of a ripper clause. Utah also declined to adopt the majority "Dillon Rule."[67] The Dillon Rule "requires strict construction of delegated powers to local governments" and recognizes only those powers expressly conferred by statute or necessarily implied or necessarily incident to those expressly conferred powers.[68] This court rejected application of the Dillon Rule in Utah because "effective local self-government, as an important constituent part of our system of government, must have sufficient power to deal effectively with the problems with which it must deal."[69] It found the rule was also inconsistent with Utah's history and its tradition of respect for local government's right to self-governance: "[E]very provision of the Constitution relating to this important subject appears to manifest an intention to bring those through whom power is to be exercised as close as possible to the subjects upon whom the power is to operate to preserve the right of local self-government to the people, and to restrict every encroachment upon such right."[70] Finally, it found that recognition of broad powers of local self-governance "is in harmony with history, with our American constitutional law, with our notions of decentralization of power, and with the spirit and genius of our

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66 *Id.* at 533.
67 *State v. Hutchinson*, 624 P.2d 1116, 1118-26 (Utah 1980).
68 *Id.* at 1118-19, n.3.
69 *Id.* at 1120.
70 *Id.* at 1124.

institutions."[71]

It is against this backdrop[72] — Utah's deep respect for the preservation of the right of local government to manage local affairs — that this Court must consider whether the Utah Inland Port Authority Act violates the ripper clause by: (1) delegating power to the Authority to spend or otherwise appropriate the City's municipal monies;[73] (2) mandating the zoning the City must adopt for one-fifth of its geographic area;[74] and (3) requiring the

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[71] *Id.* (quoting *State v. Eldredge*, 76 P. 337 (Utah 1904)). The Court made several other statements in recognition of the importance of respecting and preserving local control:

> [T]he history of our political institutions is founded in large measure on the concept at least in theory if not in practice that the more local the unit of government is that can deal with a political problem, the more effective and efficient the exercise of power is likely to be. *Id.* at 1121.
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> Broad construction of the powers of counties and cities is consistent with the current needs of local governments. The Dillon Rule of strict construction is antithetical to effective and efficient local and state government. If at one time it served a valid purpose, it does so no longer. The complexities confronting local governments, and the degree to which the nature of those problems varies from county to county and city to city, has changed since the Dillon Rule was formulated. Several counties in this State, for example, currently confront large and serious problems caused by accelerated urban growth. The same problems however, are not so acute in many other counties. Some counties are experiencing, and others may soon be experiencing, explosive economic growth as the result of the development of natural resources. The problems that must be solved by these counties are to some extent unique to them. *Id.* at 1126.

[72] *See, e.g.*, *American Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 12, 140 P.3d 1235 (finding that to determine if the protections of a constitutional provision extend to the conduct in question, courts should look to prior case law, historical evidence of the law when it was drafted, Utah's particular traditions, the intent of the drafters, and "more importantly, the citizens who voted it into effect").

[73] UTAH CODE §§ 11-58-601 & 602.

[74] UTAH CODE § 11-58-205(5).

City to permit the transporting, unloading, transfer, or temporary storage of natural resources anywhere on this vast area of land.[75]

B. Utah's Ripper Clause Jurisprudence.

Utah case law interpreting the scope and meaning of the ripper clause is extremely limited. Despite the fact the ripper clause was included in Utah's first constitution, adopted more than a century ago, the City has found only twenty-two decisions from Utah courts[76] and one decision from the Utah Public Service Commission[77] that consider whether a statute, regulation, or action violates Utah's ripper clause. These decisions span a period of more than eighty years,[78] with the most recent decision being issued by Utah's Federal

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[75] UTAH CODE § 11-58-205(6).

[76] *Qwest Corp. v. Utah Telecomm. Open Infrastructure Agency*, 438 F. Supp. 2d 1321 (D. Utah 2006); *Utah Assoc. Mun. Power Sys. v. Pub. Serv. Comm'n of Utah*, 789 P.2d 298 (Utah 1990); *City of W. Jordan v. Utah State Ret. Bd.*, 767 P.2d 530 (Utah 1988); *Mun. Bldg. Auth. of Iron Cty v. Lowder*, 711 P.2d 273 (Utah 1981); *Lindon City v. Eng'rs Constr. Co.*, 636 P.2d 1070 (Utah 1981); *Salt Lake Cty. v. Murray City Redevelopment*, 598 P.2d 1339 (Utah 1979); *Salt Lake City v. Int'l Assoc. Firefighters, Locals 1645*, 563 P.2d 786 (Utah 1977); *Tribe v. Salt Lake City Corp.*, 540 P.2d 499 (Utah 1975); *I.J. Wagner v. Salt Lake City*, 504 P.2d 1007 (Utah 1972); *Branch v. Salt Lake Cty. Serv. Area No. 2-Cottonwood Heights*, 460 P.2d 814 (Utah 1969); *Carter v. Beaver Cty. Serv. Area No. One*, 399 P.2d 440 (Utah 1965); *Backman v. Salt Lake Cty.*, 375 P.2d 756 (Utah 1962); *Merkley v. State Tax Comm'n*, 358 P.2d 991 (Utah 1961); *State Water Pollution Control Bd. v. Salt Lake City*, 311 P.2d 370 (Utah 1957); *Cty. Water System v. Salt Lake City*, 278 P.2d 285 (Utah 1954); *Tygesen v. Magna Water Co.*, 226 P.2d 127 (Utah 1950); *Provo City v. Dept. of Bus. Regulation*, 218 P.2d 675 (Utah 1950); *Union Pac. R.R. Co. v. Public Serv. Comm'n*, 134 P.2d 469 (Utah 1943); *Riggins v. Dist. Court of Salt Lake Cty.*, 51 P.2d 645 (Utah 1935); *Lehi City v. Meiling*, 48 P.2d 530 (Utah 1935); *Logan City v. Public Serv. Comm'n*, 271 P. 961 (Utah 1928); *City of St. George v. Public Utilities Comm'n*, 220 P. 720 (Utah 1923).

[77] *In re White City Water Co.*, 1992 WL 486434, 133 P.U.R.4th 62 (Utah P.S.C. Feb. 20, 1992).

[78] *See supra* n.76.

District Court almost fifteen years ago, in 2006.[79] None of these decisions come close to addressing a situation that is factually similar to the enactment of the Utah Inland Port Authority Act and the provisions at issue in this case, rendering this a case of largely first impression.

C. The Act Violates Utah's Ripper Clause.

1. The Act Delegates Power to the Authority to Spend or Otherwise Appropriate Salt Lake City's Municipal Monies.

a. The Authority is a Special Commission.

The Authority is a special commission within the meaning of the ripper clause. A classic ripper clause inquiry begins by determining if the body at issue is a "special commission, private corporation or association."[80] This court has afforded the term "special commission" an extremely wide meaning, which the Authority easily meets. Specifically, "[a] special commission is some body or group separate and distinct from municipal government."[81] Importantly, a special commission "is not offensive to the constitution by its creation," only when it is "delegated powers which intrude into areas of purely municipal concern."[82] Consistent with this definition, Utah's jurisprudence has repeatedly found the State-created Public Service Commission is a special commission

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[79] *Qwest Corp.*, 438 F. Supp. 2d 1321.

[80] *See, e.g.*, *Utah Assoc. Mun. Power Sys.*, 789 P.2d at 301-304 (finding the Public Service Commission is a special commission and then considering if the performance of a municipal function had been delegated to it by an Interlocal Agreement); *City of W. Jordan*, 767 P.2d at 533-35 (assuming without deciding that State Retirement Board is a special commission and then considering whether operating a statewide retirement program that covers municipal employees is the performance of a municipal function).

[81] *Tribe*, 540 P.2d at 502-503.

[82] *Id.* at 503.

within the meaning of the ripper clause and that the actions of that entity violate Utah's ripper clause when the entity regulates purely municipal concerns.[83] In contrast, Utah jurisprudence has consistently found quasi-municipal corporations or local service districts are not special commissions within the meaning of the ripper clause.[84] The distinction rests on two important facts: (1) the quasi-municipal corporations and local districts at issue were all created at the voluntary election of the county, city, or town over which the body would exercise control, and (2) the body that the county, city or town voluntarily created was governed and controlled by the elected officials of that county, city, or town.[85]

For example, in *Tribe v. Salt Lake City Corporation* this court was tasked with

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[83] *Utah Assoc. Mun. Power Sys.*, 789 P.2d at 301 ("It is certainly true that *Logan City* and *Barnes* hold that the PUC, and therefore the PSC, is a 'special commission.' We see no reason to depart from that holding since it appears to be congruent with the purpose behind 'ripper clauses,' of which article VI, section 28 is an example."); *Logan City*, 271 P. at 970-72 (finding Public Service Commission could not regulate the rates charged by a municipally owned electric company to its residents because that allowed direct supervision over and interference with municipal property and improvements and the performance of a municipal function); *Barnes v. Lehi City*, 279 P. 878, 883 & 888 (Utah 1929) (summarily affirming holding in *Logan City* that municipality has authority to own and control a utility and that such utility is not subject to regulation or control by the Public Service Commission).

[84] *See, e.g.*, *Tygesen*, 226 P.2d at 130 (recognized the legitimacy of statutes that permit the creation of water districts and improvement districts where "the initiating agencies were the legislative bodies of the cities desiring the districts"); *Mun. Bldg. Auth. of Iron Cty.*, 711 P.2d at 281-82 (finding a local building authority created at the discretion of local government and then controlled by that local government was "clearly" not a special commission); *State Water Pollution Control Bd.*, 311 P.2d at 376 (recognizing the difference between bodies created by the State, which are special commissions within the meaning of the ripper clause, and bodies created voluntarily by a municipality, which are not special commissions within the meaning of the clause); *Tribe*, 540 P.2d at 502-03 (finding municipal created and controlled redevelopment agency was not a special commission within the meaning of the Act).

[85] *See supra* n.84.

determining if Salt Lake City's Redevelopment Agency was a special commission within the meaning of the ripper clause.[86] At issue was the constitutionality of a statute that allowed municipalities to choose to create a redevelopment agency to manage "blight" in their municipality.[87] Salt Lake City chose to exercise that power and the elected officials of Salt Lake City sat as the board and controlled the agency.[88] The City and the redevelopment agency then took actions permitted by the statute and tax payers brought suit challenging the constitutionality of the agency and acts permitted by the statute.[89] The specific question posed to the Court was whether the Salt Lake City Redevelopment Agency was "a special commission and contravenes the provisions of Article VI, section 28."[90] The Court concluded it was not.[91] Important to the Court's analysis was the fact that the redevelopment agency was created by and controlled by Salt Lake City's elected officials: "[t]he agency is separate and apart from the city government, and yet is administered by a legislative body responsible to the local electorate."[92] In other words, the Court found the redevelopment agency was not a special commission within the meaning of the ripper clause because it was created and controlled by the municipality's elected officials.[93]

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[86] 540 P.2d at 501 ("In summary, the points raised by plaintiffs are: (1) That the Redevelopment Agency proposed is in fact a special commission and contravenes the provisions of Article VI, Section 28, Utah Constitution.").

[87] *Id.* at 501-02.

[88] *Id.* at 501.

[89] *Id.* at 501-02.

[90] *Id.* at 501.

[91] *Id.* at 502-03.

[92] *Id.* at 503.

[93] *Id.*

This court applied the same analysis in *Municipal Building Authority of Iron County v. Lowder*, to find a building authority created by a local government pursuant to Utah's Municipal Building Authority Act was not a special commission within the meaning of the ripper clause.[94] In that case, Iron County created a municipal building authority with the commissioners of the County (i.e., its local elected officials) acting as the Board of Trustees.[95] When certain County employees asserted the County's creation of the Authority was a violation of the ripper clause, the County and building authority brought a declaratory action.[96] The question before the Court was whether "the [Building] Authority [was] a special commission prohibited by article VI, section 28."[97] The Court began its analysis by drawing a distinction between state statutes that "set up an entity and directly give[] it powers" and state statutes that provide authority to local governments to set up an entity, if they so choose.[98] The Court found that the Act at issue fell into the latter category and, as such, the Act did not by itself remove "control over local functions from local government or the people."[99] The Court went on to find that in addition to the delegation of any power to a building authority requiring an affirmative and voluntary act of the local government to create the authority, the building authority created was managed and controlled by the elected officials of the County: thus, "[l]ocal control [was] retained over

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94 711 P.2d at 281-82.
95 *Id.* at 276.
96 *Id.*
97 *Id.*
98 *Id.* at 281.
99 *Id.* at 281-82.

a locally created entity."[100]

The same conclusion was reached by this Court in *State Water Pollution Control Bd. v. Salt Lake City*, issued approximately two decades before the decision in *Tribe*.[101] In that case the court found the state-created Water Pollution Board was a special commission within the meaning of the ripper clause, finding "the only cases in which this court has found the Constitution inapplicable to the interfering agency are those similar to the case of *Lehi City v. Meiling*," which involved a statute permitting the voluntary creation of a water district by a municipality.[102] The court found the state-created water pollution board was clearly distinguishable and a special commission because it was created by the State, not "initiated by the cities desiring the district," and its powers were delegated directly by the State, not as a result of the municipality electing to create it.[103]

In summary, this Court has consistently found that whether a body is a special commission within the meaning of the ripper clause turns on whether the body is voluntarily created by local government and ultimately controlled by that government. Here, the Authority was neither created at the election of Salt Lake City nor is it operated or subject to the control of Salt Lake City. As such, it easily meets this Court's definition of a special commission.[104]

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[100] *Id.* at 282.
[101] 311 P.2d at 375-76.
[102] *Id.*
[103] *Id.*
[104] Notably, Appellees argued to the district court that no violation of the ripper clause could be shown because the Authority is a public corporation and the ripper clause only precludes delegation of power to special commissions, ***private*** corporations or associations. (R. 00180-81.) This court summarily rejected an identical argument in *Logan*

b. The Act Delegates Power to the Authority to Supervise or Interfere with Municipal Monies.

i. The monies at issue are municipal.

The property and sales and use tax monies diverted to the Authority by the Act are municipal. Article XIII, section 5 of the Utah Constitution provides "the Legislature may not impose a tax for the purpose of a political subdivision of the State, but may by statute authorize political subdivisions of the State to assess and collect taxes for their own purposes."[105] Courts have "long recognized that the purpose of [this provision is] to ensure the right of the people of Utah to local self-government" and to "preserve local self-government free from needless legislative interference."[106] Pursuant to this constitutional direction, the State authorizes municipalities to assess and collect property tax from real property within their municipal boundaries and sales and use tax for points of sale within

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City v. Public Serv. Comm'n, 271 P. 961 (Utah 1928). In that case the Court was tasked with determining if the Public Service Commission was a special commission for purposes of the ripper clause and whether it could set rates for a municipally owned utility. *Id.* at 970-73. The parties supporting the position that the Public Service Commission had jurisdiction to set rates for municipally owned utility companies argued no violation of the ripper clause could be shown because the Public Service Commission was a "general" not a "special" commission. *Id.* at 972-73. This court summarily rejected this construction of the ripper clause provision as "too narrow" and one that "in effect impairs the very essence and purpose of [the ripper clause provision]." *Id.* at 972. Rather, the analysis must turn on who creates and controls the entity; not what the entity is called. As this court explained: "if municipalities are entitled to protection from an agency of the state exercising delegated powers of the kind enumerated, the right thus proposed to be protected would be violated as much by a general commission doing the mentioned acts as by a special commission doing the same things." *Id.* Just like the parties in *Logan City*, the State created an entity and called it a public corporation in the hopes of foiling a ripper clause claim. Such kabuki theater necessarily fails: a spade is a spade, even if you call it a fork.

[105] UTAH CONST. ART XIII, § 5(4).

[106] *Mountain States Tel. & Tel. Co. v. Garfield Cty.*, 811 P.2d 184, 187 (Utah 1991) *citing The Best Foods v. Christensen*, 285 P. 1001, 1003 (Utah 1930).

municipal boundaries.[107] Thus, the Utah constitution renders property and sales and use tax collected by the City pursuant to this statutory authority "municipal monies."

ii. Interference with these monies is prohibited.

The plain language of the ripper clause precludes the delegation of power to the Authority to "make, supervise, or interfere with any municipal improvement, money, property or effects."[108] This court's decision in *Logan City* illustrates the Act's provisions diverting the City's tax monies to the Authority violate this aspect of the ripper clause.[109] In *Logan City*, this Court examined whether a municipal owned utility was subject to the provisions of the Utility Act, including a requirement that it "submit its proposed contract[s], purchase[s], or other expenditures" to the Public Service Commission for approval or disapproval.[110] This Court concluded it would be a violation of the ripper clause to subject the municipal owned utility to this and other provisions of the Act because it subjects the municipality to "direct supervision over and an interference with . . . municipal improvements and property . . . [which is] forbidden by [the ripper clause]."[111] Just like the Utilities Act in *Logan City*, the Act's redirection of the City's property tax to the Authority delegates power to the Authority to directly supervise or interfere with the

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[107] UTAH CODE § 10-6-133 (permitting cities to levy property tax.); UTAH CODE § 59-12-203 (permitting cities to impose a sales and use tax). Notably, property tax is the vehicle the State has authorized municipalities to generate revenue for their own use since statehood. *See, e.g.*, C. L. 1888, § 1798 S 2; R.S. 1898, § 253; UTAH CODE § 10-8-87 (1953). *See also*, UTAH CODE § 11-9-3 (1959) (granting municipalities the right to levy local sales and use taxes).

[108] UTAH CONST. ART VI, § 28.

[109] 271 P. at 970-74.

[110] *Id.*

[111] *Id.* at 971-72.

spending and appropriation of municipal monies, which this Court has found is "forbidden" by the ripper clause.[112]

c. The Act Delegates Power to the Authority to Perform the Municipal Function of Spending or Appropriating Municipal Funds.

i. The municipal function test.

This Court has developed a three-factored test for determining whether any given function is the performance of a "municipal function" within the meaning of the ripper clause. Specifically, in *City of West Jordan v. Utah State Retirement Board*, this Court was tasked with determining if management of a statewide retirement fund, where the members included municipal employees, was a municipal function within the meaning of the ripper clause.[113] This Court conducted a review of Utah case law that purported to give meaning to the term "municipal functions" as used in the ripper clause, and concluded it

[112] The Act's redirection of these municipal monies to the Authority also has the practical effect of delegating power to the Authority to "make, supervise or interfere" with a municipal "improvement" or municipal "property." UTAH CONST. ART VI, § 28. To date, the City, like other municipalities, uses growth-related property tax to control development of municipal improvements and municipal infrastructure. (R. 01254-57 (Fact Nos. 100-18).) Specifically, growth-related property tax is used to incentivize and control the development of municipal infrastructure, such as roads, pipelines, sidewalks, and curb and gutter that are necessary for development of an area. (R. 01255-57 (Fact Nos. 112-18).) This is done by providing reimbursement to developers for installing this infrastructure concurrent with the development of their property in that area. (R. 01255-57 (Fact Nos. 112-18).) Exactly what infrastructure is developed, where it is placed, and the quality and standards are negotiated and controlled by the City. (R. 01256 (Fact No. 111).) As such, the diversion of these monies to the Authority, together with the power to use these monies to select the type, timing, and quality of municipal improvements and infrastructure, delegates to the Authority the power to "make, supervise or interfere with . . . municipal improvement[s] . . . [and municipal] property." UTAH CONST. ART VI, § 28.

[113] 767 P.2d 530, 531-35 (Utah 1988).

"provides relatively little by way of a consistent analytical framework for determining how to characterize a given area of activity."[114] To remedy this failure, a new multifactored test was adopted to guide lower courts in determining if the facts of a particular case show a power to "perform [a] municipal function" is delegated.[115] This test directs courts to consider three factors: (1) the relative abilities of the state and the municipality to perform the function; (2) to what degree performance of the function affects the interests of those beyond the boundaries of the municipality; and (3) to what extent the legislation under attack intrudes upon the ability of the people within the municipality to control through their elected officials the substantive policies that affect them uniquely.[116]

Only three decisions have been published in the thirty-one years since *City of West Jordan* and the adoption of this multifactored ripper clause test: one Utah Supreme Court decision,[117] one Utah Federal District Court decision,[118] and one Utah Public Service Commission decision.[119] The functions at issue in those cases are not remotely similar to delegating the power to make decisions regarding the spending or appropriation of municipal monies and, thus, offer no guidance. But, application of the three-factor test makes clear this function is municipal.

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114 *Id.* at 534.
115 *Id.*
116 *Id.*
117 *Utah Assoc. Mun. Power Sys.*, 789 P.2d 298.
118 *Qwest Corp.*, 438 F. Supp. 2d 1321.
119 *In re White City Water Co.*, 1992 WL 486434.

ii. *Spending or appropriating the City's municipal funds is a municipal function.*

The provisions of the Act operate to delegate power to the Authority to perform the municipal function of making spending and appropriation decisions for a large portion of the funds that make up the City's annual budget. Specifically, the Act does not confer taxing authority on the Authority, but rather redirects hundreds of millions of the City's property tax monies and a portion of its sales and use tax monies directly to the Authority.[120] For example, from November 2019 onwards, at least 75%[121] of growth-related property tax from undeveloped properties on the jurisdictional land — which includes one-third of the developable area of Salt Lake City — is redirected to the Authority for a period of at least twenty-five years, and potentially in perpetuity.[122] A percentage of the City's sales and use tax is also redirected, with no termination date.[123] In the absence of these provisions, these are funds that would be received by the City, become part of the City's general fund, and decisions regarding the spending and appropriation of these funds would be made by the City's elected officials as part of the City's annual budget.[124]

It hardly merits argument to state that decisions regarding appropriation and allocation of the City's annual budget is a municipal function. Indeed, the Porter article

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[120] UTAH CODE § 11-58-601 & 602; R. 01245-48 (Fact Nos. 68-79); R. 00449. ¶ 91; R. 00500, ¶ 91.

[121] *See* UTAH CODE § 11-58-601 (2019) (diverting 100% of growth-related property tax); UTAH CODE § 11-58-601 (2020) (diverting 75% of growth-related property tax).

[122] UTAH CODE § 11-58-601; R. 01250-52 (Fact Nos. 80-90).

[123] UTAH CODE § 11-58-602(6).

[124] R. 01246 (Fact Nos. 72 & 79); R.00713, ¶¶ 14 & 17.

referenced in this briefing and relied on by this court in its seminal *City of West Jordan* decision, uses a commission that required the City of Philadelphia to pay for construction projects the city considered poorly designed and unwisely located as an example of the type of conduct ripper clauses were specifically designed to prohibit.[125] A consideration of the function of spending and appropriating municipal funds under the three factor municipal function test developed by this court in *City of West Jordan* echoes this conclusion.

Specifically, the first factor of the municipal function test considers the relative abilities of the state and the municipality to perform the function.[126] The City Council appropriates the City's budget on an annual basis, is informed on the competing fiscal demands of the City, and is clearly in a better position to make decisions regarding the spending or appropriation of City monies than the State.[127] This factor weighs in favor of the function being municipal.

The second factor considers the degree to which performance of the function affects the interests of those beyond the boundaries of the municipality.[128] How a municipality choses to spend the funds it generates from the tax revenue of its residents has little, if any, effect on the interests of those beyond the boundaries of the municipality and this factor also weighs in favor of the function being municipal.

The third factor considers the ability of the residents within the municipality to

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[125] Porter, at 307.
[126] *City of W. Jordan*, 767 P.2d at 534.
[127] R. 01244-45 (Fact No. 65).
[128] *City of W. Jordan*, 767 P.2d at 534.

control through their elected officials the substantive policies that affect them uniquely.[129] Municipal monies consist of taxes paid by municipal residents. Thus, decisions regarding how these monies are spent affect them uniquely. When these spending and appropriation decisions are made by the City Council, who are elected directly by the City's residents, City residents can voice their opinion and affect change at the polls if they are dissatisfied with their elected officials' spending and appropriation decisions. Here, delegating power to spend municipal tax monies to the unelected Authority board completely obliterates any ability of residents of Salt Lake City to affect change through their elected officials regarding these decisions.

d. The District Court Erred in Finding the Diversion Provisions were not Subject to Scrutiny under the Ripper Clause.

The district court found the provisions redirecting the City's municipal monies to the Authority were not subject to scrutiny under the ripper clause[130] and are actions the Legislature is permitted to take.[131] Both conclusions are erroneous. First, the district court characterized the provisions as legislative mandates, which it found are exempt from scrutiny under the ripper clause.[132] This characterization draws a distinction without a difference and gives rise to absurd results. For example, compare a statute that delegates power to the Authority to make spending and appropriation decisions regarding certain monies in the City's budget and a statute, like the Act, that gives the same money directly

[129] *Id.*
[130] R. 01511-12.
[131] R. 01526-28.
[132] R. 01527.

to the Authority to make spending and appropriation decisions. Both accomplish the same result; the Authority makes spending and appropriation decisions regarding the City's municipal monies. Under the distinction the district court attempts to draw, only the statute that delegates power to the Authority to spend and appropriate monies in the City's budget is subject to scrutiny under the ripper clause; the statute that gives that same money to the Authority to spend and appropriate is not. Constitutional prohibitions are not so easily avoided.

Second, the cases cited and relied on by the district court, *Tribe*,[133] *Mountain States Tel. & Tel. Co. v. Garfield City*,[134] and *State ex rel. Pub. Serv. Comm'n v. S. Pac. Co.*,[135] do not support the conclusion the district court reached.[136] Namely, that this Court has found the Legislature may redirect municipal monies to a new body the State choses to create. Specifically, in *Tribe* this Court considered the legitimacy of a statute that permits municipalities to make the decision to create a municipal redevelopment agency.[137] If the decision is made by the municipality to create such an agency, the municipality may then make the decision to direct a portion of its property tax to that agency.[138] A decision by a municipality regarding appropriation of its own property tax monies for a redevelopment agency it voluntarily creates (and then controls) is not at all like the provisions of the Act that redirect the City's municipal tax monies away from the City to an entity the State

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133 540 P.2d 499 (Utah 1975).
134 811 P.2d 184 (Utah 1991).
135 79 P.2d 25, 39 (Utah 1938).
136 R. 01527-28.
137 540 P.2d at 501-03.
138 *Id.*

created, which the City does not control.

Mountain States is equally inapposite. In that case, this Court considered a plaintiff corporation's challenge to a statute that required imposition of a *statewide* levy to cover the administrative costs incurred by counties in the collection and distribution of local government tax assessments.[139] The court found the State could direct the levy of a *statewide* tax on all citizens of Utah to cover the costs of administering a fair and equalized property tax system throughout Utah.[140] This imposition of a *statewide* tax for a specific *statewide* purpose is not at all similar to the Act's redirecting of a significant portion of municipal property tax from just three hand-picked municipalities. *Mountain States* does not show the State may redirect the City's municipal tax monies to the Authority, as the district court found.[141] To the contrary, it directs that funding for the Authority, an entity the State decided to create to perform a claimed *statewide* function, must be raised through the imposition of a *statewide* tax.

Finally, *State ex rel. Pub. Serv. Comm'n v. S. Pac. Co.*, concerns the constitutionality of two state statutes that attempted to transfer the power to assess public utilities from the State Tax Commission to the Public Service Commission.[142] In that case this court found both statutes unconstitutional because the Utah Constitution confers the power to assess utilities on the State Tax Commission, which means "this duty and power cannot be directly exercised by the Legislature" or transferred by the Legislature to "[an]other officer or

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139 811 P.2d at 185-92.
140 *Id.*
141 R. 01527-28.
142 79 P.2d 25, 26-40 (Utah 1938).

board."[143] Far from supporting the district court's conclusion that the Legislature has the power to redirect municipal monies, this case demonstrates just the opposite. Just like the power of assessment at issue in *State ex rel. Public Service Comm'n*, the power to collect and spend municipal tax monies is conferred on municipalities by the Utah Constitution.[144] Thus, consistent with the holding in *State ex rel. Public Service Comm'n*, any duty or power to tax, or to spend or appropriate those tax monies, cannot be exercised by the Legislature or transferred by the Legislature to another officer, board, or body. This is exactly what the Legislature is attempting to do through the Act's diversion provisions.[145]

In summary, this Court has not found the Legislature may divert municipal tax monies to a state created entity and the district court erred in reaching that conclusion.

2. The Act Directs the Zoning the City Must Adopt and Land Uses the City Must Permit.

a. The Ripper Clause Prohibits Legislation that Directs the Performance of Municipal Functions.

The provisions of the Act that mandate the zoning the City must adopt and certain land uses it must permit also violate the ripper clause. It would seem to go without saying

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[143] *Id.* at 36-40.

[144] *See supra* § I.C.1.b.i.

[145] The other cases cited by the district court to reach this conclusion are equally inapposite. (R. 01257-58.) *Zissi v. State Tax Comm'n of Utah*, 842 P.2d 848 (Utah 1992) concerned the constitutionality of a statute that imposed a stamp duty tax on drug dealers *statewide*. *Moss ex rel. State Tax Comm'n v. Bd. of Comm'rs of Salt Lake City*, 261 P.2d 961 (Utah 1953) concerned the interpretation of a statute setting forth the maximum amount of tax a municipality was permitted to tax its residents to fund its municipal functions and expenses. *Plutus Mining Co. v. Orme*, 289 P. 132 (Utah 1930) determined a city was not permitted to collect municipal tax from property that was segregated and no longer within municipal boundaries.

that the Legislature cannot accomplish by direct mandate that which it is constitutionally prohibited from achieving through delegation to a third party. *Backman v. Salt Lake County*[146] provided this court the opportunity to squarely address that issue. In *Backman*, this court considered the constitutionality of a provision of an Act that directed the "legislative bodies of all counties" of a certain size to hold a special election at which the "proposition of the incorporation of a civic auditorium and sports arena district *shall* be submitted to the electors."[147] This court found those statutory mandates "offensive to the plain terms of [the ripper clause]."[148] Much like the Act at issue in this case, the Civic Auditorium and Sports Arena Act was "conceived and passed in haste . . . in the compulsory closing hours of an overtaxed legislature," which the court found resulted in an "unconstitutional pregnancy, resulting in a birth in which its legislative pains could not be anaesthetized by any proper judicial ministration."[149] In finding the statute's mandate to hold an election was a violation of the ripper clause, the court commented that "if [the ripper clause] has any meaning at all, it would seem to be applicable here; otherwise a legislative act could create a commission with authority to levy 10 mills,—or more, to operate and maintain the highway system of a municipality, its parks and recreation areas, sewage disposal, health department, the police force, the fire department, parades, and even

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146 *Backman v. Salt Lake Cty.*, 375 P.2d 756, 757-58 (1962), overruled in part by *Mun. Bldg. Auth. of Iron Cty. V. Lowder*, 711 P.2d 273 (Utah 1981) (finding ripper clause should be narrowly construed).

147 *Id.*

148 *Id.* at 761.

149 *Id.* at 757.

municipal government itself, ad infinitum."[150] The opinion goes on to state that "[w]e are convinced that the framers of our state constitution wisely anticipated the inroads that might be cut in the structure of local, representative government, which fundamentally is composed of officials elected by those closest to government, the electors, when they judiciously insisted on incorporating [the ripper clause] as a must in our constitution."[151] The case was ultimately decided on procedural grounds, rendering these findings obiter dictum,[152] and overruled in part to the extent Article VI, section 28 should be construed "narrowly so as to facilitate flexibility in local government finance,"[153] but this Court's application of the ripper clause to a direct legislative mandate remains instructive.

Finding direct legislative mandates are subject to scrutiny under the ripper clause is also consistent with the jurisprudence of this Court that has consistently found the rules and regulations of a state created body are subject to scrutiny under the ripper clause. For example, in *State Water Pollution Control Board. v. Salt Lake City*, the City was cited for not complying with the board's regulations that directed the fashion in which flush tanks in a sewer system must operate and prohibited the use of anything less than an eight-inch pipe.[154] The court applied a ripper clause analysis and declined to subject Salt Lake City's

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150 *Id.* at 761.

151 *Id.*

152 *Branch*, 460 P.2d at 817 (finding *Backman* was decided on procedural grounds, rendering the decision on the ripper clause obiter dictum).

153 *Mun. Bldg. Auth. of Iron Cty.*, 711 P.2d at 281 (making these comments in the context of finding a county could create a building authority for the purpose of constructing and funding a county jail and that the Authority could fund the construction of the jail by issue of revenue bonds, secured by the new jail site and construction, which the bondholder could foreclose on with no recourse against the county or its tax payers.).

154 311 P.2d at 371-72.

purely local operation of its sewer system to this mandatory rule, finding it would be a violation of the ripper clause to do so.[155]

The mandatory rules and regulations of the state created public service commission are handled in the same way. A municipality is not subject to mandatory regulations where the management of the utility is a purely local concern.[156] These cases make clear that if the Authority had adopted a rule or regulation mandating the zoning the City must adopt or a rule or regulation prohibiting the City from preventing the transporting, unloading, or storage of natural resources within its municipal boundaries then those rules or regulations would be subject to scrutiny under the ripper clause. The Act attempts to make an end run around this well-established principle by accomplishing directly that which is clearly prohibited if mandated by the body it creates. The Act's mandatory provisions do not escape scrutiny under the ripper clause and the district court erred in reaching that conclusion.

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[155] *Id.* at 373-75. Consistent with the edict to find a statute constitutional wherever possible, the Court found the rules and regulations could be applied to the municipal utility in circumstances where it was shown that the particular violation at issue had an effect on a body of water outside municipal boundaries. *Id.* at 375.

[156] *Utah Assoc. Mun. Power Sys.*, 789 P.2d at 301 (affirming a long line of precedent that finds the Public Service Commission is a special commission); *Logan City*, 271 P. at 970-72 (finding the Public Service Commission could not regulate the rates charged by a municipally owned electric company to its residents because that allowed direct supervision over and interference with municipal property and improvements and the performance of a municipal function); *Barnes*, 279 P. at 883 & 888 (summarily affirming holding in *Logan* that municipality has authority to own and control a utility and that such utility is not subject to regulation or control by the Public Service Commission).

b. Decisions Regarding the Zoning to be Adopted for One-Fifth of the Geographic Area of Salt Lake City is the Performance of a Municipal Function.

Much like making decisions regarding the spending and appropriation of municipal monies, it barely merits argument to state that adoption of zoning for an area that equals approximately one-fifth of the total geographic area of Salt Lake City is a municipal function and the provisions of the Act that direct the City in the performance of this municipal function violate the ripper clause. Application of the three-factor municipal function test demonstrates the point. With respect to the first factor, the City is in a far better position than the State to perform this function. The adoption of zoning ordinances and the consequent regulation of private property are functions that have been performed by municipalities since before statehood.[157] A municipality's power to adopt ordinances and regulate private property within its boundaries stems from the liberally construed police power awarded all municipalities.[158] Indeed, Utah's appellate courts have recognized the legitimacy and "manifest [ ] wisdom underlying the delegation of [this] power[] to the cities;" namely the "need for some general planning and control" and the

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[157] *See, e.g.*, C. L. 1888, § 1798 S 2; R.S. 1898, § 253; UTAH CODE § 10-8-87 (1953).

[158] UTAH CODE § 10-9a-102(1)-(2) (conferring wide police power on municipalities to adopt ordinances, resolutions, rules, restrictive covenants, easements, and development agreements to regulate private property within municipal boundaries); *Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 252 (Utah Ct. App. 1998) (recognizing municipalities power to enact zoning ordinance and to regulate private property stems from its police power); *W. Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 390 (Utah 1980) (stating "[i]t is established that an owner of property holds it subject to zoning ordinances enacted pursuant to a state's police power"); *Hutchinson*, 624 P.2d at 1121-26 (finding a delegation of police power is liberally construed and the liberal construction afforded municipalities to adopt land use regulation pursuant to its police power).

fact that it is "essential and desirable" that "cities have [ ] authority in planning their growth."[159]

Like every other city in the state of Utah, pursuant to this police power, Salt Lake City adopts zoning ordinances and currently has more than sixty-seven categories of zoning, which include residential use, agricultural use, open space, industrial or manufacturing uses, and overlay zones.[160] It also has a planning department staffed with thirty employees experienced in municipal planning that assist in the development and planning of zoning citywide for the benefit of all its residents.[161] In stark contrast, the State does not adopt zoning ordinances, create master plans, or have any planning staff.[162] Rather, the only land use decisions the State ever makes are with respect to use of State owned lands, which are not subject to municipal zoning.[163] Given its long history, experience, and existing professional planning staff, the City is in a far better position to perform the function of adopting zoning and determining appropriate uses for private property within municipal boundaries and the first factor shows that adoption of zoning ordinances is a municipal function.

The second factor, which considers the degree to which the function affects the interests of those beyond the boundaries of the municipality, also weighs in favor of finding the function municipal. Zoning decisions affect the interests of the owners of the property

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159 *Call v. City of W. Jordan*, 606 P.2d 217, 219 (Utah 1979).
160 R. 01231 (Fact No. 15).
161 R. 01233 (Fact No. 25).
162 R. 01237-38 (Fact Nos. 41-44).
163 UTAH CODE § 10-9a-304(1).

subject to the zoning ordinance and any neighboring property owner. For example, zoning that regulates the height of a fence affects the interests of the owner of the property and the neighboring properties, not the residents of Price, St George, Manti or other far flung municipalities. Here, zoning for the jurisdictional land, which is almost entirely in Salt Lake City, affects the property owner subject to the zoning and neighboring property owners, all City residents. As such, this factor also weighs in favor of finding zoning is a municipal function.[164]

With respect to the third factor, zoning decisions affect the residents of Salt Lake City uniquely and these residents have no power to control through their elected officials these zoning decisions that affect them uniquely. Ordinarily, municipal zoning ordinances are adopted by the City Council, who are elected directly by the City's residents.[165] Thus, if a resident is unhappy with a zoning decision made by the City, the resident may voice their concern to their City Council member and ultimately voice their displeasure at the ballot box. The Act changes this by mandating the zoning the City Council must adopt, rendering Salt Lake City residents powerless to affect change through their local elected officials of this issue that affects them uniquely. Indeed, the Act and this zoning provision was adopted by the State legislature over the objection of all State legislative representatives with districts that include residents of Salt Lake City.[166] Adoption of

[164] Notably, Salt Lake City residents are also the individuals that must live with the larger consequences of the mandated zoning, which includes such things as increased traffic, pollution, and other environmental impacts that will result from development of the land. These are not impacts that will affect the residents of other municipalities.

[165] UTAH CODE §§ 10-9a-501(1) & (4)(a)(ii).

[166] R. 01264 (Fact Nos. 139-142).

zoning is a municipal function and the provisions of the Act that mandate the zoning the City must adopt for one-fifth of its geographic area violate the ripper clause.

c. Decisions Regarding Land Uses for Private Property in One-Fifth of the Geographic Area of Salt Lake City is the Performance of a Municipal Function.

The provisions of the Act that direct the City to permit "transporting, unloading, loading, transfer or temporary storage of natural resources" [167] in one-fifth of the City also violate the ripper clause. As with the adoption of zoning ordinances, the ability to impose land use regulations that prohibit or limit a use to certain confined areas of the City is a municipal function and for good reason. First, a municipality is in the best position to weigh the competing interests of its residents and determine which areas are best suited for certain uses. The State has no comparable experience. Second, where in the City natural resources are transported, unloaded, loaded and temporarily stored are issues that affect the health and welfare of the residents of Salt Lake City uniquely, not the residents of other municipalities. Third, the Act's categoric ban removes the ability of city residents to control through their local elected officials these issues that affect them uniquely. All three elements of the municipal function test are met and another violation of the ripper clause is shown.

3. The Act's Self-Serving Statements Claiming its Statewide Purpose Do Not Defeat the Ripper Clause Claims.

The Act's self-serving statements do not defeat the City's ripper clause claims. In a transparent attempt to conceal the unconstitutionality of the Act, it is peppered with

[167] UTAH CODE § 11-58-205(6).

statements claiming it was passed to fulfill a statewide public purpose and to address statewide concerns.[168] The Court should not be fooled by this fig leaf. First, the statements were only added *after* the City informed legislators their proposed bill violated the ripper clause.[169] Second, and more importantly, private property owner's development of an inland port is no more a matter of statewide concern than Kennecott's operation of a mine in Magna, private developers' construction of homes in Daybreak, Herriman, or Mapleton, or Snowbird's operation of a ski resort in Little Cottonwood Canyon. If a potentially successful private development were alone sufficient to show a statewide interest and bring regulation of that private development outside of local control, there is nothing to stop the State from passing legislation that cherry-picks control of industries or economic generators in a checkerboard fashion throughout the state. For example, the State could draw a boundary around downtown Salt Lake City, Kennecott Utah Copper, or any of Utah's eleven ski resorts, and create an entity that controls the spending of all property tax growth from these properties, based only on empty claims of a statewide interest. Alternatively, the State could target a specific city and direct the zoning the City must adopt to eliminate any land uses it deems undesirable—perhaps choosing to veto community gardens, food trucks, accessory dwelling units, or all bars in that city. Such legislation is

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[168] *See, e.g.*, UTAH CODE § 11-58-201.

[169] Notably, the legislature also changed the boundaries of the jurisdictional land at the eleventh hour and after being informed it violated the ripper clause to add small portions of West Valley and Magna in a half-hearted effort to make it appear that the Act affected interests others than the City's. (S.B. 234 (4th substitute), 2018 Leg. Sess., (Utah 2018).) But the West Valley and Magna additions are nominal and have no true connection to the private property owners' development of an inland port.

not permitted, and the Act's self-serving statements of statewide interest do not defeat the City's ripper clause claims.

II. THE DISTRICT COURT ERRED IN FINDING NO VIOLATION OF UTAH'S UNIFORM OPERATION OF LAWS PROVISION.

A. The Framework for Analyzing a Claim Under Utah's Uniform Operation of Laws Provision.

Article I, section 24 of the Utah Constitution provides that "[a]ll laws of a general nature shall have uniform operation."[170] While this provision is often analogized to the federal equal protection clause, Utah courts have "in fact, developed a standard for reviewing legislative classifications under article I, section 24, which is at least as exacting **and, in some circumstances, more rigorous** than the standard applied under the federal constitution."[171] To determine if a statute violates this provision a court asks three questions: (1) what classifications the statute creates; (2) whether the different classes are treated disparately, and (3) if there is disparate treatment between classes, whether the legislature had any reasonable objective that warrants the disparity.[172] With respect to the third question, there are two possible levels of scrutiny.[173] If a statute implicates a fundamental or critical right or creates classifications which are considered impermissible or suspect in the abstract, a heightened degree of scrutiny applies.[174] Otherwise, a rational

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[170] UTAH CONST. ART I, § 24.

[171] *Mountain Fuel Supply Co. v. Salt Lake City Corp.*, 752 P.2d 884, 889 (Utah 1988) (emphasis added).

[172] *State v. Angilau*, 2011 UT 3, ¶ 21, 245 P.3d 745.

[173] *Id.*

[174] *Id.*

basis review is employed.[175]

B. The Statute Creates Two Classes of Municipalities and Treats Them Differently.

With respect to the first question, the statute creates two classes of municipalities. One class consists of the three municipalities that are mandated to be subject to the provisions of the Act.[176] The other class consists of all other municipalities, who are only subject to the provisions of the Act if the municipality and the owner of the land at issue expressly request to be subject to the Act.[177] With respect to the second question, the classes created by the Act are treated differently because the three municipalities that are mandated to be subject to the provisions of the Act lose the ability to make spending and appropriation decisions with respect to a large portion of their municipal budget. They also lose the ability to make decisions with respect to the zoning that will apply to a large area of land within their municipal boundaries and the ability to regulate transportation of natural resources in those areas. Municipalities that are not mandated to be subject to the Act retain power to make spending and appropriation decisions with respect to their entire budget and to make zoning decisions with respect to all land within their municipal boundaries.

C. The Different Treatment Does Not Satisfy a Rational Basis Review.

With respect to the third question, whether the legislature had any reasonable objective that warrants the disparity, a rational basis standard of review applies. A rational

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175 *Id.*
176 UTAH CODE §§ 11-58-102(2) & 501(1)-(2).
177 *Id.*

basis review involves a three-part inquiry: "[1] whether the classification is reasonable; [2] whether the objectives of the legislative action are legitimate, and [3] whether there is a reasonable relationship between the classification and the legislative purposes."[178] While this standard of review carries the same name as its federal counterpart, Utah Courts have recognized the state standard imposes "a higher de facto standard of reasonableness than would be imposed by the federal courts:"[179]

1. The Classification is Unreasonable.

With respect to the first step of the inquiry, "deciding if a classification is reasonable, [Utah courts] have considered: (1) if there is a greater burden on one class as

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[178] *Merrill v. Utah Labor Comm'n*, 2009 UT 26, ¶ 9, 223 P.3d 1089 (citing *Blue Cross & Blue Shield of Utah v. State*, 779 P.2d 634, 637 (Utah 1989)).

[179] *See Mountain Fuel*, 752 P.2d at 889 (emphasis added).

> Since the mid–1930's, when the United States Supreme Court renounced the theory of substantive due process, federal courts have given extremely wide deference to economic regulations challenged on either due process or equal protection grounds. As commentators have noted, the Supreme Court has struck down only one state legislative effort at economic regulation since 1937, making federal constitutional review of such legislation virtually a dead letter.
>
> **State courts, on the other hand, have a long tradition, stretching back into the nineteenth century, of being far less willing to find that legislative classifications underlying economic regulations are reasonable**. While state courts have been more deferential to legislative classifications at some times than at others, **they have never abandoned their review function to the degree that the federal courts have since the mid–1930's.** As a result, to pass state constitutional muster, a legislative measure must often meet **a higher de facto standard of reasonableness than would be imposed by the federal courts**. *Id.* (quotation simplified) (emphasis added).

opposed to another without a reason; (2) if the statute results in unfair discrimination; (3) if the statute creates a classification that is arbitrary or unreasonable; or (4) if the statute singles out similarly situated people or groups without justification."[180] If a classification is not reasonable, the statute fails and no further analysis is required.[181] For example, in *Merrill v. Utah Labor Commission*, the Utah Supreme Court considered the constitutionality of a statute that reduced the worker's compensation benefits an individual received, if the individual received both worker's compensation benefits and social security benefits.[182] The court found classification of injured workers based on receipt of social security was not reasonable because if the criterion for determining receipt of worker's compensation benefits was income based there was no reason or "rational basis" to just look at income from social security.[183] The statute failed on this classification scheme alone.[184]

Like *Merrill*, the classification under the Utah Inland Port Authority Act results in "unfair discrimination" and is unreasonable.[185] The only conceivable reason for mandating that three municipalities be subject to the provisions of the Act is the fact that the legislature was concerned that these municipalities (and the residents they represent) did not want to cede municipal powers, *i.e.*, decision making authority regarding a substantial portion of

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[180] *Merrill*, 2009 UT 26, ¶ 10.
[181] *Id.* ¶ 17.
[182] *Id.* ¶ 1.
[183] *Id.* ¶¶ 15-16.
[184] *Id.* ¶ 17.
[185] *See id.* ¶ 10 (identifying "unfair discrimination" as a basis for finding a classification unreasonable).

the municipal budget to a State created entity, or permit the legislature to make zoning and land use decisions regarding a substantial portion of property within municipal boundaries. To single out three municipalities and subject them to these punitive measures, while permitting all other municipalities to make the choice to voluntarily participate is unfair discrimination and unreasonable. The Act fails on this classification scheme alone.

2. The Disparate Treatment of Municipalities is not Reasonably Related to the Legislative Purpose.

The second and third steps of the rational basis inquiry "determine if the legislature has a legitimate objective in creating the classification"[186] and if there is a reasonable relationship between the classification and the objective.[187] With respect to these inquiries, "[courts] do not . . . accept any conceivable reason for the legislation," but rather "judge such enactments on the basis of reasonable or actual legislative purposes."[188] If the provision at issue bears no "reasonable relationship" to the legislative purpose identified, the provision will not withstand a rational basis review.[189]

For example, in *Merrill*, the State argued to this court that a provision that limited worker's compensation benefits to individuals that also received social security furthered the legitimate legislative purpose of preventing duplication of benefits and restoring the solvency of the workers' compensation fund.[190] The Court found the objectives were legitimate, but that this legitimacy did not save the statute because the classifications were

186 *Id.* ¶ 18.
187 *Id.* ¶ 22.
188 *Id.* ¶ 18.
189 *See, e.g., id.*, ¶¶ 22-37.
190 *Id.*

not a reasonable or rational means of achieving those objectives.[191] Specifically, the Court found that worker's compensation benefits and social security benefits serve different purposes, which meant depriving social security beneficiaries of worker's compensation benefits did not avoid a duplication of benefits and was not a rational or reasonable way of achieving a solvent worker's compensation fund."[192]

Similarly, in *Weber Basin Home Builders Association v. Roy City* this court considered whether an ordinance that imposed a greater burden of the cost of city government on new property owners created a classification "without any proper basis for such differentiation."[193] The Court found that "it is not to be doubted that each new residence has its effect in increasing the cost of city government; nor that due to the steadily increasing costs 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," but found the classification unreasonable because "the new residents are entitled to be treated equally and on the same basis as the old residents."[194]

Like *Merrill* and *Weber Basin*, there is no "reasonable relationship" between the Act's classifications of mandated municipalities and voluntary municipalities and the stated legislative purpose. The Act is peppered with general statements that its purpose is to "promote economic growth" for the benefit of citizens statewide.[195] But there is no

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191 *Id.*

192 *Id.* ¶ 23.

193 487 P.2d 866, 868 & n.9 (Utah 1971).

194 *Id.* at 868-69.

195 *See, e.g.*, UTAH CODE § 11-58-201(3). Notably, the Executive Director of the Authority, Jack Hedge, testified under oath for the State and Authority (and in response to

reasonable relationship between controlling the spending of a substantial portion of the municipal budgets for Salt Lake City, Magna, and West Valley, and fostering economic development and the creation of jobs for citizens state wide. Similarly, the State's promise that development of an inland port will create between 4,000 and up to 24,000 new jobs over the next thirty years[196] does not show a reasonable relationship between stripping Salt Lake City of its ability to make zoning and certain land use decisions for one-third of its developable area and one-fifth of its geographic area. If that were the case, the State could pass legislation at the behest or request of a business or other special interest any time it wished to overrule a local decision regarding the zoning and uses a particular community wished to promote or prevent.

A practical example demonstrates this point. The sole purpose of the Governor's Office of Economic Development is to promote economic growth in the State of Utah, which function it has performed for years without mandating control of a municipality's monies and zoning. No reasonable relationship exists between the classifications created by the Act and its stated purpose. A violation of the uniform operation of laws provision is shown.

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the City's motion for preliminary injunction) that the purpose of the Utah Inland Port Authority Act was for the State to "secure a return" of the costs of relocating the Utah State prison. (R. 00708-09, ¶ 16). While recouping costs for public expenditure in a fair, balanced way, is a legitimate legislative purpose, recouping cost from just three municipalities is not. Similarly, the Authority is not paying for the relocation of the prison.

[196] R. 01420; R. 01103.

III. THE 2020 AMENDMENTS TO THE ACT DO NOT RENDER THIS APPEAL MOOT.

The City openly acknowledges that amendments were made to the Act during the pendency of this appeal, but those amendments do not render this appeal moot. "An amendment to a statute under consideration on appeal does not automatically moot the appeal."[197] It only does so if the "amendment actually prevents the requested judicial relief from affecting the rights of the litigants."[198] For example, in *In re J.P.*, this court found amendments to the Juvenile Court Act did not moot the plaintiff's constitutional challenge to the provisions of the Act because the Act still allowed for termination of parental rights without a showing of parental unfitness, abandonment, or substantial neglect, which were the grounds on which the plaintiff was challenging the constitutionality of the Act.[199]

Just like *In re J.P.*, the 2020 legislative amendments do not render this appeal moot. The amendments reduce the amount of municipal property tax redirected to the Authority from 100% of growth-related property tax to 75% of that same tax, but do not change the basic fact that the statute gives the Authority power to supervise or interfere with municipal monies and delegates power to the Authority to perform the municipal function of spending and appropriating municipal monies. No changes were made to the provisions mandating the zoning the City must adopt or the land uses it must permit, and the Act continues to apply disparately to three of Utah's municipalities. Thus, the relief requested in this appeal

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197 *In re J.P.*, 648 P.2d 1364, 1370 (Utah 1982).
198 *Id.*
199 *Id.* at 1370-71.

— a determination that these provisions violate the ripper clause and that the Act violates the uniform operation of laws provision — is not moot.

CONCLUSION

The Act violates the ripper clause in three different ways: (1) it delegates power to the Authority to supervise and interfere with municipal monies and to perform the municipal function of spending and appropriating municipal funds; (2) it mandates the zoning the City must adopt for one-fifth of its geographic area — the performance of a municipal function; and (3) it requires the City to permit the land use of transporting, unloading, transfer, or temporary storage of natural resources anywhere in this same vast geographic area — also the performance of a municipal function. The Act also violates the uniform operation of laws provision because stripping three municipalities of the power to make spending and appropriation decisions for large amounts of the monies that make up their municipal budgets, and removing local zoning and land use authority, is not reasonably related to achievement of statewide economic growth. The Act violates the ripper clause and Utah's uniform operation of laws provision.

DATED this 17th day of August, 2020.

/s/ Samantha J. Slark
Attorney for Salt Lake City Corporation

CERTIFICATE OF COMPLIANCE

This brief, submitted under Utah Rule of Appellate Procedure 24(g)(1), complies with the type-volume limitation. The word processing system used to prepare this brief, states that it contains 13,690 words in Times New Roman type, which is a proportionally spaced font.

Further, the undersigned certifies that this brief complies with Utah Rule of Appellate Procedure 21(g) regarding public and non-public filings.

/s/ Samantha J. Slark

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of August, 2020, a true and correct copy of the foregoing **BRIEF OF APPELLANT** was electronically filed with the Clerk of the Court, and further sent by email to:

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Appellant’s Addendum

West's Utah Code Annotated
Constitution of Utah
Article VI. Legislative Department

U.C.A. 1953, Const. Art. 6, § 28

Sec. 28. [Special privileges forbidden]

Currentness

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.

Credits
Laws 1972, S.J.R. 1.

Formerly Utah Const., Art. VI, § 29.

Notes of Decisions (30)

U.C.A. 1953, Const. Art. 6, § 28, UT CONST Art. 6, § 28
Current through 2020 Fifth Special Session. Some statutes sections may be more current, see credits for details.

End of Document

West's Utah Code Annotated
Constitution of Utah
Article I. Declaration of Rights

U.C.A. 1953, Const. Art. 1, § 24

Sec. 24. [Uniform operation of laws]

Currentness

All laws of a general nature shall have uniform operation.

Notes of Decisions (372)

U.C.A. 1953, Const. Art. 1, § 24, UT CONST Art. 1, § 24
Current through 2020 Fifth Special Session. Some statutes sections may be more current, see credits for details.

End of Document

Effective 3/16/2018

Chapter 58
Utah Inland Port Authority Act

Part 1
General Provisions

11-58-101 Title.

This chapter is known as the "Utah Inland Port Authority Act."

Enacted by Chapter 179, 2018 General Session

11-58-102 Definitions.

As used in this chapter:

(1) "Authority" means the Utah Inland Port Authority, created in Section 11-58-201.

(2) "Authority jurisdictional land" means land within the authority boundary delineated:

(a) in the electronic shapefile that is the electronic component of H.B. 2001, Utah Inland Port Authority Amendments, 2018 Second Special Session; and

(b) beginning April 1, 2020, as provided in Subsection 11-58-202(3).

(3) "Base taxable value" means:

(a)

(i) except as provided in Subsection (3)(a)(ii), for a project area that consists of the authority jurisdictional land, the taxable value of authority jurisdictional land in calendar year 2018; and

(ii) for an area described in Subsection 11-58-601(5), the taxable value of that area in calendar year 2017; or

(b) for a project area that consists of land outside the authority jurisdictional land, the taxable value of property within any portion of a project area, as designated by board resolution, from which the property tax differential will be collected, as shown upon the assessment roll last equalized before the year in which the authority adopts a project area plan for that area.

(4) "Board" means the authority's governing body, created in Section 11-58-301.

(5) "Business plan" means a plan designed to facilitate, encourage, and bring about development of the authority jurisdictional land to achieve the goals and objectives described in Subsection 11-58-203(1), including the development and establishment of an inland port.

(6) "Development" means:

(a) the demolition, construction, reconstruction, modification, expansion, or improvement of a building, utility, infrastructure, landscape, parking lot, park, trail, recreational amenity, or other facility, including publicly owned infrastructure and improvements; and

(b) the planning of, arranging for, or participation in any of the activities listed in Subsection (6)(a).

(7) "Development project" means a project for the development of land within a project area.

(8) "Inland port" means one or more sites that:

(a) contain multimodal transportation assets and other facilities that:

(i) are related but may be separately owned and managed; and

(ii) together are intended to:

(A) allow global trade to be processed and altered by value-added services as goods move through the supply chain;

(B) provide a regional merging point for transportation modes for the distribution of goods to and from ports and other locations in other regions;
(C) provide cargo-handling services to allow freight consolidation and distribution, temporary storage, customs clearance, and connection between transport modes; and
(D) provide international logistics and distribution services, including freight forwarding, customs brokerage, integrated logistics, and information systems; and
(b) may include a satellite customs clearance terminal, an intermodal facility, a customs pre-clearance for international trade, or other facilities that facilitate, encourage, and enhance regional, national, and international trade.
(9) "Inland port use" means a use of land:
(a) for an inland port;
(b) that directly implements or furthers the purposes of an inland port, as stated in Subsection (8);
(c) that complements or supports the purposes of an inland port, as stated in Subsection (8); or
(d) that depends upon the presence of the inland port for the viability of the use.
(10) "Intermodal facility" means a hub or other facility for trade combining any combination of rail, trucking, air cargo, and other transportation services.
(11) "Nonvoting member" means an individual appointed as a member of the board under Subsection 11-58-302(6) who does not have the power to vote on matters of authority business.
(12) "Project area" means:
(a) the authority jurisdictional land; or
(b) land outside the authority jurisdictional land, whether consisting of a single contiguous area or multiple noncontiguous areas, described in a project area plan or draft project area plan, where the development project set forth in the project area plan or draft project area plan takes place or is proposed to take place.
(13) "Project area budget" means a multiyear projection of annual or cumulative revenues and expenses and other fiscal matters pertaining to the project area.
(14) "Project area plan" means a written plan that, after its effective date, guides and controls the development within a project area.
(15) "Property tax" includes a privilege tax and each levy on an ad valorem basis on tangible or intangible personal or real property.
(16) "Property tax differential":
(a) means the difference between:
(i) the amount of property tax revenues generated each tax year by all taxing entities from a project area, using the current assessed value of the property; and
(ii) the amount of property tax revenues that would be generated from that same area using the base taxable value of the property; and
(b) does not include property tax revenue from:
(i) a county additional property tax or multicounty assessing and collecting levy imposed in accordance with Section 59-2-1602;
(ii) a judgment levy imposed by a taxing entity under Section 59-2-1328 or 59-2-1330; or
(iii) a levy imposed by a taxing entity under Section 11-14-310 to pay for a general obligation bond.
(17) "Public entity" means:
(a) the state, including each department, division, or other agency of the state; or
(b) a county, city, town, metro township, school district, local district, special service district, interlocal cooperation entity, community reinvestment agency, or other political subdivision of the state.

(18) "Publicly owned infrastructure and improvements":
(a) means infrastructure, improvements, facilities, or buildings that:
(i) benefit the public; and
(ii)
(A) are owned by a public entity or a utility; or
(B) are publicly maintained or operated by a public entity;
(b) includes:
(i) facilities, lines, or systems that provide:
(A) water, chilled water, or steam; or
(B) sewer, storm drainage, natural gas, electricity, energy storage, renewable energy, microgrids, or telecommunications service; and
(ii) streets, roads, curb, gutter, sidewalk, walkways, solid waste facilities, parking facilities, and public transportation facilities.
(19) "Shapefile" means the digital vector storage format for storing geometric location and associated attribute information.
(20) "Taxable value" means the value of property as shown on the last equalized assessment roll.
(21) "Taxing entity" means a public entity that levies a tax on property within a project area.
(22) "Voting member" means an individual appointed or designated as a member of the board under Subsection 11-58-302(2).

Amended by Chapter 126, 2020 General Session

11-58-103 Vested right of landowner.
(1) As used in this section:
(a) "Municipal inland port regulations" means a municipality's land use ordinances and regulations relating to the use of land within the authority jurisdictional land for an inland port use.
(b) "Vested development right" means a right:
(i) to use or develop land located within the authority jurisdictional land for an inland port use in accordance with municipal inland port regulations in effect on December 31, 2018; and
(ii) that may not be affected by later changes to municipal ordinances or regulations.
(c) "Vested right notice" means a notice that complies with the requirements of Subsection (3).
(2) An owner of land located within the boundary of the authority jurisdictional land may establish a vested development right on that land by causing a notice to be recorded in the office of the recorder of the county in which the land is located.
(3) A notice under Subsection (2) shall:
(a) state that the owner elects to establish a vested development right on the owner's land to use or develop the land for an inland port use in accordance with municipal inland port regulations in effect on December 31, 2018;
(b) state that the owner's election is made under Title 11, Chapter 58, Utah Inland Port Authority Act;
(c) describe the land in a way that complies with applicable requirements for the recording of an instrument affecting land;
(d) indicate the zoning district in which the land is located, including any overlay district;
(e) bear the signature of each owner of the land;
(f) be accompanied by the applicable recording fee; and
(g) include the following acknowledgment:
"I/we acknowledge that:

• the land identified in this notice is situated within the authority jurisdictional land of the Utah Inland Port Authority, established under Utah Code Title 11, Chapter 58, Utah Inland Port Authority Act, and is eligible for this election of a vested right;

• this vested right allows the land described in this notice to be used or developed in the manner allowed by applicable land use regulations in effect on December 31, 2018;

• all development activity must comply with those land use regulations;

• the right to use and develop the land described in this notice in accordance with those land use regulations continues for 40 years from the date this notice is recorded, unless a land use application is submitted to the applicable land use authority that proposes a use or development activity that is not allowed under the land use regulations in effect on December 31, 2018, or all record owners of the land record a rescission of the election of a vested development right for this land.".

(4)

(a) An owner of land against which a vested right notice is recorded has a vested development right with respect to that land for 40 years from the date the vested right notice is recorded, or, if earlier, until the vested development right is rescinded by the recording of a rescission of the election of the vested development right signed by all record owners of the land.

(b) A vested development right may not be affected by changes to municipal ordinances or regulations that occur after a vested right notice is recorded.

(5) Within 10 days after the recording of a vested right notice under this section, the owner of the land shall provide a copy of the vested right notice, with recording information, to the applicable local land use authority.

(6) A vested development right may not be affected by an action under Subsection 17-27a-508(1)(a)(ii)(A) or (B) or Subsection 10-9a-509(1)(a)(ii)(A) or (B).

Enacted by Chapter 126, 2020 General Session

11-58-104 Severability.

If a court determines that any provision of this chapter, or the application of any provision of this chapter, is invalid, the remainder of this chapter shall be given effect without the invalid provision or application.

Enacted by Chapter 126, 2020 General Session

11-58-105 Nonlapsing funds.

Money the authority receives from legislative appropriations is nonlapsing.

Enacted by Chapter 126, 2020 General Session

Part 2
Utah Inland Port Authority

11-58-201 Creation of Utah Inland Port Authority -- Status and purposes.

(1) Under the authority of Article XI, Section 8 of the Utah Constitution, there is created the Utah Inland Port Authority.

(2) The authority is:

(a) an independent, nonprofit, separate body corporate and politic, with perpetual succession;
(b) a political subdivision of the state; and
(c) a public corporation, as defined in Section 63E-1-102.

(3)
(a) The purpose of the authority is to fulfill the statewide public purpose of working in concert with applicable state and local government entities, property owners and other private parties, and other stakeholders to encourage and facilitate development of the authority jurisdictional land and land in other authority project areas to maximize the long-term economic and other benefit for the state, consistent with the strategies, policies, and objectives described in this chapter, including:
(i) the development of inland port uses on the authority jurisdictional land and on land in other authority project areas;
(ii) the development of infrastructure to support inland port uses and associated uses on the authority jurisdictional land and on land in other authority project areas; and
(iii) other development on the authority jurisdictional land and on land in other authority project areas.
(b) The duties and responsibilities of the authority under this chapter are beyond the scope and capacity of a municipality, which has many other responsibilities and functions that appropriately command the attention and resources of the municipality, and are not municipal functions of purely local concern but are matters of regional and statewide concern, importance, interest, and impact, due to multiple factors, including:
(i) the strategic location of the authority jurisdictional land in proximity to significant existing and potential transportation infrastructure, including infrastructure provided and maintained by the state, conducive to facilitating regional, national, and international trade and the businesses and facilities that promote and complement that trade;
(ii) the enormous potential for regional and statewide economic and other benefit that can come from the appropriate development of the authority jurisdictional land, including the establishment of a thriving inland port;
(iii) the regional and statewide impact that the development of the authority jurisdictional land will have; and
(iv) the considerable investment the state is making in connection with the development of the new correctional facility and associated infrastructure located on the authority jurisdictional land.
(c) The authority is the mechanism the state chooses to focus resources and efforts on behalf of the state to ensure that the regional and statewide interests, concerns, and purposes described in this Subsection (3) are properly addressed from more of a statewide perspective than any municipality can provide.

Amended by Chapter 399, 2019 General Session

11-58-202 Port authority powers and duties.

(1) The authority has exclusive jurisdiction, responsibility, and power to coordinate the efforts of all applicable state and local government entities, property owners and other private parties, and other stakeholders to:
(a) develop and implement a business plan for the authority jurisdictional land, to include an environmental sustainability component, developed in conjunction with the Utah Department of Environmental Quality, incorporating policies and best practices to meet or exceed applicable federal and state standards, including:

(i) emissions monitoring and reporting; and
(ii) strategies that use the best available technology to mitigate environmental impacts from development and uses on the authority jurisdictional land;
(b) plan and facilitate the development of inland port uses on authority jurisdictional land and on land in other authority project areas;
(c) manage any inland port located on land owned or leased by the authority; and
(d) establish a foreign trade zone, as provided under federal law, covering some or all of the authority jurisdictional land or land in other authority project areas.
(2) The authority may:
(a) facilitate and bring about the development of inland port uses on land that is part of the authority jurisdictional land or that is in other authority project areas, including engaging in marketing and business recruitment activities and efforts to encourage and facilitate:
(i) the development of an inland port on the authority jurisdictional land; and
(ii) other development of the authority jurisdictional land consistent with the policies and objectives described in Subsection 11-58-203(1);
(b) facilitate and provide funding for the development of the authority jurisdictional land and land in other authority project areas, including the development of publicly owned infrastructure and improvements and other infrastructure and improvements on or related to the authority jurisdictional land;
(c) engage in marketing and business recruitment activities and efforts to encourage and facilitate development of the authority jurisdictional land;
(d) apply for and take all other necessary actions for the establishment of a foreign trade zone, as provided under federal law, covering some or all of the authority jurisdictional land;
(e) as the authority considers necessary or advisable to carry out any of its duties or responsibilities under this chapter:
(i) buy, obtain an option upon, or otherwise acquire any interest in real or personal property;
(ii) sell, convey, grant, dispose of by gift, or otherwise dispose of any interest in real or personal property; or
(iii) enter into a lease agreement on real or personal property, either as lessee or lessor;
(f) sue and be sued;
(g) enter into contracts generally;
(h) provide funding for the development of publicly owned infrastructure and improvements or other infrastructure and improvements on or related to the authority jurisdictional land or other authority project areas;
(i) exercise powers and perform functions under a contract, as authorized in the contract;
(j) receive the property tax differential, as provided in this chapter;
(k) accept financial or other assistance from any public or private source for the authority's activities, powers, and duties, and expend any funds so received for any of the purposes of this chapter;
(l) borrow money, contract with, or accept financial or other assistance from the federal government, a public entity, or any other source for any of the purposes of this chapter and comply with any conditions of the loan, contract, or assistance;
(m) issue bonds to finance the undertaking of any development objectives of the authority, including bonds under Chapter 17, Utah Industrial Facilities and Development Act, bonds under Chapter 42, Assessment Area Act, and bonds under Chapter 42a, Commercial Property Assessed Clean Energy Act;
(n) hire employees, including contract employees;
(o) transact other business and exercise all other powers provided for in this chapter;

(p) engage one or more consultants to advise or assist the authority in the performance of the authority's duties and responsibilities;
(q) work with other political subdivisions and neighboring property owners and communities to mitigate potential negative impacts from the development of authority jurisdictional land;
(r) own and operate an intermodal facility if the authority considers the authority's ownership and operation of an intermodal facility to be necessary or desirable;
(s) own and operate publicly owned infrastructure and improvements in a project area outside the authority jurisdictional land; and
(t) exercise powers and perform functions that the authority is authorized by statute to exercise or perform.

(3)
(a) Beginning April 1, 2020, the authority shall:
(i) be the repository of the official delineation of the boundary of the authority jurisdictional land, identical to the boundary as delineated in the shapefile that is the electronic component of H.B. 2001, Utah Inland Port Authority Amendments, 2018 Second Special Session, subject to Subsection (3)(b) and any later changes to the boundary enacted by the Legislature; and
(ii) maintain an accurate digital file of the boundary that is easily accessible by the public.
(b)
(i) As used in this Subsection (3)(b), "split property" means a piece of land:
(A) with a single tax identification number; and
(B) that is partly included within and partly excluded from the authority jurisdictional land by the boundary delineated in the shapefile described in Subsection 11-58-102(2).
(ii) With the consent of the mayor of the municipality in which the split property is located, the executive director may adjust the boundary of the authority jurisdictional land to include an excluded portion of a split property or exclude an included portion of a split property.
(iii) In adjusting the boundary under Subsection (3)(b)(ii), the executive director shall consult with the county assessor, the county surveyor, the owner of the split property, and the municipality in which the split property is located.
(iv) A boundary adjustment under this Subsection (3)(b) affecting the northwest boundary of the authority jurisdictional land shall maintain the buffer area between authority jurisdictional land intended for development and land outside the boundary of the authority jurisdictional land to be preserved from development.
(v) Upon completing boundary adjustments under this Subsection (3)(b), the executive director shall cause to be recorded in the county recorder's office a map or other description, sufficient for purposes of the county recorder, of the adjusted boundary of the authority jurisdictional land.
(vi) The authority shall modify the official delineation of the boundary of the authority jurisdictional land under Subsection (3)(a) to reflect a boundary adjustment under this Subsection (3)(b).

(4)
(a) The authority may establish a community enhancement program designed to address the impacts that development or inland port uses within project areas have on adjacent communities.
(b)
(i) The authority may use authority money to support the community enhancement program and to pay for efforts to address the impacts described in Subsection (4)(a).
(ii) Authority money designated for use under Subsection (4)(b)(i) is exempt from execution or any other process in the collection of a judgment against or debt or other obligation of the

authority arising out of the authority's activities with respect to the community enhancement program.

(c) On or before October 31, 2020, the authority shall report on the authority's actions under this Subsection (4) to:

(i) the Business, Economic Development, and Labor Appropriations Subcommittee of the Legislature;

(ii) the Economic Development and Workforce Services Interim Committee of the Legislature; and

(iii) the Business and Labor Interim Committee of the Legislature.

(5) An intermodal facility owned by the authority is subject to a privilege tax under Title 59, Chapter 4, Privilege Tax.

Amended by Chapter 126, 2020 General Session
Amended by Chapter 263, 2020 General Session

11-58-203 Policies and objectives of the port authority -- Additional duties of the port authority.

(1) The policies and objectives of the authority are to:

(a) maximize long-term economic benefits to the area, the region, and the state;

(b) maximize the creation of high-quality jobs;

(c) respect and maintain sensitivity to the unique natural environment of areas in proximity to the authority jurisdictional land and land in other authority project areas;

(d) improve air quality and minimize resource use;

(e) respect existing land use and other agreements and arrangements between property owners within the authority jurisdictional land and within other authority project areas and applicable governmental authorities;

(f) promote and encourage development and uses that are compatible with or complement uses in areas in proximity to the authority jurisdictional land or land in other authority project areas;

(g) take advantage of the authority jurisdictional land's strategic location and other features, including the proximity to transportation and other infrastructure and facilities, that make the authority jurisdictional land attractive to:

(i) businesses that engage in regional, national, or international trade; and

(ii) businesses that complement businesses engaged in regional, national, or international trade;

(h) facilitate the transportation of goods;

(i) coordinate trade-related opportunities to export Utah products nationally and internationally;

(j) support and promote land uses on the authority jurisdictional land and land in other authority project areas that generate economic development, including rural economic development;

(k) establish a project of regional significance;

(l) facilitate an intermodal facility;

(m) support uses of the authority jurisdictional land for inland port uses, including warehousing, light manufacturing, and distribution facilities;

(n) facilitate an increase in trade in the region and in global commerce;

(o) promote the development of facilities that help connect local businesses to potential foreign markets for exporting or that increase foreign direct investment;

(p) encourage all class 5 though 8 designated truck traffic entering the authority jurisdictional land to meet the heavy-duty highway compression-ignition diesel engine and urban bus exhaust emission standards for year 2007 and later; and

(q) encourage the development and use of cost-efficient renewable energy in project areas.

(2) In fulfilling its duties and responsibilities relating to the development of the authority jurisdictional land and land in other authority project areas and to achieve and implement the development policies and objectives under Subsection (1), the authority shall:

(a) work to identify funding sources, including federal, state, and local government funding and private funding, for capital improvement projects in and around the authority jurisdictional land and land in other authority project areas and for an inland port;

(b) review and identify land use and zoning policies and practices to recommend to municipal land use policymakers and administrators that are consistent with and will help to achieve:

(i) the policies and objectives stated in Subsection (1); and

(ii) the mutual goals of the state and local governments that have authority jurisdictional land with their boundaries with respect to the authority jurisdictional land;

(c) consult and coordinate with other applicable governmental entities to improve and enhance transportation and other infrastructure and facilities in order to maximize the potential of the authority jurisdictional land to attract, retain, and service users who will help maximize the long-term economic benefit to the state; and

(d) pursue policies that the board determines are designed to avoid or minimize negative environmental impacts of development.

(3)

(a) The authority may use property tax differential and other authority money to encourage, incentivize, or require development that:

(i) mitigates noise, air pollution, light pollution, surface and groundwater pollution, and other negative environmental impacts;

(ii) mitigates traffic congestion; or

(iii) uses high efficiency building construction and operation.

(b)

(i) In consultation with the municipality in which development is expected to occur, the authority shall establish minimum mitigation and environmental standards that a landowner is required to meet to qualify for the use of property tax differential in the landowner's development.

(ii) The authority may not use property tax differential for a landowner's development in a project area unless the minimum mitigation and environmental standards are followed with respect to that landowner's development.

(c) The authority may develop and implement world-class, state-of-the-art, zero-emissions logistics that support continued growth of the state's economy in order to:

(i) promote the state as the global center of efficient and sustainable supply chain logistics;

(ii) facilitate the efficient movement of goods on roads and rails and through the air;

(iii) benefit the commercial viability of developers, landowners, and tenants and users; and

(iv) attract capital and expertise in pursuit of the next generation of logistics solutions.

Amended by Chapter 126, 2020 General Session

11-58-205 Applicability of other law -- Cooperation of state and local governments -- Municipality to consider board input -- Prohibition relating to natural resources -- Inland port as permitted or conditional use -- Municipal services -- Disclosure by nonauthority governing body member.

(1) Except as otherwise provided in this chapter, the authority does not have and may not exercise any powers relating to the regulation of land uses on the authority jurisdictional land.

(2) The authority is subject to and governed by Sections 63E-2-106, 63E-2-107, 63E-2-108, 63E-2-109, 63E-2-110, and 63E-2-111, but is not otherwise subject to or governed by Title 63E, Independent Entities Code.
(3) A department, division, or other agency of the state and a political subdivision of the state shall cooperate with the authority to the fullest extent possible to provide whatever support, information, or other assistance the board requests that is reasonably necessary to help the authority fulfill its duties and responsibilities under this chapter.
(4) In making decisions affecting the authority jurisdictional land, the legislative body of a municipality in which the authority jurisdictional land is located shall consider input from the authority board.
(5)
(a) No later than December 31, 2018, the ordinances of a municipality with authority jurisdictional land within its boundary shall allow an inland port as a permitted or conditional use, subject to standards that are:
(i) determined by the municipality; and
(ii) consistent with the policies and objectives stated in Subsection 11-58-203(1).
(b) A municipality whose ordinances do not comply with Subsection (5)(a) within the time prescribed in that subsection shall allow an inland port as a permitted use without regard to any contrary provision in the municipality's land use ordinances.
(6) The transporting, unloading, loading, transfer, or temporary storage of natural resources may not be prohibited on the authority jurisdictional land.
(7)
(a) A municipality whose boundary includes authority jurisdictional land shall provide the same municipal services to the area of the municipality that is within the authority jurisdictional land as the municipality provides to other areas of the municipality with similar zoning and a similar development level.
(b) The level and quality of municipal services that a municipality provides within authority jurisdictional land shall be fairly and reasonably consistent with the level and quality of municipal services that the municipality provides to other areas of the municipality with similar zoning and a similar development level.
(8)
(a) As used in this Subsection (8):
(i) "Direct financial benefit" means the same as that term is defined in Section 11-58-304.
(ii) "Nonauthority governing body member" means a member of the board or other body that has authority to make decisions for a nonauthority government owner.
(iii) "Nonauthority government owner" mean a state agency or nonauthority local government entity that owns land that is part of the authority jurisdictional land.
(iv) "Nonauthority local government entity":
(A) means a county, city, town, metro township, local district, special service district, community reinvestment agency, or other political subdivision of the state; and
(B) excludes the authority.
(v) "State agency" means a department, division, or other agency or instrumentality of the state, including an independent state agency.
(b) A nonauthority governing body member who owns or has a financial interest in land that is part of the authority jurisdictional land or who reasonably expects to receive a direct financial benefit from development of authority jurisdictional land shall submit a written disclosure to the authority board and the nonauthority government owner.
(c) A written disclosure under Subsection (8)(b) shall describe, as applicable:

(i) the nonauthority governing body member's ownership or financial interest in property that is part of the authority jurisdictional land; and
(ii) the direct financial benefit the nonauthority governing body member expects to receive from development of authority jurisdictional land.
(d) A nonauthority governing body member required under Subsection (8)(b) to submit a written disclosure shall submit the disclosure no later than 30 days after:
(i) the nonauthority governing body member:
(A) acquires an ownership or financial interest in property that is part of the authority jurisdictional land; or
(B) first knows that the nonauthority governing body member expects to receive a direct financial benefit from the development of authority jurisdictional land; or
(ii) the effective date of this Subsection (8), if that date is later than the period described in Subsection (8)(d)(i).
(e) A written disclosure submitted under this Subsection (8) is a public record.

Amended by Chapter 126, 2020 General Session

11-58-206 Port authority funds.

The authority may use authority funds for any purpose authorized under this chapter, including:
(1) promoting, facilitating, and advancing inland port uses;
(2) owning and operating an intermodal facility; and
(3) paying any consulting fees and staff salaries and other administrative, overhead, legal, and operating expenses of the authority.

Amended by Chapter 399, 2019 General Session

11-58-207 Projects benefitting authority jurisdictional land.

To foster economic development within and enhance the uses of the authority jurisdictional land:
(1) the Department of Transportation shall fund, from money designated in the Transportation Investment Fund for that purpose, the completion of 2550 South from 5600 West to 8000 West, with matching funds from the county in which the road is located; and
(2) the county in which the proposed connection is located shall study a connection of 7200 West between SR 201 and I-80.

Enacted by Chapter 179, 2018 General Session

Part 3
Port Authority Board

11-58-301 Port authority board -- Delegation of power.

(1) The authority shall be governed by a board which shall manage and conduct the business and affairs of the authority and shall determine all questions of authority policy.
(2) All powers of the authority are exercised through the board or, as provided in Section 11-58-305, the executive director.
(3) The board may by resolution delegate powers to authority staff.

Amended by Chapter 126, 2020 General Session

11-58-302 Number of board members -- Appointment -- Vacancies.

(1) The authority's board shall consist of 11 members, as provided in Subsection (2).

(2)

(a) The governor shall appoint two board members:

(i) one of whom shall be an individual engaged in statewide economic development or corporate recruitment and retention; and

(ii) one of whom shall be an individual engaged in statewide trade, import and export activities, or foreign direct investment.

(b) The president of the Senate shall appoint one board member.

(c) The speaker of the House of Representatives shall appoint one board member.

(d) The mayor of Salt Lake County, or the mayor's designee, shall serve as a board member.

(e) The chair of the Permanent Community Impact Fund Board, created in Section 35A-8-304, shall appoint one board member from among the members of the Permanent Community Impact Fund Board.

(f) The mayor of Salt Lake City, or the mayor's designee, shall serve as a board member.

(g) A member of the Salt Lake City council, selected by the Salt Lake City council, shall serve as a board member.

(h) The city manager of West Valley City, with the consent of the city council of West Valley City, shall appoint one board member.

(i) The director of the Salt Lake County office of Regional Economic Development shall serve as a board member.

(j) The mayor of the Magna metro township, or the mayor's designee, shall serve as a board member.

(3) An individual required under Subsection (2) to appoint a board member shall appoint each initial board member the individual is required to appoint no later than June 1, 2018.

(4)

(a) A vacancy in the board shall be filled in the same manner under this section as the appointment of the member whose vacancy is being filled.

(b) A person appointed to fill a vacancy shall serve the remaining unexpired term of the member whose vacancy the person is filling.

(5) A member of the board appointed by the governor, president of the Senate, or speaker of the House of Representatives serves at the pleasure of and may be removed and replaced at any time, with or without cause, by the governor, president of the Senate, or speaker of the House of Representatives, respectively.

(6) The authority may appoint nonvoting members of the board and set terms for those nonvoting members.

(7) Upon a vote of a majority of all board members, the board may appoint a board chair and any other officer of the board.

(8)

(a) An individual designated as a board member under Subsection (2)(g), (i), or (j) who would be precluded from serving as a board member because of Subsection 11-58-304(2):

(i) may serve as a board member notwithstanding Subsection 11-58-304(2); and

(ii) shall disclose in writing to the board the circumstances that would otherwise have precluded the individual from serving as a board member under Subsection 11-58-304(2).

(b) A written disclosure under Subsection (8)(a)(ii) is a public record under Title 63G, Chapter 2, Government Records Access and Management Act.
(9) The board may appoint one or more advisory committees that may include individuals from impacted public entities, community organizations, environmental organizations, business organizations, or other organizations or associations.

Amended by Chapter 126, 2020 General Session

11-58-303 Term of board members -- Quorum -- Compensation.
(1) The term of a board member appointed under Subsection 11-58-302(2)(a), (b), (c), (e), (g), or (h) is four years, except that the initial term of one of the two members appointed under Subsection 11-58-302(2)(a) and of the members appointed under Subsections 11-58-302(2)(e) and (g) is two years.
(2) Each board member shall serve until a successor is duly appointed and qualified.
(3) A board member may serve multiple terms if duly appointed to serve each term under Subsection 11-58-302(2).
(4) A majority of board members constitutes a quorum, and the action of a majority of a quorum constitutes action of the board.
(5)
(a) A board member who is not a legislator may not receive compensation or benefits for the member's service on the board, but may receive per diem and reimbursement for travel expenses incurred as a board member as allowed in:
(i) Sections 63A-3-106 and 63A-3-107; and
(ii) rules made by the Division of Finance according to Sections 63A-3-106 and 63A-3-107.
(b) Compensation and expenses of a board member who is a legislator are governed by Section 36-2-2 and Legislative Joint Rules, Title 5, Chapter 3, Legislator Compensation.

Amended by Chapter 126, 2020 General Session

11-58-304 Limitations on board members and executive director.
(1) As used in this section:
(a) "Direct financial benefit":
(i) means any form of financial benefit that accrues to an individual directly, including:
(A) compensation, commission, or any other form of a payment or increase of money; and
(B) an increase in the value of a business or property; and
(ii) does not include a financial benefit that accrues to the public generally.
(b) "Family member" means a parent, spouse, sibling, child, or grandchild.
(2) An individual may not serve as a voting member of the board or as executive director if:
(a) the individual owns real property, other than a personal residence in which the individual resides, on or within five miles of the authority jurisdictional land, whether or not the ownership interest is a recorded interest;
(b) a family member of the individual owns an interest in real property, other than a personal residence in which the family member resides, located on or within one-half mile of the authority jurisdictional land; or
(c) the individual or a family member of the individual owns an interest in, is directly affiliated with, or is an employee or officer of a private firm, private company, or other private entity that the individual reasonably believes is likely to:

(i) participate in or receive a direct financial benefit from the development of the authority jurisdictional land; or
(ii) acquire an interest in or locate a facility on the authority jurisdictional land.
(3) Before taking office as a voting member of the board or accepting employment as executive director, an individual shall submit to the authority:
(a) a statement verifying that the individual's service as a board member or employment as executive director does not violate Subsection (2); or
(b) for an individual to whom Subsection 11-58-302(8) applies, the disclosure required under that subsection.
(4)
(a) An individual may not, at any time during the individual's service as a voting member or employment with the authority, acquire, or take any action to initiate, negotiate, or otherwise arrange for the acquisition of, an interest in real property located on or within five miles of the authority jurisdictional land, if:
(i) the acquisition is in the individual's personal capacity or in the individual's capacity as an employee or officer of a private firm, private company, or other private entity; and
(ii) the acquisition will enable the individual to receive a direct financial benefit as a result of the development of the authority jurisdictional land.
(b) Subsection (4)(a) does not apply to an individual's acquisition of, or action to initiate, negotiate, or otherwise arrange for the acquisition of, an interest in real property that is a personal residence in which the individual will reside upon acquisition of the real property.
(5)
(a) A voting member or nonvoting member of the board or an employee of the authority may not receive a direct financial benefit from the development of authority jurisdictional land.
(b) For purposes of Subsection (5)(a), a direct financial benefit does not include:
(i) expense reimbursements;
(ii) per diem pay for board member service, if applicable; or
(iii) an employee's compensation or benefits from employment with the authority.
(6) Nothing in this section may be construed to affect the application or effect of any other code provision applicable to a board member or employee relating to ethics or conflicts of interest.

Amended by Chapter 1, 2018 Special Session 2

11-58-305 Executive director.
(1) On or before July 1, 2019, the board shall hire a full-time executive director.
(2)
(a) The executive director is the chief executive officer of the authority.
(b) The role of the executive director is to:
(i) manage and oversee the day-to-day operations of the authority;
(ii) fulfill the executive and administrative duties and responsibilities of the authority; and
(iii) perform other functions, as directed by the board.
(3) The executive director shall have the education, experience, and training necessary to perform the executive director's duties in a way that maximizes the potential for successfully achieving and implementing the strategies, policies, and objectives stated in Subsection 11-58-203(1).
(4) An executive director is an at-will employee who serves at the pleasure of the board and may be removed by the board at any time.
(5) The board shall establish the duties, compensation, and benefits of an executive director.

Amended by Chapter 126, 2020 General Session

Part 5
Project Area Plan and Budget

11-58-501 Preparation of project area plan -- Required contents of project area plan.

(1)
(a) The authority jurisdictional land constitutes a single project area.
(b) The authority is not required to adopt a project area plan for a project area consisting of the authority jurisdictional land.

(2)
(a) The board may adopt a project area plan for land that is outside the authority jurisdictional land, as provided in this part, if the board receives written consent to include the land in the project area described in the project area plan from:
(i) as applicable:
(A) the legislative body of the county in whose unincorporated area the land is located; or
(B) the legislative body of the municipality in which the land is located; and
(ii) the owner of the land.
(b) Land included or to be included within a project area need not be contiguous or in close proximity to the authority jurisdictional land.
(c) In order to adopt a project area plan, the board shall:
(i) prepare a draft project area plan;
(ii) give notice as required under Subsection 11-58-502(2);
(iii) hold at least one public meeting, as required under Subsection 11-58-502(1); and
(iv) after holding at least one public meeting and subject to Subsection (2)(d), adopt the draft project area plan as the project area plan.
(d) Before adopting a draft project area plan as the project area plan, the board may make modifications to the draft project area plan that the board considers necessary or appropriate.

(3) Each project area plan and draft project area plan shall contain:
(a) a legal description of the boundary of the project area;
(b) the authority's purposes and intent with respect to the project area; and
(c) the board's findings and determination that:
(i) there is a need to effectuate a public purpose;
(ii) there is a public benefit to the proposed development project;
(iii) it is economically sound and feasible to adopt and carry out the project area plan; and
(iv) carrying out the project area plan will promote the goals and objectives stated in Subsection 11-58-203(1).

Amended by Chapter 399, 2019 General Session

11-58-502 Public meeting to consider and discuss draft project area plan -- Notice -- Adoption of plan.

(1) The board shall hold at least one public meeting to consider and discuss a draft project area plan.

(2) At least 10 days before holding a public meeting under Subsection (1), the board shall give notice of the public meeting:

(a) to each taxing entity;
(b) to a municipality in which the proposed project area is located or that is located within one-half mile of the proposed project area; and
(c) on the Utah Public Notice Website created in Section 63F-1-701.
(3) Following consideration and discussion of the draft project area plan, and any modification of the project area plan under Subsection 11-58-501(2)(d), the board may adopt the draft project area plan or modified draft project area plan as the project area plan.

Amended by Chapter 399, 2019 General Session

11-58-503 Notice of project area plan adoption -- Effective date of plan -- Time for challenging a project area plan or project area.
(1) Upon the board's adoption of a project area plan, the board shall provide notice as provided in Subsection (2) by publishing or causing to be published legal notice:
(a) in a newspaper of general circulation within or near the project area; and
(b) as required by Section 45-1-101.
(2)
(a) Each notice under Subsection (1) shall include:
(i) the board resolution adopting the project area plan or a summary of the resolution; and
(ii) a statement that the project area plan is available for general public inspection and the hours for inspection.
(b) The statement required under Subsection (2)(a)(ii) may be included within the board resolution adopting the project area plan or within the summary of the resolution.
(3) The project area plan shall become effective on the date designated in the board resolution.
(4) The authority shall make the adopted project area plan available to the general public at its offices during normal business hours.
(5) Within 10 days after the day on which a project area plan is adopted that establishes a project area, or after an amendment to a project area plan is adopted under which the boundary of a project area is modified, the authority shall send notice of the establishment or modification of the project area and an accurate map or plat of the project area to:
(a) the State Tax Commission;
(b) the Automated Geographic Reference Center created in Section 63F-1-506; and
(c) the assessor and recorder of each county where the project area is located.
(6)
(a) A legal action or other challenge to a project area plan or a project area described in a project area plan is barred unless brought within 30 days after the effective date of the project area plan.
(b) A legal action or other challenge to a project area that consists of authority jurisdictional land is barred unless brought within 30 days after the board adopts a business plan under Subsection 11-58-202(1)(a) for the authority jurisdictional land.

Amended by Chapter 399, 2019 General Session

11-58-504 Amendment to a project area plan.
(1) The authority may amend a project area plan by following the same procedure under this part as applies to the adoption of a project area plan.
(2) The provisions of this part apply to the authority's adoption of an amendment to a project area plan to the same extent as they apply to the adoption of a project area plan.

Enacted by Chapter 179, 2018 General Session

11-58-505 Project area budget.

(1) Before the authority may use the property tax differential from a project area, the board shall prepare and adopt a project area budget.

(2) A project area budget shall include:

(a) the base taxable value of property in the project area;

(b) the projected property tax differential expected to be generated within the project area;

(c) the amount of the property tax differential expected to be used to implement the project area plan, including the estimated amount of the property tax differential to be used for land acquisition, public improvements, infrastructure improvements, and loans, grants, or other incentives to private and public entities;

(d) the property tax differential expected to be used to cover the cost of administering the project area plan; and

(e) for property that the authority owns or leases and expects to sell or sublease, the expected total cost of the property to the authority and the expected selling price or lease payments.

(3) The board may amend an adopted project area budget as and when the board considers it appropriate.

(4) For a project area that consists of the authority jurisdictional land, the budget requirements of this part are met by the authority complying with the budget requirements of Part 8, Port Authority Budget, Reporting, and Audits.

Amended by Chapter 126, 2020 General Session

Part 6
Property Tax Differential

11-58-601 Port authority receipt and use of property tax differential -- Distribution of property tax differential.

(1) As used in this section:

(a) "Designation resolution" means a resolution adopted by the board that designates a transition date for the parcel specified in the resolution.

(b) "Post-designation differential" means 75% of property tax differential generated from a post-designation parcel.

(c) "Post-designation parcel" means a parcel within a project area after the transition date for that parcel.

(d) "Pre-designation differential" means 75% of property tax differential generated from all pre-designation parcels within a project area.

(e) "Pre-designation parcel" means a parcel within a project area before the transition date for that parcel.

(f) "Transition date" means the date after which the authority is to be paid post-designation differential for the parcel that is the subject of a designation resolution.

(2)

(a) The authority shall be paid pre-designation differential generated within the authority jurisdictional land:

(i) for the period beginning November 2019 and ending November 2044; and
(ii) for a period of 15 years following the period described in Subsection (2)(a)(i) if, before the end of the period described in Subsection (2)(a)(i), the board adopts a resolution extending the period described in Subsection (2)(a)(i) for 15 years.
(b) The authority shall be paid pre-designation differential generated within a project area, other than the authority jurisdictional land:
(i) for a period of 25 years beginning the date the board adopts a project area plan under Section 11-58-502 establishing the project area; and
(ii) for a period of 15 years following the period described in Subsection (2)(b)(i) if, before the end of the period described in Subsection (2)(b)(i), the board adopts a resolution extending the period described in Subsection (2)(b)(i) for 15 years.
(3) The authority shall be paid post-designation differential generated from a post-designation parcel:
(a) for a period of 25 years beginning on the transition date for that parcel; and
(b) for a period of an additional 15 years beyond the period stated in Subsection (3)(a) if the board determines by resolution that the additional years of post-designation differential from that parcel will produce a significant benefit.
(4)
(a) For purposes of this section, the authority may designate an improved portion of a parcel in a project area as a separate parcel.
(b) An authority designation of an improved portion of a parcel as a separate parcel under Subsection (4)(a) does not constitute a subdivision, as defined in Section 10-9a-103 or Section 17-27a-103.
(c) A county recorder shall assign a separate tax identification number to the improved portion of a parcel designated by the authority as a separate parcel under Subsection (4)(a).
(5) The authority may not receive:
(a) a taxing entity's portion of property tax differential generated from an area included within a community reinvestment project area under a community reinvestment project area plan, as defined in Section 17C-1-102, adopted before October 1, 2018, if the taxing entity has, before October 1, 2018, entered into a fully executed, legally binding agreement under which the taxing entity agrees to the use of its tax increment, as defined in Section 17C-1-102, under the community reinvestment project area plan; or
(b) property tax differential from a parcel of land:
(i) that was substantially developed before December 1, 2018;
(ii) for which a certificate of occupancy was issued before December 1, 2018; and
(iii) that is identified in a list that the municipality in which the land is located provides to the authority and the county assessor by April 1, 2020.
(6)
(a) As used in this Subsection (6):
(i) "Agency land" means authority jurisdictional land that is within the boundary of an eligible community reinvestment agency and from which the authority is paid property tax differential.
(ii) "Applicable differential" means the amount of property tax differential paid to the authority that is generated from agency land.
(iii) "Eligible community reinvestment agency" means the community reinvestment agency in which agency land is located.
(b) The authority shall pay 10% of applicable differential to the eligible community reinvestment agency, to be used for affordable housing as provided in Section 17C-1-412.

(7)
(a) Subject to Subsection (7)(b), a county that collects property tax on property within a project area shall pay and distribute to the authority the property tax differential that the authority is entitled to collect under this chapter, in the manner and at the time provided in Section 59-2-1365.
(b) For property tax differential that a county collects for tax year 2019, a county shall pay and distribute to the authority, on or before June 30, 2020, the property tax differential that the authority is entitled to collect:
(i) according to the provisions of this section; and
(ii) based on the boundary of the authority jurisdictional land as of May 31, 2020.

Amended by Chapter 126, 2020 General Session

11-58-602 Allowable uses of property tax differential and other funds.
(1) The authority may use the property tax differential, money the authority receives from the state, money the authority receives under Subsection 59-12-205(2)(b)(iii), and other funds available to the authority:
(a) for any purpose authorized under this chapter;
(b) for administrative, overhead, legal, consulting, and other operating expenses of the authority;
(c) to pay for, including financing or refinancing, all or part of the development of land within a project area, including assisting the ongoing operation of a development or facility within the project area;
(d) to pay the cost of the installation and construction of publicly owned infrastructure and improvements within the project area from which the property tax differential funds were collected;
(e) to pay the cost of the installation of publicly owned infrastructure and improvements outside a project area if the board determines by resolution that the infrastructure and improvements are of benefit to the project area;
(f) to pay to a community reinvestment agency for affordable housing, as provided in Subsection 11-58-601(6); and
(g) to pay the principal and interest on bonds issued by the authority.
(2) The authority may use revenue generated from the operation of publicly owned infrastructure operated by the authority or improvements, including an intermodal facility, operated by the authority to:
(a) operate and maintain the infrastructure or improvements; and
(b) pay for authority operating expenses, including administrative, overhead, and legal expenses.
(3) The determination of the board under Subsection (1)(e) regarding benefit to the project area is final.
(4) The authority may not use property tax differential revenue collected from one project area for a development project within another project area.
(5) Until the authority adopts a business plan under Subsection 11-58-202(1)(a), the authority may not spend property tax differential revenue collected from authority jurisdictional land.
(6)
(a) As used in this Subsection (6):
(i) "Authority sales and use tax revenue" means money distributed to the authority under Subsection 59-12-205(2)(b)(iii).
(ii) "Eligible county" means a county that would be entitled to receive sales and use tax revenue under Subsection 59-12-205(2)(b)(i) in the absence of Subsection 59-12-205(2)(b)(iii).

(iii) "Eligible municipality" means a municipality that would be entitled to receive sales and use tax revenue under Subsection 59-12-205(2)(b)(i) in the absence of Subsection 59-12-205(2)(b)(iii).

(iv) "Point of sale portion" means:

(A) for an eligible county, the amount of sales and use tax revenue the eligible county would have received under Subsection 59-12-205(2)(b)(i) in the absence of Subsection 59-12-205(2)(b)(iii), excluding the retail sales portion; and

(B) for an eligible municipality, the amount of sales and use tax revenue the eligible municipality would have received under Subsection 59-12-205(2)(b)(i) in the absence of Subsection 59-12-205(2)(b)(iii), excluding the retail sales portion.

(v) "Retail sales portion" means the amount of sales and use tax revenue collected under Subsection 59-12-205(2)(b)(i) from retail sales transactions that occur on authority jurisdictional land.

(b) Within 45 days after receiving authority sales and use tax revenue, the authority shall:

(i) distribute half of the point of sale portion to each eligible county and eligible municipality; and

(ii) distribute all of the retail sales portion to each eligible county and eligible municipality.

Amended by Chapter 126, 2020 General Session

Part 7
Port Authority Bonds

11-58-701 Resolution authorizing issuance of port authority bonds -- Characteristics of bonds.

(1) The authority may not issue bonds under this part unless the board first adopts a resolution authorizing their issuance.

(2)

(a) As provided in the authority resolution authorizing the issuance of bonds under this part or the trust indenture under which the bonds are issued, bonds issued under this part may be issued in one or more series and may be sold at public or private sale and in the manner provided in the resolution or indenture.

(b) Bonds issued under this part shall bear the date, be payable at the time, bear interest at the rate, be in the denomination and in the form, carry the conversion or registration privileges, have the rank or priority, be executed in the manner, be subject to the terms of redemption or tender, with or without premium, be payable in the medium of payment and at the place, and have other characteristics as provided in the authority resolution authorizing their issuance or the trust indenture under which they are issued.

(3) Upon the board's adoption of a resolution providing for the issuance of bonds, the board may provide for the publication of the resolution:

(a) in a newspaper having general circulation in the authority's boundaries; and

(b) as required in Section 45-1-101.

(4) In lieu of publishing the entire resolution, the board may publish notice of bonds that contains the information described in Subsection 11-14-316(2).

(5) For a period of 30 days after the publication, any person in interest may contest:

(a) the legality of the resolution or proceeding;

(b) any bonds that may be authorized by the resolution or proceeding; or

(c) any provisions made for the security and payment of the bonds.

(6)

(a) A person may contest the matters set forth in Subsection (5) by filing a verified written complaint, within 30 days of the publication under Subsection (5), in the district court of the county in which the person resides.

(b) A person may not contest the matters set forth in Subsection (5), or the regularity, formality, or legality of the resolution or proceeding, for any reason, after the 30-day period for contesting provided in Subsection (6)(a).

Enacted by Chapter 179, 2018 General Session

11-58-702 Sources from which bonds may be made payable -- Port authority powers regarding bonds.

(1) The principal and interest on bonds issued by the authority may be made payable from:

(a) the income and revenues of the projects financed with the proceeds of the bonds;

(b) the income and revenues of certain designated projects whether or not they were financed in whole or in part with the proceeds of the bonds;

(c) the income, proceeds, revenues, property, and funds the authority derives from or holds in connection with its undertaking and carrying out development of authority jurisdictional land;

(d) property tax differential funds;

(e) authority revenues generally;

(f) a contribution, loan, grant, or other financial assistance from the federal government or a public entity in aid of the authority; or

(g) funds derived from any combination of the methods listed in Subsections (1)(a) through (f).

(2) In connection with the issuance of authority bonds, the authority may:

(a) pledge all or any part of its gross or net rents, fees, or revenues to which its right then exists or may thereafter come into existence;

(b) encumber by mortgage, deed of trust, or otherwise all or any part of its real or personal property, then owned or thereafter acquired; and

(c) make the covenants and take the action that may be necessary, convenient, or desirable to secure its bonds, or, except as otherwise provided in this chapter, that will tend to make the bonds more marketable, even though such covenants or actions are not specifically enumerated in this chapter.

Amended by Chapter 399, 2019 General Session

11-58-703 Purchase of port authority bonds.

(1) Any person, firm, corporation, association, political subdivision of the state, or other entity or public or private officer may purchase bonds issued by an authority under this part with funds owned or controlled by the purchaser.

(2) Nothing in this section may be construed to relieve a purchaser of authority bonds of any duty to exercise reasonable care in selecting securities.

Enacted by Chapter 179, 2018 General Session

11-58-704 Those executing bonds not personally liable -- Limitation of obligations under bonds -- Negotiability.

(1) A member of the board or other person executing an authority bond is not liable personally on the bond.
(2)
(a) A bond issued by the authority is not a general obligation or liability of the state or any of its political subdivisions and does not constitute a charge against their general credit or taxing powers.
(b) A bond issued by the authority is not payable out of any funds or properties other than those of the authority.
(c) The state and its political subdivisions are not and may not be held liable on a bond issued by the authority.
(d) A bond issued by the authority does not constitute indebtedness within the meaning of any constitutional or statutory debt limitation.
(3) A bond issued by the authority under this part is fully negotiable.

Enacted by Chapter 179, 2018 General Session

11-58-705 Obligee rights -- Board may confer other rights.
(1) In addition to all other rights that are conferred on an obligee of a bond issued by the authority under this part and subject to contractual restrictions binding on the obligee, an obligee may:
(a) by mandamus, suit, action, or other proceeding, compel an authority and its board, officers, agents, or employees to perform every term, provision, and covenant contained in any contract of the authority with or for the benefit of the obligee, and require the authority to carry out the covenants and agreements of the authority and to fulfill all duties imposed on the authority by this part; and
(b) by suit, action, or proceeding in equity, enjoin any acts or things that may be unlawful or violate the rights of the obligee.
(2)
(a) In a board resolution authorizing the issuance of bonds or in a trust indenture, mortgage, lease, or other contract, the board may confer upon an obligee holding or representing a specified amount in bonds, the rights described in Subsection (2)(b), to accrue upon the happening of an event or default prescribed in the resolution, indenture, mortgage, lease, or other contract, and to be exercised by suit, action, or proceeding in any court of competent jurisdiction.
(b)
(i) The rights that the board may confer under Subsection (2)(a) are the rights to:
(A) cause possession of all or part of a development project to be surrendered to an obligee;
(B) obtain the appointment of a receiver of all or part of an authority's development project and of the rents and profits from it; and
(C) require the authority and its board and employees to account as if the authority and the board and employees were the trustees of an express trust.
(ii) If a receiver is appointed through the exercise of a right granted under Subsection (2)(b)(i)(B), the receiver:
(A) may enter and take possession of the development project or any part of it, operate and maintain it, and collect and receive all fees, rents, revenues, or other charges arising from it after the receiver's appointment; and
(B) shall keep money collected as receiver for the authority in separate accounts and apply it pursuant to the authority obligations as the court directs.

Enacted by Chapter 179, 2018 General Session

11-58-706 Bonds exempt from taxes -- Port authority may purchase its own bonds.

(1) A bond issued by the authority under this part is issued for an essential public and governmental purpose and is, together with interest on the bond and income from it, exempt from all state taxes except the corporate franchise tax.
(2) The authority may purchase its own bonds at a price that its board determines.
(3) Nothing in this section may be construed to limit the right of an obligee to pursue a remedy for the enforcement of a pledge or lien given under this part by the authority on its rents, fees, grants, properties, or revenues.

Enacted by Chapter 179, 2018 General Session

Part 8
Port Authority Budget, Reporting, and Audits

11-58-801 Annual port authority budget -- Fiscal year -- Public hearing required -- Auditor forms -- Requirement to file annual budget.

(1) The authority shall prepare and its board adopt an annual budget of revenues and expenditures for the authority for each fiscal year.
(2) Each annual authority budget shall be adopted before June 22, except that the authority's initial budget shall be adopted as soon as reasonably practicable after the organization of the board and the beginning of authority operations.
(3) The authority's fiscal year shall be the period from July 1 to the following June 30.
(4)
  (a) Before adopting an annual budget, the board shall hold a public hearing on the annual budget.
  (b) The authority shall provide notice of the public hearing on the annual budget by publishing notice:
    (i) at least once in a newspaper of general circulation within the state, one week before the public hearing; and
    (ii) on the Utah Public Notice Website created in Section 63F-1-701, for at least one week immediately before the public hearing.
  (c) The authority shall make the annual budget available for public inspection at least three days before the date of the public hearing.
(5) The state auditor shall prescribe the budget forms and the categories to be contained in each authority budget, including:
  (a) revenues and expenditures for the budget year;
  (b) legal fees; and
  (c) administrative costs, including rent, supplies, and other materials, and salaries of authority personnel.
(6)
  (a) Within 30 days after adopting an annual budget, the board shall file a copy of the annual budget with the auditor of each county in which the authority jurisdictional land is located, the State Tax Commission, the state auditor, the State Board of Education, and each taxing entity that levies a tax on property from which the authority collects property tax differential.

(b) The requirement of Subsection (6)(a) to file a copy of the annual budget with the state as a taxing entity is met if the authority files a copy with the State Tax Commission and the state auditor.

Amended by Chapter 1, 2018 Special Session 2

11-58-802 Amending the port authority annual budget.

(1) The board may by resolution amend an annual authority budget.
(2) An amendment of the annual authority budget that would increase the total expenditures may be made only after public hearing by notice published as required for initial adoption of the annual budget.
(3) The authority may not make expenditures in excess of the total expenditures established in the annual budget as it is adopted or amended.

Enacted by Chapter 179, 2018 General Session

11-58-803 Port authority report.

(1)
(a) On or before November 1 of each year, the authority shall prepare and file a report with the county auditor of each county in which the authority jurisdictional land is located, the State Tax Commission, the State Board of Education, and each taxing entity that levies a tax on property from which the authority collects property tax differential.
(b) The requirement of Subsection (1)(a) to file a copy of the report with the state as a taxing entity is met if the authority files a copy with the State Tax Commission and the state auditor.
(2) Each report under Subsection (1) shall contain:
(a) an estimate of the property tax differential to be paid to the authority for the calendar year ending December 31; and
(b) an estimate of the property tax differential to be paid to the authority for the calendar year beginning the next January 1.
(3) Before November 30 of each year, the board shall present a report to the Executive Appropriations Committee of the Legislature, as the Executive Appropriations Committee directs, that includes:
(a) an accounting of how authority funds have been spent, including funds spent on the environmental sustainability component of the authority business plan under Subsection 11-58-202(1)(a);
(b) an update about the progress of the development and implementation of the authority business plan under Subsection 11-58-202(1)(a), including the development and implementation of the environmental sustainability component of the plan; and
(c) an explanation of the authority's progress in achieving the policies and objectives described in Subsection 11-58-203(1).

Amended by Chapter 1, 2018 Special Session 2

11-58-804 Audit requirements.

The authority shall comply with the audit requirements of Title 51, Chapter 2a, Accounting Reports from Political Subdivisions, Interlocal Organizations, and Other Local Entities Act.

Enacted by Chapter 179, 2018 General Session

11-58-805 Audit report.

(1) The authority shall, within 180 days after the end of the authority's fiscal year, file a copy of the audit report with the county auditor, the State Tax Commission, the State Board of Education, and each taxing entity that levies a tax on property from which the authority collects property tax differential.

(2) Each audit report under Subsection (1) shall include:

(a) the property tax differential collected by the authority;

(b) the outstanding principal amount of bonds issued or other loans incurred to finance the costs associated with the authority's projects; and

(c) the actual amount expended for:

(i) acquisition of property;

(ii) site improvements or site preparation costs;

(iii) installation of public utilities or other public improvements; and

(iv) administrative costs of the authority.

Enacted by Chapter 179, 2018 General Session

11-58-806 Port authority chief financial officer is a public treasurer -- Certain port authority funds are public funds.

(1) The authority's chief financial officer:

(a) is a public treasurer, as defined in Section 51-7-3; and

(b) shall invest the authority funds specified in Subsection (2) as provided in that subsection.

(2) Notwithstanding Subsection 63E-2-110(2)(a), property tax differential funds and appropriations that the authority receives from the state:

(a) are public funds; and

(b) shall be invested as provided in Title 51, Chapter 7, State Money Management Act.

Amended by Chapter 1, 2018 Special Session 2

Part 9
Port Authority Dissolution

11-58-901 Dissolution of port authority -- Restrictions -- Notice of dissolution -- Disposition of port authority property -- Port authority records -- Dissolution expenses.

(1) The authority may not be dissolved unless the authority has no outstanding bonded indebtedness, other unpaid loans, indebtedness, or advances, and no legally binding contractual obligations with persons or entities other than the state.

(2) Upon the dissolution of the authority:

(a) the Governor's Office of Economic Development shall publish a notice of dissolution:

(i) in a newspaper of general circulation in the county in which the dissolved authority is located; and

(ii) as required in Section 45-1-101; and

(b) all title to property owned by the authority vests in the state.

(3) The books, documents, records, papers, and seal of each dissolved authority shall be deposited for safekeeping and reference with the state auditor.

(4) The authority shall pay all expenses of the deactivation and dissolution.

Enacted by Chapter 179, 2018 General Session

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE CITY CORPORATION, Plaintiff, vs. UTAH INLAND PORT AUTHORTY, STATE OF UTAH, GARY HERBERT, and SEAN REYES, Defendants.	MEMORANDUM DECISION AND ORDER Case No. 190902057 Judge James Blanch

This matter is before the court on cross-motions for summary judgment. Plaintiff Salt Lake City (the "City") filed its motion first, challenging the constitutionality of certain provisions of the Utah Inland Port Authority Act under the Utah Constitution. Defendants Utah Inland Port Authority, State of Utah, Governor Gary Herbert, and Attorney General Sean Reyes (collectively, the "State") filed a memorandum in opposition to the City's motion in which it also sought summary judgment, asserting the City's claims fail as a matter of law. The court held oral argument on November 18, 2019. Samantha Slark argued on behalf of the City, and Lance Sorenson argued on behalf of the State.[1] Following oral argument, the court took the motions under advisement. Now, being fully advised, the court renders this Memorandum Decision and Order.

INTRODUCTION

This case presents the question of whether the Utah Constitution prohibits the Utah State Legislature from seizing control from Salt Lake City over the development and operation of an

[1] The court commends counsel on both sides for the extraordinarily high quality of the briefing and oral argument in this case.

"inland port" to be developed in the northwest quadrant of the City and delegating some of that control to a "Port Authority Board." The answer is no. Whether wise or unwise,[2] the Utah Inland Port Authority Act (the "Act")[3] is sufficiently infused with a state purpose that it does not run afoul of the "Ripper Clause" in the Utah Constitution, which prohibits the Legislature from delegating purely municipal authority to "special commissions."[4] Nor does the Act violate the other provisions of the Utah Constitution the City cites. For these reasons, the court must grant summary judgment in favor of the State and against the City.

Despite the Act's presumed constitutionality,[5] the City contends that in various ways the Act violates Article VI, Section 28 of the Utah Constitution—the "Ripper Clause," which provides:

> 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.

Utah Const. Art VI, § 28. This clause and similar clauses in several other states' constitutions provide an interpretative challenge to courts because municipalities do not possess inherent constitutional powers. Rather, municipalities are creatures of the State, which has plenary

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[2] "It's neither this court's right nor its vocation to make constitutional judgments based on its view of whether the legislature has made good or bad policy judgments." *Richards v. Cox*, 2019 UT 57, ¶ 1 n.1, 450 P.3d 1074 (making the quoted observation with respect to limitations on the Utah Supreme Court's authority—limitations that apply with equal if not greater force to this district court's authority). In other words, in our system of separate powers, appropriate judicial respect for the political branches of government prohibits courts from rejecting constitutionally permissible legislative choices based on disagreements with the policies they represent.

[3] Utah Code § 11-58-101, *et seq.* (2018).

[4] Utah Const. Art VI, § 28.

[5] "[W]hen confronted with a constitutional challenge to a statute, [the court must] presume the statute to be constitutional, resolving any reasonable doubts in favor of constitutionality." *Richards*, 2019 UT 57 at ¶ 39 (*quoting Univ. of Utah v. Shurtleff*, 2006 UT 51, ¶ 30, 144 P.3d 1109).

authority over their functions.[6] This principle would appear at first blush to mean the Ripper Clause prohibits nothing, but any interpretation that renders the clause meaningless would of course be disfavored. Further, as discussed in detail below, the Utah Supreme Court has relied upon the Ripper Clause to invalidate statutes that impermissibly delegate certain municipal functions to special commissions, indicating the Ripper Clause does impose a meaningful limitation on the Legislature's power. But the precise scope of that limitation has proven difficult to identify in the governing case law.

The Utah Supreme Court attempted to resolve this conundrum in the 1988 case of *City of West Jordan v. Utah State Retirement Board*, 767 P.2d 530 (Utah 1988), which remains valid authority that this court is required to follow.[7] First, *West Jordan* clarifies that the Ripper Clause "prohibits *only* the legislature's *delegating* certain powers relative to municipal matters to a special commission." *Id.* at 533 (emphasis added). In other words, it does not prohibit direct legislative action or legislative mandates that do not involve the "delegation" of a power to a special commission. Second, concerning whether an activity is a "municipal function" that the Legislature cannot delegate, *West Jordan* provides a test to determine whether a function is "sufficiently infused" with a "state interest" to escape classification as a municipal function, as opposed to being infused with an "exclusively local interest." *Id.* at 534. In other words, *West Jordan* appears to stand for the proposition that although the Legislature has plenary authority over all municipal powers, once it has granted municipalities powers that are infused with an

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[6] *See, e.g., Call v. City of West Jordan*, 606 P.2d 217, 218 (Utah 1979) ("[C]ities have no inherent sovereign power, but only those granted by the Legislature."). *See also Salt Lake City v. Tax Comm'n of Utah*, 359 P.2d 397, 399 (Utah 1961) ("Cities are creatures and agencies of the state, which latter possesses plenary power over them.").

[7] *See also Utah Associated Municipal Power Systems v. Public Service Comm. of Utah*, 789 P.2d 298 (Utah 1990) (restating, reaffirming, and applying the method of analysis for Ripper Clause claims set forth in *West Jordan*).

"exclusively local interest," those functions become "municipal functions" under the Ripper Clause, which thereafter prohibits the Legislature from delegating the functions to special commissions.

Under this analytical framework, the City's challenge to the Act under the Ripper Clause fails. Some aspects of the Act fall outside the scope of the Ripper Clause because they are direct legislative mandates, rather than "delegations" of authority to the Port Authority Board or anyone else. These include the diversion of tax differential to finance construction of inland port projects, the prohibition against the City's interference with inland port uses, and the requirement that the City furnish infrastructure to support inland port uses with the right of reimbursement. The only aspects of the Act identified by the City that involve "delegation" of allegedly municipal functions are the provisions allowing the Port Authority Board to make land-use, or zoning, decisions concerning "inland port uses" on the jurisdictional land. But even if the Port Authority Board is a "special commission" within the meaning of the Ripper Clause (which the court will assume for purposes of its analysis), the State has articulated sufficiently compelling state interests justifying this aspect of the Act to prevent its classification as a "municipal function" for purposes of the Ripper Clause.

For these reasons, the Act does not violate the Ripper Clause.[8] Nor is the court persuaded the Act violates the other provisions of the Utah Constitution the City cites. The City argues the Act violates Article XI, Section 8 of the Utah Constitution, but that provision merely grants

[8] The question of whether to develop an inland port at all in the Northwest Quadrant has generated fierce public debate, but this case does not involve the question of whether there will or will not be an inland port. It is just a dispute about power. This case turns only on the question of whether the City or the State has the constitutional authority to control the development and maintenance of the inland port, not whether an inland port or should not be developed. This case also does not include issues concerning the legality of any particular inland port functions under environmental laws or otherwise. Such disputes will be resolved in a different forum at another time.

authority to the Legislature to create "political subdivisions" other than cities or towns. It does not prohibit the Legislature from doing anything. The City further contends the Act violates Article XI, Section 5 of the Utah Constitution, which prohibits the Legislature from creating "cities and towns" by special laws. But the Port Authority Board is not a city or town, and the City has not cited any authority for the proposition that this constitutional provision may be applied to entities that are not, strictly speaking, cities or towns. Additionally, the court is persuaded the Act does not violate the Uniform Operation of Laws provision in Article I Section 24 of the Utah Constitution because there is a rational basis for the Act's distinction between municipalities that contain jurisdictional land (where the provisions of the Act are mandatory), and municipalities that do not (where the Act only applies with the municipalities' consent). Finally, because the court determines the City has not prevailed on the merits in this case, it follows the City is not entitled to an injunction against the implementation of the Act.

THE UTAH INLAND PORT AUTHORITY ACT

The court will not recite all facts set forth in the parties' briefs, but will confine its discussion to those facts necessary to address the parties' competing requests for summary judgment. The facts are taken from the materials submitted in connection with the briefing on the parties' respective motions and the presentations made at oral argument.

In 2015, the Utah State Legislature voted to relocate the Utah State Prison to the northwest quadrant, a largely undeveloped 22,700-acre expanse within Salt Lake City (the "Northwest Quadrant"). Because of the proximity of the Northwest Quadrant to interstate freeways, interstate rail lines, and the Salt Lake International Airport, discussions concerning the potential development of an "inland port" in the Northwest Quadrant had occurred in one form or another for a number of decades. Following the decision to move the prison, which will

involve the construction of infrastructure to allow access and the provision of utility services to the prison, private landowners that collectively own thousands of acres of land in the Northwest Quadrant initiated discussions with elected officials of the City concerning the potential development of an inland port to facilitate the distribution of goods. The City's discussions with these private landowners were productive, and the outlines of a proposal began to emerge under which an inland port would be developed on private land in the Northwest Quadrant, administered by a port authority board under the control of the City, with projects to be financed through increases in property taxes attributable to development ("tax differential") and land-use decisions to be made under the City's existing administrative procedures.

As discussions between the City and landowners progressed, state legislators began to involve themselves to a greater extent in the negotiations over the inland port concept. In December 2017, the Governor's Office of Economic Development received a feasibility analysis estimating that an inland port could create approximately 24,000 new jobs in Utah. In 2018, Utah's Speaker of the House of Representatives Greg Hughes and other state legislators met with representatives from the City, Salt Lake County, and private property owners regarding a proposed inland port.

The first bill drafted in the process that ultimately led to passage of the Utah Inland Port Authority Act established the Port Authority Board (the "Authority"), a nine-member board of directors to include three members from the City and one member from Salt Lake County. This initial bill delegated to the Authority the power to reverse City land-use decisions that did not meet the Act's strategies, policies, and objectives. The bill also required the City to pay the Authority a five percent annual growth-related property tax differential, *i.e.*, the increase in property taxes collected after a certain date. In response to the proposed bill, the City expressed

its displeasure with the delegation of exclusive jurisdiction over land-use decisions to an unelected, unaccountable board of directors.

Several iterations of the bill followed. The Fourth Substitute Bill was passed at the eleventh hour and contained several alterations from previous versions. Each representative of the Salt Lake City area voted against the Fourth Substitute Bill. This final bill increased up to 100% the amount of growth-related property tax differential to be diverted to the Authority; it increased the boundary of the "jurisdictional land" to include 3,000 acres from the cities of West Valley and Magna; and it increased the size of the board to eleven and reduced the City's representation from three to two, eliminating the Mayor's position. It also prevented the City from interfering with "natural resources" passing through the inland port, and it delegated to the Authority the power to develop and construct infrastructure such as water treatment plants, water and sewer lines, roads, electricity and natural gas service, and transportation facilities.

Governor Gary Herbert signed the final bill on March 16, 2018. On May 8, 2018, the Utah Inland Port Authority Act became law. *See* Utah Code § 11-58-101, *et seq.* Governor Herbert acknowledged the City had concerns regarding the Act's delegation of the City's traditional authority over land use, infrastructure, tax revenue and municipal functions, and he called for a special session in July 2018 to "modify and improve the bill." At the special session, the Act was amended to require that the City "allow an inland port as a permitted or conditional use," and it increased the time period during which the City must cede the tax differential to the Authority.

The latest amendment came in 2019 and reclassified the entire 16,157 acres of "authority jurisdictional land" as one project area, roughly 13,000 acres of which are within Salt Lake City

(about one-fifth of the geographical area of Salt Lake City),[9] and the remaining 3000 acres lie within West Valley City and Magna. Currently there are approximately 225 landowners that collectively own 472 parcels of real property within the jurisdictional land. In addition, the 2019 amendment increased the redirected growth-related property tax differential associated with the development of inland port uses on the jurisdiction land from up to 100% to simply 100%, provided for immediate collection by the Authority of growth-related property tax, extended the period the Authority may collect this growth-related property tax from 25 years to 40 years, prohibited the City from banning inland port functions, required the City to maintain infrastructure to support inland port functions (but with a provision requiring reimbursement to the City for such developments), and delegated to the Authority land-use-decision-making authority with respect to projects on the jurisdictional land that constitute "inland port uses."

The Authority's eleven-member Board of Directors now consists of seven appointees: two appointed by the Governor, one by the president of the Senate, one by the Speaker of the House, one by the chair of the State's Permanent Community Impact Fund Board, one by the Salt Lake County Mayor, and one by the West Valley City Manager with the consent of the City Council. The remaining four members are positional: the executive director of the State's Department of Transportation; the director of the Salt Lake County Office of Regional Economic Development; the chair of the Salt Lake Airport Advisory Board (or the chair's designee); and the Salt Lake City Council member whose district includes the Salt Lake City International Airport. As of November 1, 2019, the Authority has two full-time staff, including Executive Director Jack Hedge.

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[9] Although the jurisdictional land is sometimes described casually in the briefing as "City land," the vast majority of it is privately owned land that falls within the City's boundaries. It is not land the City owns. The land will be developed for inland port uses only to the extent its private property owners desire to develop it in that fashion.

The Act's statement of purpose provides:

> (3)(a) The purpose of the authority is to fulfill the statewide public purpose of working in concert with applicable state and local government entities, property owners and other private parties, and other stakeholders to encourage and facilitate development of the authority jurisdictional land and land in other authority project areas to maximize the long-term economic and other benefit for the state, consistent with the strategies, policies, and objectives described in this chapter, including:
>
> (i) the development of inland port uses on the authority jurisdictional land and on land in other authority project areas;
>
> (ii) the development of infrastructure to support inland port uses and associated uses on the authority jurisdictional land and on land in other authority project areas; and
>
> (iii) other development on the authority jurisdictional land and on land in other authority project areas.

Utah Code § 11-58-201(3)(a). The Act lists the following as its "policies and objectives":

> (1)(a) maximize long-term economic benefits to the area, the region, and the state;
> (b) maximize the creation of high-quality jobs;
> (c) respect and maintain sensitivity to the unique natural environment of areas in proximity to the authority jurisdictional land and land in other authority project areas;
> (d) improve air quality and minimize resource use;
> (e) respect existing land use and other agreements and arrangements between property owners within the authority jurisdictional land and within other authority project areas and applicable governmental authorities;
> (f) promote and encourage development and uses that are compatible with or complement uses in areas in proximity to the authority jurisdictional land or land in other authority project areas;
> (g) take advantage of the authority jurisdictional land's strategic location and other features, including the proximity to transportation and other infrastructure and facilities, that make the authority jurisdictional land attractive to:
>
> (i) businesses that engage in regional, national, or international trade; and
>
> (ii) businesses that complement businesses engaged in regional, national, or international trade;
>
> (h) facilitate the transportation of goods;
> (i) coordinate trade-related opportunities to export Utah products nationally and internationally;
> (j) support and promote land uses on the authority jurisdictional land and land in other authority project areas that generate economic development, including rural economic development;
> (k) establish a project of regional significance;

(l) facilitate an intermodal facility;
(m) support uses of the authority jurisdictional land for inland port uses, including warehousing, light manufacturing, and distribution facilities;
(n) facilitate an increase in trade in the region and in global commerce;
(o) promote the development of facilities that help connect local businesses to potential foreign markets for exporting or that increase foreign direct investment; and
(p) encourage all class 5 through 8 designated truck traffic entering the authority jurisdictional land to meet the heavy-duty highway compression-ignition diesel engine and urban bus exhaust emission standards for year 2007 and later.

Id. at § 11-58-203(1).

ANALYSIS

This case primarily turns on the legal question of whether certain provisions of the Utah Inland Port Authority Act violate the Utah Constitution's Ripper Clause, which places constitutional limitations on the State's authority over municipalities. The City challenges, both facially and as-applied,[10] portions of the Act as unconstitutional under four provisions of the Utah Constitution: Article VI, Section 28 (the "Ripper Clause"); Article XI, Section 8; Article XI, Section 5; and Article I, Section 24.

In a case such as this, the mere filing of cross-motions for summary judgment does not necessarily mean the case may be finally disposed of as a matter of law. "Cross-motions for summary judgment do not ipso facto dissipate factual issues, even though both parties contend for the purposes of their motions that they are entitled to prevail because there are no material issues of fact." *Amjac Interwest, Inc. v. Design Associates*, 635 P.2d 53, 55 (Utah 1981).

[10] *See State v. Houston*, 2015 UT 40, ¶ 130, 353 P.3d 55 ("There is no clear, established distinction between 'facial' and 'as-applied' challenges[.]"); *United States v. Supreme Court of New Mexico*, 839 F.3d 888, 908 (10th Cir. 2016) ("[T]he line between facial and as-applied relief is a fluid one, and many constitutional challenges may occupy an intermediate position on the spectrum between purely as-applied relief and complete facial invalidation."); and *Vega v. Jordan Valley Medical Center, LP*, 2019 UT 35, ¶ 5, 449 P.3d 31 (in a facial challenge, the court will "only overturn the will of the legislature when 'the statute is so constitutionally flawed that no set of circumstances exists under which the [statute] would be valid.'") (*citing Gillmor v. Summit Cty.*, 2010 UT 69, ¶ 27, 246 P.3d 102).

"[C]ross-motions for summary judgment do not warrant the court in granting summary judgment unless one of the moving parties is entitled to judgment as a matter of law upon facts that are not genuinely disputed." *Id.* (quoting 6 Moore's Federal Practice, 341-344 (2nd ed. 1976)). In other words, although both parties similarly contend the case may be resolved as a matter of law without the necessity of trial, both parties may be incorrect under Rule 56 of the Utah Rules of Civil Procedure. Although the parties do not entirely agree on their Statements of Undisputed Material Facts, there are no genuine disputes of fact sufficient to preclude summary judgment. Because the court ultimately agrees with the State's position, the court construes disputes of facts, to the extent there are any, in favor of the City. *See IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶ 19, 196 P.3d 588 (holding that in assessing each of the parties' competing motions, the court separately draws all reasonable inferences in a light most favorable to the party opposing summary judgment).

I. Article VI, Section 28 (the "Ripper Clause")

The City seeks a declaratory judgment that provisions of the Act violate the Utah Constitution's Ripper Clause by interfering with the City's authority over (a) municipal land-use zoning, (b) municipal functions, and (c) municipal monies.

a. History of Ripper Clauses in State Constitutions

Early in America's history, state constitutions granted legislatures plenary power—later termed police power—over municipalities, in part because of the distrust of governors who still had allegiance to England. David O. Porter, *The Ripper Clause in State Constitutional Law: An Early Urban Experiment*, 1969 UTAH L. REV. 287, 298.[11] State legislatures began to take

[11] The Utah Supreme Court quoted the Porter article extensively and favorably in the *West Jordan* case. 767 P.2d at 533-34. The court therefore accords greater persuasive weight to the Porter article than it ordinarily would to a law review article.

advantage of this power and appointed special commissions and local boards that took control over the municipal functions of cities and towns. *Id.* at 299. Industry boomed in the years following the Civil War, and as urban populations grew, rural state legislators capitalized on their powers over urban infrastructure and began to exploit the cities through special acts dealing with municipal affairs. *Id.* at 290. For example, New York's legislature appointed commissions that wrested away from New York City control of its own police department, fire department, parks, transit, liquor taxes, and public health. *Id.* at 301. Nevertheless, courts routinely upheld the states' plenary powers, and cities were unsuccessful in invoking federal due process to limit legislative control over municipal functions. *Id.* at 289, 299-303.

In 1874, Pennsylvania became the first state to ratify a "ripper clause" in response to legislatively created private and special acts. For instance, one commission had required the city of Philadelphia to pay for construction projects that the city considered poorly designed and unwisely located. *Id.* at 307. Pennsylvania's ripper clause became the model for states that followed and provides: "The General Assembly 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, or to levy taxes or perform any municipal function whatever." *Id.* at 310. It appears the term "ripper clause" originated because such clauses serve to "rip" plenary power from the State in favor of a municipality's right to perform municipal functions. *Id.* at 309.

Eight states now have ripper clauses in their constitutions, each generally prohibiting legislative interference with local affairs, municipal purposes or functions, or corporate purposes through special commissions or appointed officers, or special, local, or private acts. *See id.* at 303 ("The inherent right of local self-government doctrine received wider acceptance than the no

taxation without representation rule."). After Pennsylvania ratified the first ripper clause, California, Colorado, Montana, New Jersey, South Dakota, Wyoming, and Utah followed suit. *Id.* at 290.

b. Utah's Ripper Clause

Utah's Constitution, ratified in 1895, included a ripper clause from the beginning. Virtually identical to Pennsylvania's ripper clause, it provides:

> 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.

Utah Const. Art VI, § 28. In the 125 years since statehood, only approximately 22 Utah appellate opinions have interpreted or applied the Ripper Clause. Analysis of potential Ripper Clause violations is challenging due to the difficulty involved in determining what kinds of municipal activities the clause insulates from legislative interference despite the general constitutional principle that municipalities are creatures of the State, over which the Utah Legislature has plenary power. Until the Utah Supreme Court's 1988 opinion in *West Jordan v. Utah State Retirement Board*, 767 P.2d 530 (Utah 1988), this tension in constitutional analysis created a patchwork of *ad hoc* determinations as to whether an allegedly "municipal" function was fair game for the Legislature to delegate to a special commission, or whether it was protected from interference by the Ripper Clause. This hodgepodge of results, described in more detail below, appeared unmoored to any consistent, predictable principles of constitutional analysis.

In *West Jordan*, the Utah Supreme Court, quoting the Porter article with approval, described this tension in the Court's early Ripper Clause jurisprudence as follows:

> These ripper clauses, although often written in virtually identical language, have been given different interpretations in different states and often within one state at different times. *See id.* at 310–11 & nn. 147–50, 481–90. This is understandable to some extent because, for example, conceptions of what constitutes an area of uniquely local concern that ought to be under the control of local government—the concept underlying the ban on delegating the "perform[ance of] any municipal functions"—has varied among states and over time. *See* Utah Const. art. VI, § 28; Porter at 485 & nn. 178, 179. Particularly apt here is a quotation from Porter in which he discusses the indeterminacy of the meaning given other state constitutional provisions designed to restrict legislative action with respect to subjects described variously as "local affairs," "municipal purposes," or "corporate purposes":
>
> > Although such phrases were meant to serve as standards for the courts in determining the areas of city action protected from legislative interference, they have been of limited value because the only meaning that can be given to the words "local" and "municipal" on their face is geographical rather than legal. Since a geographical definition would allow cities complete freedom to act within their boundaries, which would completely disrupt state government, the final determination as to what is "local" or "municipal" is thrust upon the judges, "who have no guides to decision except the often conflicting views of other states." The result has been that the phrases "local affairs" and "municipal functions" have simply not gained any empirical meaning, even after a century of interpretation.
>
> Porter at 295 (footnotes omitted).
>
> This sort of uncertainty fairly characterizes the case law that purports to give meaning to the term "municipal functions" in article VI, section 28. *A review of our decisions provides relatively little by way of a consistent analytical framework for determining how to characterize a given area of activity.*

West Jordan, 767 P.2d at 533-34 (emphasis added).

A discussion of early Utah case law interpreting the Ripper Clause is helpful in providing some understanding of the kinds of activities the Utah appellate courts have historically identified as meriting protection from legislative interference under the Ripper Clause. One of the first cases in Utah applying the Ripper Clause was *City of St. George v. Public Utilities Commission*, 220 P. 720 (Utah 1923), where a legislatively created public utility commission had

ordered a private electric company to raise its rates. The Utah Supreme Court upheld the commission's decision, finding that in the absence of a clear surrender to cities of authority to regulate public utilities, the state retained that power. *Id.* at 725. Next came *Logan City v. Public Utilities Commission,* 271 P. 961 (Utah 1928), in which a utilities commission had ordered Logan City to raise its electric rates to be competitive with a private power company. The Court found this a violation of the Ripper Clause, as the action complained of was "beyond the power and jurisdiction of the commission." *Id.* at 974. The Court stated:

> To say that the power of the commission, not withstanding the Constitution, to supervise, regulate, and control the business and fix rates and charges of a municipally owned and operated plant is the same as that of a privately owned public utility, is to disregard or not give effect to the Constitution, for a municipality is specifically and exclusively mentioned therein, and the Constitution in such particular expressly and exclusively adopted for the benefit and protection of only municipalities.

Id. at 973. *See also Barnes v. Lehi City*, 279 P. 878 (Utah 1929) (holding that city's authority over its electric plant prohibits regulation by Public Service Commission).

The Utah Supreme Court issued several Ripper Clause decisions in the 1930s. Following the end of Prohibition, the Liquor Control Act established a commission to regulate alcohol and issue permits in addition to conferring limited authority to municipalities to sell and control alcohol sales. *Riggins v. District Court of Salt Lake County*, 51 P.2d 645 (Utah 1935). The Court held, "The state's authority to regulate and control the sale of light beer becomes a municipal function when, and only when, the state divests itself and invests a municipality with such powers." *Id.* at 656. *See also Lehi City v. Meiling*, 48 P.2d 530 (Utah 1935) (holding Water District did not interfere with municipal functions where the property, improvements, and money belonged to the district, not the city); *State Tax Comm'n v. City of Logan*, 54 P.2d 1197 (Utah 1936) (finding no violation of the Ripper Clause where Tax Commission collected sales

tax on city's electricity sold to customers, as obligation to collect sales tax is not restricted to cities alone); and *State ex rel. Pub. Serv. Comm'n v. S. Pac. Co.*, 79 P.2d 25 (1938) (stating legislature is without authority to deprive Tax Commission of its constitutionally-specified powers over taxing).

Since the 1930s, Utah Supreme Court cases discussing the Ripper Clause have been sporadic. In *Tygesen v. Magna Water Company*, 226 P.2d 127 (Utah 1950), the Court found no violation of the Ripper Clause where a legislative act vested control of county-initiated improvement districts to perform functions "separate and distinct from any of the functions assumed" by the county, stating that improvement districts do not control municipally owned properties or "the manner of the performance of any of the functions which the counties have assumed." *Id.* at 130. *See also County Water System v. Salt Lake City*, 278 P.2d 285 (Utah 1954) (holding city's sale of excess municipal water outside its borders was incidental to city function and is not subject to Public Service Commission regulations).

In one case from 1975, the Pollution Control Board, to which the Legislature had granted authority over all bodies of water within Utah, had issued citations to Salt Lake City for code violations. *State Water Pollution Control Bd. v. Salt Lake City*, 311 P.2d 370 (Utah 1957). In considering the Ripper Clause, the Utah Supreme Court noted that sewage disposal is "almost invariably left to cities to perform" and that statutes had specifically granted cities the power to operate sewer systems. *Id.* at 374. However, the Court noted, the Pollution Control Board has the authority to step in when a municipality may operate a water system that threatens to pollute the waters "beyond the confines of the city." *Id.* at 375.

In Backman v. Salt Lake County, 375 P.2d 756 (Utah 1962), the Court was tasked with determining the constitutionality of a legislative requirement that all counties of a certain size

hold a special election to fund a county auditorium and sports arena, and which levied a tax in the counties. In finding the mandate a violation of the Ripper Clause, the court commented, in *dicta*, that if the Ripper Clause "has any meaning at all, it would seem to be applicable here; otherwise a legislative act could create a commission with authority to levy 10 mills,—or more, to operate and maintain the highway system of a municipality, its parks and recreation areas, sewage disposal, health department, the police force, the fire department, parades, and even municipal government itself, ad infinitum." *Id.* at 761.

The Court later overturned *Backman*, in part, in *Municipal Building Authority of Iron County v. Lowder*, 711 P.2d 273 (Utah 1981). There, Iron County desperately needed a new jail but was prohibited by the Utah Constitution from taking on debt without voter approval, and the voters had rejected a bond to fund a new jail. The Court operated under the assumption that a jail is a municipal function. *Id.* at 281. Under the state's Municipal Building Authority Act, Iron County created a Building Authority to take out a loan, construct the jail, and lease it to the county. The county itself took on no debt. The Court stated, "[o]f course the Act is intended to permit avoidance of the constitutional debt limitations. It is the very rigidity of those limitations that has led the courts to narrowly construe them and the legislature to actively assist local government in avoiding them." *Id.* at 280. In splitting from the *Backman* decision from nearly 20 years earlier, the Utah Supreme Court rejected the "restrictive and anachronistic approach" of *Backman* regarding taxation. "Instead, we construe the prohibitions of article VI, section 28 narrowly so as to facilitate flexibility in local government finance." *Id.* at 281.

In *Tribe v. Salt Lake City Corporation*, 540 P.2d 499 (Utah 1975), the Court upheld provisions in the Redevelopment Act enabling Redevelopment Agencies to tackle blight. Although blight in Salt Lake City "would appear to have only local operation, [] it must be

remembered that it is a local operation of an act of general statewide scope." *Id.* at 502. Whether the Redevelopment Agency's actions were constitutional under the Ripper Clause, the Court stated, "hinges on whether the objects and purposes of the Act are statewide or local; and whether the Agency, as structured by the Act, is such a one as can concurrently exist with municipal corporations and assessment units." *Id.* *Tribe* clarified that the Ripper Clause prohibits legislative interference only in "areas of purely municipal concern." *Id.* at 503.

Next came the *Firefighters* case. *Salt Lake City v. Int'l Ass'n of Firefighters, Locals 1645, 593, 1654 & 2064*, 563 P.2d 786 (Utah 1977). In discussing public firefighters, the Utah Supreme Court stated that "[b]y conferring the right to perform a state affair, the matter is not converted into a municipal function, over which the state has constitutionally relinquished control. The state may withdraw or modify that portion of its power, which it has conferred." *Id.* at 789. The Court cited to a case from Nebraska that considered the municipal-function-versus-state-function question in a different way, *i.e.*, whether the state could intervene if a municipality were to abolish—essentially abandon—its own municipal powers over the same action:

> This concept is illustrated in *Axberg v. City of Lincoln*, wherein it was observed that if a fire department be deemed purely a matter of local self-government, it could be impaired or abolished and the state would be unable to interfere. Police and fire protection are essential to the administration of state government, which has the duty to protect and defend the rights of its citizens to life, liberty, and property. The duty of the state cannot be circumscribed by city limits, particularly where uniform state action may often be required. Police, fire, and health protection are matters of statewide concern.

Id. at 789-790 (*citing Axberg v. City of Lincoln*, 141 Neb. 55, 2 N.W.2d 613 (1942)).

Shortly after *Firefighters*, the Utah Supreme Court again addressed urban blight in *Salt Lake County v. Murray City Redevelopment*, 598 P.2d 1339 (Utah 1979). Finding no Ripper Clause violation, the court noted, "[a]s redevelopment inures to the benefit of the public

generally, the public may be charged for the benefits of improvements through general taxation of the state, not solely by Murray City." *Id.* at 1343. Then, in *State v. Hutchinson*, 624 P.2d 1116 (Utah 1980), the Utah Supreme Court disavowed Dillon's Rule, under which a grant of power to municipalities is "strictly construed to the exclusion of implied powers not reasonably necessary in carrying out the purposes of the expressed powers granted." *Id.* at 1119 n.4. The Court observed that strict construction of a general welfare grant "effectively nullifies the legislative grant of general police powers." *Id.* at 1119. "Broad construction of powers of cities is consistent with the current needs of local governments." *Id.* at 1125.

In addition to the above cases from Utah, the parties have cited several cases from outside Utah that have deemed the following to be pure municipal functions: salaries of municipal employees, the power to levy taxes, bonds secured by municipal property, setting rates for municipally-owned utilities, and public parks. *See Peters v. Parkhouse*, 36 Pa. D&C 2d 527 (C.P. 1965); *Merchants' National Bank of San Diego v. Escondido Irrigation District*, 77 P. 937 (Cal. 1904); *Town of Holyoke v. Smith*, 226 P. 158 (1924); and *Hames v. City of Polson*, 215 P.2d 950 (Mont. 1950).

The case law described above was the historical backdrop against which the Utah Supreme Court decided the watershed 1988 case of *City of West Jordan v. Utah State Retirement Board,* 767 P.2d 530 (Utah 1988). That case summarizes prior Utah jurisprudence regarding the Ripper Clause; candidly acknowledges the prior lack of a cohesive analytic framework for the consideration of claimed constitutional violations under the Ripper Clause; and sets forth an analytical framework to assess whether a statute's delegation of authority to a special commission is "sufficiently infused" with a state interest to pass muster under the Ripper Clause, or whether it delegates activities of "exclusively local" interest in violation of the constitution.

The analytical approach set forth in *West Jordan* remains valid law in Utah,[12] and this court is obligated to follow it.

In *West Jordan*, the Utah Legislature had enacted a state retirement system in which political subdivisions were presumed members unless they specifically opted out. At first West Jordan opted out, then later it opted in, and then it attempted to opt out again. In response, the Legislature passed a bill stating that any political subdivision of the state that was a member of the retirement system prior to 1982 may not opt out, but any political subdivision that was not a member by 1982 was presumptively a member but could voluntarily opt out. The city challenged the legislation under the Ripper Clause, arguing that the state had usurped the city's municipal function of operating a retirement system for public employees.

The Court in *West Jordan* acknowledged the difficulty in pinning down what constitutes a municipal function versus a state function under the Ripper Clause, noting that its prior cases were not particularly helpful to its analysis. The Court declined to provide a "hard and fast" list of purely municipal functions or of state functions. *Id.* at 534. "However, our more recent cases, such as *Tribe* and *International Ass'n of Firefighters,* reflect an increasing willingness to recognize that many functions traditionally performed by municipalities may be sufficiently infused with a state, as opposed to an exclusively local, interest to escape characterization as 'municipal functions' for purposes of article VI, section 28." *Id.* at 534. The Court created a non-exclusive list of three considerations to guide future courts in determining whether an activity delegated by a statute is "sufficiently infused" with a "state interest" to pass

[12] *See, e.g., Utah Associated Municipal Power Systems v. Public Service Comm. of Utah*, 789 P.2d 298 (Utah 1990) (restating, reaffirming, and applying the method of analysis for Ripper Clause claims set forth in *West Jordan*). There has been no case that is binding on this court subsequent to either *West Jordan* or *UAMPS* that modifies the analytical approach mandated by those cases or calls the validity of that analysis into question in any way.

constitutional muster, or is a municipal function characterized by an "exclusively local interest" that the legislature may not delegate under the Ripper Clause: (1) the relative abilities of the state and municipal governments to perform the function, (2) the degree to which the performance of the function affects the interests of those beyond the boundaries of the municipality, and (3) the extent to which the legislation will intrude upon the ability of the people within the municipality to control, through their elected officials, the substantive policies that uniquely affect them. *Id.* "This sort of balancing approach is best suited to accomplishing the purposes of the ripper clause without erecting mechanical conceptual categories that, without serving any substantial interest, may hobble the effective government which the state constitution as a whole was designed to permit." *Id.* at 534.

Also, and very importantly for purposes of this case, the Court clarified in *West Jordan* that legislative enactments fall outside the ambit of the Ripper Clause unless they involve the "delegation" of activities to a special commission, private corporation, or association. "Article VI, section 28 prohibits *only* the legislature's *delegating* certain powers relative to municipal matters to a special commission." *Id.* at 533 (emphasis added). Thus, the Ripper Clause does not prohibit direct legislative interference with municipal activities, even those that are significantly disruptive. Unless a legislative mandate involves the "delegation" of an activity to a special commission or other similar entity, as opposed to direct interference with an activity, the legislation does not implicate the Ripper Clause.

The *West Jordan* Court upheld the constitutionality of the Retirement Act, finding the retirement board had not intruded "in the functioning of local government; it simply manages the funds in an actuarily sound fashion and pays benefits." *Id.* at 535. The state can do a better job of providing a financially sound retirement program to public employees by consolidating funds,

a function municipalities cannot do. Through the state's general welfare powers, the State has a legitimate interest in the retirement benefits for all its public employees across the state. And the legislation left local units with complete autonomy as to whether to offer retirement benefits to their employees. *Id.* "On balance, we conclude that the level of intrusiveness on local self-government resulting from this legislation is minimal and does not warrant our holding that the policies underlying the ripper clause are affected." *Id.* Although *West Jordan* is over thirty years old, its non-exclusive, three-part test for determining whether a function is "state" or "local" in nature remains binding for the purpose of analyzing Ripper Clause claims.

c. The City's Claims under the Ripper Clause

The City contends that the Act violates the Ripper Clause by infringing on the City's powers over (a) land use and zoning, (b) municipal functions, and (c) municipal monies.

The court must approach the City's challenges presuming the constitutional validity of the Act. *See, e.g., West Jordan*, 767 P.2d at 532 ("[W]e begin with the presumption of validity that must be accorded legislative enactments when attacked on constitutional grounds. The burden is on those who would have us strike down an act."); *Richards v. Cox*, 2019 UT 57 at ¶ 39, 450 P.3d 1074 ("[W]hen confronted with a constitutional challenge to a statute, [the court must] presume the statute to be constitutional, resolving any reasonable doubts in favor of constitutionality."); *State v. Drej*, 2010 UT 35, ¶ 9, 233 P.3d 476 (presuming challenged legislation is constitutional and resolving any reasonable doubts in favor of constitutionality); *State v. Herrera*, 1999 UT 64, ¶ 18, 993 P.2d 854 (the Court will not strike down legislation unless it clearly violates a constitutional provision); *Merrill v. Utah Labor Comm'n*, 2009 UT 26, ¶ 5, 223 P.3d 1089 (the party challenging a statute bears the burden of proving its invalidity); and *Utah Technology Finance Corp. v. Wilkinson*, 723 P.2d 406, 412 (Utah 1986) (courts should not

upset a legislative determination unless it is "palpably erroneous"). "The courts have a duty to investigate and, insofar as possible, discover any reasonable avenues by which the statute can be upheld." *Trade Commission v. Skaggs Drug Centers, Inc.*, 446 P.2d 958, 962 (Utah 1968). However, "there is a limit: if the legislature has erred in its understanding of the constitution, it is our right and duty to intervene. We do not abrogate our duty to interpret and apply the mandates of the constitution." *Richards*, 2019 UT 57 at ¶ 40.

The court must also approach its analysis bearing in mind, as noted above, that cities are political subdivisions of the State. Their powers are either expressly given or are implied as essential to carrying out the objectives and responsibilities granted by law. *Johnson v. Sandy City Corp.*, 497 P.2d 644, 645 (Utah 1972). *See also Salt Lake City v. Tax Comm'n of Utah*, 11 Utah 2d 359, 362 (1961) ("Cities are the creatures and agencies of the state, which latter possesses plenary power over them."); *Call v. City of West Jordan*, 606 P.2d 217, 218 (Utah 1979) ("It is not questioned that cities have no inherent sovereign power, but only those granted by the Legislature."); *Allgood v. Larson*, 545 P.2d 530 (Utah 1976) ("The state may always invade the field or regulation delegated to the cities and supercede, annul, or enlarge the regulation which the municipality has attempted. It may modify or recall the police power of the city as it may abolish the city itself."); and *Firefighters*, 563 P.2d at 789 (stating Legislature may withdraw its delegation of power to municipalities, which "have none of the elements of sovereignty").

A challenge to legislation under the Ripper Clause requires a two-fold inquiry. First, the City must show that the Authority is a "special commission, private corporate or association." Utah Const. Art VI, § 28. If that threshold requirement is met, the City must then demonstrate that the Legislature delegated purely municipal functions to the Authority. The City argues the

Authority is a special commission that is unaccountable to and unrepresentative of the City. The State counters that it is an independent public corporation, a political subdivision of the State. *See* Utah Code § 11-58-201(2). The Utah Supreme Court has explained the distinction.

> A quasi-municipal corporation has been defined as a public agency created by the legislature to aid the state in some public work for the general welfare, other than to perform as another community government. A municipal corporation is a body politic and corporate, created to administer the internal concerns of the district embraced within its corporate limits, in matters peculiar to such place and not common to the state at large. A special commission is some body or group separate and distinct from municipal government. *Such a commission is not offensive to the constitution by its creation, but only when such a commission is delegated powers which intrude into areas of purely municipal concern.*

Tribe, 540 P.2d at 502–03 (emphasis added). Here, because the court finds the Act does not impermissibly delegate purely municipal activity to the Authority, it is not necessary to decide whether the Authority is a "special commission." The court will presume that it is for purposes of the Ripper Clause analysis. The Court in *West Jordan* employed a similar analytical approach. 767 P.2d at 532 ("For the purposes of argument, we will assume that the Board constitutes a 'special commission,' although the Utah cases do not give this term any clear meaning.").

The second inquiry under the Ripper Clause is whether the Legislature has delegated to the Authority power either "to make, supervise or interfere with any municipal improvement, money, property or effects" or "to perform any municipal functions." Utah Const. Art VI, § 28. While all power granted to the City ultimately flows from the State, in order for the Ripper Clause to have any import, there must be some limitation to the State's ability to usurp municipal functions. The City believes the State has crossed that line with several provisions of the Act.

Significantly, of the three Ripper Clause claims brought by the City, only one—the authority to overturn the City's administrative land-use decisions—involves the kind of "delegation" of activity that might possibly fall within the prohibitions of the Ripper Clause.

West Jordan, 767 at 533 (holding the Ripper Clause "only" prohibits "delegating"). The other two claims regarding municipal monies and municipal infrastructure are not delegations of power to interfere with a municipality's functions but are instead direct mandates and direct exercises of legislative power. Regardless, even if those aspects of the Act did delegate municipal functions to the Authority, those functions, like land-use and zoning, are sufficiently infused with a state interest that they do not violate the Ripper Clause.

i. Land Use and Zoning

The City asserts the Act confers power on the Authority to interfere with the City's municipal land-use authority in three ways: (a) by delegating zoning decisions of private property to the Authority's Appeals Panel, Utah Code § 11-58-403(5)(b); (b) by prohibiting the City from interfering with the "transporting, unloading, loading, transfer, or temporary storage of natural resources," *id.* at § 11-58-205(6); and (c) by requiring the City to approve a zoning change application or conditional use application to permit Inland Port uses, *id.* at § 11-58-205(5).[13]

The City takes particular issue with the Act's usurpation of final administrative determinations regarding the zoning of private property within the City's boundaries for any inland port use and for any reason contrary to the objectives of the Act. "Inland port use" is defined broadly as the use of land for an inland port, or a use that furthers or complements the purposes of an inland port, or a use "that depends upon the presence of the inland port for the viability of the use." *Id.* at § 11-58-102(9). The power to make such determinations is delegated

[13] The last two of these grounds—prohibiting interference with natural resources and requiring zoning approval for inland port uses—are direct legislative mandates, not delegations of power, and thus the Ripper Clause is not implicated. Nevertheless, as discussed below, even if they were delegations of power, they are sufficiently infused with a state interest to pass muster under the Ripper Clause.

to an Appeals Panel under the auspices of the Authority, thus directly implicating the question (assuming, as the court does, that the Authority constitutes a special commission) of whether such delegation runs afoul of the Ripper Clause.

The Appeals Panel consists of either the Authority's eleven-member Board of Directors or "one or more individuals designated by the board." *Id.* at § 11-58-402(2). The Act provides: "A person adversely affected by an inland port use appeal decision [of a municipality] may appeal the inland port use appeal decision to the appeals panel." *Id.* at § 11-58-403(1). The Appeals Panel conducts a *de novo* review and may:

> (5)(b) decide in favor of the person adversely affected by the inland port use appeal decision if the appeals panel determines that the inland port use appeal decision:
>
> > (i) is clearly contrary to the policies and objectives under Subsection 11-58-203(1);
> > (ii) imposes restrictions or conditions on the proposed development that unreasonably impair or essentially prohibit an inland port use; or
> > (iii) is arbitrary and capricious, or illegal[.]

Id. at §§ 11-58-403(5)(b) and -403(2)(b)(ii).

The City argues municipal land use and zoning are purely municipal functions, that the City is in a better position than the State to manage the inland port, that the effects of the inland port will be felt most by residents of Salt Lake City, and that these residents are without a voice to effect change through their locally elected representatives.

1. State Function

In *West Jordan*, the Utah Supreme Court set forth a three-pronged test for determining whether a function is a state function or a purely municipal function for purposes the Ripper Clause. This court must and will consider those three factors in deciding whether activities delegated to the Authority under the Act are state or local functions. But nothing in the *West*

Jordan opinion prohibits the court simply from assessing directly whether the Act is "sufficiently infused" with a state interest to pass muster under the Ripper Clause. Indeed, the *West Jordan* Court itself immediately engaged in considering directly whether the Retirement Act was infused with a state interest after announcing the three-part test designed to guide that inquiry. *See* 767 P.2d at 534-35 ("First, the state certainly has a legitimate interest in determining the minimum level of retirement benefits provided to public employees by its political subdivisions, among others."). Thus, *West Jordan* does not prohibit a direct and explicit analysis of whether challenged legislation is infused with a state purpose, as opposed to addressing the question obliquely through application of the three factors. The court finds it useful to address that issue directly prior to assessing the three *West Jordan* factors.

The Legislature is not prohibited from rescinding police powers it has granted to municipalities in the defense of a strong state purpose, even when this may interfere with municipal functions and hamper the ability of a local population to curtail the state activities through local elected officials. The State argues that among other things, such a state purpose arises from the legislative finding that an inland port may create 24,000 jobs throughout Utah. The City argues the creation of jobs alone is not a *per se* reason to find a valid state purpose. The court agrees in theory that an economic justification by itself may not elevate a municipal function to a state function for purposes of the Ripper Clause in some situations. But just as the Utah Supreme Court in *West Jordan* declined to adopt any hard and fast rules, the Legislature's stated purpose, policies and objectives are a reasonable manifestation of a compelling state purpose to "maximize long-term economic benefits," create high-quality jobs, facilitate the transportation of goods, and promote development of facilities to connect local businesses to foreign markets. Utah Code § 11-58-203(1). The court affords deference to those legislative

findings. In this case, the inland port is a massive, state-wide project, and the State's interest in maintaining consistency over zoning regarding inland port uses is necessary for its smooth operation.

2. Relative Abilities

West Jordan next requires an analysis of the relative abilities of the City and the State to perform the functions in question. The City argues zoning of private property is a municipal function for both historical and practical reasons. It cites Utah's Municipal Code, which endows municipalities with the authority to divide their territories into zoning districts and to "regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings and structures, and the use of land." Utah Code § 10-9a-505(1). Likewise, Utah's Municipal Land Use, Development, and Management Act grants municipalities the authority to provide for the health, safety, and welfare of its residents. In particular,

> To accomplish the purposes of this chapter, a municipality may enact all ordinances, resolutions, and rules and may enter into other forms of land use controls and development agreements that the municipality considers necessary or appropriate for the use and development of land within the municipality, including ordinances, resolutions, rules, restrictive covenants, easements, and development agreements governing: uses; density; open spaces; structures; buildings; energy efficiency; light and air; air quality; transportation and public or alternative transportation; infrastructure; street and building orientation; width requirements; public facilities; fundamental fairness in land use regulation; and considerations of surrounding land uses to balance the foregoing purposes with a landowner's private property interests and associated statutory and constitutional protections.

Id. at § 10-9a-102(2).

The City argues that in addition to the statutory authority given to cities, the City itself is better situated to handle zoning issues regarding private property, and it has a long history of doing so through general and master planning to guide development. The City has 67 separate zoning categories, and when it reasonably anticipates negative effects from a land use, the City

may impose conditional uses such as limiting hours of operation or imposing mitigation measures for noise or pollution. The City's land-use decisions are reviewed by three subdivisions staffed by land-use experts. The Division of Building Services reviews routine building permit applications; the Planning Division with a staff of 30 considers conditional use permit applications, planned development, and special exceptions; and the Planning Commission, made up of city residents appointed by the Mayor and with the consent of the City Council, addresses the more impactful use permitting and planned development issues. The Planning Commission holds public hearings and issues findings and recommendations that may be appealed to a hearing officer.

The City points to its agreement with the State regarding the Utah State Prison relocation project as an example of appropriate land-use power-sharing. There, the City and the State's Division of Facilitates Construction and Management executed an agreement regarding the infrastructure, design, construction, ownership, and funding of necessary municipal improvements to serve the new prison. Under that agreement, the City retains oversight authority over the affected private properties. The City also points to the prison relocation project as an example of the State's lack of municipal-planning experience and poor foresight. The City asserts the State has refused to fund any infrastructure beyond the bare minimum required to service the prison, particularly regarding sewer and water lines, pump stations, streetlights, and roads. The City posits that any additional development to private property near the prison will require renovations to infrastructure that could have been avoided had the State planned ahead.

The State first counters that land-use regulations, including zoning, are state police powers that may be delegated but not surrendered. Utah's Municipal Code provides: "A

municipality may not impose a requirement, regulation, condition, or standard that conflicts with a provision of this chapter, other state law, or federal law." Utah Code § 10-9a-104. "The provisions of this Act may not be considered as impairing, altering, modifying or repealing any of the jurisdictions or powers possessed by any department, division, commission, board or office of state government." *Id.* at § 10-1-108. *See also Village of Euclid, Ohio v. Amber Realty Co.*, 272 U.S. 365, 387-88 (1926) (holding that a city's zoning ordinance was an appropriate use of state police power); *Norton v. Village of Corrales*, 103 F.3d 928, 932 (10th Cir. 1996) (referring to "the exercise of the state's traditional police power through zoning"); *Reed Co. v. North Salt Lake City*, 431 P.21d 559, 562 (Utah 1967) ("The power of North Salt Lake to zone is derived from the state."); *Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602, 607 ("[I]t is established that an owner of property holds it subject to zoning ordinances enacted pursuant to a state's police power."); *Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 252 (Utah Ct. App. 1998) (recognizing that a city's power to enact zoning ordinance and to regulate private property stems from its police power); and *W. Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 390 (Utah 1980) ("It is established that an owner of property holds it subject to zoning ordinances enacted pursuant to a state's police power.").

The State also argues it is in a better position to operate an inland port, citing the portion of the Act explaining the Legislature's rationale for a state-wide Act.

> (3)(b) The duties and responsibilities of the authority under this chapter are beyond the scope and capacity of a municipality, which has many other responsibilities and functions that appropriately command the attention and resources of the municipality, and are not municipal functions of purely local concern but are matters of regional and statewide concern, importance, interest, and impact, due to multiple factors, including:
>
> > (i) the strategic location of the authority jurisdictional land in proximity to significant existing and potential transportation infrastructure, including infrastructure provided and maintained by the state, conducive to

> facilitating regional, national, and international trade and the businesses and facilities that promote and complement that trade;
> (ii) the enormous potential for regional and statewide economic and other benefit that can come from the appropriate development of the authority jurisdictional land, including the establishment of a thriving inland port;
> (iii) the regional and statewide impact that the development of the authority jurisdictional land will have; and
> (iv) the considerable investment the state is making in connection with the development of the new correctional facility and associated infrastructure located on the authority jurisdictional land.
>
> (c) The authority is the mechanism the state chooses to focus resources and efforts on behalf of the state to ensure that the regional and statewide interests, concerns, and purposes described in this Subsection (3) are properly addressed from more of a statewide perspective than any municipality can provide.

Utah Code § 11-58-§ 201(3). The City decries this statutory characterization of the Act's need for state interference as self-serving, and it invites the court to disregard the weight of the Legislature's conclusions.

But the court may not disregard legislative findings as casually as the City suggests. The mere fact that the City is entitled to have genuine disputes of material fact resolved in its favor for summary judgment purposes does not require or permit the court to disregard legislative findings because the City contends they are disingenuous. To the contrary, the court is required to afford deference to legislative findings. In a prior Ripper Clause case, the Utah Supreme Court explained that "facts of the Legislature are presumed constitutional, especially when dealing with economic matters based on factual assumptions." *Wilkinson*, 723 P.2d at 412. That Court stated,

> We find no violation of [the Ripper Clause] here. The legislature in rather lengthy findings has determined that the aiding of emerging high-tech businesses will foster the growth of the state's economy and assist in creating employment for the citizens of the state. These findings are entitled to respect and weight by the judiciary and should not be overturned unless palpably erroneous.

Id. at 412-13.

Although the court does not necessarily accept at face value the Act's implication that the City (or any city) is incapable of fulfilling the responsibilities and duties of operating an inland port, the relevant consideration is not whether the City itself could competently do the job, but which entity is better positioned to do the job, and the Act's recitation of reasons why the State is better suited to operate the inland port is reasonable, particularly considering the strategic location of the Salt Lake City area to increasing Utah-based, national, and international trade. The jurisdictional land is at a literal crossroads of transportation with the potential for growth; and if, as hoped by the State, the inland port expands to other areas of Utah, this hub-and-spoke model is more efficiently operated by one entity. The City's competing contention is not that an inland port is bad policy or should not be located in the Northwest Quadrant. As noted above, despite passionate local opposition to the very concept of an inland port, the issue this court has been tasked to decide is only whether the City or the State has the constitutional authority to operate an inland port, not whether an inland port is a good idea.

Given the undisputed premise of this case that an inland port will be developed in the Northwest Quadrant, the Legislature has reasonably concluded that the function of running an inland port is a function properly within the State's ability to take over from the City and delegate to a port authority. In *West Jordan*, the Utah Supreme Court found that the State was better suited to provide a financially sound retirement program than a municipality. It stated that "there is every reason to believe that the state, by consolidating funds from many smaller political subdivisions and providing for continuity and expertise in the management of the funds, can do a better job than each separate local unit of government." 767 P.2d at 535. Likewise

here, consolidating land use policies into the Authority's purview could streamline the purpose of the Act to increase commerce and trade through the inland port.[14]

Nor does the court find fault with the State's contention that the Appeals Panel may appropriately exercise *de novo* review of the City's administrative zoning decisions and overturn those decisions it deems "clearly contrary to the policies and objectives under" the Act. Utah Code § 11-58-403(5)(b)(i). For the City to have ultimate say over the zoning of private property within the jurisdictional land, the State argues, could frustrate and impede the State's ability to promote economic well-being within Utah. For example, in the case of a wholly state purpose such as housing prisoners, whatever location the Legislature chooses will coincide with property located within a county and perhaps also a municipality. If the prison were surrounded by a city or county refusing to grant access to the prison, a political subdivision could stymie a critical state function in service of purely local objections. There surely are times when exercising a state function may require the interference with local control. Here, were the City to make land use decisions contrary to the goals of the Act, it could frustrate and impede the State's ability to promote the inland port.

Finally, it is significant that the Act delegates the above-described land-use and zoning powers to the Authority only with respect to projects that are "inland port uses" or that are

[14] The parties raise two others points that are of limited relevance. First they discuss which of them is better situated to operate a "foreign trade zone" such as the one the City currently operates at the Salt Lake International Airport, and the City points out that far more cities than states operate foreign trade zones around the country. The State points out that New York and New Jersey both have ripper clauses, and they host a joint port authority (PANYNJ), which manages vast amounts of roads, tunnels, bridges, airports, etc., that it either owns or leases. The City retorts that PANYNJ does not exercise land use authority over private property. Pennsylvania also has a ripper clause and a port authority that does not regulate land use of private property (although it may relocate facilities without complying with local zoning ordinances). The majority of port authorities, the City asserts, are operated by municipal or similar political subdivisions and are generally funded through tolls, fares, rentals, or the state treasury. The court accepts this assertion as true for the purpose of the parties' motions.

"clearly contrary to the policies and objectives under the Act." In other words, the land-use and zoning powers delegated to the Authority are tailored to the legislative purposes enumerated in the Act—purposes that are sufficiently infused with a state interest to satisfy the constraints of the Ripper Clause. The Act does not purport to divest the City of all land-use and zoning power within the jurisdictional land. The City will still exercise its traditional land-use and zoning authority within the jurisdictional land except with respect to uses that either support or interfere with the inland port.

The City dismisses these limitations as meaningless, arguing the Authority will just characterize anything it wants to as an "inland port use" or an interference with the purposes of the Act and essentially usurp all City land-use and zoning authority within the jurisdictional land. The court is not persuaded this is a realistic concern. The language of the Act places the above-described limitations on the types of projects over which the Authority may exercise power. If the Authority were to disregard those limitations and attempt to exercise authority over projects that are not "inland port uses" or contrary to the purposes of the Act, there does not appear to be any impediment to the City seeking judicial relief to reclaim its power over land-use and zoning decisions that fall outside the scope of the powers delegated to the Authority.

3. Effects Outside Salt Lake City

The next element of the *West Jordan* test considers the degree to which the land use functions at issue affect those Utahans living outside the City's borders. While currently confined to primarily the City's borders, the inland port project appears to be a legislative work in progress and is expected to expand in geographical scope. If that occurs, Utah residents outside Salt Lake City would be directly affected. Regardless, even without actualization of the hub-and-spoke expansion, residents outside Salt Lake City are not unaffected by the ability of

the Authority to run the inland port as intended. The State points to a feasibility study by the Governor's Office of Economic Development that estimated that the inland port could create up to 24,000 new jobs. Not all of the employees working directly or tangentially on inland port functions will live in Salt Lake City.

4. Intrusion

The last factor of *West Jordan* is the "disenfranchisement" or "intrusiveness" element, and it represents the "paramount purpose" of the Ripper Clause, *i.e.*, "to prevent interference with local self-government." *West Jordan*, 767 P.2d at 534. The City asserts that, when read together, Utah's cases addressing the Ripper Clause reflect an overarching policy that land-use decisions are best controlled by local elected officials who are accountable to those who are affected. *See, e.g., State Water Pollution Control Bd.*, 311 P.2d at 376 (striking state pollution control board's authority over City's sale of water in its boundaries, as contrasted with water district in *Lehi v. Meiling* "initiated by the cities desiring the district") (citing *Lehi City v. Meiling*, 48 P.2d 530 (Utah 1935)); *Tribe*, 540 P.2d at 502 ("The agency is separate and apart from city government and yet is administered by a legislative body responsible to the local electorate."); *Tygesen*, 226 P.2d at 130 (recognizing statutes permitting creation of water districts and water improvement districts where "the initiating agencies were the legislative bodies of the cities desiring the districts"); and *Specht v. City of Sioux Falls,* 526 N.W.2d 727, 732 (S.D. 1995) (relying on *West Jordan* and finding authority managed by unelected commissioners with life terms had the "statutory authority to become a self-propelled, unaccountable, bureaucratic freight train"). *But see Firefighters,* 563 P.2d at 789 ("Thus, the act authorizes the appointment of arbitrators, who are private citizens with no responsibility to the public, to make binding determinations affecting the quantity, quality, and cost of an essential public service. The

legislature may not surrender its legislative authority to a body wherein the public interest is subjected to the interest of a group which may be antagonistic to the public interest.").

The State responds that the Act is not without limitations on the Appeals Panel's ability to affect the City's administrative land use determinations. The Act specifically provides that, except for the duties enumerated to the Appeals Panel, it "does not have and may not exercise any powers relating to the regulation of land uses on the authority jurisdictional land." Utah Code § 11-58-205(4). In addition,

> (b) An appeals panel may not consider an appeal of an inland port use appeal decision to the extent that the appeal involves municipal requirements concerning:
>
> (i) the construction of public utilities;
>
> (ii) the administration of construction codes defined in Section 15A-1-202;
>
> (iii) the permitting and building plan review for a development project, unless the appeal involves a denial of an inland port use application;
>
> (iv) the municipality's enforcement of a violation of a municipal code provision, unless the provision is inconsistent with the purposes of this chapter; or
>
> (v) fees or fines.

Id. at § 11-58-403(1). The court acknowledges the City is facing intrusion by the State on what it considers crucial land-use choices related to the wellbeing of its residents. Potential impacts could include increased pollution, noise and traffic and the appurtenant effects of those. Nor does the court deny that the Authority's Board of Directors and Appeals Panel are not elected to their roles and are not directly accountable to the City's residents through the local elective process (other than the one member of the Salt Lake City Council). However, on balance the court concludes that the delegation of exclusive decision-making over municipal zoning determinations does not violate the Ripper Clause. The appropriate question is not whether the function is municipal in nature, because indeed municipal zoning is almost always conducted by

municipalities or counties, but whether it is the type of function intended to be protected under the Ripper Clause, which the Utah Supreme Court has limited to activities that are "particularly" or "exclusively" local functions. *See West Jordan*, 767 P.2d at 523. The Court in *West Jordan* stated:

> [O]ur more recent cases, such as *Tribe* and *International Ass'n of Firefighters*, reflect an increasing willingness to recognize that many functions traditionally performed by municipalities may be sufficiently infused with a state, as opposed to an exclusively local, interest to escape characterization as "municipal functions" for purposes of article VI, section 28.

West Jordan, 767 P.2d at 534. Here, the *West Jordan* elements militate in favor of finding that the State is better positioned than the City to manage the inland port functions, via delegation to the Authority, without unconstitutionally interfering with the City's pure municipal duties. And the degree to which the inland port will affect Utah residents outside of Salt Lake City will, if anything, increase in the future.

ii. Municipal Functions

The City claims the Act interferes with its authority over core municipal functions by delegating to the Authority the power to develop, on private property within the City's boundaries, inland port infrastructure. The City then will be responsible for the upkeep and maintenance of the infrastructure, particularly of roads and sidewalks, including pothole repair, paving and snow removal; street lights; water and sewer pipelines; and trash pick-up, traffic control, fire and police service, and storage of hazardous items.

The Act delegates to the Authority the right to:

> (2)(b) facilitate and provide funding for the development of the authority jurisdictional land and land in other authority project areas, including the development of publicly owned infrastructure and improvements and other infrastructure and improvements on or related to the authority jurisdictional land;

Utah Code § 11-58-202(2)(b).[15] This portion of the Act applies to only those cities with jurisdictional land within their boundaries, *i.e.*, Salt Lake City, Magna and West Valley City.

> A municipality whose boundary includes authority jurisdictional land shall provide the same municipal services to the area of the municipality that is within the authority jurisdictional land as the municipality provides to other areas of the municipality with similar zoning and a similar development level.

Id. at § 11-58-205(7)(a)(i).

The City asserts it already engages in long-term planning for development of municipal infrastructure, but under the Act, the City is given no say in the construction of infrastructure that will eventually be deeded to the City and must be maintained by the City. The City must take on the liability for infrastructure that it may not have wanted in the first place, or that may not be constructed to specifications with which the City is comfortable. The City acknowledges the Act requires the Authority to reimburse the City for these increased municipal services due to inland port uses, but the City complains it is required to front the costs of the increased infrastructure, beyond the City's annual budget, which makes planning and allocation of limited resources difficult.[16]

The Authority's power over municipal functions on jurisdictional land is a specifically mandated power, not a delegation of discretionary power, and therefore, the Ripper Clause is not implicated. Moreover, even if the municipal functions given to the Authority were discretionary, it would still be constitutional under the *West Jordan* test because it is sufficiently infused with a state interest. In order to maintain consistency and efficiency in operating the inland port, the

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[15] "Publicly owned infrastructure and improvements" includes lines for water, sewer, gas, electricity, telecommunication and "streets, roads, curb, gutter, sidewalk, walkways, solid waste facilities, parking facilities, and public transportation facilities." Utah Code § 11-58-102(18).

[16] As with the issue of whether the City has a remedy if the Authority attempts to broaden its power beyond the limitations set forth in the Act, it appears to the court the City will have a wide range of judicial remedies available to it to ensure it receives adequate and timely reimbursement for infrastructure it constructs pursuant to the requirements of the Act.

State is better suited to plan the municipal infrastructure for inland port uses. In addition, performance of the Authority's functions affects the interests of many in Utah beyond the City's borders, especially considering the planned satellite areas. And although the City's residents may be disenfranchised regarding inland port activities, on the whole, the infrastructure development mandated by the Act is sufficiently infused with a state interest. Municipal land use authority stems from the State, and the State may reassert its authority over the same.

iii. Municipal Monies

The City asserts that the Act violates the portion of the Ripper Clause prohibiting the Legislature from delegating "any power to . . . interfere with any municipal . . . money." Utah Const. Art VI, § 28. The City calculates that the Act will redirect $360 million in property tax revenue away from the City. The Act mandates that the Authority

> (A) shall be paid 100% of the property tax differential, as provided in Subsection (3), for a period of 25 years after a certificate of occupancy is issued with respect to improvements on a parcel, as determined by the board and as provided in this part; and
> (B) may be paid up to 100% of the property tax differential, as provided in Subsection (3), for a period of 15 additional years beyond the period stated in Subsection (1)(a)(i)(A) if the board determines that the additional years of property tax differential will produce a significant benefit;

Utah Code § 11-58-601(1)(a). The Authority may use the property tax differential "for any purpose authorized under this chapter." *Id.* at § 11-58-602(1)(a). Beginning January 1, 2020, the Authority will also start receiving a portion of the sales and use tax revenue collected by the City for points of sale within the jurisdictional land. *Id.* at § 11-58-602(7).

The City argues collection of property tax is the essence of local self-government, and the loss of the tax differential hobbles its ability to provide municipal services for the increased infrastructure. Property taxes constitute roughly one-third of the City's general fund, which it uses for public development, municipal infrastructure, improvements, police and fire services,

public areas, permitting and licensing, parks and open space, and implementation of other policy objectives. The City notes that last year there was a 49% increase in property tax revenue on the jurisdictional land from the year before, and the proceeds from the sales and use taxes increased 30% from the prior year.

Here again, the diversion of the tax differential is a direct legislative mandate and is not a delegation of power subject to the Ripper Clause. Not only is the Authority's right to receive the tax differential a direct mandate, but the Utah Supreme Court has previously held the Legislature possesses the power to divert tax revenue from municipalities and counties. *See Tribe*, 540 P.2d at 504 ("the law is well settled that in exercising the powers of the state, the legislature may require the revenue of a municipality, raised by taxation, to be applied to uses other than that for which the taxes were levied"); *State ex rel. Public Service Commission v. Southern Pac. Co.*, 79 P.2d 25, 38 (Utah 1938) ("If the discretion and power of the Tax Commission had been given it by the Legislature under its plenary power over taxation, then the Legislature could withdraw part or all of the authority which it had delegated. . . . Legislative power over taxation is plenary except where limitations or exceptions are expressed in the basic law."); and *Zissi v. State Tax Com'n of Utah*, 842 P.2d 848, 855 (Utah 1992) ("in areas of economic regulation, we grant broad deference to the legislature").

The City has been granted the power to tax, but the Legislature may limit this power. *See Plutus Mining Co. v. Orme,* 289 P.132, 139 (Utah 1930) ("The authority of a city to tax property is not a vested right. Unless prohibited by some constitutional provision, the Legislature may limit or even deprive cities of their power to tax."); and *Moss ex rel. State Tax Commission v. Board of Com'rs of Salt Lake City*, 262 P.2d 961, 964 (Utah 1953) ("The City's power to tax is derived solely from legislative enactment and it has only such authority as is expressly conferred

or necessarily implied."). The State has the authority to direct how tax revenues are distributed among political subdivisions. *See Mountain States*, 811 P.2d at 192 ("The state, as we have already pointed out, in enacting the law in question, simply calls upon its agencies, the counties, and the cities to assist in discharging a public duty which in no way affects local self-government.") (*citing Salt Lake County v. Salt Lake City*, 134 P. 560 (1913)). Here, the Legislature is not taxing the City nor is it infringing on the City's right to tax property, sales and uses within its boundaries. It is instead redirecting a portion of taxes allocated by the City. *See* Utah Const. Art XIII, § 5(4) ("[T]he Legislature may not impose a tax for the purpose of a political subdivision of the State, but may by statute authorize political subdivisions of the State to assess and collect taxes for their own purposes.").

Even if the tax differential provisions of the Act were not a mandate from the Legislature but were instead a delegation of discretionary power to the Authority, these provisions still would not run afoul of the Ripper Clause. The Legislature's decision to redirect tax differentials generated within the jurisdictional land is within its taxing power, which it cannot relinquish to municipalities. Although the City claims it could use the tax differential more wisely than the Authority, that is not an issue the court has the power to correct. Even if the court harbors doubts about the wisdom or the fairness of the Legislature's decision regarding diversion of the tax differential, the court lacks the prerogative to set aside decisions made within the Legislature's broad policy making authority on the ground that the court finds the decisions objectionable for policy reasons.

II. Article XI, Section 8

The City brings a separate claim for declaratory relief under Article XI, Section 8 ("Section 8") of the Utah Constitution, under which the Inland Port Authority was established.

See Utah Code § 11-58-201. Both sides have sought summary judgment in their favor regarding that claim as well. Section 8 provides:

> The Legislature may by statute provide for the establishment of political subdivisions of the State, or other governmental entities, in addition to counties, cities, towns, school districts, and special service districts, to provide services and facilities as provided by statute. Those other political subdivisions of the State or other governmental entities may exercise those powers and perform those functions that are provided by statute.

Utah Const. Art XI, § 8. *See Metro. Water Dist. of Salt Lake & Sandy v. Sorf*, 2019 UT 23, ¶ 1, 445 P.3d 443 (holding Section 8 authorizes "quasi-governmental entities known as limited purpose local districts.").

In arguing that the City's residents who may be uniquely affected by inland port uses are without recourse to address their concerns through locally elected representatives, the City argues Section 8 should be read "in harmony" with Article XI, Section 7 ("Section 7") of the Utah Constitution. *See Univ. of Utah v. Shurtleff*, 2006 UT 51, ¶ 17, 144 P.3d 1109 ("When interpreting the constitution, we strive to harmonize constitutional provisions with one another and with the meaning and function of the constitution as a whole."); and *American Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 18, 140 P.3d 1235 ("conventional methods of constitutional interpretation [] dictate that when determining the meaning of a constitutional provision, other provisions dealing generally with the same topic assist us in arriving at a proper interpretation of the constitutional provision in question.") (internal citation and quotations omitted).

Section 7 permits the Legislature to authorize special service districts, but only "upon the assent of a majority of the qualified electors of the special service district," and a district may contain multiple cities or towns "but only with the consent of the governing authority of each city or town to be included in the special service district." Utah Const. Art XI, § 7. The City argues Section 7 indicates a constitutional intent that political subdivisions, or arms thereof,

should exist only at the behest of local residents. The City argues that unless the consent limitation of Section 7 is read into Section 8, there is nothing to stop the State from encircling, for example, a lucrative ski resort or a high-tech complex and taking control over the zoning to the State's benefit.

The court is not prepared to extrapolate language from Section 7, wherein special service districts for such services as municipal water or electricity are geographically local functions, and engraft them onto Section 8. The City has cited no cases suggesting this is a proper interpretation of Section 8, which on its face merely authorizes the Legislature to create political subdivisions but does not prohibit it from doing anything. To apply the same condition to Section 8's broad authority to create "political subdivisions of the State, or other governmental entities" would be contrary to the plain language of Section 8, which contains no such limiting language and is simply inapplicable in this case. The City's claim under Section 8 fails as a matter of law.

III. Article XI, Section 5

The City also asks the court to read the Ripper Cause in harmony with Article XI, Section 5 ("Section 5") of the Utah Constitution, and it brings a separate claim under this section. Section 5 states, in relevant part:

> The Legislature may not create cities or towns by special laws.
> . . .
> 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:
>
> > 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.
> >
> > 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.
> >
> > 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 needed for any such improvement and to sell or lease such excess property with restrictions, in order to protect and preserve the improvement.

Utah Const. Art XI, § 5.

The City argues that in creating the Authority, the Legislature created the functional equivalent of a city by special law for the sole purpose of interfering with the City's constitutionally granted authority over its municipal functions and municipal monies. But the Authority is not a city or town; it is a special commission created by the Legislature, and therefore Section 5 does not apply. *See Tygesen*, 226 P.2d at 131 ("[T]he inhibitions of Sec. 5, Art. XI applied only to cities, towns, villages and subdivisions of these but did not apply to an arm of the government separate and distinct from a municipality"); *Freeman v. Stewart*, 273 P.2d 174, 176 (Utah 1954) (the Legislature may create non-municipal entities that are not subject to the restrictions of Section 5); *Mountain States*, 811 P.2d at 191 ("Section 5 does not prohibit the diversion of revenues raised in a county to effect a statewide purpose."); and *Tygesen*, 226 P.2d at 131 (stating that laws that apply "alike to all portions of the state and [are] made for the use and benefit of the inhabitants of all counties" do not offend Section 5).

Because the Authority is not a city or town and is not subject to Section 5, the court will not address whether the Authority was created by "special law."[17] The City's claim under Article XI, Section 5 of the Utah Constitution fails as a matter of law.

IV. Article I, Section 24: Uniform Operation of Laws[18]

The City contends the Act violates the Uniform Operation of Laws provision contained in Article I, Section 24 of the Utah Constitution. That provision states: "All laws of a general nature shall have uniform operation."

Describing the purpose of the Uniform Operation of Laws provision, the Utah Supreme Court has held as follows:

> The purpose of the uniform operation of laws provision is to prevent classifying persons in such a manner that those who are similarly situated with respect to the purpose of a law are treated differently by that law, to the detriment of some of those so classified. The essence of the uniform operation of laws principle is that legislative classifications resulting in differing treatment for different persons must be based on actual differences that are reasonably related to the legitimate purposes of the legislation. Persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same.

Merrill v. Utah Labor Comm'n, 2009 UT 26, ¶ 6, 223 P.3d 1089 (internal citations and quotations omitted). "Most classifications are presumptively permissible and thus subject to rational basis review." *In re Adoption of J.S.*, 2014 UT 51, ¶ 67, 358 P.3d 1009. *See State v. Robinson,* 2011 UT 30, ¶ 23, 254 P.3d 183 ("Broad deference is given to the Legislature when assessing the reasonableness of its classifications and their relationship to legitimate legislative purposes.").

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[17] The distinction between a special law and a general law is similar to the Uniform Operation of Laws clause, Article 1, Section 24, of the Utah Constitution. *Utah Farm Bureau Ins. Co. v. Utah Ins. Guar. Ass'n*, 564 P.2d 751, 754 (Utah 1977).

[18] A ripper clause and uniform operation of law clause are closely related. *See* Porter, *The Ripper Clause*, 1969 UTAH L. REV. 287, 291.

The State first argues that the City is not a person and therefore may not bring a claim under the Uniform Operation of Law clause. The City responds that it is not bringing a federal equal protection claim, which it acknowledges it lacks standing to assert. The court agrees the City has standing to bring a claim under the Uniform Operation of Law provision. *See West Jordan*, 767 P.2 at 536 n.4 (suggesting, hypothetically, a municipality might have a claim under the Uniform Operation of Law clause where a law's classification based on population size is unrelated to its purpose).

The City asserts the Act singles out three cities—Salt Lake City, Magna, and West Valley City—that are subject to the Act regardless of their consent, while any other municipality in the state may voluntarily become subject to the Act if it and the affected property owners consent. The mandatory provision states:

> (5)(a) No later than December 31, 2018, the ordinances of a municipality with authority jurisdictional land within its boundary shall allow an inland port as a permitted or conditional use. . . .
>
> . . .
>
> (7)(a)(i) A municipality whose boundary includes authority jurisdictional land shall provide the same municipal services to the area of the municipality that is within the authority jurisdictional land as the municipality provides to other areas of the municipality with similar zoning and a similar development level. . . .

Utah Code §§ 11-58-205(5) and -205(7)(a)(i). The discretionary provision for municipalities and counties other than Salt Lake City, Magna, and West Valley City, provides:

> (2)(a) The board may adopt a project area plan for land that is outside the authority jurisdictional land, as provided in this part, if the board receives written consent to include the land in the project area described in the project area plan from:
>
> (i) as applicable:
>
> (A) the legislative body of the county in whose unincorporated area the land is located; or
>
> (B) the legislative body of the municipality in which the land is located; and
>
> (ii) the owner of the land.

Id. at § 11-58-501(2)(a).

The State argues the classification the City complains of does not violate the Uniform Operation of Law provision because it is reasonably related to permissible legislative purposes. The court should consider three factors: (1) whether the classification is reasonable, (2) whether the objectives of the legislative action are legitimate, and (3) whether there is a reasonable relationship between the classification and the legislative purposes. *Merrill*, 2009 UT 26 at ¶ 9.

The first *Merrill* consideration is whether the classification is reasonable. For this, the court should look at the following factors: "(1) if there is a greater burden on one class as opposed to another without a reason; (2) if the statute results in unfair discrimination; (3) if the statute creates a classification that is arbitrary or unreasonable; or (4) if the statute singles out similarly situated people or groups without justification." *Id.* at ¶ 10. The Act does place a greater burden on the three cities than on other municipalities within the state in that it deprives those three cities of any choice as to whether they will be subject to the Act. The Act requires the three cities to adopt mandatory zoning, and it preempts some of the cities' authority to regulate private property, develop infrastructure, and determine how to spend growth-related property tax. But the distinction is not unfair, arbitrary, unreasonable, or unjustified. The classification is based on actual differences that are reasonably related to the legitimate purposes of the Act.

The three cities currently subject to the mandatory provisions of the Act are not similarly situated to other municipalities because those cities have within their borders portions of the jurisdictional land. These municipalities serve as the primary location of the inland port, and it is not an unreasonable distinction for the Legislature to require only municipalities containing jurisdictional land within their boundaries to conform to the purposes of the Act in order for the

inland port to achieve the purposes argued by the State. It is not unreasonable for the Legislature to determine that municipalities that lack jurisdictional land within their boundaries are not as crucial as Salt Lake City, Magna, and West Valley City to achieving the objectives of the inland port. If, for example, the city of St. George were to opt out of the jurisdiction of the Act despite a request from the State, the State's objectives for the inland port will likely not be significantly thwarted. But because the inland port jurisdictional land lies mainly within Salt Lake City's borders, it is important for purposes of the Act that Salt Lake City, where the proposed inland port would have its epicenter, not be permitted to opt out of the Act.

The next *Merrill* factor is whether the Legislature had a legitimate objective in creating the classification. The State points to the language of the Act setting forth policies and objectives, including to: maximize long-term economic benefits to the region and state; maximize creation of high-quality jobs; take advantage of the strategic location and proximity to transportation and other infrastructure and facilities; facilitate the transportation of goods; and promote land uses on jurisdictional land that generate economic development including warehousing, light manufacturing, and distribution facilities. Utah Code § 11-58-203(1).

The court will not rely solely on the stated goals of the Act but considers for itself whether the distinction between Salt Lake City, Magna, and West Valley City, on one hand, and other subdivisions of the State, on the other hand, is a legitimate objective, bearing in mind the required deference toward finding the Act to be constitutional. *See Merrill,* 2009 UT 26 at ¶ 18 ("We do not, however, 'accept any conceivable reason for the legislation. . . . Rather, we judge such enactments on the basis of reasonable or actual legislative purposes.'") (citation omitted); and *Drej*, 2010 UT 35 at ¶ 9 ("we resolve any reasonable doubts in favor of constitutionality") (citation omitted). The City acknowledges economic welfare is a legitimate governmental

objective. *See Sun Valley Water Beds of Utah, Inc. v. Herm Hughes & Son, Inc.*, 782 P.2d 188, 191 (Utah 1989) (To facilitate the legislative interest in promoting the social and economic welfare of the populace."); and *Baker v. Matheson*, 607 P.2d 233, 243 (Utah 1979) (holding there was no due process violation where a legislative act's general "objective was to improve the economic welfare and well-being of the State as a whole"). The Act's objectives, as reflected in its "policies and objectives" section, Utah Code § 11-58-203(1), are legitimate state objectives for the economic benefit of Utah residents.

The third and most critical question is whether the Legislature chose a permissible means to achieve legitimate ends. *See Blue Cross & Blue Shield of Utah v. State*, 779 P.2d 634, 641 (Utah 1989). The City argues that the Act unfairly burdens its residents with the State's $860 million cost to relocate the Utah State Prison, and the Act's 40-year property tax differential obligation will far exceed the prison relocation costs. Even if that is the case, the Legislature has the ability to deflect county and municipal tax income. *Id. at* 637 ("In the tax area, as in other areas of purely economic regulation, we give broad deference to the legislature when scrutinizing the reasonableness of its classifications and their relationship to legitimate legislative purposes.").

The provisions of the Act that single out the City regarding land-use, zoning, and property tax differentials are a permissible means of achieving the goals of the Act. *See* Utah Code § 11-58-201(3) (stating the purpose of the Authority is to fulfill a statewide public purpose to facilitate development of the jurisdictional land and other locations to maximize long-term economic and other benefits for the state, and that the duties are beyond the scope and capacity of any one municipality). To the extent Salt Lake City, Magna, and West Valley City are treated differently under the Act, that is because they contain jurisdictional land within their borders, and

it is therefore reasonable for the Act to treat them differently than municipalities that lack jurisdictional land.

V. Motion for Preliminary Injunction

The City has filed a motion for a preliminary injunction asking the court to enjoin the State's implementation of the Act pending the outcome of this litigation. That motion has been fully briefed and was also before the court for consideration at the oral argument conducted November 18, 2019. A party seeking preliminary injunctive relief bears the burden of demonstrating to the court's satisfaction that (1) "[t]he applicant will suffer irreparable harm unless the order or injunction issues," (2) "[t]he threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined," (3) "[t]he order or injunction, if issued, would not be adverse to the public interest," and (4) *"[t]here is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation."* Utah R. Civ. P. 65A(e) (emphasis added). These elements are conjunctive in nature, meaning the court must deny a request for preliminary injunctive relief if the applicant fails to make any one or more of the showings required in Rule 65A(e).

The court has determined that the State is entitled to summary judgment in its favor and against the City on all of the City's claims challenging the Act's constitutionality. It necessarily follows from this determination that the City has not persuaded the court that there is a substantial likelihood it will prevail on the merits of its underlying claims. It further follows that the City cannot make a showing that the case presents issues "which should be the subject of further litigation," given that the court's summary judgment order concludes the litigation of the City's claims at the trial court level. Thus, given the court's ruling, the City necessarily cannot

make the showing required in Rule 65A(e)(4) of the Utah Rules of Civil Procedure, and its motion for preliminary injunctive relief must be denied.

CONCLUSION

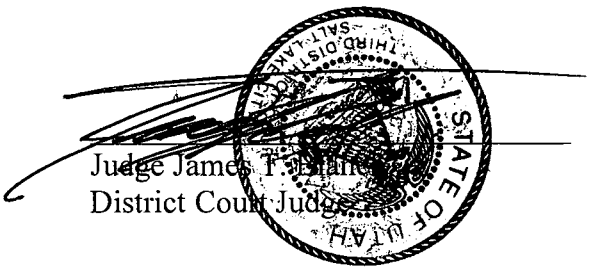
Based upon the undisputed material facts recited above, the court concludes, as a matter of law, as follows:

1. The Utah Inland Port Authority Act, Utah Code § 11-58-101, *et seq.* (the "Act"), does not violate Article VI, Section 28 of the Utah Constitution (the "Ripper Clause") regarding land-use zoning, municipal functions, or municipal monies;
2. The Act does not violate Article XI, Section 5 of the Utah Constitution;
3. The Act does not violate Article XI, Section 8 of the Utah Constitution;
4. The Act does not violate the Article I, Section 24 of the Utah Constitution; and
5. These holdings necessarily require denial of the City's Motion for Preliminary Injunction.

For the above reasons, the court GRANTS the State's cross-motion for summary judgment, DENIES the City's motion for summary judgment, and DENIES the City's Motion for Preliminary Injunction.

IT IS SO ORDERED.

DATED this 8th day of January, 2020.



Judge James T. Blanch
District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 190902057 by the method and on the date specified.

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/s/ SIRARPI OGANESYAN

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The Ripper Clause in State Constitutional Law: An Early Urban Experiment – Part I

*By David O. Porter**

Introduction

This is a long two-part article, portions of which may interest a wide variety of readers. In this introductory statement the substance of the various sections of the article is outlined.

The first section attempts to establish the legal position of the city vis à vis the other levels of government in our federal system. The second section reviews some of the unfortunate experiences of city residents during a period of flagrant legislative interference in local government, and some of the attempts of these citizens to protect themselves through the adoption of constitutional restrictions on the powers of the legislature, and through the advancement in the courts of the doctrines of "taxation without representation" and "the inherent right of local self-government." Section three describes the early history of the ripper clause and some of the arguments that were given in support of its inclusion in the Pennsylvania constitution of 1874.

Sections 4 through 10 are the core of the study. These sections carefully digest and evaluate all of the cases which deal with the ripper clause in each of the eight states which adopted it.

The last section has two rather ambitious aims. First, the interpretations and constructions given to the ripper clause in all eight states will be summarized. Second, an evaluation of the impact of the development of cities will be made indicating whether the goals of its drafters were realized, frustrated, or ignored, and exploring some of the areas where it may be relevant today. A special effort will be exerted to show some of the possible applications of the basic rationale of the clause — local control over local expenditures and policy — to modern urban problems and the effectiveness of constitutional reforms like the ripper clause in achieving such goals.

I. The City in the Framework of American Government

The subordination of the city to the state legislature is a fundamental principle in the law of municipal corporations. The power of the legislature over cities is usually said to be plenary and complete, limited only by provisions in the state and federal constitutions.[1] By mere legislative act,

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[1] *See* 1 C. Antieau, Municipal Corporation Law § 2.04, at 64 (1968); 1 J. Dillon, Commentaries on the Law of Municipal Corporations § 93, at 145,

a municipal corporation has been deprived of a bridge which it bonded to build;[2] denied the right to continue selling cemetery lots and monuments;[3] abolished and replaced by a taxing district dominated by state-appointed officers;[4] deprived of its duly elected officers by having the old offices abolished and new officers appointed by the governor to fill newly entitled positions which in fact were the old ones with new names;[5] and required to accept a board of public works, appointed by the governor with power to contract and bond, through a legislative amendment to the city charter.[6]

The Supreme Court of the United States has treated municipalities in much the same way as the state courts. In the *Dartmouth College* case the Court recognized, in dictum, the dependence of municipal corporations on the legislature. Justice Washington, in a concurring opinion, stated that a public corporation

> is the mere creature of public institution, created exclusively for the public advantage, without other endowments than such as the king or government may bestow upon it, and having no other founder or visitor than the king or government .... *It would seem reasonable, that such a corporation may be controlled, and its constitution altered and amended by the government, in such manner as the public interest may require.*[7]

This dictum became law in *Town of East Hartford v. Hartford Bridge Co.*[8] and has been followed consistently since that time.[9]

In seeking relief from state legislative control, cities have frequently appealed to the United States Supreme Court under the contract clause, but since the *East Hartford* case, a municipal charter has not been considered a contract within the protection of that clause of the federal Constitution.[10]

155–56 (5th ed. 1911); 1 E. McQUILLIN, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 121 (1911); C. RHYNE, MUNICIPAL LAW § 2–20, at 22 (1957); Annot., 116 A.L.R. 1037 (1938).

[2] Baier v. City of Saint Albans, 128 W. Va. 630, 39 S.E.2d 145 (1946).

[3] Opinion of the Justices, 323 Mass. 759, 79 N.E.2d 889 (1948).

[4] Luehrman v. Taxing Dist., 70 Tenn. 425 (1879).

[5] Commonwealth *ex rel.* Elkin v. Moir, 199 Pa. 534, 49 A. 351 (1901).

[6] *In re* Senate Bill providing for a Bd. of Pub. Works in the City of Denver, 12 Colo. 188, 21 P. 481 (1889).

[7] Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 660–61 (1819) (concurring opinion) (emphasis added).

[8] 51 U.S. (10 How.) 511 (1850).

[9] *See, e.g.*, City of Trenton v. New Jersey, 262 U.S. 182 (1923); City of Pawhuska v. Pawhuska Oil & Gas Co., 250 U.S. 394 (1919); Hunter v. City of Pittsburg, 207 U.S. 161 (1907); City of Worcester v. Worcester Consol. St. Ry., 196 U.S. 539 (1905); Atkin v. Kansas, 191 U.S. 207 (1903); Williams v. Eggleston, 170 U.S. 304 (1898); Meriwether v. Garrett, 102 U.S. (12 Otto) 472, 511 (1880); Newton v. Commissioners, 100 U.S. (10 Otto) 548 (1880); Mount Pleasant v. Beckwith, 100 U.S. (10 Otto) 514 (1880); Board of Tippecanoe County v. Lucas, 93 U.S. (3 Otto) 108 (1876); Commissioners of Laramie County v. Commissioners of Albany County, 92 U.S. (2 Otto) 307 (1876); Barnes v. District of Columbia, 91 U.S. (1 Otto) 540 (1876).

[10] In 1880, the Supreme Court stated: "There is no contract between the State and the public that the charter of a city shall not be at all times subject to legislative control." Meriwether v. Garrett, 102 U.S. (12 Otto) 472, 511 (1880).

Cities have also been unsuccessful in their attempts to invoke the due process clause of the fourteenth amendment as a limitation upon legislative control of municipal functions. The extensive power of the legislature over property held by the city for the exercise of "governmental" functions is not questioned.[11] There has been some controversy, however, as to what extent the legislature may control property held by a city in its "proprietary" or private functions. In dictum the United States Supreme Court has suggested that municipal proprietary property might be entitled to protection under the due process clause;[12] but in *City of Trenton v. New Jersey*,[13] a case dealing with a function usually regarded as proprietary, a waterworks, the Court denied the city protection under that clause. Speaking of the difference between governmental and proprietary functions, the Court stated:

> The basis of the distinction is difficult to state, and there is no established rule for the determination of what belongs to the one or the other class. It originated in the courts. Generally it is applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations. But such distinction furnishes no ground for the application of constitutional restraints here sought to be invoked by the City of Trenton against the State of New Jersey. They do not apply as against the State in favor of its own municipalities.[14]

Since its decision in *Trenton*, the Court has consistently rejected arguments claiming that property held by municipal corporations in a proprietary capacity is protected by due process. State courts still occasionally recognize the propriety-governmental distinction and offer protection to municipal proprietary property under state due process clauses,[15] but most state courts have followed the *Trenton* rationale and reject the distinction as a basis for invoking state due process.[16]

The equal protection and privileges and immunities clauses of the fourteenth amendment likewise have not limited legislative control of municipal corporations. In the 1933 case of *Williams v. Mayor of Baltimore*[17] the Court held that a city was not entitled to any privileges and immunities under the fourteenth amendment. An 1898 opinion by Justice Brewer concerning the city's relation to the equal protection clause is still good law:

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[11] Annot., 116 A.L.R. 1037, 1038–39 (1938).

[12] Hunter v. City of Pittsburg, 207 U.S. 161, 179–80 (1907); *cf.* Trenton v. New Jersey, 262 U.S. 182, 188 n.2 (1923).

[13] 262 U.S. 182 (1923).

[14] *Id.* at 191–92 (footnotes omitted).

[15] State *ex rel.* City of Missoula v. Holmes, 100 Mont. 256, 47 P.2d 624 (1935); Kern v. Arnold, 100 Mont. 346, 49 P.2d 976 (1935); Town of Bell v. Bayfield County, 206 Wis. 297, 239 N.W. 503 (1931).

[16] Town of Bridgie v. County of Koochiching, 227 Minn. 320, 35 N.W.2d 537, 539 (1949); City of Beaumont v. Gulf States Util. Co., 163 S.W.2d 426 (Tex. Civ. App. 1942); Town of Falls Church v. County Bd., 166 Va. 192, 184 S.E. 459 (1936); Madison Metropolitan Sewerage Dist. v. Committee on Water Pollution, 260 Wis. 229, 50 N.W.2d 424 (1951).

[17] 289 U.S. 36, 40 (1933).

> Again it is insisted that the plaintiff in error is denied the equal protection of the laws because these five towns are put into a class by themselves, organized into a single municipal corporation, and seperated from other towns in the State by being subjected to different control in respect to highways. But this overlooks the fact that the regulation of municipal corporations is a matter peculiarly within the domain of state control; that the State is not compelled by the Federal Constitution to grant to all its municipal corporations the same territorial extent, or the same duties and powers. A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the State for conducting the affairs of government, and as such it is subject to the control of the legislature.[18]

The division of powers in the United States Constitution is between the national and state governments, with no mention of local governmental units. This omission, together with decisions of state and federal courts denying cities protection under the federal Constitution, has left local governments almost entirely at the mercy of state legislatures, which are limited only by state constitutional provisions. Furthermore, early state constitutions contained no restrictions on legislatures for the protection of cities. As urban populations and fortunes expanded, rural legislators began to exploit the cities by means of state law. Special laws were passed which deprived individual cities of control over franchises or patronage-laden city agencies, such as police or fire departments. After 1850, as new constitutions or amendments were drafted in the various states, city reformers successfully worked for the inclusion of constitutional provisions protecting cities from increasing legislative abuse. Thus, state constitutions provide more protection from legislative interference with municipal corporations than does the federal Constitution.

Probably the most common state constitutional restriction on legislatures is a prohibition on special, local, or private acts. These provisions, first adopted in the early nineteenth century to forbid special bills such as bills of divorce or bills changing a man's name, were applied to legislative action dealing with cities and city charters in the constitutions of Ohio and Indiana in 1851.[19] The form of these provisions varies widely from state to state. Ohio, for example, merely prohibits special acts incorporating private and municipal corporations.[20] Indiana and Utah prohibit private, local, or special acts in enumerated areas.[21] These provisions do not com-

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[18] Williams v. Eggleston, 170 U.S. 304, 309–10 (1898).

[19] IND. CONST. art. 4, § 22; OHIO CONST. art. XIII, § 1.

[20] The Ohio Constitution provides that "[t]he General Assembly shall pass no special act conferring corporate powers." OHIO CONST. art. XIII, § 1. This section has been held to apply to municipal as well as private corporations. State v. Cincinnati, 20 Ohio St. 18, 36–37 (1870).

[21] The Indiana Constitution sets forth the following restrictions:

> The General Assembly shall not pass local or special laws, in any of the following enumerated cases, that is to say:
> ....
> (7) For laying out, opening and working on highways, and the election or appointment of supervisors;
> (8) Vacating roads, town plats, streets, alleys, and public squares;
> ....

pletely preclude legislative action within the enumerated areas, but simply require general rather than special laws to deal with them. Other state constitutions require general rather than special or private laws to be passed whenever possible or applicable.[22] Clauses of the last type are held not to be violated by special laws when the courts are convinced it is impossible or impracticable to adopt a more general act.[23]

A closely related provision is a clause requiring that "all laws of a general nature shall have uniform operation."[24] This clause usually appears as a supplement to a provision requiring that laws be general and serves to make certain that ostensibly general laws are not in fact special in their application.[25] It may be invoked when one or more municipal corporations are exempted from general law applying to other municipalities having similar characteristics.[26] Laws allowing local option, however, have been held not to violate uniformity requirements.[27]

The effectiveness of the provisions discussed above has been greatly reduced by the legislative practice of classifying cities according to population or geographical location. Most state courts allowed such classi-

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(10) Regulating county and township business;
(11) Regulating the election of county and township officers and their compensation . . . .

IND. CONST. art. 4, § 22.

Utah's Constitution contains the following prohibitions:

The Legislature is prohibited from enacting any private or special laws in the following cases:

. . . .
(3) Locating or changing county seats.
. . . .
(8) Assessing and collecting taxes.
. . . .
(11) Regulating county and township affairs.
(12) Incorporating cities, towns or villages; changing or amending the charter of any city, town or village; laying out, opening, vacating or altering town plats, highways, streets, wards, alleys, or public grounds.
. . . .
(16) Granting to an individual, association or corporation any privilege, immunity or franchise.
. . . .
(18) Creating, increasing or decreasing fees, percentages or allowances of public officers during the term for which said officers are elected or appointed.
. . . .
In all cases where a general law can be applicable, no special law shall be enacted.

UTAH CONST. art. VI, § 26.

[22] The Kansas State Constitution provides that "[a]ll laws of a general nature must have a uniform operation throughout the state; and in all cases where a general law can be made applicable, no special law shall be enacted . . . ." KAN. CONST. art. 2, § 17.

[23] Higgins v. Board of County Comm'rs, 153 Kan. 280, 112 P.2d 128 (1941).

[24] CAL. CONST. art. 1, § 11; WYO. CONST. art. 1, § 34.

[25] The Indiana Constitution enumerates areas in which private, local, or special acts are prohibited, IND. CONST. art. 4, § 22, but provides additionally that "[i]n all the cases enumerated in the preceding section, [art. 4, § 22] and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state." IND. CONST. art. 4, § 23.

[26] May v. City of Laramie, 58 Wyo. 240, 131 P.2d 300 (1942) (applying WYO. CONST. art. 1, § 34).

[27] State *ex rel.* Keefe v. McInerney, 63 Wyo. 280, 182 P.2d 28 (1947).

fication early in their interpretation of these clauses.[28] The usual practice in legislative classification of cities is to put the largest four or five cities into single-city categories, thereby defeating any benefit that could be derived from requiring the legislature to pass general laws dealing with each category.[29] Some states have sought to control this practice by including restrictions in their constitutions as to the number or type of classifications of cities the legislature may make.[30]

Some legislatures have also avoided the prohibitions on special laws by passing amendments to general laws. In New York, for example, the legislature passed a general law incorporating cities and villages and providing generally for the building of bridges; then, in the next session, the legislature passed an amendment taking all counties except one out of the operation of the general act.[31]

It has been argued that breaches of the provisions against special laws are inevitable. American cities are denied the exercise of any powers not expressly conferred upon them by the legislature.[32] Therefore, cities must go to the legislature for authorization to solve any new problems associated with the demands of our changing urban society.[33] Since few cities encounter identical problems, special laws are called for. The following summary of the problem has been given:

> [Those who secured prohibitions on special laws relating to municipal corporations] had reasons for supposing that [the prohibitions] would be successful. Special legislation relative to a large number of private rights had been previously prohibited. The legislature was thus very generally forbidden by the constitution to grant divorces, by special act. . . . Why, now, has the prohibition of special legislation been successful in one class of cases but unsuccessful in another? The reason is not far to seek. In the one class of cases, of which the matter of divorce

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[28] *E.g.*, Burckholter v. Village of McConnelsville, 20 Ohio St. 308 (1870); Wheeler v. Philadelphia, 77 Pa. 338 (1875).

[29] 1 J. BRYCE, THE AMERICAN COMMONWEALTH 559 (rev. ed. 1910); F. GOODNOW, MUNICIPAL PROBLEMS 40–45 (1911).

[30] The Colorado constitutional provision is representative:

> The general assembly shall provide, by general laws, for the organization and classification of cities and towns. The number of such classes shall not exceed four; and the powers of each class shall be defined by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions.

COLO. CONST. art. XIV, § 13.

[31] 1 J. BRYCE, *supra* note 32. Under a similar provision in New Jersey, the State Supreme Court denied the legislature such power. State v. Mayor of Newark, 53 N.J.L. 4, 20 A. 886 (1890).

[32] Dillon's Rule, which has been adopted by virtually all states, strictly limits a municipality's powers to those expressly conferred by the legislature.

> It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers, and no others*: First, those granted in *express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation, — not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

1 J. DILLON, *supra* note 1, § 237, at 448–49 (footnotes omitted).

[33] *See*, E. BANFIELD & J. WILSON, CITY POLITICS 66 (1963); *see also* F. GOODNOW, MUNICIPAL HOME RULE 45–47, 92–94 (1916).

> is a good example, it was recognized that special action was necessary, and provision was made for some authority by which it might be taken. That is, the legislature passed a general law providing that the courts, in the proper cases . . . might grant divorces in concrete and special instances. In the case of special legislation as to cities, however, *it was not recognized that special action was necessary, and no provision was made for it.* No authority was provided which under the general regulation of the legislature could take the necessary special action. The result was that the pressure on the legislature for modification by special legislation of the laws relative to cities, which, it will be remembered, descended into great detail, was as great after as before the adoption of the constitutional provisions prohibiting special legislation.[34]

Restrictions prohibiting the legislature from imposing taxes for municipal purposes[35] and forbidding legislatures to create special commissions which interfere in municipal functions[36] were introduced in the early 1860's and 1870's. They aimed primarily at ending "taxation without representation" on the local level.[37] The provision restricting the legislature's power to levy taxes for municipal purposes has usually been interpreted merely to mean that the legislature may not impose a tax on a city for "municipal" or "local" purposes, unless the locally elected officials or the local electorate approve the expenditure.[38] The Utah Supreme Court refused to allow the state to authorize a state-appointed fruit-tree inspector to hire as many assistants as he saw fit, on the theory that this gave the inspector an indirect power of local taxation, since the county was obliged to pay the salaries of all his assistants.[39] Although the provision prohibiting special commissions has been interpreted as prohibiting many of the same things as the tax-restriction clause, it has also forbidden legislative interference in municipal functions not directly concerned with taxing.[40]

Another attempt by the states to secure some degree of autonomy for municipal government has been the imposition of constitutional restric-

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[34] F. GOODNOW, *supra* note 29, at 75–76 (emphasis added).

[35] For example, Utah's Constitution provides:
> The legislature shall not impose taxes for the purpose of any county, city, town or other municipal corporation, but may, by law, vest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporation.

UTAH CONST. art. XIII, § 5.

[36] PA. CONST. art. 3, § 20 provides:
> The General Assembly 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, or to levy taxes or perform any municipal function whatever.

[37] *See, e.g.*, Harward v. St. Clair & Monroe Levee & Drainage Co., 51 Ill. 130 (1869); Wilson v. School Dist. of Philadelphia, 328 Pa. 225, 195 A. 90, 99–100 (1937).

[38] People *ex rel.* Cannon v. City of Chicago, 351 Ill. 396, 184 N.E. 610 (1933); *see* Golden Gate Bridge & Highway Dist. v. Felt, 214 Cal. 308, 5 P.2d 585, 591 (1931).

[39] State *ex rel.* Wright v. Standford, 24 Utah 148, 66 P. 1061 (1901). Provisions of this sort have also been used to prevent delegation of local taxing powers to state-appointed parks boards or police boards or commissions. *See, e.g.*, Lovington v. Wider, 53 Ill. 302 (1870); People *ex rel.* McCagg v. Mayor of Chicago, 51 Ill. 17, 28–32 (1869).

[40] *See* Walnut & Quince St. Corp. v. Mills, 303 Pa. 25, 154 A. 29 (1931); Moll v. Morrow, 253 Pa. 442, 98 A. 650 (1916); Logan City v. Public Util. Comm., 72 Utah 536, 271 P. 961 (1928).

tions on legislative appointment of local officers.[41] Courts have usually construed these provisions to prohibit appointment by state authority of officers performing local functions, but not those performing state functions.[42] The New York legislature circumvented an 1846 constitutional provision[43] aimed at limiting legislative appointments of local officers (1) by establishing boards with "temporary," not "permanent," functions;[44] (2) by creating new districts with new officers which were not under the protection of the 1846 constitution;[45] and (3) by simply taking advantage of a clause at the end of the provision which authorizes the legislature, in creating city, town and village offices not provided for by the constitution, to make these offices appointive if it wishes.[46] So successful were these evasive actions that it was charged on the floor of the 1867–68 constitutional convention that seven out of eight tax dollars disbursed in New York City were controlled by officers appointed by state authorities.[47] The New York courts, however, were successful in holding back the legislature in some areas under this clause, especially in preventing the extension of an incumbent's term of office.[48] Courts in states with clauses similar to the New York provision, such as Michigan,[49] often used them more effectively in limiting legislative interference with local functions.[50]

As a further increment to municipal self-rule, state constitutions have provided for home rule charters which may be drafted and accepted by cities.[51] The aim of these provisions was to stake out a limited area in

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[41] For example, the 1850 Michigan Constitution provided that "[j]udicial officers of cities and villages shall be elected and all other officers shall be elected or appointed at such time and in such manner as the legislature may direct." MICH. CONST. art. XV, § 14 (1850).

[42] *See* People *ex rel.* LeRoy v. Hurlbut, 24 Mich. 44, 59–69, 103 (1871).

[43] All county officers whose election or appointment is not provided for by this Constitution, shall be elected by the electors of the respective counties or appointed by the boards of supervisors, or other county authorities, as the legislature shall direct. All city, town and village officers, whose election or appointment is not provided for by this Constitution shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this Constitution, and all officers, whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the legislature may direct.

N.Y. CONST. art. X, § 2 (1846).

[44] *See* Hanlon v. Board of Supervisors, 57 Barb. 383, 396–97 (N.Y. 1870); Greaton v. Griffin, 4 Abb. Pr. (n.s.) 310, 313–15 (N.Y. Sup. Ct. 1868).

[45] *See* People *ex rel.* Wood v. Draper, 15 N.Y. 532, 543 (1857).

[46] People v. Pinckney, 32 N.Y. 377 (1865).

[47] H. MCBAIN, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE 40 (1916).

[48] *Id.* at 42.

[49] *See* note 41 *supra* and accompanying text.

[50] H. MCBAIN, *supra* note 47, at 42–45.

[51] The Wisconsin constitutional provision reads in part:

Cities and villages organized pursuant to state law are hereby empowered, to determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of state-wide concern as shall with uniformity effect every city or every village. The method of such determination shall be prescribed by the legislature.

WIS. CONST. art. XI, § 3.

which the local government could define its own powers. This was to be accomplished in two ways:

> [F]irst, it would remove the prior restraint of the doctrine that only expressly delegated powers were exercisable, which prevented the city both from dealing with new types of problems as they arose, and from changing its way of doing things, such as adopting a new form of government; second, it would remove the constant threat of legislative interference, arising from the idea that everything the city did was subject to state supervision and control.[52]

These provisions, however, have not greatly relaxed the restrictions on municipal action or otherwise mitigated legislative interference. The courts have insisted on preserving legislative control over many "governmental" functions at the local level, and most "state-wide" functions performed by cities.[53]

The scope of the protection offered to municipal corporations by the various state constitutional provisions reviewed above is somewhat uncertain. These provisions prohibit legislative action in respect to "local affairs," "municipal purposes," "municipal functions," or "corporate purposes." Although such phrases were meant to serve as standards for the courts in determining the areas of city action protected from legislative interference, they have been of limited value because the only meaning that can be given to the words "local" and "municipal" on their face is geographical rather than legal. Since a geographical definition would allow cities complete freedom to act within their boundaries, which would completely disrupt state government, the final determination as to what is "local" or "municipal" is thrust upon the judges, "who have no guides to decision except the often conflicting views of other states."[54] The result has been that the phrases "local affairs" and "municipal functions" have simply not gained any empirical meaning, even after a century of interpretation.[55] One critic, writing on the problem of defining "local affairs" as they relate to home rule charter cities, has said:

> Case-by-case adjudication has often succeeded in giving rational meaning to empty formulas, but in this case it was not equal to the task. The usual process is for a rule to be formulated in terms of policy. In these cases the decisions are no doubt made for reasons of policy, but no rules have been formulated. For one thing, the factors relevant to a decision whether the city should handle a problem are shifting and complex, however the court approaches the problem. Furthermore, the factors are politically sensitive. The court might feel that the state is consistently doing a bad job of regulating city traffic, for example, and that the most satisfactory decision would be to turn the whole subject over to the cities. That can hardly be developed into a rule, however, for deciding whether a subject is a local affair. In fact, it will probably be left out of the opinion altogether. As a result, it being impossible or

[52] Dyson, *Ridding Home Rule of the Local Affairs Problem*, 12 KAN. L. REV. 367, 368 (1964) (footnote omitted).

[53] *See* E. BANFIELD, *supra* note 33, at 65; F. GOODNOW, *supra* note 33, at 85.

[54] Dyson, *supra* note 52, at 379.

[55] 2 C. TOOKE, PROGRESS OF LOCAL GOVERNMENT: 1835–1935, at 188 (1937).

> imprudent to give reasons, the judges have with impressive consistency refrained from doing so. They have commonly decided such questions in two steps. First they have placed the problems in a broad category, such as streets or sanitation. Then they have said, in effect, "We think that . . . (streets, sanitation) is a matter of . . . (local, statewide) concern," often with a "clearly" thrown in for good measure. End of opinion.
>
> The result has been that until the question is decided by the state's supreme court, no one knows for sure whether a given subject will be held one of local or statewide concern. [These] built-in uncertainties, resolvable only by the courts, have been a lawyer's nightmare.[56]

As was discussed above, the United States Supreme Court has refused to recognize a distinction between "governmental" and "proprietory" functions of a city where the problem involves an application of the fourteenth amendment due process clause.[57] State courts interpreting constitutional provisions protecting "municipal functions" or "local affairs," however, are forced to give some meaning to this distinction. They must seek reliable tests for determining which functions belong to the state-wide class and which to the municipal class. Currently, many state courts hold a function municipal (1) if the activity has traditionally been carried on by municipalities in the past; (2) if it is performed voluntarily; or (3) if it is revenue-producing.[58] Sometimes these tests are alternative; sometimes, supplementary. Furthermore, the liberality with which they are applied in favor of cities varies from state to state and no widely applicable rules or firm conclusions can be stated.

A few state courts have taken a novel approach to the problem of determining the relation of city to state by rejecting the almost universally accepted rule that municipalities are at the mercy of legislative discretion unless protected by specific constitutional provision. These courts restricted legislative action on the ground that a city has an "inherent right of local self-government." This doctrine, first articulated explicitly by Judge Thomas M. Cooley in 1871, argued that cities have (or retain) certain inherent rights of local self-government in matters of a purely local nature.[59] State constitutions were said to have been adopted with an implicit understanding that these rights of local self-government would be reserved to cities. This historical argument led to the conclusion that explicit constitutional restrictions on the legislative control cities were unnecessary, since laws regulating proprietary or private functions of municipal corporations violated the "spirit" of state constitutions and were invalid.[60] It appears, however, that the doctrine of an inherent right of

[56] Dyson, *supra* note 52, at 368–69 (footnotes omitted).

[57] *See* note 14 *supra* and accompanying text.

[58] C. ADRIAN, GOVERNING URBAN AMERICA 140 (1955).

[59] People *ex rel.* LeRoy v. Hurlbut, 24 Mich. 44, 96, 108 (1871). Many commentators believe this case was decided under a specific constitutional provision and that the discussion of inherent local self-government was merely dictum. *See* McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 190, 192–93 (1916).

[60] For one of the finest essays written in support of this doctrine see Eaton, *The Right to Local Self-Government*, 13 HARV. L. REV. 441, 441–54, 570–88, 638–58

local self-government has been laid to rest in most of the few states which had recognized it.[61]

II. AN ERA OF LEGISLATIVE INTERFERENCE

It was early recognized in England that corporations were created only by the Crown, or that royal assent was a prerequisite to incorporation by Parliament.[62] The Crown's suppression of feudalistic notions of autonomy caused centralization of power in the national government to the extent that local units had no legal individuality, *i.e.*, they had "no sphere of action of their own which could be distinguished from the general sphere of action of the state as a whole."[63]

The granting of a charter did not exempt English municipal corporations from usurpation of its functions by special commissions. Such commissions often exercised many municipal powers independently of the local officers, including the power to tax.[64] So extensive were the powers conferred on these commissions that the local officers sometimes became the nominal government of the city; duties requiring efficiency and responsibility were transferred to other hands.[65]

The experience of American colonial cities was similar to that of England's cities of the same period. Municipal corporations were chartered by colonial authorities, usually by the governor acting for the Crown. Later in the colonial period provincial assemblies gained power to charter cities.[66] As in England, American charters, once granted, were usually not altered by the governor or legislature, except at the request of the city concerned.[67] Colonial legislatures did, however, regard themselves as empowered to enact laws relating to municipal affairs.[68] Also, again fol-

(1900); 14 HARV. L. REV. 20, 20–38, 116–38 (1900). For hostile criticism of the doctrine see McBain, *supra* note 59, at 190–216, 299–322.

[61] 1 C. ANTIEAU, *supra* note 1, § 2.05, at 66. For a history of this doctrine see note 119 *infra*.

[62] McBain, *The Legal Status of the American Colonial City*, 40 POL. SCI. Q. 176, 179–84 (1925). Municipal charters were probably granted only at the request of the city, and generally were not subjected to alteration by the Crown or Parliament. *See* 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS §§ 50–53 (5th ed. 1911).

[63] F. GOODNOW, MUNICIPAL PROBLEMS 33–34 (1911). As Goodnow explains it:

> The boroughs did . . . obtain at the end of the fifteenth century corporate capacity, but the corporate capacity they obtained was not extended to any other localities until very recently. The English county became a corporation only in 1888, the parish only in 1894. Further, the corporate capacity conferred upon the boroughs merely made it possible for them to own property and sue and be sued, *i.e.*, gave them a legal individuality from the point of view of the private law. It did not at first have any influence upon their governmental position. . . . The idea was held, after as before the grant to them of corporate capacity, that boroughs was, [*sic*] so far as the exercise of governmental powers was concerned, merely the delegates of the central Parliament or legislature in which was concentrated ultimately all governmental power.

Id.

[64] McBain, *supra* note 62, at 184.

[65] *Id.*

[66] *Id.* at 187–89.

[67] *Id.* at 191.

[68] *Id.* at 192–94; (contains examples of colonial enactments dealing with municipal affairs).

lowing England's example, special commissions with power over local affairs were created in one or two colonies.[69]

The Pennsylvania and New York provincial legislatures, in the exercise of what later became known as the police power, passed a considerable number of laws dealing with municipal affairs.

> Fire prevention, street traffic, the running at large of animals, the storage of gunpowder, the location of noxious industries, street encroachments, the assize of bread, the breaking of street lamps, building regulations, and the shooting of firearms and fireworks, were among the subjects of these laws.[70]

These powers were exercised concurrently by the city and legislative authorities, with the legislature pre-empting many areas normally controlled by cities under their charters. Thus, it can be seen that:

> Almost from the beginning the provincial legislatures asserted some competence in respect to [municipalities'] powers and duties; and gradually in a few of the provinces, especially in New York and Pennsylvania, there developed a considerable body of statutory law relating to the government of cities.[71]

After the American Revolution the power to incorporate cities was taken completely from the governors because of a prevailing distrust of executives engendered by the conflict with England. Consequently, legislatures began to grant municipal charters as ordinary legislative acts, subject thereafter to alteration and repeal.[72] This shift of the municipal chartering power was accomplished without opposition, but had a significant effect on American cities. One noted scholar has asserted that if the chartering power had been left with the governors, the courts probably would have protected city charters from excessive gubernatorial revision, and would have relegated the legislatures to a minor role in regulating cities. Thus, the revulsion against executive authority was a major factor in establishing legislative supremacy over American cities.

Immediately after the Revolution, state legislatures were given extensive grants of power subject to few limitations.[73] The usual pattern was to invest the "supreme legislative power" in a senate and a house of representatives.[74] A notable example is the Pennsylvania constitution of 1776

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[69] McBain has stated:

> Mention has already been made of the fact that Parliament frequently created special commissions for the performance of municipal functions, to which commissions the corporate officers of the boroughs were not infrequently attached as members. Somewhat similar statutes were enacted in one or two of the American provinces, notably in Pennsylvania.

Id. at 195.

[70] *Id.* at 196–97.

[71] *Id.* at 200.

[72] 1 E. McQuillin, The Law of Municipal Corporations § 1.83, at 292 (3d ed. 1949).

[73] H. McBain, The Law and the Practice of Municipal Home Rule 4 (1916).

[74] Constitutional provisions were typically worded as follows: "The Supreme Legislative power shall be exercised by a Senate and a House of Representatives." Vt. Const. ch. II, § 2 (1793).

"The Legislative power of this state shall be vested in a General Assembly, which

which conferred the legislative power on a single body, the House of Representatives.[75] So extensive was this grant of power that during the first sessions of the Pennsylvania legislature, it usurped many of the functions of the executive and the judiciary. These encroachments prompted the drafting of a second constitution in 1790 which divided the general assembly into two houses — the Senate, elected for four years, and the House of Representatives, elected annually. The only restrictions on the legislature in the new constitution were that it might not suspend the writ of habeas corpus, pass bills of attainder, impair contracts, or pass ex post facto laws. The governor could exercise only a limited veto power.[76] Thus, even though the legislature had abused the powers granted to it under the 1776 constitution, the 1790 constitution made few corrections.

> The feeling was that the members of the Legislature would be representatives of the people, and full deliberation and delay having been insured by the establishment of two branches, and by conferring a qualified negative on the Governor, in them the people could securely put their trust.[77]

Legislatures, however, were soon to abuse the general grants of power bestowed upon them. During the period from 1780–1850, cities grew in size and number. By 1835, the United States was on the verge of a period of great expansion. Steam power, railroads, and water transportation were rapidly developing and cities and states began to compete for the advantages of these facilities.[78] Although at first most of the money for these improvements came from state funds, the stage was being set for municipal financing of railroads and canals.[79]

The Jacksonian era brought with it not only wider suffrage and more elective offices, but also the need for stronger party organization. Beginning in the 1850's, the party in control of the state government began to make use of its position by setting up local boards and conferring upon them wide administrative and legislative powers.[80] Special commissions controlled by the governor or the legislature became common. At various times during the second half of the nineteenth century, the police depart-

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shall consist of a Senate and House of Representatives." DEL. CONST. art. II, § 1 (1792).

"That the government of this province shall be vested in a governor, legislative council, and general assembly." N.J. CONST. art. I (1776).

[75] Dickson, *The Development in Pennsylvania of Constituitonal Restraints upon the Power and Procedure of the Legislature*, 35 AM. L. REG. & REV. (n.s.) 477, 481–82 (1896).

[76] *Id.* at 484–86.

[77] *Id.* at 486.

[78] In Pennsylvania, for example, between 1792 and 1828, 168 turnpike companies were incorporated, of which 102 went into operation, constructing nearly 2,350 miles of road at a cost of $8,000,000. During the same period, $22,000,000 was expended in the construction of canals, railroads, turnpikes and bridges. *See* 2 C. TOOKE, PROGRESS OF LOCAL GOVERNMENT: 1835–1935, at 11–12 (1937).

[79] For example, judicial approval of municipal subscriptions to railroad bonds was given in Pennsylvania in 1853. *See* Sharpless v. Mayor of Philadelphia, 21 Pa. 147, 59 Am. Dec. 759 (1853); Moers v. City of Reading, 21 Pa. 188, 198 (1853).

[80] 2 C. TOOKE, *supra* note 78, at 120.

ments of New York, Boston, Detroit, and St. Louis, among others, were removed from local control.[81] The permissive attitude of the courts aided the legislatures in bringing city patronage under their control. Beginning in 1837, the United States Supreme Court adopted an indulgent attitude toward state exercise of their police power.[82] The Supreme Court's reluctance to declare state legislative acts invalid was soon reflected in state court rulings.[83]

Initially, legislative efforts to control cities were prompted as much by failure of city administrators to meet municipal problems as by political patronage. Rapid city growth[84] often resulted in municipal facilities being built without adequate planning and lent itself to waste and corruption.[85] An additional factor was that many eastern cities were being challenged by immigrant ethnic groups which came to outnumber the native Protestants. This was the case in Boston after 1890. Reluctant to relinquish their dominant position, the natives sought to control the city from the statehouse. Boston's police commissioner became a gubernatorial appointee, and state-controlled licensing and finance boards were created. The finance board was granted subpeona power and commissioned to make continuing investigations into the city's affairs.[86]

Legislative interference was also promoted by the legislative and judicial practice of granting American cities only enumerated powers.[87] Under this practice, cities were obliged to seek legislative grants of power each time new problems arose. The legislatures of many states became so accustomed to granting these appeals that they often overextended their control and began to interfere with the administration of purely local affairs.[88]

The legislature first began actively to govern New York City in 1837. There were apparently two causes for this interference: one was the advent of Republican control of the state legislature; the other was the appearance of New York City's first demagogue, Fernando Wood.[89] Wood had organized the Irish vote into a solid bloc. Under him, the police force had become corrupt and a source of patronage. Corruption in the police department led the legislature, urged on by indignant citizens of New York City, to create the Metropolitan Police District which included New York and Brooklyn. The district was controlled by com-

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[81] C. ADRIAN, GOVERNING URBAN AMERICA 53 (1955).

[82] City of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837); Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).

[83] 2 C. TOOKE, *supra* note 78, at 119–20.

[84] Whereas in 1790, no American city had exceeded 40,000 inhabitants, in 1880 there were forty cities exceeding 40,000 and twenty exceeding 100,000. 1 J. BRYCE, THE AMERICAN COMMONWEALTH 593 (1891).

[85] *Id.* at 622–23.

[86] E. BANFIELD & J. WILSON, CITY POLITICS 39 (1963).

[87] *See* F. GOODNOW, *supra* note 63, at 36.

[88] *Id.* at 37–38; 1 J. BRYCE, *supra* note 84, at 632.

[89] Godkin, *The Problems of Municipal Government*, 4 ANNALS 857, 866 (1894).

missioners appointed by the governor, and had power to require the city to levy taxes to cover its expenses. Outraged by this action, other groups of citizens, led by the mayor, took the case to the courts, where the statute's constitutionality was upheld.[90]

Encouraged by its success with the Metropolitan Police District, the New York legislature extended its control into many areas. Fire departments, public health, excise regulation (liquor), public parks, and rapid transit commissions were established.[91] Commissions were created to improve specific city streets, often to the advantage of private developers.[92] Another deplorable practice was the legislative granting of franchises to street railways which began in 1860 and continued until a constitutional amendment prohibited it in 1874.[93] The legislature was even known to pass a bill imposing liability upon a city where a trial court had found none.[94]

Recognizing the evils of special legislation in New York, the governor appointed a commission in 1876 to investigate the problem and to devise a plan to improve city government.[95] The Commission, upon finding gross waste, embezzlement, and misapplication of city funds, suggested that the causes for the sorry state of city government were: (1) incompetent and unfaithful governing boards and officers; (2) the introduction of state and national politics into municipal affairs; and (3) the assumption by the legislature of the direct control of local affairs.[96] As to the latter category, the Commission said in part:

> The representatives elected to the central (State) legislature have not the requisite time to direct the local affairs of the municipalities. . . . They have not the requisite knowledge of details. . . . When a local bill is

[90] People *ex rel.* Wood v. Draper, 15 N.Y. 532, 544–45 (1857).

[91] H. McBAIN, *supra* note 73, at 21–22.

[92] Hanlow v. Board of Supervisors, 57 Barb. 383 (N.Y. 1870); King & Ross v. City of Brooklyn, 42 Barb. 627 (N.Y. 1868).

[93] H. McBAIN, *supra* note 73, at 60–62.

[94] The classic case of the abuse of such a curative act is Town of Guilford v. Supervisors of Chenango County, 13 N.Y. 143 (1855). A two-man commission of highways for the town of Guilford had unsuccessfully prosecuted a suit. When the commissioners retired they appealed to the town for reimbursement but were refused. They then sued the town, but without success. Next they secured a legislative act authorizing a vote by the electors of Guilford to decide whether or not to reimburse the highway commissioners. The vote rejected their request. The legislature was then prevailed upon to pass an act requiring reimbursement and the courts upheld this act.

[95] The Commission, chaired by W. M. Evarts, reported that the municipal debt for New York City in 1840 was $10,000,000; in 1850, $12,000,000; in 1860, $18,000,000; in 1870, $73,000,000; in 1876, $113,000,000. The commission concluded:

> The magnitude and rapid increase of this debt are not less remarkable than the poverty of the results exhibited as the return for so prodigious an expenditure . . . . [T]he wharves and piers are for the most part temporary and perishable structures; the streets are poorly paved; the sewers in great measure imperfect, insufficient, and in bad order; the public buildings shabby and inadequate; and there is little which the citizen can regard with satisfaction, save the aqueduct and its appurtenances and the public park. Even these should not be said to be the product of the public debt; for the expense occasioned by them is, or should have been, for the most part already extinguished. In truth, the larger part of the city debt represents a vast aggregate of moneys wasted, embezzled, or misapplied.

1 J. BRYCE, *supra* note 84, at 643 n.3.

[96] *Id.* at 609–11.

> under consideration in the legislature, its care and explanation are left exclusively to the representatives of the locality to which it is applicable; and sometimes by express, more often by a tacit understanding, local bills are "log-rolled" through the houses. . . . To appreciate the extent of the michief done by the occupation of the central legesiative body with the consideration of a multitude of special measures relating to local affairs, some good, probably the larger part bad, one has only to take up the session laws of any year at random and notice the subjects to which they relate. Of the 808 acts passed in 1870, for instance, 212 are acts relating to cities and villages, 94 of which relate to cities, and 36 to the city of New York alone. A still larger number have reference to the city of Brooklyn. These 212 acts occupy more than three-fourths of the 2000 pages of the laws of that year. . . . What the law is concerning some of the most important interests of our principal cities can be ascertained only by the exercise of the patient research of professional lawyers. In many instances even professional skill is baffled.[97]

Despite the accuracy of its observations, the Commission's proposals were not adopted. Some of its provisions restricted suffrage to property holders. Such an undemocratic suggestion was unacceptable in that era of expanding voter awareness.[98]

New York was not the only state whose legislature imposed upon the cities; in practically every state with at least one important city, the same conditions of legislative interference with city functions prevailed.[99] In New Jersey, during the period from 1852–1875, the legislature passed 58 special acts establishing and appointing commissions to regulate municipal affairs, twenty-seven of which were passed between 1870 and 1875.[100] Nor was legislative abuse confined to the eastern states. In 1885, the Wisconsin legislature passed about 500 acts granting or dealing with city charters; these acts filled 1,342 pages of print, while all other legislation enacted that year filled only about 600 pages.[101] In Ohio, in the period 1876–1892, 1,202 special acts affecting cities were passed, of which 1,124 conferred some sort of financial power.[102] During the period 1849–1879, special legislation in California directed the transfer of city money from one fund to another,[103] authorized bond issues for specified purposes with-

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[97] *Id.* at 612.

[98] Godkin, *supra* note 89, at 869. This recommendation proposed to limit the officers on the finance board to property holders and to require a small property qualification for the electors of the board. The commission's hope was to create a sort of "board of directors" which would exclude from control of the corporate funds penniless and propertyless persons. *Id.*

[99] H. McBain, *supra* note 73, at 12.

[100] Booth v. McGuinness, 78 N.J.L. 346, 75 A. 455, n. at 467 (Ct. Err. & App. 1910).

[101] I J. Bryce, The American Commonwealth 513 n.1 (1891).

[102] F. Goodnow, *supra* note 63, at 47. It will be observed that these acts were passed in spite of the prohibition on special laws added to the Ohio constitution in 1851.

[103] Ch. 59, [1859] Cal. Stats. 41; ch. 75, [1859] Cal. Stats. 57; ch. 44, [1863] Cal. Stats. 46.

out local approval,[104] designated salaries for municipal officers,[105] and intervened in many other ways.[106]

Cities sought relief from special legislation in a number of ways. Some appealed to the state courts for help. Most state courts offered no protection; instead they responded with the well-settled rule that the legislature is supreme over municipalities except where limited by constitutional provisions.[107] A few jurisdictions, however, restricted legislative action through implied prohibitions such as violation of the "inherent right of local self-government" or of the principle of "no taxation without representation." The few decisions which were based upon the latter rationale[108] usually borrowed their argument from the Illinois Supreme Court. They determined that a constitutional provision granting public corporations the power to tax for corporate purposes limited, by implication, the exercise of the taxing power to public corporations. Under this rationale, the Illinois court denied the legislature power to delegate municipal taxing power to commissions not elected or at least appointed by local authorities.[109]

The inherent right of local self-government doctrine received wider acceptance than the no taxation without representation rule. The "inherent right" doctrine was espoused by several legal scholars[110] and was

[104] Ch. 384, [1861] Cal. Stats. 406; ch. 214, [1864] Cal. Stats. 217; ch. 263, [1864] Cal. Stats. 271; ch. 160, [1870] Cal. Stats. 225; ch. 618, [1878] Cal. Stats. 957.

[105] Ch. 278, [1861] Cal. Stats. 275; ch. 495, [1861] Cal. Stats. 557. For other examples see Peppin, *Municipal Home Rule in California: I*, 30 CALIF. L. REV. 1, 13 n.30 (1941).

[106] Ch. 253, [1857] Cal. Stats. 347; ch. 224, [1858] Cal. Stats. 183; ch. 8, [1859] Cal. Stats. 6; ch. 28, [1859] Cal. Stats. 19; ch. 159, [1859] Cal. Stats. 157; ch. 4, [1860] Cal. Stats. 2. For examples of other types of interference see Peppin, *supra* note 105, at 9–21 & n.26.

[107] Sharpless v. Mayor of Philadelphia, 21 Pa. 147, 59 Am. Dec. 759 (1853).

[108] *E.g.*, Schultes v. Eberly, 82 Ala. 242, 2 So. 345 (1887) (statute giving tax power to school district, trustees of which appointed by superintendent of education, held unconstitutional); State *ex rel.* Howe v. Mayor of City of Des Moines, 103 Iowa 76, 72 N.W. 639 (1897) (delegation of power to tax to appointed board of trustees of library held unconstitutional); Vallelly v. Board of Park Comm'rs, 16 N.D. 25, 111 N.W. 615 (1907) (legislative act authorizing appointed board to levy general taxes held unconstitutional). *See* 4 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 1373 (5th ed. 1911).

[109] *See* notes 38–39 *supra* and accompanying text. The Iowa Supreme Court, in State *ex rel.* Howe v. Mayor of City of Des Moines, 103 Iowa 76, 72 N.W. 639 (1897) held invalid the delegation of the taxing power to an appointed library board on the ground

> that there is an implied limitation upon the power of the legislature to delegate the power of taxation. This, of necessity, must be so, otherwise the legislature might clothe any person with the power to levy taxes, regardless of the will of those upon whom such burdens would be cast, and such person might be directly responsible to no one. Whatever the effect of the constitutional provisions in Illinois and Kansas may be, the reasoning of the cases is in line with the views expressed by Judge Cooley, and it is equally applicable to cases where there are no express constitutional limitations. . . .
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> . . . [C]ounsel have cited no instance in the legislation of this state, and we have found none, where the power to tax was conferred upon a board or officer not elected by and immediately responsible to the people, and we are unwilling to extend the right to delegate such power to any body or person not directly representing the people.

Id. at 643–44.

[110] *See* Thomas M. Cooley's exposition of the doctrine in People *ex rel.* LeRoy v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103 (1871), and People *ex rel.* Park Comm'rs v. Common Council, 28 Mich. 228, 15 Am. Rep. 202 (1873). *See also* 1 E. MCQUILLIN,

applied by at least six state courts.[111] This theory has been traced by McBain to one or more of four grounds:

> 1. That municipal corporations in England were of common law origin, that their charters were a confirmation of existing rights and not a grant of wholly new rights; and that municipal corporations in the United States, being a development from similar institutions in England, must be conceived to be of similar origin.
>
> 2. That the institutional history of the American Colonies discloses the fact that organized local governments either antedated organized central governments or that the two were synchronously established . . . and that in consequence the "rights" of local government cannot be said to have sprung from the central government.
>
> 3. That at the time of . . . the first state constitutions a system of local self-government was thoroughly understood and tolerably uniform; that these constitutions were framed with this system in view and with the expectation of its continuous existence; and that it is in consequence fair to presume that the principles of this system . . . were intended to be incorporated into these constitutions by general implication.
>
> 4. That the right of local self-government is one of those rights embraced within that well-known reserve clause of constitutional bills of rights which declares that "this enumeration of rights shall not be construed to impair or deny others retained by the people."[112]

The above theories are not very convincing. The first point — that American cities possess rights of common law origin — disregards the widely accepted rule that a common law principle not incorporated into some constitutional provision may be statutorily modified.[113] The second point — that cities were founded prior to or simultaneously with the central government and therefore retain rights which were neither original with the central government nor expressly delegated to the state government by constitutional provision — assumes, contrary to accepted constitutional construction, that state constitutions are merely affirmative enumerations of powers conferred upon governmental organs.

> [T]o maintain . . . that a surrender of the "rights" of local self-government must be found in an express or clearly implied grant of authority to the state legislature is merely to assert that the powers of the legislature are in this respect wholly exceptional and peculiar. It is to declare that with respect to local governments the state legislature enjoys *not* such powers as it is not *denied* but only those powers that are *conferred* upon it by expression or by specific implication.[114]

A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS §§ 54, 69–70, 164, 167–69, 246 (1911); Eaton, *The Right to Local Self-Government*, 13 HARV. L. REV. 441, 570, 638 (1900) & 14 HARV. L. REV. 20, 116 (1900); Note, *Constitutional Law — Power of the Legislature To Impose a Liability on a Municipal Corporation Without Its Assent*, 4 CENT. L.J. 521 (1877).

[111] The courts in Indiana, Iowa, Texas, Kentucky, Nebraska, and California all adopted the doctrine in at least one case.

[112] McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 299, 299–300 (1916).

[113] *Id.* at 300–01.

[114] *Id.* at 302–03.

The third point — that there was a tolerably uniform and well-understood system of local self-government at the time of the adoption of the first state constitutions — is refuted by the institutional history of the period. In the first place, there were too few municipal corporations during the colonial period to establish any "uniform system."[115] Moreover, the practice of specially incorporating cities prevailed throughout the states, "so that it is fair to say that in no state outside of New England did there exist a municipal system that could be called uniform."[116] It is therefore reasonable to conclude that "with the single exception of the New England town governments, if any principle can be said to have been preponderant, it was the principle of *central* rather than local appointment of local officers."[117]

The fourth point — that the right of local self-government was included with the "reserve clauses" of state bills of rights — must be rejected on the ground that such reserve clauses applied to

> personal, and not to governmental rights. For full governmental powers were by this instrument conferred upon the government thereby established. The legislative power was thereby vested in the general Legislature, maker of laws for the whole state and for every part of it, without any other limitation than that which the Constitution itself in express terms imposes.[118]

The doctrine of an inherent right of local self-government is apparently no longer applied in any of the few states which adopted the theory.[119]

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[115] McBain states that at the end of the colonial period there were no chartered municipal corporations in New England, three in New York, four in New Jersey, four in Pennsylvania, one in Maryland, three in Virginia, and one in North Carolina. Several of the municipalities were "close corporations" which appointed their successors by co-optation, not popular election, while others had at least the mayor and recorder appointed by the governor or general assembly of the state. *See* McBain, *supra* note 112, at 304 & n.16. Neither the uniformity of local government nor the occurrence of local election of its officers increased during the years immediately following the Revolution.

[116] 2 C. TOOKE, *supra* note 78, at 117.

[117] McBain, *supra* note 112, at 308 (emphasis in original).

[118] Booth v. McGuinness, 78 N.J.L. 346, 75 A. 455, 458 (Ct. Err. & App. 1910). The context within which such provisions are found seems to support Judge Garrison's interpretation of reserve clauses. *See* McBain, *supra* note 112, at 314.

[119] Both Nebraska and Texas adopted the inherent right doctrine, but only for brief periods. *See* State *ex rel.* Smyth v. Moores, 55 Neb. 480, 76 N.W. 175 (1898), *overruled in* Redell v. Moores, 63 Neb. 219, 88 N.W. 243 (1901); *Ex parte* Lewis, 45 Tex. Crim. 1, 73 S.W. 811 (1903), *declared unsound in* Brown v. City of Galveston, 97 Tex. 1, 75 S.W. 488 (1903). Indiana adopted the doctrine in State *ex rel.* Holt v. Denny, 118 Ind. 449, 21 N.E. 274 (1889), but in State *ex rel.* Schroeder v. Morris, 199 Ind. 78, 155 N.E. 198 (1927), the *Denny* case was so narrowly construed and distinguished that it is inconceivable that the doctrine would be upheld in that state today. Even in Michigan, where Cooley, one of the greatest proponents of "inherent right," sat on the bench, the court rested its decisions in that area upon a specific constitutional restriction on the legislature. McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 190, 198 (1916). The California Supreme Court decided People v. Lynch, 51 Cal. 15, 21 Am. Rep. 677 (1875), on the theory of an inherent right of local self-government. The significance of this case, however, was diminished by the subsequent inclusion in the new California constitution of several local self-government provisions. The Iowa Supreme Court in State *ex rel.* White v. Barker, 116 Iowa 96, 89 N.W. 204 (1902), carefully enunciated the doctrine while invalidating a state court's right to appoint trustees to a city's waterworks board (largely on the ground that operation of a waterworks system was a proprietary func-

Most states, in fact, avoided the doctrine and also the rule against taxation without representation. They adopted, instead, constitutional provisions which restricted the general grants of power to legislatures. Most restrictive provisions drafted after 1850 were specifically directed against special legislation. The confidence in the legislature as an effective governing unit, as expressed in the early state constitutions, was gone. It was thought that explicit limitations on the legislature's powers were necessary.

III. Drafting the Ripper Clause

In Pennsylvania in the years immediately after the Civil War, private and special legislative acts reached an extreme. Pennsylvania industry was booming; the demand for coal and iron, created during the war and maintained by the growth of the railroad system, had every mine, furnace, and mill operating at full capacity.[120] The Pennsylvania Legislature was kept busy during this period granting hundreds of corporation charters, many upon the condition that organization would not be effected or business conducted within the state. The pressure on the legislature for special acts was so great, and the devices used by interest groups and lobbyists so diverse, that laws were sent to the governor for signature without ever having passed either house of the assembly. Such bills were merely prepared by a legislative clerk and forwarded to the secretary of state for signing by the chief executive.[121]

Many special acts involving Pennsylvania cities were passed during this period. In cases brought before it, the Supreme Court of Pennsylvania asserted that the general assembly's legislative power was almost as unlimited as Parliament's and accepted the doctrine that municipalities existed and exercised their rights subject to the absolute discretion of the legislature.[122] This judicial attitude is illustrated by an excerpt from a concurring opinion in *Sharpless v. Mayor of Philadelphia*:[123]

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tion). The *Barker* case, however, was cited unsympathetically in State *ex rel.* Welch v. Darling, 216 Iowa 553, 246 N.W. 390 (1933), in which the court upheld a law creating a city parks board for Des Moines on the ground that care of city parks was a governmental function. As a practical matter, then, the inherent right doctrine is probably dead in Iowa. Kentucky adopted the theory in Lexington v. Thompson, 113 Ky. 540, 68 S.W. 477 (1902), but subsequently declared it unsound in Board of Trustees v. Schupp, 223 Ky. 269, 3 S.W.2d 606, 609 (1928), and Warley v. Board of Park Comm'rs, 223 Ky. 688, 26 S.W.2d 554, 555 (1930). The Kentucky court finally overruled *Lexington v. Thompson* in Board of Trustees v. City of Paducah, 333 S.W.2d 515 (Ky. 1960). Montana pays lip service to the inherent right of local self-government, but appears to rely on the due process clause of its constitution to invalidate state legislation in this area. *See, e.g.*, State *ex rel.* City of Missoula v. Holmes, 100 Mont. 256, 47 P.2d 624 (1935); State *ex rel.* Kern v. Arnold, 100 Mont. 346, 49 P.2d 976 (1935). Montana's constitution also contains restrictions on the legislature for the protection of municipalities, upon which restrictions the state's courts are more likely to rely than upon the inherent right doctrine.

[120] Dickson, *The Development in Pennsylvania of Constitutional Restraints upon the Power and Procedure of the Legislature*, 35 Am. L. Reg. & Rev. (n.s.) 477, 498 (1896).

[121] Id. at 498–99.

[122] 1 J. Dillon, Commentaries on the Law of Municipal Corporations § 122 (5th ed. 1911).

[123] 21 Pa. 147 (1853).

> To what extent can [a municipal corporation's] powers be enlarged, and what additions may be made to the original purposes for which it was created; or in other words, how far may the legislature go in the exercise of a legislative power? I submit that there is no limit to this authority until it is met by the mandate of the constitution, "Thus far, but no farther." I am aware that under this rule acts may be passed which will, in the minds of many persons, be contrary to natural justice, and subversive of the just rights of the people. The remedy is to be found in further constitutional restrictions upon legislation, not in restraints imposed by the judiciary. The limit of the power of the people's representatives, in my judgment, should be written upon the pages of the constitution, rather than remain in the breast of our judges.[124]

The court upheld a wide variety of special acts dealing with municipal affairs. For example, the original legislative franchise of the Lombard and South Street Railway Company allowed the laying of tracks in Philadelphia streets on condition that the company respect city ordinances. The supreme court, nevertheless, upheld a subsequent legislative act authorizing construction of tracks down a street in defiance of a city ordinance.[125] Many other examples could be cited.[126]

In 1870 a particularly abusive act created the Philadelphia Building Commission. This self-perpetuating commission could require the city council to provide an unlimited sum of money for the construction of public buildings. Great agitation arose in Philadelphia over the alleged extravagance, mismanagement, and dishonesty of the Commission.[127] At the 1872 constitutional convention, delegates asserted that the Commission had constructed buildings which were fifty years out-of-date and had chosen sites for public buildings unwisely.[128] But despite strong opposition to the Building Commission, the act creating it was not even challenged in the courts until after the adoption of the new constitution in 1874. When this belated curtailment proved unsuccessful,[129] the Commission

[124] *Id.* at 186.

[125] City of Philadelphia v. Lombard and S. St. Passenger Ry., 4 Brewst. 14 (Pa. 1866).

[126] In the South Street Bridge case in 1868, the city of Philadelphia was required to pay for the construction of an unwanted bridge. The City had not even known that the bill was before the general assembly, and upon learning of its passage, the city officers had urged the governor not to sign it, but in vain. The law was upheld by the court as an exercise of the plenary control of the legislature over municipal corporations. City of Philadelphia v. Field, 58 Pa. 320 (1868). During the 1872 constitutional convention, it was asserted that Philadelphia had deemed the erection of the bridge entirely unnecessary and that the legislature had been induced to pass the act creating the bridge commission by agents of interested passenger railway companies. *See* 3 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 121 (1873) [hereinafter cited as DEBATES].

As another example, in 1869 an act divested Philadelphia of the management of all the trusts left to it and placed these trusts under the control of a board, appointed by the justices of the district court and the court of common pleas, called the "Directors of City Trusts." This law was upheld in City of Philadelphia v. Fox, 64 Pa. 169 (1870).

[127] Perkins v. City of Philadelphia, 156 Pa. 554, 27 A. 356, 357 (1893).

[128] One such building was placed in the intersection of Board and Market streets, thus closing the streets and "ruining two magnificent avenues." 2 DEBATES, *supra* note 126, at 703.

[129] Perkins v. Slack, 86 Pa. 270 (1878).

continued to operate for over twenty years before its power was finally limited by the legislature.

Dissatisfaction with the increasing number of special and local acts finally led to the convening of a constitutional convention late in 1872.

> The members [of the convention] came together in a curious temper. With few exceptions they were animated with a spirit of bitter hostility to the Legislature, and one after another declared that they had only been sent there to put an end, if possible, to the frauds prevailing at Harrisburg.... Instead of the confidence that the members of the General Assembly would truly represent and protect their constituents, which prevailed in 1776 and 1790 and even in 1838, the dominant thought of the Convention was that all its energies should be given to the task of guarding the people of Pennsylvania against their own Legislature.[130]

The constitution drafted by the convention and approved by the Pennsylvania voters in 1874 attempted to curtail the volume of special enactments by absolutely forbidding special or local legislation on subjects enumerated in twenty-six separate clauses. In effect, the 1874 constitution was a concrete manifestation of the hostile attitude generally held toward the legislature.[131]

One of the primary concerns, then, of the delegates was to protect municipal corporations from special legislation. Early in the convention, members from Philadelphia offered resolutions aimed at curtailing interference by legislatively created commissions. One such resolution requested that the committee on cities and city charters recommend amendments to the old constitution that would vest the exclusive rights to raise money and exercise municipal functions with the local officers of the larger cities.[132] A former Pittsburgh mayor offered a resolution to prohibit commissions from interfering with local matters: "No public commission shall be created for any city with power to fill vacancies, to raise money by loan, to levy taxes or to execute any police or municipal function."[133] A Philadelphia delegate, lamenting the helplessness of his city before the arbitrary will of the legislature, noted in response to comments of an earlier speaker:

> [T]he Legislature of the State has utterly refused to listen to or recognize the councils of the city. No man knows better than he [Mr. Hanna, also of Philadelphia] does how utterly powerless those councils are to-day in Harrisburg, to obtain any legislation they ask for. No man knows better than he does, the fact that if the city of Philadelphia asks she is to be refused, because she asks. Our streets are taken from us and handed over to private corporations. The city councils with almost entire unanimity, entreat the Legislature not to do it; but the Legislature is silent. So it is with almost everything that is asked for from the Legislature of Pennsylvania which has the endorsement of the councils of Philadelphia. To ask it is to be sure to be refused.[134]

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[130] Dickson, *supra* note 120, at 501, 503.
[131] *See* 2 DEBATES, *supra* note 126, at 703–04.
[132] 1 *id.* at 98.
[133] 1 *id.* at 219.
[134] 2 *id.* at 400.

The mood of the delegates — at least the delegates from the larger cities — was unquestionably hostile to the legislature's abuse of its powers over municipal corporations. Consequently, the committee drafting the article on legislation included a "ripper clause," a provision forbidding the general assembly from delegating municipal functions to governmental or private commissions. The section, as it was presented to the convention at the second reading, stated:

> The Legislature shall not delegate to any commission of private persons, corporation or association, any power to make, supervise or interfere with any public improvement or to levy taxes, or perform any municipal function whatever.[135]

One non-city delegate proposed amending the section by adding, after the word "not," the phrase "without consent of the local authorities."[136] In elaborating on his proposal the delegate said:

> I am in favor of leaving this power in the hands of the Legislature, to create commissions for certain purposes, by and with the consent of the local authorities. In the case of cities, by and with the consent of the councils, and in the case of boroughs, with the consent of the borough councils.[137]

The proposed change was emphatically opposed by several convention members, all of whom indicated that they favored the provision in its original form precisely because it prohibited the legislature from creating special-purpose commissions under any circumstances. One speaker pointed out that city officials could, if they desired, appoint commissions to perform functions deemed (or "considered") better accomplished by bodies independent of the regular city government, and forcibly added:

> I hope that all the power for creating commissions will be taken from the Legislature and placed in the hands of the proper municipal authority. There is where it ought to be placed, and there is where it ought to rest. I therefore hope that the amendment . . . will be voted down.[138]

A Philadelphia delegate, speaking next, urged the defeat of the amendment on the ground that the municipal authorities, being more knowledgeable of local affairs than the legislature, should alone be empowered to create special commissions.[139] A third speaker opposed the textual change because it weakened the original proposal, the intention which he described as being:

> To strike at an evil which has prevailed to a very considerable extent in Philadelphia, and also in Allegheny county. Many of our citizens in Allegheny county, a few years ago, thought that a commission appointed by the Legislature, was the best plan for the purpose of making general local improvements, but since then there has been a

[135] 2 *id.* at 696.
[136] 2 *id.* at 696–97.
[137] 2 *id.* at 697.
[138] *Id.*
[139] *Id.*

> complete change in the mind of every one, excepting those who are connected with these commissions and their immediate friends, who favor the appointment of a commission for everything. I believe some three or four commissions have been created in our county for this purpose, and there has been more money wasted by them than by all the other official authorities during the past twenty years.[140]

Objecting to the fact that commissions were not accountable to the people, a fourth opponent of diluting the ripper clause asserted that no public improvement should be authorized without the approval of the persons upon whom the burden of taxation would be placed or their immediate representatives:

> The Legislature, in the creation of commissions for various purposes, determines [the desirability of public improvements] without any regard to the wishes or the necessities of the people, or to the condition of the city treasury. *The commissioners are wholly irresponsible; no department is authorized to examine and to approve or disapprove their actions. They are generally without restriction as to their power to assess and levy taxes.*[141]

The amendment to allow legislative appointment of commissions on condition of approval of local authorities was rejected.[142]

Despite the relative unanimity among the delegates that control over purely municipal functions should be placed exclusively in the hands of local authorities, the convention was reluctant to provide for the abolition of existing commissions appointed by the legislature to deal with local affairs. Abolition proposals, offered as amendments to the ripper clause[143] and to other provisions in the article on cities and city charters,[144] were rejected principally on the ground that such proposals were legislative and had no place within the fundamental law. Future legislatures, however, were left free to abolish the existing commissions.[145]

The final form of the ripper clause as drafted by the convention and accepted by the voters was:

> The General Assembly 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, or to levy taxes or perform any municipal function whatever.[146]

The ripper clause drafted by the Pennsylvania convention became a model for ripper clauses subsequently drafted by others states. With minimal discussion, California's constitutional convention of 1878–1879

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[140] 2 *id.* at 698.
[141] *Id.* (emphasis added).
[142] 2 *id.* at 700.
[143] 2 *id.* at 700–07.
[144] 3 *id.* at 117–20.
[145] 2 *id.* at 701–02.
[146] PA. CONST. art. III, § 20.

adopted the Pennylvania form almost verbatim.[147] Five other Western states,[148] none of which had a city large enough to have experienced legislative depredations, incorporated ripper clauses into their first constitutions by simply copying the Pennsylvania or the California provision.[149] In an 1875 constitutional amendment, New Jersey adopted a variation of the ripper clause, prohibiting legislative creation of municipal commissions by special or local acts, but not by general laws.[150]

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[147] The legislature shall not delegate to any special commission, private corporation, company, association, or individual, any power to make, control, appropriate, supervise, or in any way interfere with, any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever.

CAL. CONST. art. 11, § 13.

[148] The general assembly 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, or to levy taxes or perform any municipal functions whatever.

COLO. CONST. art. V, § 35.

The legislative assembly 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, or to levy taxes, or to perform any municipal functions whatever.

MONT. CONST. art. V, § 36.

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, effects, whether held in trust or otherwise, or levy taxes, or to select a capital site, or to perform any municipal functions whatever.

S. D. CONST. art. III, § 26.

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.

UTAH CONST. art. VI, § 29.

The legislature shall not delegate to any special commissioner, private corporation or association, any power to make, supervise or interfere with any municipal improvements, moneys, property or effects, whether held in trust or otherwise, to levy taxes, or to perform any municipal functions whatever.

WYO. CONST. art. 3, § 37.

[149] H. MCBAIN, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE 45–46 (1916).

[150] The legislature shall not pass private, local or special laws in any of the following enumerated cases, that is to say:

. . . .

Regulating the internal affairs of towns and counties; appointing local offices or commissions to regulate municipal affairs.

. . . .

The legislature shall pass general laws providing for the cases enumerated in this paragraph, and for all other cases which, in its judgment, may be provided for by general laws. The legislature shall pass no special act conferring corporate powers, but they shall pass general laws under which corporations may be organized and corporate powers of every nature obtained, subject, nevertheless, to repeal or alteration at the will of the legislature.

N.J. CONST. art. IV, § 7, ¶ 11 (1875 amendment to 1844 constitution).

A similar provision was included in the New Jersey Constitution of 1947.

The Legislature shall not pass any private, special or local laws:

. . . .

(12) Appointing local officers or commissions to regulate municipal affairs.

(13) Regulating the internal affairs of municipalities formed for local government and counties, except as otherwise in this Constitution provided.

IV. The Ripper Clause in Pennsylvania

Long before the Civil War, Pennsylvania courts had clearly established that the legislature had complete authority over municipal corporations, except as prohibited by express provisions of the federal or state constitutions.[151] The city was considered an agent of the state government; its powers could be expanded or contracted as the legislature saw fit.[152] Consequently, it was apparent to members of the 1874 constitutional convention that if municipal corporations were to be protected from the arbitrary discretion of the legislature, it would have to be by specific constitutional provision.[153] As a result, the new constitution contained over 60 specific limitations on the power of the legislature to enact special laws. One of these limitations, section 20 of article III, was the ripper clause.[154]

The ripper clause expressly withdrew from the legislature the power to create commissions dealing with "municipal functions."[155] These commissions were prohibited because they took the functions of local government from elected municipal officials and placed them in the hands of appointed commissioners over whom the local taxpayers had no control.[156] The purpose of the clause has been well understood by Pennsylvania courts.[157]

The first problem arising under the Pennsylvania ripper clause was whether legislative commissions created prior to its adoption in 1874 were prohibited from further operation. In fact, almost immediately after the new constitution took effect, cases were initiated to obtain a declaration of the invalidity of existing commissions. In *Struthers v. City of Philadelphia*,[158] contracts made by the Philadelphia Building Commission were challenged. In view of the ripper clause, the court questioned whether the Building Commission still existed, but it did not rule on the question because it was being discussed in another unrelated case. The court upheld the contracts on the ground that the Commission was unquestion-

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> The Legislature shall pass general laws providing for the cases enumerated in this paragraph, and for all other cases which, in its judgment, may be provided for by general laws. The Legislature shall pass no special act conferring corporate powers, but shall pass general laws under which corporations may be organized and corporate powers of every nature obtained, subject, nevertheless, to repeal or alteration at the will of the Legislature.

N.J. Const. art. IV, § 7, ¶ 9.

[151] Sharpless v. Mayor of Philadelphia, 21 Pa. 147, 161, 186 (1853).

[152] Philadelphia v. Fox, 64 Pa. 169, 180 (1870).

[153] Perkins v. City of Philadelphia, 157 Pa. 554, 27 A. 356, 360–61 (1893).

[154] The constitutional language is as follows:

> The General Assembly 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, or to levy taxes or perform any municipal function whatever.

Pa. Const. art. III, § 20.

[155] *See* notes 132–46 *supra* and accompanying text.

[156] 2 Debates *supra* note 126, at 698.

[157] *See, e.g.*, Porter v. Board of Plumbing Supervision, 43 Pa. D. & C. 616, 621 (C.P. 1942).

[158] 12 Phila. R. 268 (Pa. C.P. 1877).

ably valid before the adoption of the new constitution, and therefore contracts made by it could not be abrogated by state law or constitutional change without violating the contract clause of the federal Constitution.

The real test as to the retroactive nature of the ripper clause came in *Perkins v. Slack*[159] in 1878, a case directly challenging the status of the Philadelphia Building Commission. The complaint was principally based on article XV, section 2, which provides that "no debt shall be contracted or liability incurred by any municipal commission, except in pursuance of appropriations previously made therefor by the municipal government," but reliance was also placed on the ripper clause. The trial court held that article XV, section 2, prevented commissions like the Philadelphia Building Commission from making expenditures without first obtaining the consent of the elected city officers. Upon appeal to the Pennsylvania Supreme Court, the section was construed to prohibit commissions from signing contracts before funds had been appropriated by the city, but not to prevent commissions from requiring the city to appropriate the necessary funds. Justice Trunkey pointed out that while the constitutional convention had rejected several proposed amendments to article III, section 20, which would have annulled all special commissions, article XV, section 2, was only briefly discussed and was passed without objection. Thus, neither the ripper clause nor article XV, section 2, were construed to abolish the powers of existing commissions.[160]

Determining what constitutes a "special commission" prohibited by the Pennsylvania ripper clause has been a continuing problem for the Pennsylvania courts. In 1893, the legislature attempted to abolish the Philadelphia Building Commission and to vest its powers exclusively in the Philadelphia department of public welfare. The Pennsylvania Supreme Court, in *Perkins v. City of Philadelphia*,[161] held that a city department was not competent to receive such an extraordinary grant of power from the state legislature. The department would become a special commission if this transfer were permitted.[162]

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[159] Perkins v. Slack, 686 Pa. 270 (1878).

[160] Speaking of § 2, article XV, Justice Trunkey stated:

> Doubtless its mover and a few others believed it broad enough to throttle all commissions [but] . . . [i]ts scope and just bearing must have been understood by the strong majority of the convention which so steadily rejected amendments, designed to destroy commissions, to Section 20, Article III. That majority included able lawyers, who well knew that no statute or part thereof, positively repugnant, would be repealed by implication. It cannot be inferred the convention intended what, on full discussion, was refused.

Id. at 279.

The Penn Avenue Commission, which had constructed miles of wide avenues through farm lands recently annexed to the city of Pittsburgh, was also held to be unaffected by article III, § 20, because it was created prior to the adoption of the 1874 constitution. Commonwealth *ex rel.* Whelen v. City of Pittsburgh, 88 Pa. 66, 87 (1878). California courts have also refused to give the ripper clause retroactive application. *See* Board of Comm'rs v. Board of Trustees, 71 Cal. 310, 12 P. 224 (1886).

[161] 156 Pa. 554, 27 A. 356 (1893).

[162] The Pennsylvania Court reasoned that:

> If the powers of the commission had passed to the city, the department, as such, would have taken nothing. The direction of the actual labor would have been with it, by virtue of being one of the nine subdivisions of the

The *Perkins* decision set a standard for many subsequent cases. If a commission created after the ratification of the constitution of 1874 performed functions deemed by the courts to be municipal, and exercised these powers independently of the local officers, the commission was held unconstitutional by the Pennsylvania courts. Thus, in 1901, the Supreme Court of Pennsylvania declared that an 1899 act providing for "sidepath" commissioners violated the ripper clause.[163] The court held that the maintenance and regulation of the highways in townships was a municipal function vested in the supervisors of the townships. The transfer of any of this power to sidepath commissioners violated article III, section 20.

In *Philadelphia v. Spangler*,[164] a Pennsylvania district court refused to allow legislative extension of the powers of the Fairmount Park Commission, a commission created prior to the constitution of 1874. The district court held that even though the Commission antedated the constitution of 1874, the ripper clause precluded expansion of its powers.[165] And in the 1962 case of *Erie Firefighters Local No. 293 v. Gardiner*,[166] the Pennsylvania Supreme Court refused to enforce the decisions of a board of arbitration against municipal authorities on the ground that the salaries and pension plan of city employees are municipal affairs and cannot be delegated by the legislature to such a panel.

Not only the legislature, but municipal corporations themselves are forbidden by the ripper clause to delegate municipal powers to commissions or private corporations operating independently of municipal officers. In *Lighton v. Abington Township*[167] the supreme court refused to allow a township to issue non-debt revenue bonds which authorized a private trust company to assume control of a municipally-owned sewage system in the event of default on the part of the city. In concluding that a municipal corporation is also bound by the requirements of the ripper clause, the court reasoned:

> As the constitution specifically deprives the state of power to delegate the management of the municipal property to a private corporation, certainly the agent, the township, cannot make such a delegation; the effect of the limitation on the principal would be destroyed if the agent could do what was prohibited.[168]

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executive power of the city. *But under the act of 1893 this department is named as the sole legislative donee of the powers of the commission. It takes not from or through the city, but independently of it, and directly from the commonwealth.*

27 A. at 358 (emphasis added).

[163] The act provided that, on the presentation of a petition signed by at least twenty-five "freeholders, residents of the county and riders of bicycles," the court of quarter sessions should appoint three "resident wheelmen" to be side-path commissioners. These commissioners were to receive from the county commissioners the proceeds of a tax levied on bicycles owned in the county and were to expend the money in constructing and maintaining side-paths for bicyclists along the edges of public roads. *See* Porter v. Shields, 200 Pa. 241, 49 A. 785 (1901). *See also* Commonwealth *ex rel.* Dare v. Smith, 9 Pa. Dist. 350 (1900); Keeler v. Westgate, 10 Pa. Dist. 240 (1901).

[164] Philadelphia v. Spangler, 9 Pa. D. & C. 577 (1927).

[165] *Id.* at 590.

[166] 406 Pa. 395, 178 A.2d 691, 695 (1962).

[167] 336 Pa. 345, 9 A.2d 609, 611–12 (1939).

[168] *Id.* at 612.

The *Lighton* holding has been followed in at least two other cases.[169]

Although municipalities may not create commissions to operate independently from elected municipal officers, the courts have upheld municipal creation of quasi-judicial commissions serving as administrative arms of the local government. A 1923 Pittsburgh zoning ordinance established a board of appeals to review complaints alleging that a city ordinance caused practical difficulties or unnecessary hardships. When justified by the facts the board could modify the requirements of the ordinance. A challenge to the constitutionality of the board of appeals was rejected by the superior court in *Junge's Appeal (No. 2)*[170] on the ground that the board was created by the city and the members of the board were appointed and subject to removal by the city authorities. The superior court's holding in the *Junge* case was adopted by the state supreme court in *Appeal of Ward*[171] in 1927.

Likewise, the Pennsylvania General Assembly has been allowed to create commissions and to delegate municipal powers to officers and boards which exercise their powers under the control of elected municipal authorities. For example, in 1893, a district court upheld legislation authorizing a city or borough council to create a board of health.[172] The board was appointed by the local authorities; it had no power to tax, and its rules and regulations were not binding unless approved by the local authorities. And in *Stratton v. Allegheny County*[173] the supreme court upheld an act authorizing counties and cities that agree among themselves to build joint city-county buildings in cities where the county seat was located. The court sustained this act on the ground that the purpose of the ripper clause was to prevent legislative interference with local affairs, not prohibit the authorization of joint city-county activities, undertaken with the consent of each local unit. In *Commonwealth ex rel. v. Krebs*,[174] an act authorizing establishment of commissioners of water works was upheld because the commissioners were appointed by municipal officers or, at the officials' request, by a court of common pleas, and the commissioners relied on the local officers for the continued exercise of their powers. The commission could not bond or increase the debt of the borough for any purpose without prior approval of the local authorities.

Acts of the legislature adding new departments or bureaus to city governments have been upheld if the new agencies remain under the control of the locally elected officers and do not perform functions completely

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[169] In Borough of Weatherly v. Warner, 148 Pa. Super. 557, 25 A.2d 831 (1942) the Superior Court of Pennsylvania held unconstitutional a municipal ordinance that authorized appointive municipal officers — the borough engineer and supervisor — to determine which streets should be curbed, the materials to be used, and the specifications to be met. Similarly, in Czelusniak v. Olyphant Borough, 82 Pa. D. & C. 290 (1952), a county court refused to allow Olyphant Borough to operate a municipal electric company through a board which was independent of the borough council.

[170] Junge's Appeal (No. 2), 89 Pa. Super. 548, 564 (1927).

[171] 289 Pa. 458, 137 A. 630, 632 (1927).

[172] Smith v. Baker, 3 Pa. Dist. 626 (1893).

[173] 245 Pa. 519, 91 A. 894 (1914).

[174] 43 Pa. County Ct. 425 (1915).

out of harmony with the purposes of city government. In 1931, in *Walnut & Quince Street Corp. v. Mills*,[175] the court upheld a legislative act creating a Philadelphia "art jury" to approve works of art and other erections upon, or extending over, public places. The court upheld the act of the ground that the art jury constituted an integral part of the local government of Philadelphia.[176]

In *Moll v. Morrow*,[177] however, the court invalidated a legislative attempt to create a board of public morals as a subdivision of the bureau of public safety in cities of the second class. Even though the board was to be organized at the request of the regular city officials and its members were to be appointed and removed by the mayor, the court argued that its purpose was wholly out of harmony with the normal functions of a city government and that it constituted "a special agency for the performance of a municipal function" and illegally exercised control over city policemen in violation of the ripper clause. Apparently the board of morals was considered a special commission, despite its dependence on municipal officers, because it was charged with a state police function rather than a municipal function; but it performed this state function through the city police, and in controlling the city police it was usurping a municipal power in a manner not much different from the classic special police commissions which the ripper clause was meant to forbid.

A county retirement fund board was held not to violate the ripper clause in *Retirement Board v. McGovern*.[178] In *McGovern*, the Board sought a writ of mandate to compel the county commissioners to turn over funds deducted from employees' wages. The commissioners refused on the grounds that the Board interfered with county money by requiring the county to contribute to the fund, and that it performed the municipal function of providing a pension plan for county employees. The court dismissed these contentions by citing a previous decision[179] (a case which had not dealt with the ripper clause) that treated retirement boards as integral agencies of the municipal government and thus capable of performing municipal functions. The 1942 case of *Porter v. Board of Plumbing Supervision*[180] upheld an act instructing the director of the Philadelphia Board of Health to appoint a board of plumbing supervision which

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[175] 303 Pa. 25, 154 A. 29 (1931).

[176] The court reasoned that:

> The Charter Act of 1919 established the art jury as a distinct element of the governmental structure. Although the act changed in part what had theretofore been within the scope of certain municipal departments, it did not create a special commission in the sense of creating a body separate and distinct from the subdivisions of the municipal government, empowered to "supervise or interfere with any municipal improvement," but merely directed that, before designated structural encroachments should be permitted on the highways, approval of their design should be secured from this body of experts particularly fitted for passing judgment in matters of aesthetics.

154 A. at 32.

[177] 253 Pa. 442, 98 A. 650 (1916).

[178] 316 Pa. 161, 174 A. 400 (1934).

[179] Commonwealth v. Walton, 182 Pa. 373, 38 A. 790, 791 (1897).

[180] Porter v. Board of Plumbing Supervision, 43 Pa. D. & C. 616, 621 (C.P. 1942).

was charged with certifying plumbers and supervising their work. The court reasoned that since the board was subservient to the city health department it did not violate the ripper clause.[181] But where a board appointed by the county commissioners was authorized to function independently of the commissioners, it was declared a special commission.[182]

The ripper clause has been held to permit legislative allocation of ministerial and administrative functions to designated officers. For example, in 1919, the Supreme Court of Pennsylvania sustained an act requiring the city controller to determine the nature of bonds presented for his signature and to approve only bonds which were issued for capital improvements.[183] The court upheld the act on the ground that the controller was not called upon to exercise any duties usually associated with a special commission; his function was merely administrative. Another case, *Clark v. Beamish*,[184] involved an act calling for an election to decide whether voting machines should be used within a certain county and, if the vote was affirmative, to approve a bond issue to purchase the machines. Under the act, the Secretary of State was to execute a contract for the voting machines if the county commissioners had not done so within one year after an affirmative vote. The court rejected the claim that this provision violated the ripper clause on the ground that the Secretary of State was not exercising any legislative power or controlling any money or property belonging to the county; his function was merely to ascertain a state of fact.

The consolidation of administrative units performing local functions has been sustained by the Pennsylvania Supreme Court where control of these units is left with local governing bodies. In 1937 the legislature passed an act consolidating the more than 400 city and county poor districts in the state into sixty-seven units to be governed by the county commissioners. This act was upheld in *Kotch v. Middle Field Poor District*,[185] in which the court reasoned that since the consolidated poor districts were governed by locally elected officers they did not constitute special commissions. Countering the argument that the act made the State Department of Welfare a special commission because it gave the Department power to suggest rules, regulations, and standards for the county poor dis-

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[181] *Id.* at 625–25 (1942) (footnotes omitted).

[182] In 1921 the legislature provided for the construction and operation of tuberculosis hospitals in the counties of the commonwealth. Such hospitals were to be governed by a board of five trustees chosen by the county commissioners. The act authorized the trustees to hire as many persons as they deemed necessary, to set salary schedules, and to promulgate the rules and regulations of the hospital. A district court held the act invalid. *In re* the Acquiring of a Site for and Construction, Equipment, and Management of a County Hospital for the Treatment of Persons Afflicted with Tuberculosis; included as a note to *In re* Tuberculosis Hospital, 7 Pa. D. & C. 725, 729 (Dist. Ct. 1926). An act passed in 1925, which made the board of trustees merely advisory to the county commission, was upheld in 1927 in Commonwealth v. Woodring, 289 Pa. 437, 137 A. 635 (1927).

[183] Kraus v. City of Philadelphia, 265 Pa. 425, 109 A. 226, 230 (1919).

[184] 313 Pa. 56, 169 A. 130 (1933).

[185] 329 Pa. 390, 197 A. 334 (1938).

tricts, the court noted that the State Welfare Department exercised only advisory powers over the local districts.[186]

State-wide commissions regulating privately-owned public utilities and services operating within municipalities have been held not to be special commissions under the Pennsylvania ripper clause. In *Borough of Lansdowne v. Public Service Commission*,[187] the Pennsylvania superior court upheld a decision by the Public Service Commission which allowed a private fire company to increase its rate for the fire protection service provided to the borough. The court reasoned that the Public Service Commission did not have the power or authority to usurp or exercise any municipal function, even though its action required Lansdowne and several other boroughs to appropriate additional amounts to pay the increased fees. This conclusion appears to have been dictated by earlier decisions which assigned the regulation of public utilities to the state under its police powers.[188]

Pennsylvania courts have upheld acts delegating non-municipal functions to city officials or commissions. In 1893, a district court refused to invalidate an act giving certain officers of cities of the second class the power to approve the location of cemeteries, hospitals, and pest houses. The court held that these officers did not constitute an illegal special commission because the powers conferred upon them did not involve "municipal matters."[189]

In 1913, an act was upheld which provided for a grand jury hearing to consider a request by the Allegheny County commissioners that a high-

[186] In Kotch v. Middle Field Poor District, 329 Pa. 390, 197 A. 334 (1938), the court reasoned that:

> There is no unusual power conferred upon the State Department of Welfare and no control to perform a municipal function. The sole purpose of the sections here attacked is to constitute the State Department of Welfare a coordinating and standardizing nucleus for the whole . . . district system. It can advise action by commissioners, check action where ill-advised, prescribe forms in which certain routine matters are to be done, but it cannot itself act in their place. Such supervision does not supplant the function of local authority but is in aid of it and so constitutional.

197 A. at 342.

A similar act was upheld in Managers of Relief and Employment v. Witkin, 329 Pa. 410, 196 A. 837 (1938). This act provided for the consolidation of the poor districts in cities of the first class (Philadelphia is the only first class city in Pennsylvania) into the city department of public welfare. All property was transferred to the city and was to be supervised by the welfare department. The court sustained the act on the ground that it did not transfer the functions of the poor districts directly to a single department of the city, as the act invalidated in Perkins v. City of Philadelphia, 157 Pa. 554, 27 A. 356 (1893), had attempted to do. Rather this act vested all powers of the former districts in the city and merely designated the department of public welfare as the branch of the city government in charge of such functions.

[187] 74 Pa. Super. 203 (1920).

[188] Borough of Wilkinsburg v. Public Serv. Comm'n, 72 Pa. Super. 423 (1919). *See also* cases cited *id.* at 428.

It had repeatedly been held that a maximum rate stipulated in a franchise granted by a municipality to a public utility might be raised by the Public Service Commission since the fixing of rates involved the "general well-being of the State." *Id.* at 431. The *Lansdowne* decision was followed in Crown Prod. Co. v. Pennsylvania Pub. Util. Comm'n, 152 Pa. Super. 345, 32 A.2d 305 (1943).

[189] The act was held invalid, however, as a special law in violation of article III, § 7, because there was no showing that such functions were necessarily limited to cities of the second class. Commonwealth *ex rel.* United Presbyterian Women's Ass'n of North America v. Heckert, 7 Pa. Dist. 186 (C.P. 1898).

way tunnel be constructed as part of the state highway system.[190] The court traced the development of legislation dealing with highways, noting that as the population increased and transportation improved, regulation of highways became a state function. Consequently, the act was held not to violate the ripper clause since it did not "relate to the affairs of cities or cause an additional burden upon them."

In the case of *In re Baldwin Township, Allegheny County, Annexation*,[191] the supreme court upheld acts of the general assembly establishing a procedure for cities to annex new territory. The acts required that annexation be subject to approval of a majority of the electors in the annexed territory and, upon approval by the state council of education for the annexation of the school districts concerned, a final decree of annexation by the court of quarter sessions. In the *Baldwin* case, the education council had disapproved an annexation by Pittsburgh and the courts refused to reverse the decision, even though the electors of the township had authorized the annexation by an affirmative vote. The supreme court opinion asserted that the function of the state council was to determine a state of fact upon which the operation of the law depended, and held that such action was merely an administrative duty. The court dismissed the challenge raised under the ripper clause with two sentences.

> [T]he state council of education is not herein attempting "to make, supervise or interfere with any municipal improvement, money, property or effects, or to levy taxes or perform any municipal function whatever." In view of this fact, we do not need to discuss the question of what constitutes a "special commission" within the meaning of Article III, Section 20, of the Constitution.[192]

The rationale of the *Baldwin* case is still accepted in Pennsylvania and almost all other jurisdictions.[193] To authorize a board to determine the existence of the facts upon which annexation to a municipality is conditioned is not to transfer to the board any of the powers of the municipality. The ripper clause was not intended to regulate annexation; this topic has always been considered to be a legislative rather than a municipal function.

The Pennsylvania courts have held that the ripper clause forbids granting a non-elective commission the power to levy a tax, regardless of whether the board deals with municipal or state matters. In *Wilson v. School District*,[194] the supreme court invalidated an amendment to the

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[190] Grand Jury Report, 23 Pa. Dist. 411 (1913).

[191] 305 Pa. 490, 158 A. 272 (1931).

[192] 158 A. at 274.

Chief Justice Frazer entered a dissenting opinion arguing that annexation was very definitely a municipal function and that any interference with annexation by the state council of education violated the ripper clause. *Id.*

[193] *See, e.g.*, Appeal of Hewitt, 88 Pa. 55 (1879); *In re* Millcreek Township Annexation, 74 Pa. Super. 274 (1920). *See also* 2 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 7.10, at 277–83 (3d ed. 1949); 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 1.13, at 34–35 (1965).

[194] 28 Pa. 225, 195 A. 90, 113 A.L.R. 1401 (1937).

school code authorizing the school board, an appointive body in first class districts, to levy taxes to pay salaries and retirement funds of the teaching and supervisory staffs of the schools.[195] The court invalidated this section of the act on two grounds: First, it was an unconstitutional delegation of legislative power. The power to tax is a legislative function and can only be delegated to municipalities, where supervisory control is vested in elective bodies. Appointed school districts, being agencies of the state, do not possess any of the governmental attributes of municipalities and must therefore be limited to administrative functions. Second, the granting of discretionary taxing power to appointed school boards violated the ripper clause.

> The purpose of the [ripper clause] was to protect against the exercise of the taxing power by officials not subject to the control of the people. This prohibition is not limited solely to municipal taxation. The words "to levy taxes" are not modified by the word "municipal," whereas the remaining clauses in this section are specifically so modified. This demonstrates the intention of the framers that no taxing power whatever, state or municipal, be delegated to any special appointive commission. The section becomes an express and emphatic limitation on the power of the Legislature to delegate to a nonelective board or commission the power to tax.[196]

The defendant had argued that since school districts were in existence prior to the adoption of the constitution of 1874 they were not effected by the ripper clause. However, the court held that since taxing is a "separate special power, and is not a component part of the power to educate," the school board became a special commission when it was granted the power to levy taxes.

Four subsequent cases have dealt with appointive school or college boards. *Smith v. School District*[197] held that school districts cannot be compelled to maintain fixed salary schedules, because this would require that the boards be given taxing power to meet the guaranteed salaries. In 1940, *Moore v. School District*,[198] sustained legislation curing the defects of the act invalidated in the *Wilson* case. The curative act established a fixed mill levy which the school district could collect; under these circumstances the court held that the school district was merely executing the legislative will and not exercising a discretionary power to tax. A district court, in *Brown v. Seward Independent School District*,[199] followed the *Moore* decision and limited a school district to a tax levy specified in a prior act of the legislature.[200] *Peters v. Parkhouse*[201] struck down a section

[195] Although the salaries of these employees were fixed by law, the number to be employed was left to the discretion of the school board. Thus, the amount of tax to be levied by the Board could vary according to the number of employees it decided to hire. 195 A. at 94, 97.

[196] *Id.* at 99.

[197] 334 Pa. 197, 5 A.2d 535, 539 (1939).

[198] 338 Pa. 446, 13 A.2d 29 (1940).

[199] 64 Pa. D. & C. 616 (C.P. 1948).

[200] The holding of the *Moore* case was also affirmed in dictum in Walsh v. School District, 343 Pa. 178, 22 A.2d 909, 917–18 (1941).

[201] 36 Pa. D. & C. 2d 527 (C.P. 1965).

of the Community College Act which gave the appointed trustees of community colleges unlimited power to obligate its sponsoring city or county to pay for any expenditures undertaken in behalf of the college. Such a situation, the court said, is tantamount "to granting the board an unlimited power to tax . . . ." However, Pennsylvania courts have held that the taxing power may be delegated to bodies other than municipalities, provided the officers are elected.[202]

The legislature, in seeking to obtain federal funds in the construction of local projects and to avoid the constitutional debt limitations on municipalities, created "authorities" to build specific projects. These projects were financed through revenues earned by the completed improvements. The authorities which were given neither the power to tax nor the power to pledge the credit of municipalities, secured credit by placing liens on the property it was improving, and did not affect city property in any way.

The first challenge of such an authority under the ripper clause was in *Tranter v. Allegheny County Authority*.[203] The Allegheny County Authority had been created in 1934 to provide for county participation in the United States NIRA program. The Authority was empowered to borrow money from the United States government to construct highways, overpasses, and bridges in the Pittsburgh area, to be repaid from fees and tolls earned from the improvements. The supreme court upheld the Allegheny County Authority with a two-sided argument. First, the court held that the Authority was beyond the scope of the ripper clause.

> By 1873, when the convention was engaged in preparing the Constitution, public opinion had recognized the economic mistake of taking from municipalities certain powers and conferring them on independent commissions, while, at the same time, requiring the municipality to pay the bills incurred by the commission without any restraining voice in the expenditure. The separation of the power to incur debts from the duty of providing for their payment by taxation, produced the principal mischief complained of and which it was sought to prevent. . . . It cannot be said that the creation of a public corporation as a state agency to take over public highways for the limited purpose of improving them, paying for the improvement out of revenues collected for their use, and then returning them to the local political subdivisions to which they had formerly been intrusted by the state is a special commission in any sense in which those words were used in the Constitution, whether in substance or spirit.[204]

The Allegheny County Authority did not separate the power to incur debt and the responsibility for payment; the improvements were self-liquidating and title passed to the municipality only after the debts incurred during their construction had been retired. Therefore the evil to be prevented by the ripper clause was not present in the case of the Authority.

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[202] For example, an elective school board was allowed to levy a tax in English v. School District, 358 Pa. 45, 55 A.2d 803, 808 (1947).

[203] 316 Pa. 65, 173 A. 289 (1934).

[204] 173 A. at 295.

The second argument of the court was that the statute did not provide for the improvement of any municipal property, since the Allegheny County Authority dealt only with improvements on the highway system, which is considered property of the Commonwealth.[205]

The next authority to be challenged under the ripper clause was the Philadelphia Housing Authority.[206] This agency was created under state laws passed to take advantage of the 1937 Federal Housing Act. The Pennsylvania acts provided for the creation of authorities, at the request of cities, to alleviate problems of crowded slums and to provide low-cost public housing. As with the Allegheny County Authority, the housing authorities were without power to bond or borrow on the credit of municipalities and were financed by revenues received from the projects. The state supreme court upheld the Philadelphia Housing Authority on one of the grounds relied upon in the *Tranter* case: such authorities were beyond the scope of the ripper clause because there was no separation of the power to incur debt and the responsibility to pay.

In 1935, the general assembly passed the Municipal Authorities Act, which allowed municipalities to create their own authorities. The Philadelphia Authority, established under this act, was challenged as a violation of the ripper clause in *Williams v. Samuel*[207] in 1938. The city of Philadelphia planned to transfer its sewer and water properties to the Authority, which was to improve them, and then lease them back at rentals sufficient for the Authority to pay off the principal and interest of any debt incurred in making the improvements. Philadelphia would assess consumers for use of the water and sewage facilities. The court, in dismissing the contention that the act contravened the ripper clause, relied entirely on the *Tranter* holding that self-liquidating public authorities were not special commissions within the scope and meaning of the constitution.[208]

The allegation that charges by a municipal authority constituted taxes was first made in *Rankin v. Chester Municipal Authority*[209] in 1949. In this case, the superior court upheld the Chester Municipal Authority's increase in water service rates. The court determined that the higher rates, which were to finance an expansion of the water facility operated by the

[205] Since the Authority was beyond the scope of § 20, and dealt with state property, it was also held immaterial that a private trust corporation could be established to collect tolls in the event of default by the authority. *Id.*

[206] Dornan v. Philadelphia Housing Authority, 331 Pa. 209, 200 A. 834 (1938).

[207] 332 Pa. 265, 2 A.2d 834 (1938).

[208] The *Tranter* rationale was also followed in Belovsky v. Redevelopment Authority, 357 Pa. 329, 54 A.2d 277 (1947). In *Belovsky*, the court upheld the Urban Redevelopment Law against attack under the ripper clause on two grounds. First, the redevelopment authorities were purely administrative bodies enjoying no important power which was not subject to the approval of the city council or the county commissioners. Second, as held in the *Tranter* case, such authorities are public bodies and not special commissions within the meaning or intent of the ripper clause.

In Griffin v. McCandless Township, 366 Pa. 309, 77 A.2d 430 (1951), the court upheld a contract between the Township and a municipal water authority providing that the Authority should supply water to the Township and should construct, own, and operate the necessary distribution lines.

[209] 165 Pa. Super. 438, 68 A.2d 458 (1949).

authority, did not constitute a tax, but were merely a valid and reasonable charge for a commodity voluntarily purchased by patrons of the company.

The problem of taxation by municipal authorities arose again in *Evans v. West Norriton Township Municipal Authority*.[210] In this case, a suit was filed to enjoin the Authority from assessing and collecting, from owners of abutting properties, charges which would pay for the extension of a sewage system. Under the plan, the Authority was required to submit all plans and estimated costs of any extension to the elected municipal officers for their approval prior to the initiation of any work. The cost of construction could not exceed the estimated cost approved by these officers. The state supreme court held that since the power of the Authority to levy assessments was dependent on the approval of the elected local officers, it should not be considered to have the power to tax.[211]

Although the ripper clause protects municipalities, it has not been held to protect municipal authorities from legislative interference. Whether created by the state or by a municipal corporation, authorities are considered corporate bodies responsible to the state government. As such, they represent a redistribution of powers between the state and local governments.[212] In 1965, the Port Authority of Allegheny County contested the constitutionality of a law requiring it to submit disputes with its employees to arbitration. The Authority relied on *Erie Firefighers Local No. 293 v. Gardiner*,[213] a case which held that decisions by an independent labor arbitration board were not binding on a municipal corporation because such decisions interfered with the internal affairs of a city. But the court held that authorities are state agencies and therefore outside the scope of the ripper clause.[214]

It has been argued in several cases that an ordinance which involves private persons in municipal activities creates a special commission. Most cases, however, have held that the private involvement did not constitute a prohibited delegation of municipal powers or functions. For example in 1911, an action was brought challenging the establishment of a private sinking fund commission.[215] The city of Philadelphia had contracted with the Philadelphia Rapid Transit Company to have certain funds placed in a sinking fund and held in trust until $5,000,000 accrued. At that time the city could take the money or alternatively assume control of the transit company. While held in trust, the money was to be invested by a special commission. Responding to a challenge against the commission under the ripper clause, the court held that since the fund did not become property of the city until it reached $5,000,000 — at which time it would either

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[210] 370 Pa. 150, 87 A.2d 474 (1952).

[211] The opinion borrowed heavily from the *Wilson* case, discussed in text accompanying note 194 *supra*, which held that no appointive board could be given an independent power to tax.

[212] *In re* Muncipal Authority, 408 Pa. 464, 184 A.2d 695 (1962).

[213] 406 Pa. 395, 178 A.2d 691, 695 (1962).

[214] Division 85, Transit Union v. Port Authority, 417 Pa. 299, 208 A.2d 271 (1965).

[215] Brode v. City of Philadelphia, 230 Pa. 434, 79 A. 659 (1911).

pass to the city or be used to purchase the street railway — the commission administering the sinking fund did not have charge of municipal property and performed no municipal function.

The Pennsylvania Supreme Court, in the case of *In re McKeown*,[216] sustained an act which provided that one or more taxpayers of any township or road district might contract, with the approval of the court of quarter sessions, to build the roads of the township or district, in accordance with the standards prescribed in the act. The act was upheld on the ground that no commission was created; nor was any private corporation entrusted with any municipal function.

In 1926, the Philadelphia city council passed an ordinance which provided for the payment of up to $5,000,000 of the debts of the Sesqui-Centennial Exhibition Association, an Association which had been formed to conduct a public exposition to celebrate the 150th anniversary of the signing of the Declaration of Independence. Unfortunately, the exposition was a financial failure and the Association accumulated $5,500,000 in debts. The ordinance authorizing the assumption of these debts by the city was challenged unsuccessfully under the ripper clause in *Plumly v. Hadley*.[217] The court held that the ripper clause did not apply. The Exhibition Association was not vested with any governmental powers; it did not tax or possess the right of eminent domain; and it had not usurped any prerogative of the city authorities.

An attempt by a township to finance an extension of its sewage system without establishing a municipal authority was challenged in *Lighton v. Abington Township*.[218] To finance a sewage system the township issued non-debt revenue bonds, as authorized by two 1937 acts of the General Assembly. These bonds, which pledged only the property to be improved, were to be issued directly by the municipality and retired by revenues received from the operation of the improvement. In the event of default on the part of the township, the agreement provided that a private trust corporation was authorized to operate the sewage system, collect the revenue, and pay off the bonds. It was argued that the agreement violated the ripper clause by delegating to a private corporation power to interfere with a municipal function. The supreme court sustained this contention, distinguishing this method of financing from that upheld in the *Tranter* and *Williams* cases on the ground that they involved only property belonging to the authority, whereas in this case the property at stake was municipal property.[219] The effect of the *Lighton* decision was to force

[216] 237 Pa. 626, 85 A. 1085 (1912).

[217] Plumly v. Hadley, 9 Pa. D. & C. 281 (C.P. 1927).

[218] Lighton v. Abington Township, 336 Pa. 345, 9 A.2d 609 (1939).

[219] Several cases have followed the *Lighton* decision. In 1951 the Pennsylvania Supreme Court sustained an ordinance which provided for the construction of an amphitheatre in a city park and authorized leasing the structure to a private opera company. The ordinance created a commission consisting of a city official, a representative of the opera association, and a third person chosen by the other two appointees. The court held that there was no violation of the ripper clause because there was no delegation of a municipal function, nor any transfer of any of the powers or functions of the city's officers. Bernstein v. City of Pittsburgh, 366 Pa. 200, 77 A.2d 452 (1951).

municipalities to use municipal authorities to finance projects which exceeded the constitutional debt limit or for which they did not want to pledge the credit of the entire city, rather than financing such projects with non-revenue debt bonds.

It was also contended in the *Lighton* case that the ripper clause applied only to the governmental functions of cities and that a city might contract with a private corporation to perform or operate proprietary functions. The majority rejected this argument. They argued that if such a construction were intended, it would have been written into the clause. Both classes of municipal activity were familiar at the time of the writing of the constitution.[220]

In Beam v. Borough of Ephrata, 395 Pa. 348, 149 A.2d 431 (1959), the court held that the township was prohibited from delegating any municipal function to a private firm regardless of whether the property was used in a governmental or a private capacity. There, a private banking corporation had been vested with authority to collect all revenues and act as paying agent for a borough electric system.

In Robinson v. City of Philadelphia, 400 Pa. 80, 161 A.2d 1 (1960), a contract made by the city of Philadelphia with the University of Pennsylvania and Temple University to operate and direct the Philadelphia General Hospital was challenged. The court held that there had not been an illegal delegation of power, even though the two universities were performing a function formerly handled solely by the city. The universities had no power to levy a tax or assessment and were required to operate the hospital directly under the supervision and according to regulations and standards set by the city department of health. Such municipal functions, the court said, may be performed by private corporations if local governmental officials retain control in all discretionary matters.

Finally, in 1966 a district court action invalidated a delegation of power to a private, non-profit corporation. The Township had granted a corporation the right to use a parcel of city property for the construction and operation of a public swimming pool. The court held that a municipality could not permanently delegate to a private corporation the power to manage any part of its property. Foreman v. Schroeder, 38 Pa. D. & C.2d 705 (C.P. 1966).

[220] Lighton v. Abington Township, 336 Pa. 345, 9 A.2d 609, 613 (1939).

The Ripper Clause in State Constitutional Law: An Early Urban Experiment – Part II

By David O. Porter

V. The Ripper Clause in New Jersey

The New Jersey ripper clause differs substantially from the clause adopted in Pennsylvania. The Pennsylvania clause was intended to forbid absolutely the creation by the legislature of commissions which interfered with municipal functions. The New Jersey clause, adopted in 1875 as an amendment to the New Jersey Constitution of 1844, merely prohibited the legislature from passing local or special laws "[r]egulating the internal affairs of towns and counties" or "appointing officers or commissions to regulate municipal affairs."[1] The New Jersey legislature is therefore permitted to create commissions dealing with municipal affairs, provided it acts by general laws.

Statutes challenged under this clause fall into three categories: (1) general laws which do not violate the New Jersey ripper clause, even if they deal with municipal affairs; (2) special laws interfering with municipal functions; and (3) special laws which create commissions to deal with statewide rather than municipal affairs. Only statutes in the second category violate the ripper clause.

General acts dealing with municipal affairs usually raise the question of what constitutes a "reasonable" basis for classifying cities. A number of laws creating commissions interfering with municipal affairs have been upheld as general. In the first case to construe the ripper clause, *State ex rel. Van Riper v. Parsons*,[2] the supreme court interpreted a law repealing "such parts of all public, special and local laws" which provided for the legislative appointment of commissions or commissioners to regulate the affairs of any city. The act further provided that boards of six persons — one elected from each aldermanic district of the city involved — were to assume the duties formerly exercised by those commissions abolished by

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[1] The original New Jersey ripper clause read in full:

> The legislature shall not pass private, local or special laws in any of the following enumerated cases, that is to say:
>
> . . . .
>
> Regulating the internal affairs of towns and counties; appointing local officers or commissions to regulate municipal affairs. . . .
>
> The legislature shall pass general laws providing for the cases enumerated in this paragraph, and for all other cases which, in its judgment, may be provided for by general laws. The legislature shall pass no special act conferring corporate powers, but they shall pass general laws, under which corporations may be organized and corporate powers of every nature obtained, subject, nevertheless, to repeal or alteration at the will of the legislature.

N.J. Const. art. 4, § 7, ¶ 11 (1844, *as amended*, 1875).

A ripper clause substantially the same as the one enacted in 1875 was included in the constitution adopted by New Jersey in 1947. *See* note 10 *infra*.

[2] 40 N.J.L. 1 (Sup. Ct. 1878).

the act. The court held that the act was general and could therefore deal with municipal affairs.[3]

Inhabitants of Bernards v. Allen[4] provides an even more graphic illustration of the effect of New Jersey's peculiar general-specific dichotomy. The case challenged a statute providing that if the participants in the annual town meeting of a township did not levy a tax adequate to provide for such municipal functions as the support of schools, the protection of city property, the maintenance of the poor, the support of the police force, the maintenance of local streets, and the collection of these taxes, the governor could appoint three freeholders of the municipality to do so. The annual town meeting had assessed what was thought to be an inadequate tax to provide these services, and the governor appointed a taxation commission. The commission raised the total tax levy from $5,700 to $21,124. The appointment of such a body by the governor to exercise independent, discretionary powers over municipal affairs would clearly have violated the Pennsylvania ripper clause, but when certain township residents challenged the authority of the commission to levy the increased tax the New Jersey Court of Errors and Appeals invalidated the act only because it improperly delegated the power to tax. Rather than tie its decision to the ripper clause, the court declared the act unconstitutional without specifying what article of the New Jersey Constitution had been violated. In all probability, the majority's failure to rely on the ripper clause, as the dissent in fact urged,[5] is attributable to the generality of the law.

The New Jersey courts have upheld numerous acts dealing with municipal affairs on the ground that such acts were general.[6]

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[3] The *Van Riper* court said:

> The provision relates to the methods and not to the substance of legislation; and the substitution of general laws in the stead of those that are special or local, necessarily indicates the limits and extent of the prohibition: for as the mandate is to do, by general legislation, that which is interdicted to special or local legislation, it seems unavoidably to follow that it is only those things that can be accomplished by the former method that are forbidden to the latter method.

Id. at 10.

[4] 61 N.J.L. 228, 39 A. 716 (Ct. Err. & App. 1898). See dissenting opinion at 61 N.J.L. 692, 41 A. 250.

[5] *Id.* at 692, 41 A. at 250.

[6] *See, e.g.*, McDonald v. Board of Chosen Freeholders, 99 N.J.L. 399, 125 A. 379 (Ct. Err. & App. 1924) (act creating the office of superintendent of elections for designated counties with power to regulate municipal elections); Wilson v. McKelvey, 78 N.J.L. 621, 77 A. 94 (Ct. Err. & App. 1910) (act authorizing creation of park commissions to exercise control of municipal parks); Booth v. McGuinness, 78 N.J.L. 346, 75 A. 455 (Ct. Err. & App. 1910) (act authorizing regulation of municipal employees by a state civil service board); Smith v. Borough of Hightstown, 71 N.J.L. 537, 60 A. 393 (Ct. Err. & App. 1905) (act prohibiting boroughs from licensing inns or taverns); Ross v. Board of Chosen Freeholders, 68 N.J.L. 292, 55 A. 310 (Ct. Err. & App. 1903) (act granting autonomous control to boards of fire and police commissioners, boards of finance, and boards of public works in cities having stipulated population); State v. Corker, 67 N.J.L. 600, 52 A. 362 (Ct. Err. & App. 1902) (act authorizing creation of road districts and lighting districts in townships); McArdle v. Mayor of Jersey City, 66 N.J.L. 590, 49 A. 1013 (Ct. Err. & App. 1901); Hetrick v. Roberts, 117 N.J.L. 586, 190 A. 504 (Sup. Ct. 1937) (act creating municipal beach commissions to supervise and control municipally owned beaches); Wilson v. Fromm, 80