

1975

# Midwest Realty, a Utah corporation v. City of West Jordan : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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MIDWEST REALTY, a Utah  
corporation,

*Plaintiff-Respondent,*

vs.

CITY OF WEST JORDAN,

*Defendant-Appellant.*

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

Case No.  
13874

## BRIEF OF APPELLANT

Appeal from Judgment of Third Judicial District  
Court for Salt Lake County, State of Utah  
Honorable James S. Sawaya, Judge.

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FILED  
1975

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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MIDWEST REALTY, a Utah  
corporation,

*Plaintiff-Respondent,*

vs.

CITY OF WEST JORDAN,

*Defendant-Appellant.*

} Case No.  
13874

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## BRIEF OF APPELLANT

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### STATEMENT OF THE KIND OF CASE

This appeal involves the question of validity of an alleged oral contract for the construction and installation of a sewer line by a developer, for the development of two subdivisions, with the City of West Jordan, a municipality, absent the necessary legal requisites of the Utah statutes.

### DISPOSITION IN LOWER COURT

This matter came on for trial before the Honorable James S. Sawaya, sitting without a jury, wherein

the lower court found for the plaintiff-respondent in that defendant-appellant was liable to the plaintiff in the sum of \$20,134.35 on the basis of contract.

## RELIEF SOUGHT ON APPEAL

Defendant-appellant seeks a reversal of the judgment of the lower court.

## STATEMENT OF FACTS\*

On or about August 6, 1970, defendant, municipality, City of West Jordan, a city of third class, approved two (2) subdivisions namely, Western Hills 1 and Western Hills 2, on behalf of developer Midwest Realty, plaintiff herein (Exhibits 2 and 3, Tr. p. 13, line 29 to p. 14 line 16). Said plats showed the land comprised of 34 acres, being subdivided into 167 lots, varying in size from 6500 square feet to 7500 square feet and were properly recorded pursuant to Utah law; said 34 acres were purchased for the sum of \$72,250.00 (Exhibit D-5). Upon the sale of the 167 lots plaintiff, between the time it purchased the land on April 15, 1970 (Exhibit D-5) and it ultimately sold the land as subdivided lots by about December, 1971, realized a minimum net profit of \$73,909.95. (Tr. p. 43, lines 12 to 15).

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\* For convenience purposes the parties herein shall be referred to as follows: plaintiff for plaintiff-respondent, and defendant for defendant-appellant. All references to pages are as to transcript referred to Tr. All exhibit references are in the same numerical order as admitted in lower court.

There is evidence in the record alluding to the fact that the developer was originally approved by the City Planning and Zoning Commission for 158 lots and that later the City Council approved 167 lots in consideration of the developer's expense in constructing and installing the main sewer line in question (Exhibit D-22).

The lots on said subdivisions were improved by various owners and each lot was connected for water and sewer service beginning with the first connection on November 24, 1970, and the last connection being made on September 29, 1972 (stipulated facts).

Beginning with the month of October, 1971, plaintiff by and through its authorized representatives demanded from the defendant City of West Jordan the payment of monies for the construction and installation of a main sewer line which connected and serviced the two subdivisions (Tr. p. 81, line 16 to p. 82, line 8).

Plaintiff predicated its demands for payments upon an alleged oral agreement between itself and the City of West Jordan wherein the city allegedly agreed to repay the plaintiff-developer \$1.50 per connection per month for a period of 7 years, in order to defray the cost of construction and installation of the sewer main. Said payment was to be made upon completion of the connection of each lot to the municipal sewer system.

Defendant refused to pay any monies to the plain-

tiff and has not paid any money to the plaintiff. However, defendant had asked the plaintiff to increase the diameter of the sewer pipe to be installed said size to be ten inches (10") instead of the contemplated six inches (6"), and pursuant thereto agreed to pay and did pay the difference of the cost of the pipe to the contractor in the sum of \$2,584.

On November 17, 1970, the City of West Jordan entered into its standard agreement with the developer relating to construction and installation of the water and sewer lines and connections thereto for both subdivisions Western Hills No. 1 and No. 2 (Exhibit P-25, Tr. pp. 86-87).

During the period between November 24, 1970, the date of the first sewer connection, and September 29, 1972, the date of the last sewer connection, plaintiff made repeated demands for payment of the City of West Jordan, none of which was honored by the city.

On March 1, 1973, defendant City of West Jordan sent a letter to plaintiff advising it that the governing body of the city considered ". . . the payback agreement in the amount of \$20,134.35, for extension of the sewer line . . ." and that the "council voted unanimously to reject this agreement as presented." (Exhibit P-20, Tr. p. 64.); attached thereto was an agreement prepared by the plaintiff and presented to the council earlier the previous month. (Exhibit P-20).

On or about May 17, 1970, plaintiff filed a Verified Claim with the City of West Jordan as a condition precedent to filing suit pursuant to Utah law. (Exhibit P-21).

Thereupon on July 13, 1973, plaintiff filed its complaint praying for relief upon the alternate theories of (a) contract and (b) quantum meruit.

A trial was held on September 20, 1974, before the Honorable James S. Sawaya, sitting without a jury. On September 30, 1974, the court rendered its memorandum decision and found ". . . that an agreement exists between the parties wherein the defendant city agreed to pay back to plaintiff the cost of the sewer installation and that plaintiff is entitled to its First Cause of Action as prayed." It is from this decision that defendant appeals and seeks a reversal thereof.

## ARGUMENT

### POINT I

ASSUMING ARGUENDO THAT A CONTRACT EXISTED PLAINTIFF IS BARRED FROM RECOVERY BECAUSE IT FAILED TO OBSERVE THE STATUTORY REQUIREMENTS OF THE STATE OF UTAH AS THEY RELATE TO MUNICIPAL OBLIGATIONS.

A. The contract between plaintiff and the municipal corporation is *void ab initio* for failure to observe the posting and/or publication of notice relating to bidding.

It is elementary law that a contract can be valid as against the municipality only if there is compliance with state law governing the subject matter of the particular contract. The Utah State Legislature described a method of contracting for the specific purpose of constructing public improvements when it enacted Section 10-7-20, Utah Code Annotated (1953) wherein it states *inter alia*:

If the estimated cost of the proposed improvement shall exceed the amounts above mentioned, [over \$8,000.00 for third class cities] the city or town *shall . . . do so by contract* let to the lowest responsible bidder *after publication of notice at least twice in a newspaper of general circulation printed and published in such city or town at least five days prior to the opening of bids*; provided, that where no newspaper is printed or published therein, such notice shall be posted at least five days prior to the opening of bids in at least five public places in the city or town, the notice so posted for at least three days . . . (emphasis added).

The Utah State Legislature specifically prescribed a mode for the municipality to enter into contracts for public improvements and an integral part of that method is the mandatory requirement of the publication or

posting of notice. Plaintiff has failed to establish in its evidence that there was any publication or posting of the notice pursuant to the requisites of the statute. The record only discloses that three bids were solicited by plaintiff and presented to the city engineers but the record is absolutely void of any reference or evidence that there was compliance with the *sine qua non* of letting public contracts that of publication or posting of notice.

The question then is what does the word "shall" mean as is used in the statute. This court decided the same issue in *Herr v. Salt Lake County*, .....U 2d....., 525 P2d 728 (1974) wherein it held that the word "shall" in a Salt Lake County Ordinance is mandatory and not advisory and therefore jurisdictional in nature. In analyzing the issue the court said

The meaning of the word *shall* is ordinarily that of command. It is defined in the American Heritage Dictionary as follows: "2 . . . d. Compulsion, with the force of *must*, in statutes, deeds, and other legal documents." The United States Supreme Court distinguished between the words *may* and *shall* in the case of *Anderson v. Yungkau*, 329 U.S. 482 (1946) as follows:

The word "shall" is ordinarily "language of command." *Escoe v. Zerbst*, 295 U.S. 490, 493. And when the same rule uses both "may" and "shall", the normal inference is that each is used in its usual sense — the one act being permissive, the other mandatory.

The County Commission did not act within

seven days but took eleven days after the hearing before it attempted to reverse the Planning Commission. Did it thereby lose jurisdiction to make its ruling? The trial court thought that it did.

This court had a related problem before it in *Lund v. Cottonwood Meadows Co.*, 15 Utah 2d 305, 392 P. 2d (1964). Involved in that case was an ordinance of Salt Lake County which provided that an aggrieved party might appeal from a ruling of the Planning Commission to the Board of Adjustment within ninety days after the decision. This court held that the ninety-day period was jurisdictional, saying:

... The 90-day limitation of Sect. 17-27-16 is designed to assure speedy appeal to the proper tribunal any grievance that a party may have who is adversely by a decision of an administrative agency. The evident purpose of the statute is to assure the expeditious and orderly development of a community, etc. . . .

Again the general rule is

That if a contract is within the corporate power of a municipality but the contract is entered into *without observing mandatory legal requirements* specifically regulating the mode by which it is to be exercised, *there can be no recovery thereunder*. If a statute . . . says that certain contracts must be let to the lowest bidder, or that they must be made ordinance, or that they must be writing, or the like, there is reason therefor based on the idea of protecting the taxpayers, the inhabitants, *and the provisions are manda-*

tory. If the contract is entered into or executed in a different manner, *the mere fact that the municipality has received benefits does not make the municipality liable, either on the theory of ratification, estoppel or implied contract . . .*

As examples of invalid contracts upon which no recovery has been allowed for the benefits actually received may be mentioned the following: contracts not based on public bidding; contracts not in writing; contracts not authorized by ordinances or resolution; contracts not authorized by yea or nay vote of the council; contracts upon which there was no vote of the council, where such vote is necessary . . . (citations omitted; emphasis supplied) McQuillin, *Municipal Corporations* Section 29.26.

The law in this jurisdiction is that if the requirements of the statute are not in substance complied with, the contract is invalid and cannot be the basis of any liability against the municipality even though the municipality has received any benefit of the contract. McQuillin, *Municipal Corporations*, Section 29.41.

The question of whether or not publication and posting of the advertisement asking for bids for construction of public improvements is a necessary prerequisite is answered again by section 29.58 of McQuillin *Municipal Corporations* wherein it states:

An advertisement for bids must be published in the manner and for the time required by law . . . ordinarily a legally designated mode of publication is regarded as the measure of power, and

*material non observance will invalidate the contract and proceedings thereunder.* Therefore, if any particular mode of advertising for bids is specified that mode must be substantially followed. Generally no publication is proper until duly ordered. (emphasis added)

Further, discussing the matter of posting of notices relating to advertising for bidding either in lieu of, as is in this jurisdiction, or concurrent with publication, McQuillin states in section 29.59 the following:

*If . . . posting notice is required, a failure to post the notices invalidates subsequent proceedings.* (citation omitted; emphasis supplied).

The weight of authority is consistent with the analysis set forth and it is urged upon this court, consistently with its prior decisions, to uphold the validity of the requirement of publication and/or posting in examining contracts for public improvements.

Furthermore, the statute states that the "town shall do [let the bids] by contract," and the only reasonable interpretation one may place upon that language, especially in view of the public policy considerations involved, is that the "contract" must be in writing.

The Utah State Legislature contemplated that the contracts let pursuant to Section 10-7-20, Utah Code Annotated (1953) as amended 1969, should be in writing if they are for the construction of public improve-

mnetts and if the dollar limitaton (\$8,000.00) is met. It is clear that the legislature by enacting the foregoing section clearly established its intention to allow municipalities to enter into contracts for public improvements but said contracts must be in writing, and therefore, only those contracts which are in writing can be valid and enforceable as against the municipality. Such a requirement constitutes a mandatory condition precedent and noncompliance therewith renders the contract unenforceable. The municipality can make a contract only in the method prescribed by the statute and if not so made the contract is invalid and unenforceable.

The requirements as prescribed by the Utah statute setting forth the mode of contracting, to-wit, the contract must be in writing, is considered mandatory rather than merely directory and must be observed substantially.

In stating the law McQuillin says

Statutes requiring municipal contracts to be in writing usually are construed to be mandatory, and a strict compliance therewith is required to bind a city. It has frequently been held that performance, or partial performance will not cure a failure to execute a written contract in accordance with a statutory mandate. Section 29.22 (citations omitted).

In Utah, in *McDonald v. Price*, 45 U 464, 146 P 550 (1915) this court stated that the statutory method

of disposal of municipal property must be substantially followed, or if the method prescribed is not observed and followed, or the contract, whatever it may be, is invalid. Accord: *Collier, Inc. v. Paddock* 37 Ariz. 194, 291 P 1000 (1930); *Forrest City v. Orgill*, 87 Ark. 389, 112 SW 891 (1908); *Pasadena v. Estrin*, 212 Cal. 231, 298 P 14 (1931); *Durango v. Pennington*, 8 Colo. 257, 7 P 14 (1885) and numerous other jurisdictions.

B. The contract between plaintiff and the municipal corporation is void because said contract was not countersigned by City Recorder.

In addition Utah Law (Section 10-10-61, Utah Code Annotated, 1953) requires that a municipal contract in order to be valid must be countersigned by the City Recorder and if not so countersigned the contract is *void ab initio* in view of the mandatory language of the statute. Specifically, the Uniform Municipal Fiscal Procedures Act relating to the duties of the City Recorder with respect to contracts provides as follows:

He [City Recorder] shall countersign all contracts made on behalf of the city, *and every contract* made on behalf of the city or to which the city is a party *shall be void unless signed by the recorder . . .* (emphasis supplied) Section 10-10-61, Utah Code Annotated (1953).

While this court has not ruled upon the application of this statute, six other jurisdictions have ruled and upheld the proposition that a municipal contract is in-

valid if it is not countersigned as provided by state statute or ordinance. In *Council v. City of Dothay*, 236 Ala. 166, 181 So 293 (1938) and in *West Virginia Coal Co. of Missouri v. City of St. Louis*, 324 Mo. 968, 25 S.W. 2d 466 (1930), the Alabama and Missouri Supreme Courts, respectively upheld the rule of law that since the signature of the clerk and/or the controller did not appear as mandated by law those municipal contracts could not be enforced as against the municipal corporations. Other jurisdictions holding similarly are: *Superior v. Horton*, 63 F 357 (7th CCA, 1893) (comptroller's countersignature was essential to validity of contract); *Press Pub. Co. v. Pittsburgh*, 207 Pa. 623, 57 A 75, (1904); *Ellerbe & Co. v. Hudson*, 1 Wis. 2d 148, 83 NW 2d 700 (1957) (countersignature by comptroller is mandatory requirement of statute); *White Const. Co. v. Beloit*, 178 Wis. 335, 190 NW 195 (1922); *Lee v. Racine*, 64 Wis. 231, 24 NW 33 (1885) (no countersignature of comptroller, contract invalid).

Again the use of the word "shall" is mandatory and according to the *Herr* case *supra* the same rationale applies and therefore the contract is void.

C. Assuming arguendo that a contract existed plaintiff is barred from recovery because it failed to observe the requirements of Sections 63-30-13, and 10-7-77, Utah Code Annotated (1953).

Assuming, without admitting, that plaintiff had entered into a valid contract with the municipal corp-

oration, the plaintiff is under a mandatory obligation to observe the requirements of Section 63-30-13, Utah Code Annotated (1953) wherein it states, *inter alia*:

A claim against a political subdivision *shall be forever barred unless notice thereof is filed within ninety days* after the cause of action arises ... (emphasis added)

This court had an opportunity to decide this question in a rather recent case in *Baugh v. Logan City*, 27 U 2d 291, 495 P2d 814 (1972) wherein the court stated that an action on a contractual obligation is a claim permitted under the Governmental Immunity Act, but notice of such claim must be filed in accordance with Section 63-30-13, Utah Code Annotated (1953). In the Baugh case a claim based on contract was made against the City of Logan for the exchange of land owned by the plaintiff with land owned by the municipal corporation. In upholding the need that a claim must be filed with the city the court speaking through Chief Justice Callister stated the following:

"Finally plaintiffs contend that the trial court erred in its determination that Section 63-30-13 applies to a cause of action based on contract. Section 63-30-13 provides:

A *claim* against a political subdivision shall be forever barred unless notice thereof is filed within ninety days after the cause of action arises, ... [emphasis added].

Section 63-30-2 (5) provides:

The word "claim" shall mean *any claim* brought against a governmental entity or employees as *permitted by this act*; [emphasis added].

Section 63-30-5 provides:

Immunity from suit of all government entities is waived as to any contractual obligation. [emphasis added].

Since an action on a contractual obligation is a claim permitted under the Utah Governmental Immunity Act, notice of such claim must be filed in accordance with Section 63-30-13." 27 Utah 2d at 295.

1. This cause of action arose on or about November 24, 1970, or in the alternative on or about December 29, 1972.

The lower court found that the "main sewer line was completed in December, 1970, and that houses were constructed on the 167 lots so *that by December, 1971*, 141 houses [connections] had been completed, connected to the sewer system and were paying monthly service charges of \$3.50 per month and thereafter the remaining 26 lots were completed, connected to the system and began paying the monthly service charge of \$3.50 per month by June 1, 1972." (Findings of Fact, paragraph No. 7), and that "... the plaintiff on May 17, 1973, did file a verified claim with the city pursuant to the appropriate statutes." (Findings of

Fact, paragraph No. 9).

Further, according to plaintiff's testimony no payment was made by the city to the plaintiff during the period of December, 1970 to May 17, 1973 inclusive, and that no payment was ever made by the city to the plaintiff pursuant to the alleged contract. Upon cross-examination plaintiff's witness Mr. Green testified as follows:

Q. You testified that the subdivisions were completed ninety-five to ninety-five [sic] per cent by October of 1971, is that true?

A. Yes, this is true.

Q. Okay. In December — in November of 1971 did you receive any payment from the city on a payback agreement?

A. No, we didn't.

Q. In December did you receive any payment?

A. No.

Q. In January of '72 did you receive any money?

A. No.

Q. Did you receive any money from the city on a pay-back agreement up until now?

A. No. We have received nothing.  
(Tr. p. 72, lines 7 to 20).

Further, the uncontroverted evidence shows that the plaintiff did make its first demand for payment

under the alleged payback agreement sometime in October, 1971, and many times thereafter as it is shown from the following questions and answers:

Q. (By Mr. Colessides) Did Midwest Realty other than the Verified Complaint that was filed on May 17, 1973, make a demand upon the City of West Jordan for a pay-back?

A. Verbally, yes.

Q. When did they make that?

A. Several times. On several occasions.

Q. Would you state the first date they did that?

A. Boy, I don't recall to be honest with you.

Q. In October of '71 did you make a demand for payment?

A. Yes.

Q. You did? In October of '71 you did?

A. I am not sure if it was exactly October but by then we had made demand for payments.

Q. You made repeated demands for payment?

A. Yes.

Q. So can you — that's very important Mr. Green. Would you say that in October of '71 with ninety-one percent of the subdivision completed you had made demand upon the City for payment?

A. Yes. They should have started—started approximately sometime around there. After the houses had been completed and the connections were made, why, the payments should have started. (Tr. p. 81, line 16 to p. 82, line 8).

Assuming that the demand for payment satisfies the statutory requirements of Section 63-30-13, Utah Code Annotated (1953) plaintiff's claim must still be barred by reason of Section 63-30-15 wherein it states that

If the claim is denied, a claimant may institute an action in the district court against the governmental entity in those circumstances where immunity from suit has been waived as in this act provided. *Said action must be commenced within one year after denial or the denial period as specified herein.* (emphasis added).

Further as to what constitutes a denial of a claim by a governmental entity the statute states that . . .

Within ninety days of filing of a claim the governmental entity or its insurance carrier shall act thereon and notify the claimant in writing of its approval or denial. *A claim shall be deemed to have been denied if at the end of the ninety-day period the governmental entity or its insurance carrier has failed to approve or deny the claim.* (emphasis added) Section 63-30-14, Utah Code Annotated (1953).

From the uncontroverted facts and the admissions of the plaintiff as they appear on the record plaintiff should have known that its claim was denied when first made in October, 1971, or at the latest by the first day of February, 1972, and within one (1) year from that date, to-wit, February 1, 1973, according to the obligatory language of Section 63-30-15 plaintiff should have

had commenced its lawsuit in order to be within the statutes of limitation as herein referred to. Instead, plaintiff did not institute the proceeding in lower court until July 13, 1973, the date of the filing of plaintiff's complaint in Third District Court.

There appears to be no controversy as to when this action arose in that, assuming the facts in a light most favorable to the plaintiff, and assuming, but not admitting, that plaintiff had a valid contract with the municipality, plaintiff's obligations had been fulfilled, according to its contention, and plaintiff had fully performed its acts by fully constructing the sewer line in December, 1970, and the first connection for sewer service, which would entitle plaintiff to payment was made on November 24, 1970. (Tr. p. 84 line 18 to p. 85, line 5). At that point in time, defendant-City of West Jordan was obligated to pay the plaintiff the amount due for the connections made. It was incumbent upon plaintiff when it did not receive the monies which it thought it had coming to pursue a course of action prescribed by statute to collect the monies. Plaintiff did not do that until May 17, 1973, when it first filed its verified claim.

Viewed differently, the last sewer connection was made on September 29, 1972. (stipulated facts, Tr. P. 84 line 18 to p. 85, line 9); again, in view of the fact that plaintiff had not received any money on the alleged payback agreement up until then, it should have followed the dictates of Section 63-30-13, Utah

Code Annotated (1953) and should have filed its claim for payment within ninety days from September 29, 1972, which would have been, at the latest, the 30th day of December, 1973. By failing to file its claim within the allotted ninety-day period plaintiff's claim "... shall be forever barred. . ."

2. Plaintiff's claim is also barred pursuant to Section 10-7-77, Utah Code Annotated (1953, as amended).

Plaintiff is not entitled to any recovery on the basis and for the reason that it failed to give proper notice to defendant, City of West Jordan, pursuant to the following statute:

Every claim, other than claims above mentioned, against any city or town must be presented, properly itemized or described as to correctness by the claimant or his agent, to the governing body within one year after the last item of such account or claim accrued . . . Section 10-7-77, Utah Code Annotated, 1953 as amended.

The law is well settled in this jurisdiction that the presentation of a claim to the governing body within the time fixed by law is a condition precedent to bringing an action against a municipality. *Brown v. Salt Lake City*, 33 U 222, 93 P. 570, (1908); *Hurley v. Town of Bingham*, 63 U 589, 228 P 213 (1924).

Furthermore, Section 10-7-78, Utah Code Annotated (1953) states that

It shall be a sufficient bar and answer to any action or proceeding against a city or town in any court for the collection of any claim mentioned in Section 10-7-77, that such claims had not been presented to the governing body of such city or town in the manner and within the time specified in section 10-7-77.

The necessity for presenting verified claims against a municipality has already been decided by this court in *Thomas E. Jeremy Estate v. Salt Lake City*, 87 U 370, 49 P. 2d 405 (1935) wherein this court held that an action to recover monies expended to construct a bridge which the city had agreed to construct is barred and plaintiff is not entitled to recover because of its failure to file a claim as required by Section 10-7-78, Utah Code Annotated (1953); accord: *Hurley v. Town of Bingham*, *supra*. *Dahl v. Salt Lake City* 45 U 544, 147 P. 622 (1915); *Nelson v. Logan City*, 103 U 356, 135 P. 2d 259 (1943); *Peterson v. Salt Lake City*, 118 U 231, 221 P 2d 591 (1950).

In the case at bar plaintiff did not file its verified claim until May 17, 1973, two (2) years and seven (7) months from the date the last item of such claim accrued if one were to consider that plaintiff's claim arose on November 24, 1970, the date of first sewer residential connection, or at the conclusion of the construction of the sewer line by plaintiff which occurred sometime in December of 1970.

Assuming that there was a valid contract between

plaintiff and defendant, a fact not admitted herein, the record clearly shows that while plaintiff might have had a claim against this municipal corporation beginning with the month of December, 1970, plaintiff did not receive any money from the city despite its "repeated demands", and plaintiff failed to present its claim pursuant to the dictates of the Utah statute.

Plaintiff has failed to produce a satisfactory or plausible explanation as to why, while it did not receive any payment from the city despite its "repeated demands", it did not undertake to file its claim until May 17, 1973.

D. A liability against a municipality can only be asserted if there is compliance with Section 10-6-9, Utah Code Annotated (1953).

This plaintiff in this action had sought and asserted against the City of West Jordan a liability in the sum of \$20,134.35. As the record clearly demonstrates this is a unilateral act by the plaintiff to impose a financial obligation and liability against the defendant on the basis of an alleged payback agreement. However, in Utah the creation of a liability against a city or a town can only be created pursuant to Section 10-6-9 of the Utah Code Annotated, 1953. Therein it states in pertinent parts:

The yeas and nays shall be taken upon the passage of all ordinances *and all propositions to*

*create any liability against the city or town . . . which shall be entered upon the journal of its proceedings . . . (emphasis added).*

This statute uses the mandatory language of “shall be taken” and “shall be entered” in order to demonstrate the method through which a municipal corporation may be held liable financially. Such requirement constitutes a mandatory condition precedent, and noncompliance therewith renders the contract unenforceable. McQuillin, *Municipal Corporation*, Section 29.19. In *Selby v. Winfield*, 255 Ill. App. 67, the Illinois Court held that a contract which involves expenditure of public monies can only be enforced as against a city if it is authorized by recorded yeas and nays. The weight of authority in the majority of the United States jurisdictions is that municipal contracts in order to be binding as against the city or town must be a corporate action by the legislative body duly assembled and must comply with the requirements and requisites of the laws of the state and the ordinances of the particular city. Outlining the procedures for municipal improvement contracts, McQuillin states the following:

Municipal contracts for public improvements generally must be entered into in substantial accordance with statutes and charters prescribing procedures and forms. Illustratively, *where a contract for engineering services in connection with a municipal improvement was not approved by ordinance, as required by local law, the engineering firm could not recover against the city on the contract or even in quantum meruit. Ac-*

*cordingly, a party entering into an improvement contract with a municipal corporation should exercise scrupulous care that every governing statute and charter provision is respected if he intends to collect for his labors. Quite generally the improvement contract must be made or approved by the governing body of the municipality. Again, where there was no resolution of intention signed by three-quarters of the council it was held the contractor could not recover against the city. In some municipalities certain boards and commissions can effectively contract for public works without the approval of the governing body. Often the municipal contract must be signed by a department head or the chairman of the board initiating the works contract and where this is disregarded the contract is not enforceable against the municipal corporation. Care must always be taken that the contract with the municipality is entered into by parties authorized to bind the city. Statutes and charters requiring contractors to furnish bonds are mandatory and recovery has been denied when this was overlooked. Customarily municipal improvement contracts must be in writing. (citations omitted; emphasis added) McQuillin, *Municipal Corporation*, Section 23.13*

In Utah Section 10-6-5, Utah Code Annotated (1953) provides that

... the mayor and city council of the third class ... shall be the legislative and governing bodies of such cities and towns, and as such shall have, exercise and discharge all of the rights, powers, privileges and authority conferred by law upon their respective cities, towns ...

In the performance of their duties and obligations pursuant to the statutory authority granting the same the city council must comply with all the necessary requisites of the laws from which the council draws its powers and must not deviate from any of the dictates thereof. It is the general rule that the powers delegated to a municipal corporation by the legislature of the state are vested in the city council or governing body unless expressly delegated to some other officer or body and further member of a municipal council may act only as a group, and members cannot bind the municipal corporation by acting separately and individually. McQuillin, *Municipal Corporations*, Section 27.07 at p.p. 234-235.

Plaintiff attempts to establish that a contract was entered between itself and the city by Mr. Coates' testimony that he attended, sometime in August, 1970, a special city council meeting (Tr. p. 19, lines 1 to 5) and that the agreement was reached and made during that special meeting. (Tr. p. 20, lines 7 to 18). However, upon examination of the evidence and the testimony of the city recorder the record discloses of no minutes of any special meeting of the City Council during that period of time (Tr. p. 109, lines 1 to 24), and plaintiff having that burden of proof, failed to produce any minutes of the City Council that such meeting took place, moreover, that an agreement to pay plaintiff back was reached during said meeting.

It is elementary law that the city can only enter

into agreements during a meeting, regular or special of its governing body and that these agreements must be recorded in the journal of its proceedings.

Generally the power to make contracts on behalf of a municipality rests in the council or governing body, or, in case of a county, in the board of county commissioners, supervisors, or other governing authority of the county, which, however, must act at a legal meeting and as a board, since the individual members acting singly have no authority to bind the municipality. It is well settled that the members of a common council, board or committee cannot separately and individually enter into a contract which will bind the municipality, *but they must act as a body at a regular or special meeting of which such notice shall have been given as required by law.* (Citations omitted; emphasis added) McQuillin, Section 29.15.

In the absence of any evidence that such a special meeting took place the lower court has erred in its findings that the City Council had met in official meetings and approved "by unanimous vote the payback agreement and that such finding is contrary to the evidence in the case and contrary to the law in the State of Utah.

E. The alleged contract violates the Statute of Fruads, Section 25-5-4 (1).

Plaintiff wishes to assert that there is a contract between itself and the municipal corporation, totally, however disregarding the dictates of Section 25-5-4 (1)

Utah Code Annotated (1953) wherein it states that

In the following cases *every agreement shall be void* unless such agreement, or some note or memorandum, is in writing *subscribed by the party to be charged* therewith:

1. *Every agreement that by its terms is not to be performed within one year from the making thereof.* (emphasis added)

Plaintiff has failed to produce any writing, note or memorandum signed by any authorized official of the city wherein the city had agreed to perform any obligations thereunder. Plaintiff merely relies on the minutes of the city council which upon close examination do not reveal that any of the terms and conditions of the alleged contract were either clear or definite in the minds of the councilmen.

This court in deciding *Adams v. Manning*, 46 U 72, 148 P. 465 (1915), adhered to the rule that there must be a sufficient memorandum in writing in order to take a case out of the Statute of Frauds and further in the *Baugh* case *supra*, it stated on note 4 quoting from Williston on Contracts that "the preparation of deeds or giving instruction for preparation will not validate the contract. [citation]"

The lower court erred in finding that "The Pay-Back Agreement is specifically set forth in writing in the various official Minutes of the City Council and was approved by unanimous vote of said Council"

(Finding No. 11) in that the minutes by themselves cannot constitute an agreement under Utah law, nor can it be inferred that the minutes are a memorandum of the contract itself. In the *Baugh* case, *supra*, plaintiffs then had relied upon the minutes of the city council to satisfy the requirements of the Statutes of Frauds. This court however upheld the trial court's decision that the minutes were not a sufficient memorandum; the court said:

They [plaintiffs] further asserted that their contract was removed from the Statute of Frauds by part performance. In the alternative they claimed that there was a sufficient memorandum in writing to satisfy the statute. In response to a request for a copy of the written agreement, they stated:

The minutes of the meeting of the Board of City Commissioners of Logan City dated May 27, 1969, contain the following written evidence of a contract for exchange of property:

"A motion by Commissioner Bott and seconded by Commissioner Jacobsen to authorize the Mayor to sign a quitclaim deed transferring City Property in exchange for an easement of 13 feet from Fred Baugh for the purpose of constructing a sidewalk and widening the street between main and first west street. Mr. Baugh to remove the Tap Room building at his own expense and to relocate the canal to the original canal bed and also the building of the new sidewalk."

Based on the foregoing defendant moved for summary judgment. The trial court issued a memorandum decision which was incorporated into the judgment in favor of defendant. The trial court found that the claim was barred by the Statute of Fraud, Section 25-5-3, Utah Code Annotated, 1953 (emphasis supplied). 27 U 2d 291, 292-292.

There is one other case in Utah where this court ruled on the question of admissibility of minutes of municipal council meetings but that case only involved the narrow issue as to whether or not the minutes of the Richfield City Council were admissible as evidence and the court held that in view of the fact that a statute required the keeping of the minutes said minutes were competent evidence. *Richfield Cottonwood Irr. Co. v. City of Richfield*, 84 U 107, 34 P2d 945 (1934). Other than the *Baugh* and *Richfield* cases, above, counsel for appellant is unaware of any other case where this court considered the import of the minutes of a meeting of municipal council.

Ordinarily, oral agreements providing for payment of money which are not or cannot be fully performed within one year from the making thereof are within the Statute of Frauds, 37 CJS 56c. Under the facts of the instant case according to the contention of the plaintiff the agreement was reached on or about August, 1970, and under plaintiff's understanding of the contract the first payment due was on January 1, 1972 (Finding No. 13). That is clearly a contract

which was not to be performed within one year from the making and under the terms of the alleged contract it was not to be fully performed for 7 years from the making thereof.

There have been cases which held that a verbal agreement for the payment of money by annual installments for a fixed period of years is within the statute; See: *Sturm v. Continental Oil Co.*, 131 Kan 518, 292 P 774 (1930). In addition agreements to pay money in monthly installments have been held to be within the statute; *Maglaris v. Claude Neon Federal Co.*, 101 Ind. App. 156, 198 N. E. 462 (1935); *Thompson v. Ford*, 145 Ten. 335, 236 S. W. 2 (1921); *Vaudreuil Lumber Co. v. Colbert*, 220 Wis 267, 263 N. W. 637 (1935). Also agreements to pay quarterly, *Herman v. Gressel*, 266 N Y S 263, 143 Misc. 775 (1933), and agreements to pay semi-annually, *Williamsburg City F. Ins. v. Lichtenstein*, 164 N Y S 345, 98 Misc. 342, affirmed 176 App. Div. 910 (1916), have been held to be within the Statute of Frauds.

The finding of lower court that the minutes of the city council is sufficient memoranda to constitute an agreement between plaintiff and the municipal corporation is erroneous and cannot be sustained under the evidence and in light of the record. All the minutes of the council meetings submitted and accepted as evidence amply show that the parties were merely negotiating a payback agreement; from the first day that the matter came to the attention of the council until a con-

tract prepared and proposed by an agent of the plaintiff which was not even signed by the plaintiff, the parties were talking and negotiating several alternative approaches without ever arriving at a meeting of the minds as to what an agreement may be.

In discussing the essential elements in considering the validity of a municipal contract McQuillin on *Municipal Corporations* states the following:

The doctrine which seems to harmonize with our governmental and legal system, which appears to be supported by reason, and which, therefore, should prevail may be thus stated briefly: If the charter or the statute applicable requires certain steps to be taken before making a contract, and it is mandatory in terms, a contract not made in conformity therewith is invalid, and ordinarily cannot be ratified, and usually there is no implied liability for the reasonable value of the property or services of which the municipality has had the benefit. These provisions exist to protect the citizens and taxpayers of the municipality from unjust, ill considered, or extortionate contracts, or those showing favoritism, and if the municipality is suffered to disregard them and the other contracting party is, nevertheless, permitted to recover for the property delivered or the services rendered, either on the grounds of ratification, estoppel or implied contract, then it follows that the statute or charter provision can always be evaded and set at naught. Cases holding the contrary are usually based on the idea that it is unjust for a municipality to receive and accept the benefits of a contract and then defend an action to recover the contract price or the rea-

sonable value on the ground that the contract was not entered into as provided by statute or the charter, but it should be remembered that the other contracting party is charged with notice of the provisions of the statutes or charter in regard to contracting and that the welfare and protection of the taxpayers and residents of the municipality are of more importance than the dispensation of justice to a private party in a particular case. (citations omitted) Section 29.02 p.p. 215-216.

It is urged upon this court that the better reasoning is that which is promulgated by this eminent authority on municipal corporations and the said reasoning should be followed by this court in the facts of this case.

## POINT II

### THE LOWER COURT COMMITTED REVERSIBLE ERROR IN ADMITTING ORAL TESTIMONY VARYING THE TERMS OF THE WRITTEN SEWER EXTENSION CONTRACTS.

Plaintiff and defendant had entered into two agreements regarding the installation of the sewer (and water) extension as it relates to the plaintiff's subdivisions. Those agreements are represented by Exhibits p-25, collectively, containing the total understanding of the parties as they relate to the subdivisions Western Hills 1 and 2.

Defendant's City Recorder testified as to the meaning of those agreements and the procedure followed by the city with all developers in stating the following:

Q. (By Mr. Colessides) Plaintiff's Exhibit 25 relating to water and sewer extensions. Does that agreement contemplate and include the extension of the main trunk line?

A. It was my understanding that these agreements pertained to the extension of the sewer from wherever the City sewer line ended to where it would have to serve the various homes on the subdivision.

Q. And is it always — the method of the City in working these extension agreements they require every subdivider to enter into an extension agreement to bring in from wherever the City's line ends to wherever they want to develop?

A. Yes. Not only to subdividers but anyone that wants to extend the sewer line to a home. (Tr. p. 91 line 30 to p. 91 line 12)

MR. COLESSIDES: They signed this kind of agreement to take it from wherever it is to bring it to where they want to take it.

THE COURT: Are you going to have her testify that is the usual contract?

MR. COLESSIDES: Yes, that is the way they do business in West Jordan.

THE COURT: Would that be your testimony?

THE WITNESS: Yes.

(Tr. p. 92, line 1 to line 9).

A. (By Mr. Colessides) Now, when we refer to the extension agreements Mrs. Anderson, twenty-five —

THE COURT: Twenty-five? I don't have it.

THE WITNESS: They are right here.

MR. COLESSIDES: Twenty-five is over there.

Q. (By Mr. Colessides) Is every subdivider in the City of West Jordan obligated to sign this agreement?

A. Yes.

(Tr. p. 121, line 27 to p. 122, line 4).

Other than the above testimony relating to those contracts there is no other evidence in the record, either disputing these contracts, contradicting them, or placing them in issue of fact otherwise. It is the only evidence which the lower court had before it and to merely disregard the contracts in the absence of any evidence which might sustain the plaintiff's position is reversible error.

The court compounded its error by admitting oral evidence relating to a perfectly unambiguous contract in that it admitted into evidence the testimony by Mr. Coates and Mr. Green in violation of the "parol evidence rule" despite the timely objection by the defendant. (Tr. p. 16, line 24 to p. 17, line 16.)

Furthermore, in view of the lower court's findings it appears that the motion by defendant's counsel

to strike all oral testimony varying the terms of the written contract which was taken under advisement by the court (Tr. p. 87, line 23 to p. 90, line 18) was denied, otherwise, the court could not have reached the findings that it made.

The lower court's findings No. 5 is totally inconsistent and contrary to the evidence in that the November 17, 1970, written agreement (Exhibit P. 25), was the result and culmination of any and all negotiations between the parties which took place in August, 1970. Any negotiations by and between the parties which resulted in that certain written agreement, Exhibit 25, are inadmissible as evidence and the admissibility thereof is reversible error; all subsequent oral negotiations varying the terms of the written agreement cannot be held to modify the written agreement unless the modification was in writing.

In view of the lower court's findings one must assume that it found that a new agreement was made between plaintiff and defendant modifying the terms of the written contract. But, to be effective,

“as a modification, the new agreement must possess all the elements necessary to form a contract. A modification of a contract requires the assent of both, or all, parties to the contract. Mutual assent is as much a requisite element in effecting a contractual modification as it is in the initial creation of a contract. 17 Am. Jur. 2d 935.

In examining all the minutes of the city council admitted into evidence it is clear that there was no mutual assent by the city's governing body to modify the terms of the November 17, 1970, written agreement.

It is further stated that

The mental purpose of one of the parties to a contract [plaintiff] cannot change its terms, nor are indefinite expressions sufficient to establish a binding agreement to change the formal requirements of a written contract . . . Mere negotiations between parties will not suffice to produce a modification. Before that result can be accomplished, the negotiations must ripen into a mutual valid, and enforceable agreement to modify the old contract. 17 Am. Jur. 2d 935.

Regarding Finding No. 8 of the lower court the only part which is sustained by the evidence is that which relates to the fact that the "minutes were kept as the official records of the city in the offices of the City of West Jordan under the care, custody and control of the City Recorder of the defendant, and said minutes became the official records of the resolutions, ordinances and other actions . . . undertaken by the City of West Jordan." As to that finding the defendant stipulated and it now admits before this court. The balance of finding No. 8 could not possibly be supported by the evidence in the record and additionally by the fact that there were written agreements entered into by the city (Exhibit 25) and that the city did not rely upon the minutes of its council for its contractual obligations.

The finding of the lower court that "the pay-back agreement is specifically set forth in writing in the various official Minutes of the City Council and was approved by unanimous vote of said Council" (Finding No. 11) is not supported and cannot be sustained by the evidence. Nowhere in all the minutes of the council which were introduced into evidence does it show that a vote let alone a unanimous vote was taken setting forth a payback agreement. The minutes of the council discussed a possible payback agreement the terms of which are not fully known to anyone including the plaintiff itself.

The remaining of the court's finding No. 11 is totally inconsistent and contrary to the lower court's decision in that said finding is based upon a theory of unjust enrichment and/or *quantum meruit*, a cause of action sued upon by the plaintiff, but appeared to have been dismissed by the lower court in its memorandum decision to allow plaintiff to be entitled to this First Cause of Action as prayed.

The finding in Findings No. 11 that the city received the benefits "accruing from the construction of said line is totally inapposite of the facts as taken by judicial notice of the lower court as it is shown from the following colloquy between counsel for plaintiff and defendant and the court.

**MR. PRATT:** We are not seeking unjust enrichment for all the taxes you collected or anything like that. We built you a sewer line that

you are not — you now own, use and receive benefits from.

**MR. COLESSIDES:** Right. That's exactly the point. We receive benefit from it. What are the benefits? His testimony showed it was the monthly — Mrs. Anderson testified that we received three dollars and twenty-five cents every month.

**THE COURT:** Well, now, I can see your point but I am not sure that that — oh, I am sure they spend every penny of it running the treatment plant and keeping the line serviced and —

**MR. COLESSIDES:** That's exactly the evidence I want to have before the Court, Your Honor, unless the Court —

**THE COURT:** I'll take judicial notice of that.

**MR. COLESSIDES:** Unless the Court wishes to take judicial notice which is fine.

**THE COURT:** I don't think any of them make any money.

(Tr. p. 106 line 1 to line 18.)

Plaintiff's First Cause of Action upon which the lower court gave judgment is strictly a cause of action based on a contractual theory and does not contemplate the receiving of a benefit by the city, or the increased valuation of the City's assets, nor the added real property tax values. These findings are totally inconsistent with the judgment of the lower court, they are not supported or sustained by the evidence in the record and therefore are erroneous.

The lower court erred in its finding No. 10, to the effect that the city through the collection of the monthly service charges from the 167 connections "... has obtained adequate and legal financing for the payment of said construction costs, and that in addition thereto the city has other finances available for the payment of said sewer construction costs. There simply does not exist any evidence in the record tending to prove any of the above or to sustain and support the same.

The lower court not only varied the terms of the agreement by the parties as represented by Exhibit 25, but in addition, it created a new contract between the parties by sheer judicial force.

In conclusion defendant submits that the lower court's judgment should be reversed and vacated on the basis and for the reason that the court erred in modifying the existing written contract and creating a new one by interpreting oral evidence which should have been stricken from the record.

### POINT III

THE EVIDENCE PRESENTED FAILS TO ESTABLISH THAT THERE WAS A CONTRACT BETWEEN PLAINTIFF AND DEFENDANT.

The lower court erred in finding that there was a valid and enforceable contract between plaintiff and

the municipal corporation because the evidence when viewed in their totality cannot sustain such a finding.

There is no question that the City of West Jordan has a right given by the Utah State Legislature to enter into contracts the same as any other corporation. The right to contract is given by Section 10-7-1 wherein it states that

Cities and towns shall be bodies politic and corporate with perpetual succession. They . . . may . . . make contracts . . . for corporate purposes. Section 10-7-1, Utah Code Annotated (1953).

The legislature did not set any specific guidelines as to how contracts in general by the municipality may be entered into and gave the power to the city to devise the method and mode of entering into contract by enacting Section 10-7-2, Utah Code Annotated, 1953, whereby the governing body by ordinance may choose to exercise its power to contract.

In the instant case the City of West Jordan did not enact any ordinance to describe methods of contracting, so one must look either to other statutory provisions enacted by the Utah State Legislature applicable to municipal contracts (see Point I) or other existing law relating to the formation of contracts.

Generally, the requirements for the formation of a contract are that there must be "sufficient consider-

ation, clear and explicit words to express the agreement, and the assent of both contracting parties." 17 Am. Jur. 2d 345. In light of the above stated criteria we must examine the evidence in the record and determine whether or not there was agreement.

Other than plaintiff's counsel's own assertions that the City of West Jordan through the collection of \$3.50 monthly sewer fee obtained the necessary legal financing the record is void of any evidence supporting said contention. To the contrary the record is replete with testimony by plaintiff's witnesses that without a sewer plaintiff could not obtain financing from FHA to develop the subdivisions. Mr. Coates, who was one of the originators of this development testified as follows:

Q. Isn't it true that the reason you wanted to have the sewer in this subdivision is because F.H.A. would not finance unsewered subdivisions?

A. That is correct.

Q. And the reason you put the subdivision — you put the — the line from this point to this point was to develop a subdivision?

A. That is correct.

Q. Otherwise, F.H.A. would not give you the money?

A. That's correct.

(Tr. p. 26, lines 12 to 21).

And later on, plaintiff's General Manager, Mr.

Green testified as follows:

Q. Well, let me ask you this: Isn't it true that F.H.A. required you to sewer this subdivision in order for them to finance it?

A. Yes.

Q. Otherwise they wouldn't have financed it would they?

A. No.

Q. Without this sewer line they — without the sewer they would not finance it would they?

A. No.

Q. No, they would not. Now, let me ask you another question. Isn't it true that with the sewer line that property [34 acres] was improved in value.

A. Yes. This is true.

(Tr. p. 71, lines 11 to 23).

The only inference which can be made from the above testimony is that the municipality did not receive any consideration for the installation of the sewer line and that the sewer line aided and assisted the financing of the development and helped the plaintiff reap its profits.

The other requirements necessary for the formation of contract are "clear and explicit words to express the agreement" and mutual assent. We have searched the record for such clear and explicit words

but we find none. The council in its public deliberations, as shown by the evidence of the minutes, is discussing a payback agreement as early as August 4, 1970, in reviewing a proposal by Mr. Coates. After the presentation of the proposal by Mr. Coates "the council decided to meet later tonight and go over the sample agreement and *consider the water and sewer line extensions*" (emphasis added; Exhibit P-4). At that time plaintiff was proposing a payback of \$2.00 per connection, per month for a total pay out over a period of 5 years (Exhibit P-4). From that point on plaintiff was unable to show that a public meeting subsequent to that of August 4, 1970, the council agreed to a payback of \$1.50 per connection, per month for a total pay out over a period of 7 years. In addition, the record does not disclose the time when said payments will begin and how said payments are to be made that is whether they are going to be paid in monthly, quarterly, semi-annual or annual payments.

From the evidence and in light of the various amounts and the duration of time, discussed by the council and plaintiff's representatives, it appears that the parties did not arrive at a meeting of the minds so as to form a binding contract.

It is respectfully urged upon this court that because the agreement complained of lacked the necessary consideration, was vague and indefinite as to repayment terms and lacked the mutual assent necessary, it is invalid and unenforceable.

## CONCLUSION


Defendant submits that the case at bar represents the classic case of the validity of a municipal contract where justice must achieve the ultimate balance in protecting the interests of the inhabitants of a municipality versus those who deal with a city and must be aware of all the statutory requirements relating to contracting with a city.

Above all this court should protect the residents of the municipality because their interest is paramount to the interest of a private party and therefore this Court must issue its mandate to reverse the judgment of the lower court.

Respectfully submitted,

NEMELKA & COLESSIDES

NICK J. COLESSIDES

  
Attorney for Defendant-Appellant

## MAILING CERTIFICATE

Served three (3) copies of the foregoing brief to Elliott Lee Pratt, attorney for plaintiff-respondent, 351 South State Street, Salt Lake City, Utah 84111, by mailing the same, postage prepaid, this 10th day of March, 1975.

A handwritten signature in black ink, reading "Nick J. Colessides". The signature is written in a cursive, flowing style with a large initial "N".

NICK J. COLESSIDES

Attorney for Defendant-Appellant