1974

K. W. Gardner v. Davis County And Davis County Medical Association : Amicus-Curiaes Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

K. W. GARDNER, a taxpayer for himself and all others similarly situated,
Plaintiff and Appellant,

vs.

DAVIS COUNTY, a body corporate and politic of the State of Utah,
Defendants and Respondents,
and
DAVIS COUNTY MEDICAL ASSOCIATION,
Amicus-Curiae.

Case No. 13524

AMICUS-CURIAE'S BRIEF

Appeal from the Judgment of the District Court of Davis County, Honorable John F. Wahlquist

W. ROBERT WRIGHT and
JAMES S. LOWRIE of
JONES, WALDO, HOLBROOK & McDONOUGH
800 Walker Bank Building
Salt Lake City, Utah
Attorneys for Amicus-Curiae

BENNETT P. PETERSON
Davis County Courthouse
Farmington, Utah
Attorney for Respondent

PETE N. VLAHOS and
DAVID B. HAVAS
312 Eccles Bldg.
Ogden, Utah
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

Cases Cited:

TABLE OF CONTENTS (Continued)

Statutes Cited:

Other Authorities Cited:

IN THE SUPREME COURT OF THE STATE OF UTAH

K. W. GARDNER, a taxpayer for himself and all others similarly situated,
Plaintiff and Appellant,
vs.
DAVIS COUNTY, a body corporate and politic of the State of Utah,
Defendants and Respondents,
and
DAVIS COUNTY MEDICAL ASSOCIATION,
Amicus-Curiae.

Case No. 13524

AMICUS-CURIAE'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

In this case, plaintiff seeks a declaration that Davis County unlawfully declared certain real property to be surplus and that Davis County's announced sale of the real property is illegal and thereby seeks to block the commencement of construction of two private hospitals on the property in Davis County.

DISPOSITION IN THE LOWER COURT

The court below after a hearing on a motion for a preliminary injunction found that plaintiff had failed to make a showing which entitled him to preliminary in-

junctive relief and in response to defendant's Motion to Dismiss, ordered plaintiff to make a proffer of additional proof through affidavits. At the appointed time, the plaintiff failed to proffer any additional proof and the court below dismissed the plaintiff's action with prejudice, ruling that plaintiff had no basis in law or fact for relief.

NATURE OF RELIEF SOUGHT ON APPEAL

Amicus-curiae submits that the court should affirm the lower court's order, dismissing plaintiff's complaint with prejudice.

STATEMENT OF MATERIAL FACTS

Amicus-curiae submits that the following facts are the material facts in this case:

1. The Davis County Commission on June 4, 1968, submitted the following proposition to the voters of Davis County:

> "Shall Davis County, Utah, incur debt and issue general obligation bonds to the amount of $5,750,000 to mature serially in not more than thirty-five (35) years from their date or dates and to bear interest at a rate or rates not in excess of six percent (6%) per annum, for the purpose of paying part of the cost of erecting hospital facilities in and for Davis County, including the acquisition of suitable sites therefor and all necessary furnishings and equipment therefor?"

Transcript of Proceedings on Motion for Restraining Order and Preliminary Injunction 35 (hereinafter Tr.); Exhibit "A" (the exhibits are found in a manilla envelope numbered 27 in the designated record in this proceeding).

2. It was represented to the voters that:

(a) The proposition was to enable Davis County to partially fund the construction of two hospitals;

(b) One hospital was to be built in the northern part of the County;

(c) The other hospital was to be built in the southern part of the County;

(d) Hill-Burton funds (federal funds allocated through the State of Utah) were to comprise the balance of funds necessary for construction of the two hospitals. Tr. 34, 37, 43, 55-56, 69, 81; Exh. 3.

3. The proposition was approved by the voters. Tr. 35; Exh. B.

4. The County purchased two sites upon which to locate the hospitals and expended funds on architectural and other studies. The total of these expenditures amounted to less than $1,000,000. Tr. 35, 53.

5. It subsequently became impossible for Davis County to construct or participate in the construction of the two hospitals because:

(a) Hill-Burton funds became unavailable. Tr. 38-39, 97-101; Exh. 5.

(b) Under constitutional debt limitations, the County did not have sufficient bonding capacity to unilaterally pay for the construction of two hospitals. Tr. 40-42, 112-118; Exh. 6; Exh. 7.

(c) The hospitals could not be anticipated to generate enough income to make the issuance of saleable revenue bonds feasible. Tr. 40-42, 112-118; Exh. 6; Exh. 7.

(d) The County could not participate in the construction of the hospitals by some other entity without lending public credit in violation of Article VI §29 of the Utah Constitution.

6. The County then investigated other alternatives for obtaining adequate hospital facilities for its residents and determined that the most feasible and practical way to proceed was to contract with private companies to construct, own and operate two hospitals. Tr. 44-46.

7. The County entered a contract with Extend-A-Care, a private corporation, to build, own and operate a hospital in the northern part of Davis County and with Hospital Corporation of America, also a private corporation, to build, own and operate, a hospital in the southern part of Davis County. Tr. 45. The contracts provided for assurance that the hospitals would provide necessary services to county residents, would provide competitively priced services, and would be constructed within certain deadlines. Tr. 46-50.

8. The County then declared the sites it had previously purchased as surplus and resolved to sell them pursuant to §17-5-48 of the Utah Code Annotated, subject to a minimum bid which would be sufficient to recoup for the County all funds which had previously been expended on the project. Tr. 49-55; Exh. 2.

9. The plaintiff then filed his action seeking to block the sale of the sites alleging that the approval of the bonding proposition constituted an order or mandate that the County build the two hospitals and that the sites to be sold could not, therefore, be considered surplus. Designated Record 1 (hereinafter R.).

10. The plaintiff moved for a preliminary injunction (R. 7) and a full evidentiary hearing was held at which the court below heard six hours of testimony, allowed full cross-examination of witnesses by all parties, heard arguments on the merits and found that the plaintiff had failed to establish facts sufficient to entitle plaintiff to a preliminary injunction. R. 30, 32-34; Tr. 146-152. The plaintiff testified at the hearing that he was a taxpayer of Davis County and that he could think of no way in which he was harmed by the actions he opposed. Tr. 71-72, 85-87. Defendant Davis County, then moved that the case be dismissed, whereupon the court stated, that the evidence presented at the hearing and the applicable law indicated that plaintiff had no basis for relief whatsoever, but scheduled a hearing for five days later according plaintiff to make a proffer of proof in the form of an affidavit of what additional evidence plaintiff might be able to produce at a trial on the merits. R. 30, 32-34; Tr. 140-152.

11. At the subsequent hearing, counsel for plaintiff presented no affidavit and proffered no proof. Plaintiff's counsel filed a motion for additional time for discovery, but the motion failed to state, in any form, the additional discovery which plaintiff sought, the facts or evidence which plaintiff expected to discover or any witnesses which plaintiff expected to depose. R. 41-44. After argument on the plaintiff's motion for additional time for discovery and upon the evidence presented at the hearing on plaintiff's motion for a preliminary injunction the lower court ruled that as a matter of law plaintiff had no basis upon which he could obtain the relief sought. R. 45-51; Tr. 153-155. The court ordered the plaintiff's complaint dismissed with prejudice. R. 45-51; Tr. 153-155.

ARGUMENT

POINT I

PLAINTIFF'S COMPLAINT WAS INADEQUATE AS A MATTER OF LAW.

Plaintiff pleaded the submission of the bonding proposition to the voters and its passage, the sale of bonds, the expenditure of funds to purchase sites and for the planning, architecture and financing of two hospitals. R. 1-4. Plaintiff also pleaded the subsequent decision to sell and advertisement for sale of the sites purchased. R. 1-4. The court found the facts to be true and to be a matter of public record. R. 45-50, 52(1-4); Tr. 146-148, 153-155. Plaintiff further pleaded the legal conclusion that because of the vote the County was required to construct two hospitals. R. 2-3. Plaintiff characterized the requirement

as a "mandate". R. 2-3. Plaintiff then pleaded the legal conclusion that the "mandate" of the electorate would be violated by the County's contemplated sale of the property. R. 2-3. The court properly rejected these legal conclusions upon which plaintiff based his case. R. 45-50, 52(1-4); Tr. 146-148, 153-155.

A. THE APPROVAL OF THE BONDING PROPOSITION AUTHORIZED BUT DID NOT REQUIRE DAVIS COUNTY TO PROCEED.

The Utah Municipal Bond Act sets forth the requirement for municipal bonding. *See* Utah Code Ann. §11-14-1 et seq. (replacement Volume 2A 1973). The Act sets up the framework for bonding by requiring that the governing body of the municipality provide for an election. The Act then sets forth the procedural requirements for notice, publication, qualifications to vote and other like matters. The Act also provides for the governing body to canvas the election returns and declare the results and for the procedure and time limitation for contesting the election. The Act states the effect which voter approval of a bonding proposition has upon the power of the municipality's governing body:

> If the governing body shall have declared the bond proposition to have carried and no contest shall have been filed, or if such contest is filed after it shall have been favorably terminated, ***the governing body may proceed to issue the bonds voted at the election.*** It shall not be necessary that all of the bonds be issued at one time, but no bonds so voted may be issued more than ten years after the date of the election .... (Emphasis added) Utah

> Code Ann. §11-14-13 (unless otherwise indicated, all later code references are to the Utah Code Annotated, 1953 and replacement volumes).

Thus, the Utah State Legislature through the Utah Municipal Bond Act has set forth the framework for the issuance of municipal bonds and has allocated the power and responsibility between the governing bodies of the municipalities and the voters. The governing bodies initiate the action by resolving to hold a bond election. An election is held where the voters give or withhold their consent to the bonds and thereby to taxation. The governing body is then charged with discretion to proceed and to determine at what pace to proceed. In the case before the court, Davis County resolved to hold an election. Tr. 35; Exh. A. The bonding proposition was submitted to the voters and it carried. Tr. 35; Exh. B. After no contest was filed, the County was empowered to proceed. §11-14-13. Appellant, however, asserts that the county was not just empowered but was and still is required to proceed. Appellant characterizes the vote as a mandate to act. Appellant's proposition, however, is at odds with the plain language of the Act. Further, appellant's contention is at odds with the only other case which *Amicus-curiae* has found which considers the question. In the case of *Ramsey v. Cameron,* 245 S.C. 187, 139 S.E.2d 705 (1965), the Supreme Court of South Carolina considered an assertion that a favorable vote in a bonding proposition bound the municipality to proceed and required the municipality to issue the bonds voted. In denying the assertion the court relied on a section of the South Carolina Municipal Bond Act which is substantially identical to Utah Code Ann. §11-14-13 and said:

> "It is significant that the municipal council is required by the "Municipal Bond Act" to call for an election provided that the petition as specified in the Act has been presented. On the other hand, [the] city council is not required by the "Municipal Bond Act" to issue the bonds even though the election has resulted favorably. The issuance of the bonds following a favorable election is left to the discretion of the municipal council. Also left to the discretion of the city council, are many details regarding the provision of the bonds including the amount to be issued." 139 S.E. 2d at 768.

Since the legislature granted discretion to the County to proceed or not to proceed after authorization by the voters, the assertion by the appellant that the voters' approval of the bonding proposition constituted a mandate which required the County to proceed must be rejected as being without merit. And, because there is no merit to the contention that the vote imposed a requirement on the County, the complaint below failed to state a claim for which the law will grant relief.

B. THE ISSUANCE OF THE BONDS DID NOT DEPRIVE THE COUNTY OF ITS DISCRETION TO PROCEED OR NOT TO PROCEED WITH THE PROJECT.

Utah Code Ann. §17-4-1 provides that the counties of the State of Utah "are bodies corporate and politic, and as such have the powers specified in this title [17] and such other powers as are necessarily implied." Section 17-4-3 further provides that "A county has power . . . (4) to manage and dispose of its property as the interests of its inhabitants may require." In the case of *Emery*

County v. Burresen, 14 Utah 328, 47 P. 91, 37 L.R.A. 732, Go. Am. St. Rep. 898 (1896), this court recognized the power so granted to counties and said:

> A county is one of the political divisions of the state, signifying a community, clothed with such extensive authority and political power as may be deemed necessary by the superior controlling power of the state for the proper government of its people residing within its borders, and for a proper administration of its local affairs. A county can raise revenue by taxation, make public improvements, and defray the expenses of the same by taxation, exercise certain specified judicial powers, and generally act within the authorized sphere created and abridged by the statute or constitution of the state. The power of taxation furnishes the means by which it may pay its debts and meet obligations necessarily incurred for the many purposes of its existence and welfare. *The county has control of the county property to be used and disposed of to promote corporate purposes.* (Emphasis added) 47 P. at 91.

Section 17-12-1 in pertinent part provides that "[t]he revenue derived from the sale of bonds shall be applied to the purpose or purposes specified in the order of the board [of County Commissioners] and no other. Should there be any surplus, it shall be applied to the payment of said bonds." This section poses a limitation upon the power of the County to deal with its property. The question before the court, however, is the extent to which the language of §17-12-1 limits the power of the County which is granted by §§17-4-1 and 3. The question is posed by the issuance of the bonds pursuant to the bonding proposal which was carried by the voters of Davis County.

The County issued the bonds in two stages, in 1968 and in 1972. In each issue, the County reserved the right to in effect, retire all the bonds prior to maturity.

Admittedly, §17-12-1 prohibits the County from using the funds so raised for the construction of roads and bridges, from constructing offices to house the County health services or from pursuing any number of such other projects which may be in the interest of the County's inhabitants. In the case now before the court, the County does not seek to expend the funds for some other purpose. Plainly speaking, the County has resolved to abandon the purpose and to hold the funds for payment of the bonds.

The decision was clearly within the power which this court has recognized as being reposed in the County. It was an act of discretion in the management of the property of the County. It is authorized by §17-4-3(4).

A similar question came before this court in the case of *Ricker v. Board of Education of Millard County School District,* 16 U. 2d 106, 396 P.2d 416 (1964). In the *Ricker* case, the Board of Education caused a bond election to be held to authorize the issuance of bonds to raise funds for school purposes. Explanatory material circulated at the time of the bond election stated that the school board was planning to utilize the funds in several contemplated projects. After the bonding proposition carried and the bonds had been issued, because of a drastic increase in construction costs, the Board of Education revised its plans and decided to commit substantially all of the authorized

funds in one project, to the exclusion of the other projects. A taxpayer's suit was brought to prevent the Board of Education from going forward with its revised plan. This court rejected the taxpayer's claimed right. The Court recognized that the Board of Education was invested with discretion and authority to do "all things needful for the maintenance, prosperity and success of the schools, and the promotion of education." The court viewed this investment of authority to grant to the Board of Education "a broad latitude of discretion in order to carry out its objective of providing the best possible school system in the most efficient and economical way." The court continued to say, "It is the policy of the law not to favor limitations on the powers of the administrative body, but rather to give it a free hand to function within the sphere of its responsibilities."

The principles of the *Ricker* case are applicable here. The County is invested with broad power and discretion to manage its property for the welfare of its inhabitants. At the same time, the County is prohibited from expending funds raised by bonds for a purpose other than that for which the bonds were authorized. This limitation in the County's power, however, must be viewed in light of its purpose of prohibiting the taxation of the County's inhabitants for purposes which they have not authorized. The limitation was not designed to compel the County to proceed on any given project. Such a limitation would impose too severe a restraint upon the discretion of the County to deal with changed circumstances. Construing the limitations of §17-12-1 to compel the County to proceed regardless of changed circumstances could lead to

the ruination of the County and its inhabitants against which the Court guarded in *Emery County v. Burrensen, supra.* Or, as the court below stated, it is improper for a court to order the County to perform an impossible act. That the County retains discretion not to expend the funds is also demonstrated by the authorization that surplus funds may be held for repayment and by the reservation of right by the County to retire the bonds prior to maturity.

Appellant, however, cites several cases from other jurisdictions which in appellant's view support the proposition that the County must proceed with the project. All of the cases upon which appellant relies stand for the proposition that the governing body cannot divert funds from a purpose represented to the electorate to some other purpose. None of the cases upon which appellant relies deal with a decision to abandon a project, let alone a decision to abandon a project because of changed circumstances, such as in the *Ricker* case and in the case which appellant brings before this court. One of appellant's cases is significant, however. In the case of *City and County of Denver v. Currigan,* 362 P.2d 1060 (Colo.1961), cited by appellant, the municipality submitted to the voters a proposition to issue bonds in a certain sum for fifteen projects and if funds remained after completion of the fifteen projects, any excess funds were to be applied toward five additional projects. The municipality completed fourteen of the first fifteen projects, determined that the fifteenth project was unsound and should be abandoned and proceeded to enter a contract for one of the five projects of the second group. In a contest over the municipality's right to abandon the fifteenth project of the first priority group,

the court, relying upon the proposition that funds voted for one purpose cannot be devoted to another, ruled:

> "We conclude, therefore, that the projects are not interchangeable and that the priority called for in the ordinance must either be adhered to *or the project abandoned.*" [Emphasis added] 362 P. 2d at 1065.

Thus, not only is the law that a vote of the people which approves a bonding proposition does not impose a requirement upon the governing body to act, but it is also established that the governing body retains discretion at every stage and may abandon a project even after bonds have been issued and funds have been expended.

C. THE COUNTY'S DECISION TO ABANDON THE COUNTY HOSPITAL'S PROJECT AND TO TURN TO PRIVATE ENTERPRISE TO OBTAIN HOSPITAL SERVICES, WAS A WHOLLY PROPER EXERCISE OF ITS POWER AND DISCRETION.

In this case, there was no allegation that the County in any way abused its discretion. It is illuminating, however, to examine the problems which faced the County in its efforts to secure adequate and accessible hospital facilities for its inhabitants. It is also illuminating to examine the wise and prudent manner in which the County proceeded to exercise its powers.

The County determined that one hospital was needed each in the southern part of the County and in the northern part of the County. Tr. 32-34. All the studies indicated this need for Davis County. Tr. 32-33, 141-146. The voters apparently agreed with the County's determination because it was clear that two hospitals were contemplated.

Tr. 33-44. The County planned to use the bond proceeds *together with* federal Hill-Burton funds to construct two hospitals. Tr. 37. The Hill-Burton funds which the County originally counted on did not become available because of administrative impounding and of congressional appropriation cutbacks. Tr. 38-39, 97-100. There was also a substantial increase in building costs between 1968 when the bonds were voted on and 1973 when it was learned that Hill-Burton funds were not available. Tr. 43. The County, therefore, could not proceed with its original plans which the voters had authorized. The County caused other alternatives to be explored. Tr. 39-46. Two alternatives appeared to exist. Tr. 39-46. One alternative would have been to build one hospital wholly with bond proceeds. The other was to attract private hospital companies to the area to construct the needed hospitals and then abandon the County bond-financed project, reserving the bond revenues for the sole purpose of retiring the bonds. Assuming *arguendo* the legality of the first alternative of putting all the funds into the construction of one hospital, that course of action would have been highly unsatisfactory. First, it would not have resulted in enough hospital space or beds to serve the County's inhabitants. Tr. 43. Second, if placed at either end of the County, it would have left the other end of the County without satisfactory facilities within a satisfactory distance, and, if placed in the middle of the County, it would have been an unsatisfactory distance from both of the major population centers of the County. Tr. 143-144. In short, the first alternative, if adopted, would have resulted in the construction of inadequate and misplaced facilities and the frustration of the voters will.

The County selected the alternative of attracting private hospital companies to Davis County. Tr. 45. It entered into contracts with two companies. Tr. 45. One company is obligated to build, own and operate a hospital in the northern part of the County. Tr. 45. The other is obligated to build, own and operate a hospital in the southern part of the County. Tr. 45. The contracts require the private hospital companies to provide necessary services to county residents at prices competitive to Salt Lake County and Weber County hospitals. Tr. 46. The contracts also provide for construction to be completed within certain deadlines. Tr. 49. The hospitals to be constructed are required to meet certain minimum space requirements and bed capacities and to be constructed so as to facilitate future expansion. Tr. 57-58. Each of the hospitals will have a larger bed capacity than could be obtained by the County proceeding unilaterally to build one hospital. Tr. 57-58. The private companies have posted adequate sureties for their performance under the contracts. Tr. 49. It was anticipated that the private companies would bid at an auction of the sites previously purchased by the County for hospital sites. Tr. 50. They were also required to and did acquire options on alternative suitable sites for construction of the hospitals upon which they were contractually bound to construct hospitals in the event they were not the successful bidders at the auction of the County property. Tr. 47-50.

Having made other provisions for the construction and operation of the two requisite hospitals for Davis County, the County declared the sites which it had previously purchased to be surplus and prepared to sell them

pursuant to §17-5-48. Tr. 49-55; Exh. 2. The County anticipated that the private hospital companies would be the successful bidders, but such a result was not necessary to assure construction, ownership and operation of the hospitals because the companies had previously acquired options upon alternative suitable sites. The County established a minimum bid on the sites which was set high enough to enable the County to recoup all funds previously expended from the revenue raised by the initial one million dollar bond issue. Tr. 52-53. The County would thus sustain no loss because of its previous expenditures.

The County, in summary, was faced with a difficult problem. Its original plans for providing hospital facilities for its inhabitants were frustrated by circumstances beyond its control. It examined alternatives for providing the hospital facilities needed in Davis County. It exercised its power and discretion to implement the alternative which in the merits of the County's judgment far outweighed the merits of the alternative of constructing only one hospital. In so acting, the County acted wisely and prudently.

D. THE COUNTY'S RESOLUTION TO SELL THE SITES AS SURPLUS PROPERTY WAS A PROPER EXERCISE OF THE COUNTY'S POWER AND DISCRETION.

As previously illustrated, the County had acted to secure adequate and accessible hospital facilities for its inhabitants. It no longer had any need for the two hospital sites which it had previously obtained. It was, therefore, proper for them to sell these sites as surplus prop-

erty pursuant to §17-5-48. Appellant, however, argues that the County could not properly declare these sites to be surplus because the County was under orders from the electorate to build hospitals on these sites. The error in this argument by appellant has already been pointed out. The vote at the bond election constituted an authorization, a consent to be taxed, not an order to act. It was, therefore, a proper act of power and discretion for the County to resolve to sell the property as surplus property.

Moreover, appellant recognizes that it was an impossibility for the County to build two hospitals as originally planned. Appellant suggests, however, that the County could build one hospital. As previously indicated, the construction of only one hospital would have provided for Davis County, one hospital which would have been inadequate in size, bed space and accessibility. Appellant suggests, however, that it was the will of the people that the County provide for County owned and operated hospitals. It was also the will of the people that there be two hospitals. Appellant seeks to require the County to adhere to the concept of County ownership and operation of the hospital facilities. The attendant result would be the frustration of the electorates' desire that there be two hospitals. The arrangement selected by the County fulfills the desire expressed by the voters to have two hospitals. Concedely, it may, however, frustrate the desire to have County owned and operated hospitals. A situation is present where one of the expressed desires of the electorate must be frustrated. Since a vote on a bonding proposition is only an expression of desires, an authori-

zation to proceed and consent to taxation and not a requirement to act, the choice as to which desire to fulfill is properly left with the County.

It would seem that appellant in this argument seeks to challenge the County's judgment of how best to proceed after the frustration of its original plans. A challenge of this sort is usually considered to be a challenge to the exercise of discretion by the governing body. No issue with respect to the exercise of discretion was raised by the appellant in his pleadings below. Moreover, as previously demonstrated, the County's actions were wise and prudent and no abuse can be found.

Finally, the determination of whether property is surplus is the responsibility of the County under §71-4-3. The Court should bear in mind its admonition in the *Ricker* case, *supra,* where it said:

> As is the case in other areas in our system of government, it is the citizen's right to vote for and elect officials he thinks best qualified to represent his interests. Having so elected the school board, he then must trust them to administer the school program. But it is not his privilege to intrude directly into the management of school affairs. This principle carries over into the bond election. The taxpayers may give or withhold their consent to the issuance of bonds and the creation of the indebtedness. But if the consent is given, the disposition of the money raised then becomes the responsibility of the board . . . .
>
> Finally, the conclusion we have arrived at here is in conformity with what we regard as the sound and well-advised policy of reluctance of courts to intrude into the functions of other

> branches of government. This reluctance is due in part to an awareness of the sometimes awesome responsibility of having to circumscribe the limits of their authority. Even more persuasive is an appreciation of the importance in our system of the concept of separation of powers so that each division of government may function freely within the area of its responsibility. This safeguarding of the separate powers is essential to preserve the balance which has always been regarded as one of the advantages of our system. These are the considerations which we think render it imperative that courts resist efforts to use them for the purpose of interfering with or attempting to control matters of judgment and determination of policy within other departments of government. (Footnote omitted) 396 P.2d at 420.

The policies of the *Ricker* case are equally applicable to this case. The voters gave their consent. But, policy, implementation and management are the County's responsibility. The County has acted prudently, wisely and in accordance with what it believed to be the interests of its inhabitants. Unless there is some violation of its power and authority or some infringement of vested rights, none of which have been shown, the judgment of the County should not be disturbed by the judiciary. The appellant in his pleadings below failed to allege any legally sufficient basis for interfering with the County. The appellant in proceedings below failed to establish any facts which afford any basis for relief. The appellant in proceedings below failed to give any indication or suggestion of what additional facts might be adduced to establish a right to relief.

The posture of this case makes it extremely inappropriate for this court to disturb the judgment and the exercise of power and discretion of the County.

POINT II

THE TRIAL COURT EMPLOYED CORRECT AND APPROPRIATE PROCEDURES IN DISMISSING THE CASE BELOW.

Appellant in his brief charges the trial court with certain procedural irregularities. The first charge is implied by the appellant's recitation that the court acted on its own motion to dismiss plaintiff's complaint. The second charge is that the appellant's action is a class action and cannot, therefore, be dismissed without notice to all members of the class. The third charge is that the court below denied appellant due process by denying him the right to discovery and by dismissing the complaint prior to the filing of an answer to the complaint by the Defendant Davis County. These charges of appellant are without merit.

A. THE COURT DID NOT DISMISS ON ITS OWN MOTION.

Appellant in his statement of fact in his brief states that the trial court dismissed the complaint on the court's own motion. Appellant apparently seeks to bring this case within the rule that this court enunciated in *Hill v. Grand Central, Inc.*, 25 U.2d 121 (1970) when it held that a trial court could not proceed on its own motion to grant

summary judgment dismissing a complaint for failure to state what proof will be produced on an issue which has not been raised. The defect in appellant's apparent tactic is that the court did not grant summary judgment on its own motion. The court granted Defendant Davis County's motion to dismiss.

B. A COURT IS NOT REQUIRED TO GIVE NOTICE TO MEMBERS OF THE CLASS IN A CLASS ACTION PRIOR TO AN INVOLUNTARY DISMISSAL OF THE ACTION.

Appellant asserts that the court below could not dismiss the action without giving notice to all members of the class which appellant represents. Appellant claims to represent "those taxpayers of Davis County who have an interest, both in the manner in which their taxes may be expended as well as the amount of taxes that may be assessed against the class as taxpayers and residents of Davis County." (Appellant's Brief p. 11). Appellant relies upon Rule 23(e) of the Utah Rules of Civil Procedure which provides:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

There is apparently no case from this court construing Rule 23(e). The Rule, however, is identical to Rule 23(e) of the Federal Rules around which there is a substantial body of authority. For example, Professor Moore, in Moores Federal Practice, §23.80[3] comments upon Federal Rule 23(e):

> Subdivision (e) provides that notice of a proposed dismissal or compromise shall be given to all members in all types of class actions, in such manner as the court directs. This notice requirement applies only to voluntary dismissals by the plaintiff, and such notice is not a condition precedent to dismissal by the court for lack of jurisdiction or after a hearing on the merits.

To the same effect is the comment of Wright and Miller in Federal Practice and Procedures, §1797:

> Another exception to the mandatory notice requirement in Rule 23(e) occurs when the dismissal is not voluntary. Inasmuch as an involuntary dismissal presumably could not involve collusion or benefit the representative plaintiffs at the expense of the remaining class members, the protection afforded by giving notice to the absentees is not required.

The federal courts have embraced the concept that the requirement of notice of dismissal to members of the class is designed to protect the class members from a wrongful compromise or dismissal of their rights and does not apply to involuntary dismissals and dismissals on the merits. When 23(e) was first promulgated, it was numbered Rule 23(c) and in 1939 the Fourth Circuit Court of Appeals stated this view:

> [T]hat a judgment dismissing the complaint could not be entered without notice to all of the contract holders of the association, rests upon a fundamental misconception of the meaning of Rule 23(c) of the New Rules of Civil Procedure, 28 U.S.C.A. following Section 723c. The notice therein provided for is required in case of voluntary dismissal or compromise of a class action, so

> as to limit the power of the named plaintiff to terminate the suit which he has brought for others as well as for himself. It was never intended, of course, that such notice should be a condition precedent to dismissal by the court after a hearing on the merits.

Hutchenson v. Fidelity Investment Ass'n., 106 F.2d 431 at 436. *See also, Pelelas v. Caterpillar Tractor Co.*, 113 F.2d 629 (7th Cir. 1946); *May v. Midwest Refining Co.*, 121 F.2d 431 (1st Cir. 1941); *Baham v. Southern Bell Telephone and Telegraph Co.*, 55 F.R.D. 487 (1922); *Daugherty v. Ball*, 43 F.R.D. 392 (1907).

In the case now before the court, the dismissal was by no means voluntary or the result of a compromise. A hearing was held in which substantial evidence was introduced, in which there was argument on the merits and at which appellant submitted his memorandum. A second hearing was held in which appellant further argued the merits of his cause and at which appellant was given an opportunity to show that there was some merit to his case. The case was dismissed on the motion of Defendant Davis County. From that dismissal comes the appeal now before this court. The dismissal was clearly involuntary and not the result of the appellant surrendering or compromising the rights of any class. It was, therefore, proper for the court to dismiss the action without making provision for notice to the class. Appellant can gain no comfort from Rule 23(e).

C. APPELLANT'S COMPLAINTS TO THE PROCEDURE HAVE NO MERIT.

Appellant charges that the court denied him due process of law by dismissing the action prior to the filing of an answer to the Complaint and by denying appellant an opportunity to undertake discovery. First, a plaintiff cannot complain that the court dismissed his complaint prior to the filing of an answer by the Defendant when the plaintiff's complaint failed to state a legally sufficient claim for relief, when the plaintiff's evidence failed to establish a basis for relief and when the defendant's evidence showed that the defendant was acting legally and that no harm had come or would come to plaintiff. Second, a plaintiff is not entitled to discovery on a legally insufficient claim. Third, even if his claim were legally sufficient, appellant in his motion for discovery utterly failed to indicate what discovery, if any, he contemplated. His motion, fairly viewed, appears to be a memorandum at law rather than a motion for discovery. Fourth, if granting a motion to dismiss prior to the filing of an answer, constitutes denial of due process, then Rule 12(b) of the Utah Rules of Civil Procedure is unconstitutional, which we think is not the case.

CONCLUSION

Davis County had full power and authority to act in the manner it acted. A favorable vote on a bonding proposition confers authority to bond and to tax and limits the projects to which funds so obtained may be devoted. It does not require the municipality to issue bonds.

And even if bonds are issued, the municipality may exercise its discretion to abandon a project. In this case, the County wisely and prudently exercised its discretion to abandon the project. The court below recognized the appropriate principles and the absence of either an abuse of discretion or an allegation thereof and, employing appropriate procedure, ordered the dismissal of the complaint below. The trial court's order should, therefore, be affirmed.

Respectfully submitted,

JONES, WALDO, HOLBROOK
& McDONOUGH

W. Robert Wright
James S. Lowrie

800 Walker Bank Bldg.
Salt Lake City, Utah 84111

Attorneys for Amicus-Curiae

CERTIFICATE OF SERVICE

I certify that I served ~~a~~ 2 true and correct ~~copy~~ COPIES of the foregoing brief by first class mail postage prepaid this 15th day of March, 1974 to:

Pete N. Vlahos and David B. Havas
Valahos and Gale
312 Eccles Building
Ogden, Utah
Attorneys for Appellant

Bennett P. Peterson
Davis County Courthouse
Farmington, Utah
Attorney for Respondent.

James S. Jardine