2001

Midwest Realty v. City of West Jordan : Brief of Respondent

Utah Supreme Court

Nemelka and Colessides; Nick J. Colessides; Attorney for Appellant.
Elliot Lee Pratt; Attorney for Respondent.

UTAH SUPREME COURT

BRIEF

THE STATE OF UTAH

MIDWEST REALTY, a Utah Corporation,

Plaintiff-Respondent,

vs.

CITY OF WEST JORDAN,

Defendant-Appellant.

CASE NO. 13874

BRIEF OF RESPONDENT

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

ELLIOTT LEE PRATT
of CLYDE & PRATT
Attorney for Respondent
351 South State Street
Salt Lake City, Utah 84111

NEMELKA & COLESSIDES
NICK J. COLESSIDES
Attorney for Appellant
610 East South Temple Street
Salt Lake City, Utah 84102

IN THE SUPREME COURT OF THE STATE OF UTAH

MIDWEST REALTY, a Utah Corporation,	)	
Plaintiff-Respondent,	)	Case No. 13874
vs.	)	
CITY OF WEST JORDAN,	)	
Defendant-Appellant.	)	

BRIEF OF RESPONDENT

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

ELLIOTT LEE PRATT
of CLYDE & PRATT
Attorney for Respondent
351 South State Street
Salt Lake City, Utah 84111

NEMELKA & COLESSIDES
NICK J. COLESSIDES
Attorney for Appellant
610 East South Temple Street
Salt Lake City, Utah 84102

TABLE OF CONTENTS

CASES AND AUTHORITIES CITED

STATUTES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

MIDWEST REALTY, a Utah Corporation,	)	
	)	Case No. 13874
Plaintiff-Respondent,	)	
vs.	)	
CITY OF WEST JORDAN,	)	
Defendant-Appellant.	)	

BRIEF OF RESPONDENT

NATURE OF THE CASE

The action was brought by the Plaintiff against the Defendant seeking recovery of $20,134.35 owing on a pay back contract entered into by the parties. Under the contract, the City was to reimburse the Plaintiff for the cost of constructing a sewer main leading from the end of the City's system to the Plaintiff's two subdivisions. The repayment was to be at the rate of $1.50 per connection, per month for seven years, payable out of the monthly revenues received by the City from the sewer connections in the subdivisions.

DISPOSITION IN LOWER COURT

The matter was tried before the Honorable James S. Sawaya

without a jury who found for the Plaintiff-Respondent on the basis of the contract.

RELIEF SOUGHT ON APPEAL

Appellant appeals upon the grounds that recovery on the contract is barred because of failure to comply with Statutory requirements, that the Lower Court admitted oral testimony varying the terms of written sewer extension contracts, and that the evidence did not establish a contract.

Respondent seeks to sustain the Trial Court's determination that there was a valid contract as a matter of law and of fact, that Plaintiff complied with all conditions precedent to suit and that there was no violation of the Parole Evidence Rule.

STATEMENT OF FACTS

Appellant has attempted in its Statement of Facts to emphasize and state the evidence in favor of its own arguments, rather than in accordance with the facts found by the Trial Court. Thus, Plaintiff-Respondent sets forth below those facts which fairly state the case.

In April, 1970, the Plaintiff-Respondent, Midwest, acquired a tract of land which it later subdivided into Western Hills No. 1 and Western Hills No. 2 Subdivisions. (Ex. D-5)

The Subdivision Plats were submitted to the West Jordan Planning Commission on July 7, 1970, were approved by the City Engineer, Ivan Haslam, July 10, 1970, and presented to the City Commission on August 6, 1970, at which time the Subdivisions were

approved. (Ex. D-5)

Subdivision Western Hills No. 1 is situate on 7800 South and Subdivision Western Hills No. 2 is situate South of No. 1. Both Subdivisions are located West of the end of the then existing City sewer line at 3200 West. (Ex. P-1). In order for Midwest to develop these new Subdivisions, it was necessary to bring the sewer main from the end of the City's line at 3200 West, westerly along 7800 South to the Subdivisions.

In early August Mr. Arch Coates, the Developer of the Subdivisions for the Plaintiff for purposes of subdividing, met with the City Council and obtained some preliminary cost figures reflecting the cost of constructing the sewer main along 7800 South. (T. 60, 61) He thereupon met with the City Commission on August 4, 1970, and presented a feasibility study based upon an estimated cost of $14,682.00 which would be paid back over a five year period. (T. 62; Ex. P-4) The City thereafter responded that the five year period for the pay back was too short and asked that the five years be extended to seven years. (T. 65) In subsequent discussions the City and the Plaintiff agreed that the price would be reduced to $1.50 per connection per month. (T. 72)

The Plaintiff-Respondent submitted three bids (Exs. 9, 10 and 11) to the City Council on September 29, 1970, (Ex. P-13) having received them from the City Engineer, Caldwell, Richards and Sorenson. (T. 110-112) Construction of the line began and was completed some time in December, 1970, (T. 101) at which

time the City Engineer informed the City that the sewer line had been completed at a cost of $20,134.35, and recommended that the City accept the sewer as part of the City collection system. (Ex. 9) House construction in the Subdivisions began in late December, 1970, and continued over the next two years, ending September 29, 1972, when the last connections were made to the sewer system. (T. 129)

At various City Council meetings attended by representatives of Midwest, the Plaintiff's pay back agreement was considered:

> On February 2, 1971, the Council recognized the existance of the original agreement. The contract form drawn up by the City Attorney was for $20,134.35 and the Council decided it should meet with the Officials from Midwest to renegotiate the contract or to justify the increased cost. (Ex. P-14)
>
> On August 3, 1971, a representative of Midwest met with the City Council at which meeting the terms of the original agreement were discussed. The terms were: $1.50 per month per unit for a period of seven years. The Council agreed that it would have to stay with that agreement. (Ex. P-15)
>
> On September 21, 1971, there was a general discussion of pay-back agreements at the Council meeting and it was suggested that the sewer charges be raised in order to pay off the pay-back at a faster rate. The Mayor and the Council, indicating that it was for the benefit of the City, agreed to the pay-back arrangement. (Ex. P-16)

On September 28, 1971, there was a full discussion of the pay-back agreement and it was stated that a tentative agreement had been reached with Mr. Coates at the rate of $1.50 per month per connection for a maximum of seven years. Upon motion, properly seconded, the Council unanimously voted that:

> "We pay a maximum of $1.50 per month to the Contractor. The Contractor's pay back would terminate at the end of seven years, while the pay back to the City would continue until the obligation is paid....voting was unanimous in the affirmative." (Ex. P-17)

On October 5, 1971, the City adopted an Ordinance No. 17A entitled,

> "An Ordinance Amending Ordinance No. 17, Paragraph Relating To Schedule Of Monthly Service Rates (In City) Establishing The Monthly Sewer Fee For A Single Dwelling Unit To Be Charged To Residents Of The City Of West Jordan In Connection With The Pay Back Agreement On Sewer Connections." (Ex. P-18)

On September 5, 1972, some three weeks prior to the installation of the last sewer hookup in the Subdivisions, which occurred on September 29, 1972, (T. 129) the City Council once again considered the pay-back agreement. At this time Mr. Ray Green of Midwest explained in great detail the history of the agreement. The City Council indicated that it could not give any answer at that time, and that the matter would have to be discussed later among the Council Members and the Engineer. (Ex. P-19)

Finally, on March 1, 1973, following a meeting of the City Council on February 27, 1973, the pay-back agreement in the amount of $20,134.35 was rejected by the unanimous

vote of the Council. (Ex. P-20) This was the first rejection and first denial of responsibility on the part of the City. (T. 127)

A history of the City's informal operating procedures in considering and adopting resolutions, ordinances and contracts is shown by the following:

The City Recorder, in this case Muriel Anderson, acting as such since January 7, 1974, had custody of the Minute Book of the City and also had custody of the City Ordinances. (T. 48, 55) There are no signatures or certificates affixed by the City Recorder even though these are the official minutes and resolutions adopted by the City Council. (T. 50) During 1970-1971 the City contracts and agreements were not signed by the City Recorder. (T. 57)

Past contracts for the extension of culinary water lines, etc., (Ex. P-25) were not countersigned by the City Recorder, nor were contracts covering other sub-divisions within the City of West Jordan. (T. 68)

The City had previously entered into other contracts on October 6, 1970 (Ex. D-23) where the agreement was handled by mere motion, second and unanimous voting.

Even valid ordinances which the Defendant-Appellant stipulated were the official ordinances (T. 52; Ex. P-18) are adopted without signature or without indication of the voting, other than the statement "unanimous".

The City has been bound for many years by oral contracts

with Caldwell, Richards and Sorenson for the rendering of engineering services; and such contracts are neither signed nor executed by the City. (T. 54)

As each house in the subdivisions was built and hooked up to the sewer, the City began receiving $3.25 per month, per house. The value of the sewer main built by Midwest has been added to the City's assets. (T. 160) The funds from the monthly $3.25 charge go to pay for the 7800 South line as well as for the interior Subdivision sewer systems. (T. 158)

Finally, on May 17, 1973, of the Plaintiff's agreement, the Plaintiff submitted a verified claim. (Ex. P-21) The action was commenced July 13, 1973. (T. 42)

ARGUMENT

POINT 1

THE AGREEMENT WITH THE CITY IS NOT RENDERED INVALID BY STATUTE.

A. <u>This is not a contract requiring posting and/or publication of notice</u>.

Appellant relies on Section 10-7-20 Utah Code Annotated, 1953, in arguing that this contract was one for public improvements, and thus had to be open for public bidding after proper publication of notice. There are several reasons why this argument fails:

1. The Statute expressly limits its application to those improvements "to be paid for out of the General Funds of the City or Town...". It is clear that the pay back costs are not payable out of the General Fund, but are to be paid out of the Utility

Fund. In the Minutes of September 28, 1971, we find the following:

> "The Mayor told the Councilmen that it would be necessary to arrange a pay back agreement because the General Fund is not set up to absorb this expense."

In the Minutes of September 21, 1971 (Ex. P-16) there is a distinction made between the Utility Fund and the General Fund. The report of the City Accountant was that the City was earning good money "from the utility operations". These minutes also indicate that the Accountant was trying to determine if money could be transfered from the Utility Fund reserve to the General Fund, if it is held in restricted funds. Reference is also made to the Ordinance enacted on October 5, 1971, (Ex. P-18) wherein the City specifically increases the assessment from $3.25 to $4.75 to pay for the pay back agreement on the sewer construction. Also it is clear from the testimony of the City Recorder and from Ordinance 42 (Ex. D-27) that the money from the utilities goes into the Utility Fund. (T. 152,158,159)

2. The terms of the agreement itself indicate that the payments are not to come from the General Fund at all, but are to be taken from the fees collected from the use of the sewer system. Our Utah Supreme Court has specifically held that this Section does not apply to improvements to be paid for exclusively out of the proceeds derived from the improvements themselves. See Barnes vs. Lehi City, 74 Utah 321, 279 P 878, Utah Power and Light Company vs. Provo City, 94 Utah 203, 74 P 2d 1191.

3. The Statute has specific language excepting from its

Application the contracts for "making connection with water mains or sewers...".

4. Additionally, but quite fundamentally, is the fact that the contract is not one for the construction of a public improvement. Appellant in this case is the owner of the property, is the constructor of the sewer systems, the water systems and the sewer main, all of which are necessary for the development of the two Subdivisions, and which are owned by the subdivider until dedicated to the City. There is no way that the Appellant, Midwest, would be required to put up for bid the construction of its own system. The system is a requirement to be met in order to develop the Subdivisions. It is difficult to understand how a public bidding concept would fit into the subdividers responsibility to furnish sewer and water.

Also, this is an agreement to repay the developer for expenses he incurred in constructing the sewer main leading to its Subdivisions. There is nothing that could be put up for bid. If the reasonableness of the price were at issue, we nevertheless have the City's stipulation that the sum is reasonable. Also, of course, the evidence is clear that the City was notified before the work started of the three bids which had been received by the City Engineer and turned over to the developer. Then, finally the City Engineer himself approved and found said costs of $20,134.35 proper. (T. 104; Exs. 9, 10, 11, 12 and 13)

B. Countersignature by the City Recorder is not required.

Appellant relies upon Section 10-10-61 Utah Code Annotated, 1953, as Amended, for the argument that since the City Recorder of

the City of West Jordan did not countersign the contract between the City and Midwest, the contract is invalid. Respondent does not believe that this Section of the Code has that effect on the subject contract, and particularly is this so in view of the historical methods of procedure followed by the City of West Jordan, a City of the Third Class.

The definite thrust of this Statute is to the effect that contract documents are involved and in existance and are signed by someone. Thereafter, the City Recorder must "countersign". The word is defined in Blacks Law Dictionary, Fourth Edition, at page 421 as:

> "COUNTERSIGN": As a noun, the signature of a secretary or other subordinate officer to any writing signed by the principal or superior to vouch for the authenticity of it...(Cites cases); and
>
> As a verb, to sign in addition to the signature of another in order to attest the authenticity. (Cites cases)."

Thus, in our case, we have no separate contract document as such, previously signed by someone, but in fact have resolutions or minutes of the City Council setting forth the contract. There actually is no document to which such a countersignature could be affixed. The purpose is obviously to authenticate the particular separate document. This authenticity of our minutes and resolutions is indicated in the testimony of the present City Recorder who stated that these were the authentic resolutions and records of the City even though there were no signatures of the City Recorder affixed to any of the minutes included in the entire Minute Book, from which the particular minutes evidenced by the

Exhibits in this case were taken. (T. 49-51) No claim was ever made by the City (until this lawsuit) that the agreement failed for lack of a countersignature. The City has never had a countersignature of the Recorder on anything.

We think therefore that the duty of the City Recorder is a ministerial duty imposed by this Section for purposes of authenticating certain contract documents, and this Section of the Code is not intended to provide a governmental veto by the City Recorder, nor is it intended to nullify the effect of resolutions and minutes, together with the agreements set forth therein, duly adopted by the City's Governing Board, it's City Council.

2. The Utah Supreme Court in Cooper vs. Holder, 21 Utah 2d 40, 440 P 2d 115, states as is the case here that when,

> "...(A) contract has been entered into for that purpose, the City Council's function of policy making has been fulfilled; and there then is no policy decision to be made as to whether the City will pay what it owes for the services received."

In Richfield Cottonwood Irrigation Company vs. City of Richfield, 84 Utah 107, 34 P 2d 945, this Court has specifically held that minutes of the City Council are evidence of the facts therein recired, stating,

> "...(T)he minutes were kept by various Recorders of the City. The law requires that such minutes be kept. Rev. St. Utah 1933, 15-6-44. Being public records they were competent evidence of the facts therein recited."

The legislative and governing body of cities of the Third Class consist of the Mayor and City Council. Section 10-6-5, Utah Code Annotated. The governing body shall meet, keep a journal of its proceedings, and take a vote upon the passage of all ordinances

and propositions creating liabilities against the City, and shall enter the vote upon the journal of its proceedings. Section 10-6-9. The City Recorder for cities of the Third Class is an appointive officer and that person shall also be ex officio City Auditor. Section 10-6-30. Thus, it is appropriate to note that the City Recorder is not a member of the City Council and is not granted any voice in the governing or legislative function of the City. Quite obviously the City Recorder has no veto power over the legislation adopted by the City at its regular governing meetings.

The duties of the City Recorder are set forth in Section 10-10-60 wherein he is required to keep the papers and records of the City, keep a record of the proceedings of the governing body (City Council) and attend the meetings of the governing body. There thus seems little doubt but that the City Council enacts the governing and legislative pronouncements for the City and that the City Recorder has a ministerial duty of authenticating such agreements. There is no requirement whatsoever that a City has to reduce to a separate written contract form, any agreements entered into. The actions which bind the City are handled at the Council Meetings and are set forth in the minutes, resolutions and ordinances.

In our case, we have many Minutes of the City Council extending back to August 1970 and continuing on through September 1972, in which the agreement with the Plaintiff is discussed in its various details. However, specifically on September 28, 1971. (Ex. P-17) the City Council, after considerable discussion

concerning the pay back agreement, took the following action:

> "Mr. Hunt made the motion that we set the pay back agreement at $1.50 per month to be paid by the homeowner. Also, that we pay a maximum of $1.50 per month to the contractor. The contractor's pay back would terminate at the end of seven years, while the pay back to the City would continue until the obligation is paid. Motion was seconded by Mr. Copeland. Voting was unanimous in the affirmative."

Incidentally, Muriel Anderson, the City Recorder was present at the meeting, although her status is not shown. This meeting, of course, occurred at a time when a substantial part of the Subdivision had hooked up, and nine months after the main line had been constructed and the cost thereof submitted to the City Council by the City Engineer, under date of December 8, 1970. (Ex. P-9) Thus, we do have in addition to the various minutes and meetings preceeding September 28, 1971, a reaffirmation in writing properly voted upon and adopted unanimously at a regular meeting of the governing body of the City of West Jordan of an agreement to pay back $1.50 per month per connection extending over a seven year period. All of the Statutory requirements were met, the minutes and the agreement have been authenticated by the City Recorder, and although no separate contract document was prepared and executed, and certainly no countersignature appears on such document that was not executed, the City has properly acted.

One should not overlook the fact, also, that the City had traditionally entered into agreements without any countersigning by the City Recorder. (T. 54, 57, 68; Ex. P-25) The City has, of course, adopted ordinances and resolutions involving financial obligations on the part of the City even though there has

been no countersignature on the part of the City Recorder. (T. 48, 50) See Sidney Stevens Implement Company vs. Ogden City, 83 Utah 578, 33 P 2d 181, for the holding that a City can be bound by an implied contract which arises out of the general power of the City under Section 15-7-1 R.S.V., 1933 which vests in it the right and power to "make contracts and acquire and hold real and personal property for corporate purposes." This Section is now, Section 10-7-1, Utah Code Annotated.

Although Appellant has not cited the case of Rapp vs. Salt Lake City, 527 P 2d 651, ___ Utah ___, we are aware of the case, but believe that it is distinguishable from the subject case in several respects. First, the Rapp case is a tort action against the City based upon misrepresentation, and in effect seeks to impose an unjust enrichment claim against the City regardless of the intentions of the parties. Furthermore, the case in arguing for unjust enrichment, attempts to set up contracts arising out of an invitation to bid and a bid made pursuant thereto. The case was decided upon summary judgment without evidence upon many facets of the case, and particularly as to whether or not the City Recorder did countersign any agreement. Quite obviously, where there were no City Commission Minutes or Resolutions there would have been no countersignature. We believe that the Court was merely indicating by dicta various elements which go to make up statutory requirements of certain types of contracts and where the contract in the Rapp case was implied in every sense of the word, obviously the requirements were not met.

In our case, however, we have a definite course of action

upon which the Plaintiff relied, which course of action was represented by minutes and approvals by the City Council as well as a formal resolution properly adopted, as has been indicated above. We think that the Rapp case therefore is not determinative of our situation.

C. Plaintiff-Respondent complied with Sections 63-30-13 and 10-7-77 Utah Code Annotated.

Appellant argues that the Plaintiff did not file a claim within 90 days after the cause of action arose. This point simply involves a fact question, which the Lower Court has decided. Determining when the cause of action arises in a case where no specific period of time has been agreed to for the performance, becomes a question of reasonableness, which the Trial Court must settle. O'Hair vs. Counalis, 23 Utah 2d 355, 463 P 2d 799. In examining the evidence in this case, we conclude that the Trial Court was justified in determining that the Notice sent on May 17, 1973, (Ex. P-21) was within the 90 day requirement of Section 63-30-13.

Beginning August of 1970, and continuing on through the period up until September 1971, the parties met from time to time in the Council meetings to solidify the pay-back agreement. (Exs. P-13, P-14, P-15, P-16 and P-17) On October 5, 1971, the Council adopted Ordinance 17A to increase sewer rates so the pay back obligation would be better funded. (Ex. P-18) Thereafter in September, 1972, a further meeting was had at which the City explained that the matter would have to be taken up again two weeks hence. (Ex. P-19) Thereafter nothing occurred until a

meeting on February 27, 1973 at which the City Council decided to reject the agreement. This rejection was given to the Plaintiff by letter of March 1, 1973. (Ex. P-20) Thereafter, on May 17, the Notice was sent to the Appellant. (Ex. P-21)

Mr. Green, who was handling the affairs for Midwest, testified that at no time had the City rejected his claim or determined that it would not pay until he recieved the rejection in March 1973. (T. 127)

Therefore, it is reasonable to find that the Plaintiff had every reason to believe that the contract was going to be honored until he received the unequivocable rejection, March 1, 1973.

Appellant also claims that under Section 63-30-15 the action must be commenced within one year after the denial. It is obvious that the Appellant in construing Sections 63-30-13 and 63-30-15 has overlooked Section 63-30-14. Quite obviously the provisions of 63-30-13 require the filing of a claim. Section 63-30-14 provides that if the City does not approve or deny that claim so filed within 90 days, then the claim shall be deemed to have been denied. Section 63-30-15 thereupon states that an action must be commenced within one year after said denial. Thus, we have the following sequence: On March 1, 1973, the City rejected the Plaintiff's claim thus setting up the cause of action. On May 17, less than 90 days later the Plaintiff filed its claim. The action was then filed July 13, 1973. All of this shows compliance with the aforesaid Statutory requirements.

Appellant also claims that Section 10-7-77 Utah Code

Annotated was not followed and that the claim of Plaintiff is barred. Section 10-7-77 is a one year Statute of Limitations relating to the filing of claims. It obviously conflicts with Section 63-30-13 and having been re-enacted in its present form in 1973, would seem to have preference over Section 63-30-13. However, assuming that the claimant must meet both Statutes it is clear from the record that September 29, 1972, is the date that the last connection was made to the sewer system, and that the $1.50 monthly pay back on that connection would have then commenced running and would run for seven years. Strictly speaking, of course, the last accrued item would not occur for seven years. However, assuming a position most favorable to the Appellant, the one year could in no event elapse sooner than September 29, 1973. On the other hand, if the claim accrued when it was denied March 1, 1973, then Plaintiff-Respondent had until March 1, 1974, in which to file its claim. Thus, there is no interpretation of the facts and evidence which could justify any claim that Section 10-7-77 has been violated. The claim itself is verified and meets the requirements of the Statute.

In summary, Respondent submits that the Statutes have been met, the claim properly filed and the action timely initiated.

D. The method of voting for a resolution under Section 10-6-9, Utah Code Annotated, has been met.

There is no doubt but that the August 4, 1970 presentation to the Council by Mr. Coates (Ex. P-4; T. 72, 72, 80-90) does not meet the requirements of Section 10-6-9, Utah Code Annotated. However, subsequent Council meetings leading up to September 28,

1971, indicate the Council's full examination and understanding of the problem resulting in the enactment by unanimous affirmative vote on September 28, 1971 of the proposition. The phrase, "voting was unanimous in the affirmative", can only mean that everyone present voted yea. It seems rather fundamental that where the voting is unanimous the yeas and the nays have been counted. The minutes of the meeting show the six members present, including the Mayor, show the Motion made by Council Member Hunt, show the Motion seconded by Council Member Copeland and show that the voting was unanimous in the affirmative. (Ex. P-17) Furthermore, Muriel Anderson testified that this was the procedure followed by the Council in all of its meetings and that if the voting of all members was affirmative that the minutes reflected all yeas voting unanimously. (T. 163) An examination of other ordinances, concerning which there is no question as to the validity thereof, shows that this was a uniform practice of reflecting yeas and nays. (Ex. P-18) Ordinance No. 17A was so adopted. Thus, the yeas and nays were properly recorded at the meeting at which the pay-back agreement was approved.

E. The pay-back agreement satisifies the Statute of Frauds.

The writings upon which Plaintiff relies, are of course the minutes and resolutions adopted by the City Council and particularly the minutes of September 28, 1972. (Ex. P-17) These minutes are sufficient writings to comply with the Statute. Richfield Cottonwood Irrigation Company vs. City of Richfield, supr

Public records are a sufficient memorandum to comply with the Statute of Frauds. The municipal corporation acts through

its governing body and those actions are expressed in the minutes and resolutions. See 72 American Jurisprudence paragraph 306 and the cases cited therein.

The minutes involved here are the official minutes and resolutions of the City and are properly authenticated by the Recorder. Courts will not search for technicalities to defeat rights, but will give liberal interpretation to minutes which may be carelessly or inadequately kept by a municipality. Stevens vs. Muskegon, 111 Mich. 72, 69 N.W. 227.

POINT II

NO ORAL EVIDENCE MODIFIED THE TERMS OF WRITTEN SEWER EXTENSION CONTRACTS.

Plaintiff introduced Exhibit 25 consisting of water and sewer extension application agreements to show other contracts entered into by the City without the formality of countersignature of the City Recorder. The content of the documents indicates clearly that they relate to the extensions in the Subdivisions. They do not relate to the construction of the sewer main. They obviously relate to applications for sewer and water extensions and indicate the number of copies, that maps of the areas were required, the guarantees required and other details. There is a sewer extension application and a water extension application for each Subdivision.

Mrs. Anderson, quoted so extensively by Appellant at page 33 of his Brief, testified on cross examination that she couldn't say definitely whether or not these agreements related to the

sewer main. (T. 139) She obviously was asked by Defendant's Counsel to give a legal opinion. (T. 138)

The letter of transmittal from the City Engineers (Ex. P-26) shows by the percentage fee figures that the contract figures are unrelated to the main line construction.

In any event, the written minutes of the City do not constitut oral testimony contradicting or varying the terms of these extensio application agreements.

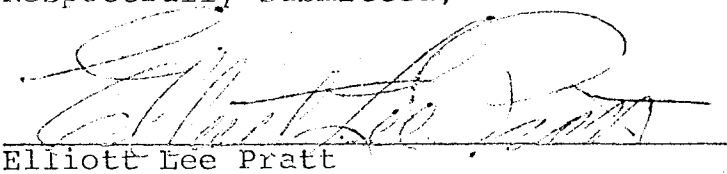
POINT III

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE FINDING THAT THERE WAS A CONTRACT.

The City received the benefit of a sewer main at the cost of $20,134.35; it received the value of added tax base in terms of the homes in the Subdivisions; it received the revenue from the monthly sewer payments of $3.25. (T. 150, 160)

The clear intent of the resolution passed by the City is that the cost previously given to the City in 1970 would be repaid at the rate of $1.50 per house, per month. The Trial Court had sufficient evidence to find a contract existed to repay the sum of $20,134.35, the reasonable cost of constructing the sewer. Respondent respectfully urges that the Trial Court Judgment be affirmed.

Respectfully submitted,



Elliott Lee Pratt
Attorney for Respondent
351 South State Street
Salt Lake City, Utah 84111