

1979

# George Rupp, Et Al. v. Grantsville City, Et Al. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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GEORGE RUPP, et al., :  
Plaintiffs-Appellants, :  
-v- : Case No. 16270  
GRANTSVILLE CITY, et al., :  
Defendants-Respondents. :

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BRIEF OF APPELLANT

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Appeal from the Third Judicial District Court  
Tooele County, State of Utah  
Honorable Ernest F. Baldwin, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

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 Plaintiffs-Appellants, ;  
 -v- ; Case No. 16270  
 GRANTSVILLE CITY, et al., ;  
 Defendants-Respondents. ;

## BRIEF OF APPELLANTS

## STATEMENT OF THE NATURE OF THE CASE

The appellants brought an action for declaratory injunctive relief enjoining the enforcement of certain provisions of the respondents' ordinance entitled "Sewers," which provisions are cited as Chapter 22, Sections 31, 34, and 35 of the Grantsville City Ordinances, as revised, and from enjoining the enforcement of certain provisions of the respondents' ordinance entitled "Water," which provisions are cited as Chapter 28, Sections 13, 15, and 27 of the Grantsville City Ordinances, as revised.

The appellants contend the respondents were without necessary statutory authority to enact certain of these

sections and that in other aspects the sections are unconstitutional in violation of notice and hearing requirements of due process.

#### DISPOSITION IN THE LOWER COURT

The trial of this matter was before the Third Judicial District Court of Tooele County, the Honorable Ernest F. Baldwin, Jr., Judge, presiding.

At the close of evidence and argument, the lower court granted the respondents' motion to dismiss.

#### RELIEF SOUGHT ON APPEAL

The appellants seek a reversal of the judgment of the lower court by having this court construe and restrain the sections of the ordinances and their enforcement as being unconstitutional and unauthorized by statutes of the State of Utah insofar as the sections of the ordinances purport to extend to the respondents' powers which have not been granted them by the legislature.

#### STATEMENT OF FACTS

In conjunction with an earlier ordinance relative to a sewer system, which did not require mandatory hookups, in 1967 the respondents held a special election which failed to give the respondents the authority to issue general obligation bonds for the construction of a sewer system.

In 1969 the respondents began prodecures for a second special election to give the respondents the authority to issue general obligation bonds for the construction of a sewer system.

In an attempt to gain public approval through this second special election, the respondents authorized the printing of pamphlets to inform the public that they now had commitments for financial grants from the federal government (Housing and Urban Development - \$198,000; Federal Water Quality Agency - \$67,000).

In these pamphlets the respondents informed the appellants and others of the general public that the charge to connect would be \$250 and that those not connected would not be charged, i.e., " ... those people using the system and receiving benefits from it to pay for the construction."

The appellants and others had adequate septic tanks and did not desire to connect.

The respondents discovered that to obtain the federal grants they had to revise their sewer ordinance to provide for mandatory hookups.

The ordinance being attacked in this case was amended in 1969 to provide for mandatory hookups, at which time no such statutory authority existed. It was not until 1971 that the legislature granted the respondents and other cities the statutory authority for mandatory hookups.

After the second special election following the representations in the pamphlet, the respondents let the contract for the construction of a sewer system. Later it was discovered the contractor had made a \$150,000 mistake in his estimate and contract price. Rather than bringing suit against the contractor, the respondents waived that right and decided to increase the connection fee from \$250 to \$350. This action was done after a public hearing before the respondents but not by a vote by the people.

Thereafter, the respondents sent notices to the appellants and others to the effect that it was mandatory that they hook up to the sewer system and pay the increased connection fee plus monthly rates, or they would have all of the water being used by them cut off as a means to effect enforcement of their mandatory hookup ordinance.

The appellants had their water turned off for refusal. They were advised by counsel to pay under protest so that they would not be deprived of water and then to determine if this action should be brought, which it was and is now before this court on appeal.

#### ARGUMENT

#### POINT I

THE RESPONDENTS HAD NO STATUTORY AUTHORITY  
TO ENACT THE ORDINANCE FOR MANDATORY HOOK-  
UPS TO THE SEWER SYSTEM.

The respondent is a city. And cities are in their nature and purpose creatures, instrumentalities, or local agents of the state to exist, function, or be annihilated strictly at the will of the legislature for the convenient administration of government throughout the state.

Cities may exercise only those powers which have been expressly granted by the legislature by general laws; those powers which are reasonably implied as being necessary to carry out those powers which have been expressly granted; and those powers which are essential to the declared objects and purposes of all cities alike created, not merely convenient, but absolutely indispensable. (16 C.J.S. Const. Law § 140(b); 62 C.J.S. Mun. Corps. §§ 107 and 110(b); 37 Am. Jur. 722; 1 McQuillin, Mun. Corps. 387 (2d ed.); 1 Dillon, Mun. Corps. § 237 at 448 (5th ed.); Utah Const. art. IX, § 5; Utah Code Ann. § 10-8-84 (1953); Rich v. Salt Lake City, 20 Utah 2d 339, 437 P.2d 690 (1968); Salt Lake City v. Allred, 19 Utah 2d 254, 430 P.2d 371 (1967); although reversed on rehearing on point of preemption, Salt Lake City v. Allred, 20 Utah 2d 298, 437 P.2d 434 (1968), wherein the cases of Kusse, Leo, Charlier, Hoffman, Horne, and Doran, *infra*, were cited with approval; Salt Lake City v. State Tax Comm'n, 11 Utah 2d 359, 359 P.2d 397 (1961); Stevenson v. Salt Lake City, 7 Utah 2d 28, 317 P.2d 597 (1957); Ritholz v. Salt Lake City, 3 Utah 2d 385, 284 P.2d 702 (1955); Nasfell v. Ogden City, 122 Utah

344, 249 P.2d 507 (1952); Nance v. Mayflower Tavern, 106 Utah 517, 150 P.2d 777 (1944); Duchesne County v. State Tax Comm'n, 104 Utah 635, 140 P.2d 335 (1943); Walton v. Tracy Loan and Trust Co., 97 Utah 249, 92 P.2d 724 (1939); Salt Lake City v. Kusse, 97 Utah 113, 93 P.2d 671 (1938); Riggins v. District Court of Salt Lake County, 89 Utah 183, 51 P.2d 645 (1935); American Petroleum Co. v. Ogden City, 90 Utah 465, 62 P.2d 557 (1936); Utah Rapid Transit Co. v. Ogden City, 89 Utah 546, 58 P.2d 1 (1936); although reversed on other grounds by Rich v. Salt Lake City, 20 Utah 2d 339, 437 P.2d 690 (1968); Lehi City v. Meiling, 87 Utah 237, 48 P.2d 530 (1935); Wadsworth v. Santaquin City, 83 Utah 321, 28 P.2d 161 (1933); Salt Lake City v. Bennion Gas & Oil Co., 80 Utah 530, 15 P.2d 648 (1932); Bohn v. Salt Lake City, 79 Utah 121, 8 P.2d 591, 81 A.L.R. 215 (1932); Morgan v. Salt Lake City, 78 Utah 403, 3 P.2d 510 (1931); American Fork City v. Robinson, 77 Utah 168, 292 P. 249 (1930); Salt Lake City v. Sutter, 61 Utah 533, 216 P. 234 (1923); Salt Lake City v. Bernhagen, 56 Utah 159, 189 P. 583 (1920); Ogden City v. Leo, 54 Utah 556, 182 P. 530 (1919); Salt Lake City v. Board of Educ. of Salt Lake City, 52 Utah 540, 175 P. 654 (1918); Zamata v. Browning, 51 Utah 400, 170 P. 1057 (1918); Tooele v. Hoffman, 42 Utah 596, 134 P. 558 (1913); Salt Lake County v. Salt Lake City, 42 Utah 548, 134 P. 560 (1913); American Fork v. Charlier, 43 Utah 231, 134 P. 739 (1913); Salt Lake City v. Doran, 42 Utah 401, 131 P. 636 (1913); Pleasant Grove City v.

Lindsay, 41 Utah 154, 125 P. 389 (1912); Salt Lake City v. Howe, 37 Utah 170, 106 P. 705 (1910), Ann. Cas. 1912C 189; Nelden v. Clark, 20 Utah 382, 59 P. 524, 77 Am. S. R. 917 (1899); Ogden City v. Boseman, 20 Utah 98, 57 P. 843 (1899); Kimball v. Grantsville City, 19 Utah 368, 57 P. 1, 45 L.R.A. 628 (1899); Ogden City v. Crossman, 17 Utah 66, 53 P. 985 (1898); Ogden City v. Bear Lake and River, etc., Co., 16 Utah 440, 52 P. 697, 41 L.R.A. 305 (1898).)

This view is well expressed in 1 Dillon, Municipal Corporations 154 (5th ed.):

It must now be conceded that the great weight of authority denies in toto the existence, in the absence of special constitutional provisions, of any inherent right of local self-government, which is beyond legislative control. The Supreme Court of the United States has declared that a municipal corporation in the exercise of all its duties, including those most strictly local or internal, is but a department of the State. The legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality; or it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses, or it may itself exercise directly within the locality any and all powers usually committed to a municipality. So viewed its acts cannot be regarded as sometimes those of an agency of the State and at others those of a municipality; but, its

character and nature remaining at all times the same, it is great or small according as the legislature shall extend or contract the sphere of its actions.

The respondents in this case now on appeal have never yet contended the law in this state to be contrary to that which has been stated above. In fact, the respondents rely solely on Utah Code Ann. § 10-8-38 (1953) for their authority to enact the 1969 mandatory hookup ordinance, when such express statutory authority was not given the respondents or any city until the 1971 amendment of Utah Code Ann. § 10-8-38 (1953).

The respondents do not rely on their so-called general welfare powers which are to be found in Utah Code Ann. § 10-8-84 (1953). Nor could there be reliance thereon, because that statute merely authorizes cities to pass "all ordinances ... necessary for carrying into effect or discharging all powers and duties conferred by this chapter...." (Emphasis added.)

The general grant of power to enact ordinances to be found in Utah Code Ann. § 10-8-84 (1953) is merely in aid of the special grants of express powers elsewhere to be found in the legislative statutes called general laws which are required to have uniform application throughout the state (American Fork City v. Robinson, 77 Utah 168, 292 P. 249 (1930)) and does not enlarge or annul any special grant of express power.



(Bohn v. Salt Lake City, 79 Utah 121, 8 P.2d 591, 81 A.L.R. 215 (1932).)

Therefore, the respondents were without statutory authority to enact the mandatory hookup ordinance under attack in this appeal, because such ordinance was enacted in 1969, two years prior to the 1971 statutory authority. And interestingly enough, the respondents to this very day have not yet enacted a valid mandatory hookup ordinance even though they have had such authority since 1971.

The appellants do not contend the respondents were without authority to construct, maintain, and operate a city sewer system. Utah Code Ann. § 10-8-38 (1953) since its inception in 1898 has provided such authority.

What the appellants do contend is that the respondents by the ordinance relied on do not have the authority to compel the appellants to hook up to the sewer.

The appellants recognize and accept the burden of establishing the invalidity of the ordinance under attack. (Salt Lake City v. Savage, 541 P.2d 1035 (Utah 1975).) This burden is met through two parallel lines of reason.

First, the general construction of doubtful city authority, both within this state and others, is that where there is a reasonable doubt concerning the existence of a particular authority of a city, that doubt should be resolved against the city, and the authority should be denied. (Nance

v. Mayflower Tavern, 106 Utah 517, 150 P.2d 773 (1944); Pacific County v. Sherwood Pacific, Inc., 567 P.2d 642 (Wash. App. 1977); Salinas v. Pacific Telephone & Telegraph Co., 72 Cal. App. 2d 494, 164 P.2d 905 (1946); Fullerton v. Central Lincoln People's Utility District, 185 Ore. 28, 201 P.2d 524 (1948).)

Secondly, there would be no need for the legislature to amend Utah Code Ann. § 10-8-38 (1953) in 1971, expressly granting the authority to cities for mandatory hookups if that authority were already implicit in the pre-amendment version of the statute.

Thus, the very fact the legislature in 1971 amended Utah Code Ann. § 10-8-38 (1953) supplies the necessary consensus that the pre-amendment version authority for mandatory hookups was sorely in doubt at best and more likely was intentionally and entirely lacking.

Hence, following the general constructions of doubtful city authority and the need for express statutory authority, the authority for mandatory hookups the respondents claim by the 1969 ordinance should be denied.

Furthermore, another well-established rule of construction is that, in the absence of any express statutory provision to the contrary, the enumeration of some express authority within a statute (e.g., to provide for a sewer system prior to 1971) implies the exclusion of all other authority within that statute (e.g., no mandatory hookups until after

the 1971 amendment). (62 C.J.S. Municipal Corporations § 120; City of Tulsa, Okla. v. Midland Valley R.R., C.C.A. Okla., 168 F.2d 252; Arnold v. City of Chicago, 387 Ill. 532, 56 N.E. 2d 795; City of Bloomington v. Wirrick, 381 Ill. 347, 45 N.E. 2d 852, cert. denied, 319 U.S. 756, 63 S. Ct. 1175, 87 L. Ed. 1709; Van Eaton v. Town of Sidney, 211 Iowa 986, 231 N.W. 475, 71 A.L.R. 820, 43 C.J. 197, n. 19.)

Also, where there is the enactment of subsequent legislation containing a specific grant of authority (1971 mandatory hookup amendment) which authority is kindred to that contained in prior legislation (sewer system), the prior legislation containing a general grant of authority usually suggests the conclusion that the subsequent specific grant of authority was not in the prior legislation. (Salt Lake City v. Towne House Athletic Club, 18 Utah 2d 417, 424 P.2d 442 (1967).)

And preference should be given subsequent statutes over prior statutes where there is a conflict. (Nelden v. Clark, 20 Utah 382, 59 P.2d 524; Pacific International Express Co. v. Utah State Tax Comm'n, 7 Utah 2d 15, 316 P.2d 549.)

Finally, where statutes are conflicting, the more specific takes precedence over the general (Rammell v. Smith, 560 P.2d 1108 (Utah 1977); University of Utah v. Richards, 20 Utah 457, 59 P. 96; 73 Am. Jur. 2d Statutes § 257; State v. Rice, 110 Ariz. 210, 516 P.2d 1222 (1973); In re Smart, 54 Haw. 250, 505 P.2d 1179 (1973).)

In conclusion, it must be conceded the respondents through the 1969 ordinance did not have authority for mandatory hookups to the city sewer system, because the legislature never provided that authority until its 1971 amendment of Utah Code Ann. § 10-8-38 (1953).

Therefore, the appellants were wrongfully compelled to hook up to the sewer system, pay connection fees and monthly fees or have their water services discontinued. The appellants should be able to again use their septic tanks if so desired and receive refunds of all fees heretofore paid by virtue of the invalid 1969 mandatory hookup ordinance and other ordinances related thereto. And all of this whether or not such fees were paid under protest, because the ordinances under which the fees were paid were and still are invalid. (Wilson v. Weber County, 111 P.2d 147 (Utah 1941).)

## POINT II

THE BOND ELECTION WAS INVALID BECAUSE THE  
RESPONDENTS INDUCED THE APPELLANTS BY  
MISREPRESENTATIONS.

Of course, if this court finds the ordinances discussed in Point I of this brief are without authority, then the respondents cannot compel the appellants to pay fees of any amounts pertaining to mandatory hookups.

This point, though brief, goes further and contends the appellants need not pay any connection fees because the

pamphlets stated the charge to connect would be \$250 and that those who did not connect would not be charged.

The appellants chose not to connect but were not only compelled to hook up but were charged \$350 rather than the \$250 represented as being the fee to connect.

The case of Utah Savings and Trust v. Salt Lake City, 99 P. 255 (Utah 1908) stands for the proposition that if erroneous statements were made with respect to the bond election, and the plaintiffs can make a showing that they and others were induced by reason of such improper statements to vote for the bonds, then the validity of the election can be examined by the courts.

The case most on point with the instant case is Ricker v. Board of Educ. of Millard County School District, 396 P.2d 416 (Utah 1964). There this court examined the effect of the "explanatory brochure" concerning a school bond election and the misleading statements contained therein. Since this court found no deceit, fraud, or corruption on the part of the school board, it held against the plaintiffs.

The appellants in the instant case, however, contend the pamphlet contained the misrepresentations stated and made the bond election invalid and unconstitutional for lack of due process and fair opportunity to vote. (U.S. Const. amends. V and XIV.)

### POINT III

THE APPELLANTS HAVE BEEN DENIED EQUAL PROTECTION OF LAW IN THAT THE RESPONDENTS HAVE NOT APPLIED THE ORDINANCES TO ALL IN LIKE SITUATIONS.

The appellants have been compelled to hook up to the sewer system and pay fees while the respondents have not even done so themselves as to all properties owned by the respondents, and without having others within the city do so, where the sewer could be but has not been constructed because of costs, and not inaccessibility, all of which constitutes select law enforcement, amounting to the denial of constitutional equal protection of the laws. (U.S. Const. amend. XIV.)

### POINT IV

THE ORDINANCES ARE UNCONSTITUTIONAL IN VIOLATION OF DUE PROCESS WHERE THEY PROVIDE FOR WATER TERMINATION WITHOUT HEARINGS.

Assuming without admitting that Revised Grantsville City Ordinances, Section 22-31 (R.G.O. § 22-31), the mandatory hookup ordinance enacted in 1969, although the legislature never expressly authorized same until 1971, is deemed by this court to be valid, the appellants still contend Revised Grantsville City Ordinances, Section 28-27 (R.G.O. § 28-27), the water termination ordinance, is still unconstitutional in that it fails to provide for prior hearings as required by due process of law.

The second paragraph of R.G.O. § 28-27 begins by stating, "Persons applying for connection ...." The appellants never applied for connection because they resisted the mandatory hookup provision of R.G.O. § 22-31.

The last paragraph of R.G.O. § 28-27 provides:

If any part of the account for either sewer or water becomes delinquent, as in this Code provided, the water service shall be discontinued by the City until all delinquencies have been paid in full including the reconnection fee.

The appellants had their water turned off because they refused to pay the mandatory hookup fee and the monthly sewer fees thereafter. The respondents sent letters of demand for such payments but held no hearings before terminating all water services to the appellants.

The respondents refused to reconnect water services to the appellants until satisfactory arrangements for payment had been made. It was because of this the appellants were advised by counsel to pay such fees under protest so that their water services would be resumed until this matter could be decided through the courts.

A recent case directly in point with the instant case is Koger v. Guarino, 412 F. Supp. 1375 (D.C. Pa. 1976). In that case a class action for declaratory injunctive relief was

brought, contending that certain termination procedures of the city water department violated the due process clause of amendment XIV of the United States Constitution.

The district court there found at p. 1386:

... a water user has a legitimate claim of entitlement to continued water services which is a property interest to which the due process clause of the Fourteenth Amendment applies.

Having determined that due process applies, the court then addressed the question as to whether the procedures adopted by the defendant water department in connection with the termination of water services were in compliance with the requirements of the due process clause. The court noted that the fundamental requirement of due process is "the opportunity to be heard at a meaningful time and in a meaningful manner." (At p. 1387.) Since the ordinances under which the defendant water department was acting did not require a hearing prior to termination of water services, the court concluded at p. 1388:

... the pre-termination procedures employed by the defendants are inadequate to satisfy the requirements of the due process clause.

And the court further concluded at p. 1389:

Due process requires a hearing prior to the termination of essential



services such as water and sewer and making payment of all delinquent water and sewer bills a condition precedent to a hearing is not sufficient.

Therefore, since in the instant case, neither R.G.O. §§ 22-31 nor 28-27 require a hearing prior to the termination of water and sewer services, both ordinances are unconstitutional under the due process clause of the fourteenth amendment of the United States Constitution.

The distinction of a class action suit is of no significance, because if the ordinances are unconstitutional or otherwise without authority, they are invalid, unenforceable, and no vehicles through which fees may be collected lawfully. Any such fees collected must be refunded whether or not paid under protest. (Wilson v. Weber Co., 111 P.2d 147 (Utah 1941).)

#### CONCLUSION

The decision of the lower court should be reversed with a declaratory judgment by this court that the respondents acted without authority through their ordinances of mandatory hookups (R.G.O. § 22-31) and water termination (R.G.O. § 28-27), because of the absence of express legislative authority and in violation of constitutional due process.

Furthermore, this court should order the respondents to refund all unlawfully collected fees and permanently enjoin the enforcement of both ordinances and any others which flow

therefrom for their provisions which are in conflict with  
statutory and constitutional requirements stated herein.

DATED this 4th day of June, 1979.

Respectfully submitted,



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#### CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing  
brief of appellants were mailed to Edward A. Watson, Tooele  
County Attorney, Tooele County Courthouse, Tooele, Utah 84074,  
this 5th day of June, 1979.

