

1988

John Call and Clark Jenkins v. City of West Jordan : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

880047

IN THE UTAH COURT OF APPEALS

JOHN CALL AND
CLARK JENKINS,

Plaintiff/Appellants,

vs.

CITY OF WEST JORDAN,

Respondent.

BRIEF OF APPELLANT

Category 14B

Case No. 880047CA

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH,
HONORABLE PAT A. BRIAN, JUDGE

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JOHN CALL AND)	
CLARK JENKINS,)	
)	BRIEF OF APPELLANT
Plaintiff/Appellants,)	
)	
vs.)	
)	
CITY OF WEST JORDAN,)	
)	Case No. 880047CA
Respondent.)	

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appellants John Call and Clark Jenkins, respectfully submit
appellant's brief.

I. PARTIES TO THIS PROCEEDING

The parties to this proceeding are:

John Call:	Plaintiff/Appellant
Clark Jenkins:	Plaintiff/Appellant
City of West Jordan:	Defendant/Respondent

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II. STATEMENT OF JURISDICTION

Utah Code Ann. §78-2a-3(h) provides the Utah Court of Appeals Jurisdiction of this appeal.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the lower court erred in refusing to enter a judgment on plaintiff's civil rights claim, effectively dismissing plaintiffs' civil rights claim.

2. Whether the lower court erred in failing to try plaintiffs' civil right claim.

3. Whether the lower court erred in refusing to award plaintiffs' attorney fees.

4. Whether the lower court erred in refusing to award plaintiffs the costs paid by plaintiffs to a court-appointed master.

5. Whether the lower court erred in failing to award plaintiffs the costs incurred in auditing the defendant's records.

6. Whether the lower court erred in failing to join other subdividers as party plaintiffs.

IV. CONSTITUTIONAL PROVISIONS AND STATUTES

§ 1983. Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable, exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 1988. Proceedings in Vindication of Civil Rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the

same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1691 et seq.], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code [26 USCS §§ 1 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Amendment 14: Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

V. STATEMENT OF THE CASE

This is an appeal from a final "Ruling and Order of Judgment" denying plaintiffs' motion for the entry of judgment on their civil rights claim and denying plaintiffs an attorney's fee award. The lower court also denied plaintiffs' motions to join other subdividers as party plaintiffs and plaintiffs' request for costs incurred by the plaintiffs in paying a court-appointed master and a CPA to audit West Jordan's records.

A statement of the facts helpful and relevant to the issues presented for review are as follows:

1. Subdividers John Call and Clark Jenkins (hereafter "Call and Jenkins") sued the respondent City of West Jordan ("City") challenging the City's ordinance requiring subdividers to dedicate seven percent of the proposed subdivision land to the city or to pay the equivalent of the land value in cash. The land or cash was to be used by the city for flood control and/or park and recreational facilities. (R.2-11, 118-121.)

2. The Third Judicial District Court upheld the ordinance and the subdividers appealed. (R. 142,143,144, 151,153.)

3. The Utah Supreme Court, Call v. West Jordan, 606 P.2d 217, (Utah 1979) (hereinafter Call I) affirmed and remanded (R.162-173.) (Copy of case attached as Addendum 1.)

4. On rehearing, the Utah Supreme Court, Call v. West Jordan, 614 P.2d 1257 (Utah 1980) (hereinafter Call II) upheld the constitutionality of the ordinance on its face, but remanded the case to give the subdividers an opportunity to present evidence that the payment required of them did not have any reasonable relationship to the City's needs for flood control or parks and recreational facilities. (R. 401-06, 696-98.) (Copy of case attached as Addendum 2.)

5. Thereafter, the trial court allowed the subdividers to amend their complaint to include claims (1) that the ordinance was invalid because the city did not follow statutory notice and hearing requirements in enacting the ordinance; and (2) a civil rights claim alleging that the subdividers rights to due process were denied by the city's failure to provide the required notice and public hearing. (R.306, 307-19,323,329,339,343.)

6. Thereafter, the City defended against the amended allegations by stating that it had complied with the notice and hearing requirements. (R.1850-55.) The City also alleged it was immune from the civil rights claim. (R.1916, 1919.)

7. On the third appeal, the Utah Supreme Court, Call v. West Jordan 727 P.2d 180 (Utah 1986) (hereafter Call III), upheld the lower court's allowance of the amended complaint. The Utah Supreme Court also ruled that the city failed to comply with the statutory notice and public hearing requirements. Because the City failed to hold a public hearing, with notice, the court held the ordinance was void ab initio. The Utah Supreme Court remanded the case to the lower court to enter judgment consistent with the opinion (R.1843-45.) (Copy of case attached as Addendum 3.)

8. Subsequently, the lower court denied plaintiffs' (1) motion for entry of judgment on plaintiffs' civil rights claim; (2) claim for attorney fees; (3) motion to join other subdividers as party plaintiffs; and (4) motion for costs paid by the plaintiffs for a court-appointed master and an audit of West Jordan's records.

VI. SUMMARY OF ARGUMENT

West Jordan deprived Call and Jenkins of their procedural rights to due process by failing to provide notice and a public hearing prior to legislating the seven percent impact fee ordinance and prior to taking Call's and Jenkin's money. In Call III, the Utah Supreme Court held that West Jordan failed to provide notice and a public hearing. The lower court erred in failing to enter a judgment in favor of the subdividers on their civil rights claim.

Entering a civil rights judgment in favor of Call and Jenkins was not prohibited by Call III. Rather, such a judgment would be totally consistent with Call III's opinion. Call III ruled that since West Jordan did not hold a public hearing, the seven percent impact fee ordinance was void ab initio and Call and Jenkins were entitled to a judgment.

Because Call and Jenkins are entitled to a § 1983 civil rights judgment against West Jordan, this case should be remanded for consideration of attorney fees pursuant to 42 U.S.C. § 1988.

West Jordan violated Rule 11 when it continued to advocate that an August 27, 1974 master plan meeting was the public hearing required by Utah Code Ann. §10-9-25 and procedural due process. That assertion, made in numerous pleadings and documents, was not grounded in fact nor warranted in law. In Call III, the Utah Supreme Court stated:

One's imagination must be stretched beyond rational limits to accept the master plan hearing as satisfying the public hearing requirements.

Call III at 183.

Because West Jordan violated Rule 11, the case should be remanded to the lower court with directions to enter a judgment awarding plaintiffs a reasonable attorney's fee and plaintiffs' costs incurred in paying an accountant and court appointed master to examine West Jordan's books.

call and Jenkins are entitled to have the master's fees taxes as costs because they are the prevailing party and because West Jordan's failure to answer simple interrogatories necessitated the reference. 3A J. Moore & J. Lucas,

Moore's Federal Practice, para. 53.04[1] (2d ed. 1987). For similar reasons, plaintiffs are entitled to a judgment for the cost of their accountant's examination of West Jordan's slip shod records. Andrecikopoulo v. Broadmoor Mgt. Co., 670 P.2d 435 (Colo. App. 1983).

The lower court erred in failing to grant Call and Jenkins's motion to join, as party plaintiffs, other subdividers who paid impact fees. In Call I, the Utah Supreme Court found that the monies and property paid by the subdividers was a trust fund. In Call III the same court held that the impact fee ordinance establishing the trust fund was void from the beginning.

Once the trust failed, only the subdividers had ownership interests in the impact fee trust fund. Persons interested in a trust fund are indispensable parties. Hiltsey v. Ryder, 738 P.2d 1024 (Utah 1987).

VII. ARGUMENT

A. THE LOWER COURT ERRED IN FAILING TO ENTER A JUDGMENT IN FAVOR OF THE SUBDIVIDERS ON THEIR CIVIL RIGHTS CLAIM

1. Factual and Procedural Background.

After Call II, the trial court allowed Call and Jenkins to amend their complaint to include claims that: (1)

the city did not hold a public hearing prior to enacting the ordinance; and (2) plaintiffs' civil rights were violated by the City's failure to provide the required notice and hearing. (R.306,307-19,323,329,339,343.)

Trial was held on September 1, 2, and November 18 of 1982. At the conclusion of the plaintiffs' evidence, the defendant prior to putting on its case in chief moved to dismiss plaintiffs' complaint. The court granted the defendant's motion to dismiss plaintiffs' complaint, no cause of action. (R.1216-1217, 1492-93.) Plaintiffs appealed.

In Call III, the Utah Supreme Court unequivocally found that there was no notice and there was no hearing and remanded the case to enter judgment consistent with the court's opinion. Call III at 183-184. (See Addendum 3.)

2. Legal Analysis.

The applicable civil rights statute provides:

Every person who under color of any statute, ordinance, regulation custom or usage of any state . . . subjects or causes to be subjected any citizen . . . to the deprivation of any rights, privileges, or amenities secured by the constitution and laws, shall be liable to the parties injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

The purpose of the civil rights statute is to compensate persons for injury caused by deprivation of constitutional rights. Lavicky v. Burnett, 758 F.2d 468 (10th Cir. 1985).

There are two and only two elements to a cause of action under 42 U.S.C. § 1983, both of which unquestionably exist in this case: (1) a citizen must have been denied a federal right; and (2) the denial must have been under the color of state law. Gomez v. Toledo, 446 U.S. 635, 640 (1980).

It is absolutely clear that the actions of West Jordan in passing the seven percent ordinance and in collecting the fees from the subdividers were actions taken under the color of state law. Monroe v. Pape, 365 U.S. 167, 184 (1961) (misuse of power possessed by virtue of state law made possible only because the wrongdoer is "with the authority of state law"). It is when the execution of a governmental policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury, that the government as an entity is responsible under § 1983. Monell v. Dept. of Social Services of New York, 436 U.S. 658, 694 (1978).

The city's collection of the seven percent fee was clearly a deprivation of property within the meaning of the Fourteenth Amendment. Cash is property for due process purposes. Coleman v. Turpin, 697 F.2d 1341 1344 (10th Cir. 1982).

The only remaining issue is whether plaintiff's rights to procedural due process were denied by the city. Timely and adequate notice and an opportunity to be heard in a meaningful way are the very heart of procedural due process. Nelson v. Jacobsen, 669 P.2d 1207, 1211 (Utah 1983).

[E]very significant deprivation whether permanent or temporary of any interest which is qualified as property under the due process clause must be proceeded by notice and opportunity for hearing appropriate to the nature of the case

Worrall v. Ogden City Fire Dept., 616 P.2d 598 (Utah 1980).

In Call III, the Utah Supreme Court unequivocally found that there was no notice and no hearing.

[W]e hold that because the statute calls for a public hearing, our legislature contemplated something more than a regular city counsel meeting held . . . without specific advance notice to the public that the proposed ordinance would be considered.

Call III at 183.

Notice to be effective must alert the public to the nature and scope of the ordinance that is being adopted.

Call III at 183.

One's imagination must be stretched beyond reasonable limits to accept the master plan hearing as satisfying the public hearing requirement The ordinance was not even drafted until months after the master plan public hearing.

Call III at 182.

There is no dispute that West Jordan, acting under color of state law, took \$16,576 of the subdivider's property without notice and without the hearing required by statute and by the due process clause. Thus, West Jordan, undeniably, deprived Call and Jenkins of their procedural rights to due process of law, as protected by the Fourteenth Amendment.

The denial of due process in this case, is analytically similar to the denial of due process in Adler v. Lynch, 415 F.Supp. 705 (D. Neb. 1976). In Adler, the plaintiff received no notice that the zoning variance previously granted to her would be reviewed by the board of commissioners at one of the board's regular meetings. At that meeting, the board rescinded the variance. As a result, the court stated:

It seems clear to the court that the plaintiff has been subjected to a

deprivation of due process of law by being denied proper notice of an opportunity to effectively participate in the proceedings of December 18.

Adler at 711.

The present case is also analytically parallel to Lavicky v. Burnett, 758 F.2d 468 (10th Cir. 1985). In Lavicky, the state seized the plaintiff's pickup truck because it believed some of the parts of the truck were stolen. The court found a violation of the plaintiff's procedural due process rights when the state disposed of the truck without following the statutory procedure for determining ownership of the allegedly stolen property prior to its disposition. Lavicky at 473. In a similar manner, West Jordan violated the plaintiff's procedural due process rights when it required the plaintiff to pay a fee that was not justified because the city had not followed statutory procedures.

The fact that the subdividers received a refund of their money does not redress their procedural due process rights.

[A] deprivation of procedural due process is an independent constitutional tort actionable under § 1983 with or without proof of actual injury.

Burt v. Able, 585 F.2d 613, 616 (4th Cir. 1978); see also Carey v. Phipus, 435 U.S. 247, 266-267 (1978).

In summary, the Utah Supreme Court previously, in this case, found that there was no notice and no public hearing. There is no dispute that West Jordan acted under color of state law when it deprived the subdividers of their \$16,576. The subdividers were entitled to judgment in their favor on their § 1983 civil rights claim.

B. THE CASE SHOULD BE REMANDED FOR
CONSIDERATION OF ATTORNEY FEES
PURSUANT TO 42 U.S.C. § 1988

1. Call and Jenkins are Entitled to Attorney Fees Pursuant to 42 U.S.C. § 1988.

Because the subdividers are entitled to a judgment on their civil rights claim, they are also entitled to have the court consider their claim for attorney fees pursuant to Section 42 U.S.C. § 1988. That section provides that in any action or proceeding to enforce a provision of sections [42 U.S.C. § 1983] the court may, in its discretion, allow the prevailing party other than the United State a reasonable attorney's fee as part of the costs

Even if only nominal damages are recovered, it does not diminish the plaintiff's eligibility for attorney fees under § 1988. Burt v. Able, 585 F.2d 613 (5th Cir. 1978).

The reason the lower court did not consider plaintiff's application for attorney fees pursuant to 42 U.S.C. § 1988, is because it was under the mistaken impression that it did not have authority under Call III to enter a judgment on a civil rights claim. (Transcript Proceedings, September 11, 1987, pp.16-19, hereafter "T".) (T.pp.16-17.)

In Call III, the Utah Supreme Court stated: "We remand this case to the trial court to enter judgment consistent with this opinion." Call III at 184. When an appellate court remands a case to the trial court, the issues decided upon appeal cannot be acted upon or decided contrary to the way they were decided in the appellate court. However, new issues may be raised so long as they do not cover issues specifically foreclosed by the appellate court. Street v. Fourth Judicial District Court, 113 Utah 60, 191 P.2d 153 (1948). see generally Call v. West Jordan, 727 P.2d 180, 181 (Utah 1986). On remand, the lower court has jurisdiction to take any action as justice may require under the circumstances, as long as it is not inconsistent with the mandate and judgment of the appellate court. Fullerton Lumbar Co. v. Torborg, 80 N.W.2d 461 (Wis. 1957). It is the trial court's duty to rule on issues not ruled upon by the

Utah Supreme Court. Eckard v. Smith, 545 P.2d 501 (Utah 1976).

In this case, the mandate to the lower court was only to enter judgment consistent with the Supreme Court's opinion. Call III at 184. Because the Supreme Court held that the ordinance was invalid for the City's failure to hold a hearing, recovery for violation of procedural due process is not inconsistent with the Supreme Court's mandate. In fact, the finding that the City acted contrary to statutory procedures is elemental to the plaintiff's § 1983 civil rights claim. see Lavicky v. Burnett, 758 F.2d 468 (10th Cir. 1985). The lower court erred when it reasoned that it did not have authority to rule on Call's and Jenkins's due process claim.

In Shapiro Burnstein & Co. v. Jerry Vogle Music Co., 161 F.2d 406 (2nd Cir. 1947), the court used the same language contained in Call III in reversing and remanding a judgment in a copyright infringement action relating to a 1912 copyright. In clarifying its prior opinion, the court noted that it had not discussed any question related to a 1914 renewal of a copyright. However, the remand and mandate did not bar the district court from reconsidering an

initial ruling on the 1914 renewal. Explaining the lower courts' powers on remand, the appellate court stated:

We reversed the judgment, remanding the case for entry of a judgment consistent with this opinion. This permits the district judge to enter any judgment which he thinks is consistent with our opinion. He may consider whether the 1914 version was a joint work or a new work and whether the principals enunciated with respect to the 1912 version are likewise applicable to the 1919 version.

Similarly, the Utah Supreme Court permitted the lower court to enter any judgment consistent with Call III. The court could and should have considered whether the City's failure to hold a hearing deprived Call and Jenkins of their constitutional rights to due process. There is no requirement for the Utah Supreme Court to specifically tell the lower court to enter judgment on the civil rights claim. Rather, the lower court was required to consider all issues not ruled upon on the appeal and to enter a judgment consistent with the Supreme Court's opinion. Under these facts, the lower court erred when it ruled it could not enter judgment on the civil rights claim because the Utah Supreme Court had not specifically ordered the lower court to do so. This court should remand the case to the trial judge to

enable him to exercise his discretion on the attorney's fee application.

C. PLAINTIFFS ARE ENTITLED TO ATTORNEY
FEES PURSUANT TO U.R.C.P. 11

1. Factual Background.

After plaintiffs amended their complaint, a core issue was whether or not a public hearing had been held. West Jordan claimed that a meeting of August 27, 1974 was the public hearing. It is true that the August 27, 1974 meeting was a public hearing. However, it was a public hearing on a different issue (master plan). Neither at trial, nor in any post-trial proceeding, has West Jordan ever cited a scintilla of evidence to show that the August 27, 1974 "public hearing" was on the subject of the seven percent fee. Indeed, at the close of the trial, the judge stated: "There was no evidence given to the court about a public hearing." (T. Sept. 2, 1982 at p.72.)

In Call III, the Utah Supreme Court stated:

One's imagination must be stretched beyond rational limits to accept the master plan public hearing as satisfying the public hearing requirements of §10-9-25.

Call III, at p.183.

2. Legal Analysis.

Rule 11 of the Utah Rules of Civil Procedure requires that every pleading, motion and other paper be signed by at least one attorney of record in his individual name. The signature of that attorney constitutes a certificate by him that (1) he has read the pleading, motion or paper and that to the best of his knowledge and after reasonable inquiry (2) the pleading, motion or paper is well grounded in fact, warranted by existing law or a good faith argument for the extension, modification or reversal of existing law and (3) that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. The penalty for signing the pleading, motion or paper in violation of these three requirements include a reasonable attorney's fee. If the pleading was signed in bad faith, Rule 11 requires that sanctions be enclosed.

A refusal to invoke Rule 11 sanctions constitutes error as a matter of law. Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174, 1175 (D.C. Cir. 1985); F.R.C.P. Rule 26, Advisory Committee Note. The sufficiency of a pleading or motion and the determination to impose sanctions are reviewed

under a de novo standard. Donaldsen v. Clark, 819 F.2d 1581 (11th Cir. 1987); Eastway Construction Corp. v. City of New York, 762 F.2d 243, 254 n.7 (2d Cir. 1985).

In the present case, the West Jordan City attorney signed the following papers asserting that West Jordan held a public hearing after the drafting of the ordinance and prior to its adoption by West Jordan City: Answer of West Jordan to Plaintiff's Complaint dated April 7, 1981; Answers to Plaintiff's Interrogatories dated March 16, 1982; Defendant's Memorandum of Points and Authorities to Plaintiffs' Motion for Summary Judgment dated April 6, 1982; and Defendant's Reply Brief to Plaintiff's Appeal to the Utah Supreme Court.

In each instance, it was asserted that West Jordan had held the required public hearing, but at trial, no evidence whatsoever was put on that a public hearing had been held. The pleadings, motions and papers were not well grounded in fact and the West Jordan Attorney knew it.

This case is analytically comparable to Frasier v. Cast, 771 F.2d 259 (7th Cir. 1985). Frasier involved a civil rights action arising out of a warrantless entry to a house. As a defense, the defendant alleged the entry to the house was warranted under the circumstances. At trial, the deputy's testimony indicated that he was not motivated by

emergency but that he was concerned with preserving another officer's life.

The trial court, after reviewing the facts, was convinced the court appellant's counsel could not reasonably have believed his own case and awarded attorney fees. Similarly, in the present case, the West Jordan attorney must have known that West Jordan's public hearing defense was frivolous, and attorney fees should be awarded.

Not content with only constructing defenses not well grounded in fact, the West Jordan Attorney, subsequent to Call III, began making assertions not grounded in law. He argued that West Jordan was immune from civil rights claims and told the court, "I am familiar with these things because . . . I as city attorney have to pay attention to these things." What he didn't tell the court was that the United States Supreme Court, in Owen v. City of Independence, 445 U.S. 622 (1980) squarely held that cities (West Jordan) have no immunity, none, whatsoever. As a result of West Jordan's conduct, plaintiffs' attorney spent five hours researching and responding to the immunity allegations. Plaintiffs should be awarded attorney fees. (R.1916-1919.) c.f. Rodgers v. Lincoln Towing Service, Inc., 771 F.2d 194 (7th Cir. 1985).

In summary, plaintiffs are entitled to attorney fees pursuant to U.R.C.P. 11. The case should be remanded with instructions to the lower court to determine the reasonable amount of attorney fees to be awarded.

D. THE CASE MUST BE REMANDED FOR JOINDER
OF THE INDISPENSABLE PARTY SUBDIVIDERS

In Call I, the Utah Supreme Court held that the impact fees paid by the subdividers to the City of West Jordan was a trust fund. The court said:

These observations are also pertinent: Although the money collected from the plaintiff in this case was deposited in the City's general fund, it should not be assumed that the money thus becomes usable for other purposes by the City and it is of no special benefit to the areas sought to be subdivided. On the contrary that it will be used for its stated purpose is assured . . . by the fact that the recognized principal is that if money is collected from the public for a specific purpose, it becomes a trust fund committed to the carrying out of that purpose. (Emphasis added.)

Call I at 320.

In Call III, the Utah Supreme Court held that West Jordan's impact fee ordinance was void ab initio:

We therefore hold that the West Jordan City Ordinance 33, §9-C-8(2) (1975) is invalid and void ab initio.

Call III at 183.

The Supreme Court having first found that the paid impact fees were a trust fund, and then having declared the Ordinance creating the fund as void from the beginning, raises the issue of who owns the fund when the trust fails for illegality. The unequivocal answer is that the settlors of the trust (the subdividers) own the fund. see In Re: Professional Air Traffic Controller Organization, 724 F.2d 205 (D.C. Cir. 1984); In Re: Mooney's Estate, 267 N.W. 197 (Neb. 1936); see generally Bell v. Harrison, 498 P.2d 397 (Ore. 1972). When the trust fails, the settlors are entitled to the trust property. G. Bogert & G. Bogert, the Law of Trusts and Trustees §468 (Rev.2d Ed. 1977); Restatement (Second) Trusts §411 (1984).

The subdividers are the only persons who are entitled to the West Jordan impact fee trust fund.

To protect the interests of the subdividers in the impact fee trust fund, plaintiffs Call and Jenkins filed the lawsuit as a class action. In Call III, the Supreme Court disallowed the class because the size of the class was too small. The court said:

[W]e are here dealing with a class whose members have been identified. They are developers engaged in business whose claims are not so insubstantial that joinder or individual suits would not merit the cost . . . Given the facts of

this case, we cannot hold the trial court abused its discretion in denying class action status.

Call III, supra at 183-84.

Clearly, the foregoing language shows the Utah Supreme Court anticipated the subdividers would subsequently be joined in this action.

The Utah Supreme Court's expectation is consistent with the framework set out in Rules 19 and 23 of the Utah Rules of Civil Procedure. Rules 19 and 23 provide the framework for joining indispensable parties before the court. Rule 19 provides for the joinder of indispensable parties but states that the rule is subject to the class action provisions of Rule 23 (U.R.C.P. 19(d)). There is no need to join parties under rule 19 if the case proceeds as a class action under Rule 23. see Matthies v. Seymour, 270 F.2d 365 (2d Cir. 1959); Stevens v. Lumis, 334 F.2d 775, 778 n.9 (1st Cir. 1964).

Consistent with the foregoing authority and the expectations of the Utah Supreme Court, Call and Jenkins, subsequent to the Call III remand, moved the court to join subdividers who paid impact fees as party plaintiffs in the above-entitled action. Because the subdividers were the only one's who had an interest in the West Jordan impact fee trust

fund, they were indispensable parties. A complete accounting or restoration of the trust assets could not be made without them. see Wash v Centeino, 692 F.2d 1239 (9th Cir. 1982); Matthies v. Seymour, 270 F.2d 365 (2d Cir. 1959); G. Bogert and G. Bogert, Trusts and Trustees, §522 at 36, (Rev. 2nd ed. 1978); 3A J. Moore and J. Lucas, Moore's Federal Practice, para. 1908 at 19-170, (2d ed. 1982).

The court's failure to grant the motion is reversible error and requires this case to be remanded for joinder of those (subdividers) who have an interest in that fund. Hiltsley v. Ryder, 738 P.2d 1024 (Utah 1987).

A case analytically similar to this one is Cass Clay, Inc. v. Northwestern Public Service Co., 63 F.R.D. 34 (D.S.D. 1974). In that case, the plaintiffs were customers of an electric company. The plaintiffs claimed that the electric company made rate increases in violation of municipal ordinances. The plaintiffs sought a refund of the overcharge. The case was brought as a class action. The court ruled that all customers of the electric company were indispensable parties under F.R.C.P. 19. The court reasoned:

If Cass Clay remained in federal court and succeeded in obtaining a judgment, a distribution plan would have to be formulated. In order to determine how much is due and owing to Cass Clay, this court would have to determine how much

was due and owing to each individual class member. The fund is constant and each individual class member's share is dependent upon their share owing to every other class member.

* * *

I think those class members are indispensable according to that rule.

* * *

It is therefore the conclusion of this court that the interests of the utility customers in the fund . . . are joint, common and undivided.

Cass Clay at 37,39.

Further, the Utah Supreme Court in Hiltsey v. Ryder, 738 P.2d 1024 (Utah 1987), remanded a case to join as an indispensable party a trust beneficiary not before the court. Similarly, this court should remand this case to join all the subdividers who have an interest in the West Jordan impact fee trust fund.

D. . THE COURT ERRED IN FAILING TO AWARD
COSTS PAID BY THE PLAINTIFFS TO
COURT APPOINTED MASTER AND FOR THE
AUDIT OF WEST JORDAN'S BOOKS

1. Factual and Procedural Background.

During the litigation and before the lower court ruled on the issue of class certification, plaintiffs served a set of interrogatories on West Jordan City asking West

Jordan to identify which subdividers paid impact fees to West Jordan, how much was paid and what was done with the subdivider's money. The defendant refused to answer the simple interrogatories and said:

The answers to these interrogatories may be determined or ascertained from the business records of the City of West Jordan or from an examination, audit or inspection of such business records and the burden of discovery in ascertaining the answers is substantially the same for the plaintiff as the defendant.

(R.187-188.)

Thereafter, plaintiff sent CPA Gerald Sharkey to examine the business records. He discovered:

1. Not all of the business records were available.
2. The business records consisted of 34 boxes commingled with police reports and other irrelevant documents.
3. Some documents were in a safe.
4. Some documents were in an employee's lounge.

(R.749-750.)

He determined that West Jordan did not maintain detailed records related to fixed asset account groups contrary to the Uniform Fiscal Procedures Act and the West Jordan answer to interrogatories. (R.349-350.) After various motions to compel, the lower court, appointed a

master to determine who paid what to the City of West Jordan and what was done with the money.

[T]he master shall examine the records of West Jordan and determine the consideration paid for each subdivider and the subdivider's compliance with West Jordan's flood control and park fee ordinance, the subject of this lawsuit.

(R.427.) The Master's report was consistent with the affidavit of Gerald Sharkey. The Master concluded that the impact fee should have had special accounting treatment and that there should have been a fixed asset ledger and description of all fixed assets. (R.432-442.)

Because the information sought by Call and Jenkins was not in the documents identified by West Jordan, and because the Master, after examining the records, could not tell what was done with the impact fees, the court punished West Jordan by requiring the City to prove how it "spent the 7 percent subdivision fees paid by plaintiffs." (R.1030-1032.)

After the final remand of this case, plaintiffs sought to have taxed against West Jordan, the costs of the court appointed master which was \$1,495, and the \$4,650 plaintiffs paid in accounting fees.

2. Legal Analysis.

(a) Master's Fees.

Master's fees are determined in connection with a bill of costs. United States v. Yonkers Bd of Ed., 108 F.R.D. 100 (S.D.N.Y. 1985). While the courts have some discretion, they uniformly impose the master's fee either upon the losing party. Capra, Inc. v. Ward Foods, Inc., 507 F.2d 1316 (5th Cir. 1978), or upon the party whose conduct necessitated the reference. 3A J. Moore and J. Lucas Moore's Federal Practice, para. 53.04[1] at 53-56 (2d ed. 1987). In this case, both factors show that the master's fee should have been imposed upon West Jordan City.

Call and Jenkins are the prevailing parties. Thus, the master's fee should be imposed upon West Jordan, the losing party. In K-2 Ski Co. v. Head Ski Co., 506 F.2d 471 (9th Cir. 1974), the plaintiff prevailed on only two of his twelve claims but the court held that the judgment rendered on those two claims made plaintiffs the prevailing party and allowed plaintiff to recover, as costs, the amount the plaintiffs paid toward the master's compensation. Similarly, in this case, while plaintiff did not prevail on all of its claims, it did prevail on obtaining a judgment against the City of West Jordan for the impact fees paid. The expense of

the master should be imposed upon West Jordan, the losing party.

Further, it was the conduct of West Jordan that necessitated the appointment of the master. The interrogatories submitted to the City of West Jordan were not difficult. They asked who paid what fees and how were the fees spent. West Jordan refused to answer the interrogatories and directed the plaintiffs to its business records. The business records were in such a slip shod form, it was impossible for the plaintiffs' accountant to perform an accurate audit. The court then appointed a master. The master discovered that he too could not locate the information within West Jordan's records. After that, the court correctly placed the burden on West Jordan to prove what it did with the money.

If West Jordan had answered the interrogatories, the expenses of a master would not have been incurred. Similarly, if West Jordan had not violated Rule 11 as stated in Part VII C of this brief, plaintiffs would not have incurred the expense of a master.

(b) Accountant Costs.

A similar analysis dictates that the court should award plaintiff the costs of its accountant in inspecting the records. While expert fees are not generally recoverable as costs Frampton v. Wilson, 605 P.2d 771 (Utah 1980), this is an unusual case. If West Jordan had answered the interrogatories and not falsely alleged that the information was readily available from its business records, plaintiffs would not have incurred the expenses of an accountant. Therefore, the lower court should have awarded the auditing expenses as a cost. see American Timber & Trading Co. v. Niedermeyer, 558 P.2d 1211 (Ore. 1976); Andrecikopoulos v. Broadmoor Management, 670 P.2d 435 (Colo. App. 1983).

Further, if West Jordan had not violated Rule 11 as set forth in Part VII C of this Brief, plaintiffs would not have incurred the expense of an accountant. The lower court could and would have ruled that the ordinance was void and awarded Call and Jenkins a refund.

For these reasons, the lower court erred in failing to award plaintiff as costs, (1) the master's fee paid by the plaintiffs; and (2) the plaintiffs costs incurred by its accountant's attempted audit.

CONCLUSION

West Jordan deprived Call and Jenkins of their procedural rights of due process. A \$ 1983 civil rights judgment should be entered in favor of Call and Jenkins.

Because West Jordan violated Rule 11, Call and Jenkins should be awarded a judgment for attorney fees. In the alternative, the case should be remanded for the lower court to determine attorney fees pursuant to 42 U.S.C. § 1988.

The master's and accountant's costs incurred in an examination of West Jordan's records should be taxed to West Jordan.

DATED this 11th day of April, 1988.

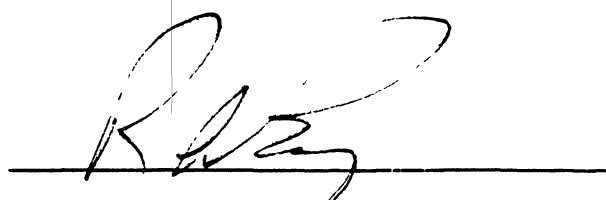
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff

By: 

CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing BRIEF OF APPELLANT (Call & Jenkins v. City of West Jordan), was mailed, U.S., Mail, postage prepaid, this *19th day of May*, 1988, to the following:

Stephen G. Homer
West Jordan City Attorney
1850 West 7800 South
West Jordan, Utah 84084

A handwritten signature, likely of Stephen G. Homer, is written over a horizontal line. The signature is stylized and cursive.

ADDENDUM

John CALL and Clark Jenkins,
Plaintiffs and Appellants,

v.

CITY OF WEST JORDAN, Utah,
Defendant and Respondent.

No. 15908.

Supreme Court of Utah.

Dec. 26, 1979.

Subdividers brought action to challenge validity of ordinance adopted by city which required subdividers to dedicate 7% of proposed subdivision land to city or to pay equivalent of that value in cash to be used for flood control and/or park and recreation facilities. The Third District Court, Salt Lake County, David K. Winder, J., upheld validity of ordinance and denied subdivider's requests for injunctive relief and damages, and subdividers appealed. The Supreme Court, Crockett, C. J., upheld validity of ordinance.

Affirmed and remanded.

Stewart, J., concurred and filed opinion.

Wilkins, J., dissented and filed opinion in which Maughan, J., concurred.

1. Zoning and Planning ⇐86

City had authority to enact ordinance which required subdividers to dedicate 7% of proposed subdivision land, or pay equivalent of that value in cash, to be used for flood control and/or park and recreation facilities. (Per Crockett, C. J., with one Judge concurring and one Judge specially concurring.) U.C.A.1953, 10-8-84, 10-9-1, 10-9-3, 10-9-19 et seq., 10-9-20, 10-9-22, 10-9-25.

2. Zoning and Planning ⇐86

Fact that dedication of 7% of proposed subdivision land area or its cash value redounded to benefit of subdivision as well as to general welfare of whole community did not invalidate ordinance which provided for such land dedication. (Per Crockett, C. J.,

with one Justice concurring and one Justice specially concurring.)

3. Trusts ⇐30½(1)

If money is collected from public for specific purpose, it becomes a trust fund committed to carrying out that purpose. (Per Crockett, C. J., with one Justice concurring and one Justice specially concurring.)

4. Eminent Domain ⇐2(1.2)

City, which received \$16,576 from subdividers under ordinance requiring subdividers to dedicate 7% of proposed subdivision land area or to pay equivalent of that value in cash to be used for flood control and/or park and recreation facilities, was not taking land under power of eminent domain without following requirement of paying just compensation but was merely imposing reasonable regulations on subdividers as prerequisite for permitting creation of subdivision. (Per Crockett, C. J., with one Justice concurring and one Justice specially concurring.)

5. Zoning and Planning ⇐602

Question of percentage of land in subdivision to be committed to public purpose is within prerogative of city council to determine, and so long as it is within reasonable limits, so that it cannot be characterized as capricious or arbitrary, courts will not interfere therewith. (Per Crockett, C. J., with one Justice concurring and one Justice specially concurring.)

6. Zoning and Planning ⇐86

Ordinance which required subdividers to dedicate 7% of proposed subdivision land or to pay equivalent of that value in cash to be used for flood control and/or park and recreation facilities was within scope of powers granted to city so that it could plan for general good of community as well as for newly created subdivision. (Per Crockett, C. J., with one Justice concurring and one Justice specially concurring.)

7. Zoning and Planning ⇐382.4

Payment to city of cash equivalent of 7% of subdivision land area, which was made pursuant to ordinance for general

purpose of parks, recreation facilities and flood control, was not necessarily to be used solely for subdividers' subdivision or any other particular one; it did not prevent city from imposing reasonable condition of construction of storm sewers and did not prevent city from refusing to credit subdividers with cost of storm sewers against cash they paid. (Per Crockett, C. J., with one Justice concurring and one Justice specially concurring.)

Robert J. DeBry and Valden P. Livingston, Salt Lake City, for appellant.

Nick J. Colessides, Salt Lake City, for respondent.

CROCKETT, Chief Justice:

Plaintiffs John Call and Clark Jenkins, subdividers, brought this action in which they challenge the validity of an ordinance adopted by the defendant City which requires that subdividers dedicate 7 percent of the land to the city, or pay the equivalent of that value in cash, to be used for flood control and/or parks and recreation facilities. The district court upheld the validity of the ordinance and denied plaintiffs' request for injunctive relief and damages. The latter appeal.

Plaintiffs contend that the ordinance is invalid because: (1) it is not within the City's granted powers; (2) the land or the money required is not for the benefit of the subdivision, but rather the City as a whole; (3) that the City is attempting to exercise the power of eminent domain without following the requirements thereof and paying just compensation; and (4) it unlawfully imposes a tax.

On January 21, 1975, the City amended an existing ordinance (No. 33) relating to subdivisions by adding the following:

Section 9-C-8(a). In addition to all the other requirements prescribed under this ordinance *the subdivider shall be required to dedicate seven percent (7.0%) of the land area of the proposed subdivision to the public use for the benefit and use of*

the citizens of the City of West Jordan . . . or in the alternative at the option of the governing body of the City, *the City may accept the equivalent value of the land in cash* if it deems advisable.

Sections 9-C-8(b) and (d) further provide that the money received "shall be used by the City for its flood control and/or parks and recreational facilities" and that if the City elects to receive money in lieu of land, payment shall be made "by the subdivider on or before final approval of the plat is given by the City Council."

On May 2, 1977, the plaintiffs presented to the City two plats and maps for a proposed "Wescall subdivision" which, if approved, would result in the future development of 92 lots on about 30 acres of land located in the City. When the City exercised its option to accept money in lieu of land, plaintiff Clark Jenkins paid, under protest, \$16,576.00, representing about 7 percent of the value of his land. The City Council then approved the subdivision and the plats were recorded. The City refused plaintiffs' demand to refund the money and this action resulted.

In rejecting plaintiffs' attack upon the ordinance, the trial court stated in its memorandum decision:

As it affects the plaintiffs, it is the opinion of this Court that the City of West Jordan, Utah's ordinance 33, as amended January 21, 1975, is valid and constitutional. It is further the Court's opinion that there has been no taking of the plaintiff's property by the defendant without just compensation nor has the defendant levied an invalid tax upon the plaintiffs. See Secs. 10-9-1 through 10-9-30, U.C.A. 1953. [Citing cases.]

The Authority of the City

[1] It is not questioned that cities have no inherent sovereign power, but only those granted by the legislature.¹ But it must be realized that it is impractical for statutes to spell out to the last detail all of the things city governments must do to perform the

1. *Johnson v. Sandv City Corp.* 28 Utah 2d 22, 497 P 2d 644 (1977)

functions imposed upon them by law. This Court has in numerous cases recognized this and has held that cities have those powers which are expressly granted and also those necessarily implied to carry out such responsibilities.²

There are a series of statutes through which the City derives its authority to enact ordinances of the character here in question. Sec. 10-8-84, U.C.A. 1953, grants to cities the authority and the duty

. . . to preserve the *health, safety* and good order of the city and its inhabitants.

This idea is carried forward and echoed in Section 10-9-1, U.C.A. 1953, which provides that:

For the purpose of promoting *health, safety, morals and the general welfare* of the community *the legislative body of cities and towns is empowered to regulate and restrict . . . the location and use of buildings, structures and land for trade, industry, residence or other purposes.*

Further dealing with that subject and more specific as to the establishment of parks, Section 10-9-3 states that such regulations

. . . shall be made in accordance with a comprehensive plan designed to . . . *facilitate adequate provision for transportation, water, sewage, schools, parks and other public requirements.*

The Municipal Planning Enabling Act³ empowers a city to have a planning commission which may "adopt and certify to the legislative body, a master plan for the physical development of the municipality."⁴

Section 10-9-22 states that the planning commission "shall have such powers as may be necessary to enable it to perform its functions and promote municipal planning."

Significantly, Section 10-9-25 then provides:

In exercising the powers granted to it by the act, *the planning commission shall*

prepare regulations governing the subdivision of land within the municipality. A public hearing thereon shall be held by the legislative body, after which the legislative body may adopt said regulations for the municipality.

[all emphasis herein added.]

If the above statutes are viewed together, and in accordance with their intent and purpose, as they should be, it seems plain enough that the ordinance in question is within the scope of authority and responsibility of the city government in the promotion of the "health, safety, morals and general welfare" of the community.⁵

Just how essential and desirable it is that cities have such authority in planning their growth is brought into sharp focus by reflecting, on the one hand, upon the conditions in the slum and ghetto areas of various cities, where there are none, or inadequate, parks and playgrounds and, on the other, upon the enrichment of life which has been conferred on other cities where there are parks, plazas, recreational and cultural areas (some of which are very famous) for the use of the public.

In modern times of ever-increasing population and congestion, real estate developers buy land at high prices. From the combined pressures of competition and desire for gain, they often squeeze every lot they can into some labyrinthian plan, with only the barest minimum for tortuous and circuitous streets, without any arterial ways through such subdivisions, and with little or no provision for parks, recreation areas, or even for reasonable "elbow room." The need for some general planning and control is apparent, and makes manifest the wisdom underlying the delegation of powers to the cities, as is done in the statutes above referred to.

As undeveloped land is improved, it is also important that some provision for flood control be made. To the extent that the

2. See *Salt Lake City v. Revene*, 101 Utah 504, 124 P.2d 537 (1942); and *Butt v. Salt Lake City Corp.*, Utah, 550 P.2d 202 (1976).

3. 10-9-19 et seq., U.C.A. 1953.

4. 10-9-20, U.C.A. 1953.

5. Language from Sec. 10-9-1, U.C.A. 1953.

establishment of subdivisions increases the need for flood control measures or recreational facilities, it is both fair and essential that subdividers be required to contribute to the costs of providing those facilities.

Lack of Benefit to the Subdivision

[2] In their point No. (2), the plaintiffs attack the ordinance on the ground that the land dedicated (or the money in lieu thereof) is not to be used solely and exclusively for the benefit of the created subdivision. They point to the provision that the land is received "for the benefit and use of the citizens of the City of West Jordan" and the money is used for "its [West Jordan's] flood control and/or parks and recreation facilities."

We agree that the dedication should have some reasonable relationship to the needs created by the subdivision.⁶ But in the planning for the expansion of a city, it is obvious that no particular percentage of each subdivision, or of each lot, could be used as a park or playground in that particular subdivision; and likewise, that it could not be so used for flood control. But it is so plain as to hardly require expression that if the purpose of the ordinance is properly carried out, it will redound to the benefit of the subdivision as well as to the general welfare of the whole community. The fact that it does so, rather than solely benefiting the individual subdivision, does not impair the validity of the ordinance.⁷

[3] These observations are also pertinent: Although the money which was collected from the plaintiffs in this case was

deposited in the City's general fund, it should not be assumed that the money thus becomes usable for other purposes by the City and is of no special benefit to the area sought to be subdivided. On the contrary, that it will be used for its stated purpose is assured, first, by the integrity and good faith of the public officials charged with that responsibility; and second, by the fact that the recognized principle is that if money is collected from the public for a specific purpose, it becomes a trust fund committed to the carrying out of that purpose.⁸

The Eminent Domain Issue

[4] There is an obvious fallacy in the plaintiffs' argument that the City has not followed the proper procedure for taking plaintiffs' property under eminent domain. This is not a proceeding initiated by the City to acquire property.⁹ It has indicated no desire to compel the plaintiff to subdivide their property, nor to dedicate any part of it. The plaintiffs are the moving parties, and as a prerequisite for permitting the creation of the subdivision, the City, under the powers conferred upon it as hereinabove discussed, can and does impose reasonable regulations.¹⁰

Invalidity as a Tax

Plaintiffs urge that the requirements of the ordinance in question are but a revenue-raising scheme for the purpose of meeting the financial needs of the City, and thus constitute an improper levy of a tax upon their property. This labeling is but an ex-

6. See statements in *Aunt Hack Ridge Estates, Inc. v. Planning Commission of Danbury*, 27 Conn.Sup. 74, 230 A.2d 45 (1967); *Krughoff v. City of Naperville*, 68 Ill.2d 352, 12 Ill.Dec. 185, 369 N.E.2d 892 (1977); *Home Builders Ass'n v. City of Kansas City, Mo.*, 555 S.W.2d 832 (1977).

7. *Ayres v. City Council*, 34 Cal.2d 31, 207 P.2d 1 (1949); *Associated Home Builders, Inc. v. City of Walnut Creek*, 4 Cal.3d 633, 94 Cal. Rptr. 630, 484 P.2d 606 (1971).

8. 15 McQuillin, *Municipal Corporations*, Sec. 39.45 states that: "Special funds are often created for a particular purpose, and in such case the general rule is that they cannot

be used for any other purpose" and that ". . . a fund raised by a municipality for a special purpose is a trust fund, and equity will, in a proper case, interfere to prevent its diversion." (Citing cases.)

9. See *Ayres v. City Council*, *supra*, note 7; *Petterson v. City of Naperville*, 9 Ill.2d 233, 137 N.E.2d 371 (1956).

10. *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182, 187 (1964); *City of Albuquerque v. Chapman*, 77 N.M. 86, 419 P.2d 460 (1966); *Mid-Continent Builders, Inc. v. Midwest City, Okl.*, 539 P.2d 1377 (1975).

ercise in semantics which misconstrues the purpose of the ordinance to make another attack upon it. It has been adjudicated that such an ordinance, if reasonably designed and carried out for the purpose intended, is a proper form of planning for the good of the community, and is not such a prohibited tax.¹¹

[5] The question as to the percentage of the land in the subdivision (in this instance, 7 percent) to be committed to the public purpose is within the prerogative of the City Council to determine, and so long as it is within reasonable limits, so that it cannot be characterized as capricious or arbitrary, the courts will not interfere therewith.¹²

[6] In harmony with what has been said above, it is our opinion that the ordinance under attack is within the scope of the powers granted to the City so that it can plan for the general good of the community as well as for the newly-created subdivisions.

We have decided the principal issue which was addressed by the parties in the district court, and on this appeal, as to the validity of the ordinance. However, we observe that in the averments of the affidavits, there are other matters which may need to be resolved on remand; and accordingly, it is deemed appropriate that we make some additional comments.¹³

There is no question, but that the ordinance should be applied fairly, and without favoritism or discrimination insofar as that can be accomplished. In view of the averment in plaintiffs' affidavit that that principle has been violated, the trial court should be concerned with examination into and resolution of any legitimate issue raised thereon.

[7] In his affidavit, plaintiff Clark Jenkins averred that he not only paid the \$16,576 (assumed to be 7 percent of the value of

the subdivision, \$248,000) but was also required to dedicate .028 acres valued at \$1,500; and to expend about \$19,000 in construction of a storm sewer (which plaintiff urges is flood control) before the City would approve the subdivision. He asserts that these amounts are in excess of the 7 percent required by the ordinance. The City's affidavit states that it received the \$16,576, but says nothing about receiving the other amounts just referred to. It is, of course, essential that the amount the City exacts pursuant to the ordinance is not more than the 7 percent of value of plaintiffs' property it prescribes.

Our final observation is on plaintiffs' urgency that the \$19,000 they expended in constructing a storm sewer should be credited upon their obligation under the ordinance. From what has been said in this decision, it should be sufficiently plain that the 7 percent exacted pursuant to the ordinance is for the general purpose of parks, recreation facilities and flood control, and is to be so administered and expended by the city government for that purpose; and that it is not necessarily to be used solely for the plaintiffs' subdivision or any other particular one. This does not in any way prevent the City from imposing other reasonable conditions upon the approval of a subdivision and proposed construction therein, including requiring a storm sewer if the conditions are such that it is needed in that subdivision for the protection of future residents thereof or other residents of the City. We therefore do not disagree with the City's requirement of the storm sewer, nor with its refusal to credit the plaintiff with the cost thereof on its 7 percent required by the ordinance.

The decision of the trial court is affirmed and the case is remanded for further pro-

11. *Petterson v. City of Naperville*, supra, note 9; *Jenad v. Village of Scarsdale*, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966).

12. For an excellent discussion of the various constitutional challenges that have been made regarding subdivision legislation, see *Associat-*

ed Home Builders, Inc. v. City of Walnut Creek, supra, note 7, and authorities therein cited.

13. See Rule 76(a), U.R.C.P.; *LeGrand Johnson Corp. v. Peterson*, 18 Utah 2d 260, 420 P.2d 615 (1966).

ceedings consistent with this opinion. No costs awarded.

HALL, J., concurs.

STEWART, Justice (concurring).

I concur in the conclusion that § 9-C-8(a) of the ordinance of the City of West Jordan is authorized by § 10-8-84 U.C.A. (1953), as amended. This statute delegates to cities general police power to be used for the benefit of the city and its inhabitants. However, the ordinance in question clearly approaches constitutionally protected rights, i. e., the prohibition against the taking of private property without just compensation. The power of a city, or for that matter of the state, to require subdividers to dedicate a portion of their land for public improvements is not without limitation. In my judgment, the Court should address the problem of what standards delineate a constitutional and an unconstitutional forced dedication by a subdivider. The question is certainly one that will recur and ought to be resolved by the Court.

WILKINS, Justice (dissenting).

I respectfully dissent.

The majority opinion forms a perilous new rule today by impermissibly expanding municipal powers, for the first time in this State, beyond those granted cities and towns by our Legislature and beyond those recognized by subdivision, zoning, and municipal government authorities, and it endangers the sound precedent of narrowly construing municipal powers which has been developed in *Salt Lake City v. Revene*,¹ *Ritholz v. City of Salt Lake*,² *Salt Lake City v. Sutter*,³ *Tooele City v. Elkington*,⁴ *Nance v. Mayflower Tavern*,⁵ *Parker v. Provo City*,⁶ *Nasfell v. Ogden City*,⁷ *Bohn v. Salt*

Lake City,⁸ *Lark v. Whitehead*,⁹ *American Fork City v. Robinson*,¹⁰ *Layton City v. Speth*,¹¹ and other cases.

I shall relate my view of this case, as well as review what I perceive to be the correct legal principles applicable to it. All statutory references are to Utah Code Annotated, 1953, as amended, unless otherwise indicated.

Subdividers have undertaken to develop a subdivision within the City's boundaries and have dedicated land area and installed storm sewer facilities within the subdivision and have additionally paid \$16,576 to the City, all in response to City demands made under authority of the Ordinance as a prerequisite to subdivision approval. The record and briefs indicate a dispute as to whether the land was dedicated and the money paid under protest. No formal written protest appears in the record, but plaintiffs claim they attended a city council meeting in which they orally objected to the land dedication and fee payment.

Subdividers framed their complaint as a class action seeking a declaration of the invalidity of the Ordinance on their own behalf and on behalf of others similarly situated. Other than a general denial in its answer and the allegation that the class consisted of 28 subdividers rather than the 100 alleged by plaintiffs buried within an affidavit on another subject, the City has totally failed to address, either here or below, the Subdividers' class action allegations. The record does not indicate whether the District Court made any of the determinations contemplated by Rule 23(a) or (b), Utah Rules of Civil Procedure, but the Court disposed of the matter in an Order dated April 21, 1978, denying the Subdividers' "Motion for Declaration of a Class Ac-

1. 101 Utah 504, 124 P.2d 537 (1942).

2. 3 Utah 2d 385, 284 P.2d 702 (1955).

3. 61 Utah 533, 216 P. 234 (1923).

4. 100 Utah 485, 116 P.2d 406 (1941).

5. 106 Utah 517, 150 P.2d 773 (1944).

6. Utah, 543 P.2d 769 (1975).

7. 122 Utah 344, 249 P.2d 507 (1952).

8. 79 Utah 121, 8 P.2d 591, 81 A.L.R. 215 (1932).

9. 28 Utah 2d 343, 502 P.2d 557 (1972).

10. 77 Utah 168, 292 P. 249 (1930).

11. Utah, 578 P.2d 828 (1978).

tion." The City's motion to dismiss was treated as one for summary judgment. On May 17, 1978, the District Court ruled in favor of the City's motion, and against the Subdividers' motion, that the Ordinance was valid and the City's demands were in conformity with it.

Except for cities which operate under charter¹² and derive their authority from Article XI, Section 5 of the Utah Constitution, the cities of this State are "creatures of statute and limited in powers to those delegated by the legislature, . . ." ¹³ All power and authority of our nonchartered municipalities is derived through legislative grant, and for the Ordinance under review here to be upheld, it must have been enacted pursuant to an enabling statute.

Prior to the majority decision here, this Court recognized that legislative authority may be exercised by municipalities in only one of three ways. Justice Wolfe wrote in *Salt Lake City v. Revene* :

It has been repeatedly stated by this court "that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in *express* words; second, those necessarily or fairly implied in or incident to the powers *expressly granted*; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation,—*not simply convenient, but indispensable*." 1 Dillon Municipal Corporation, 5th Ed., p. 448, § 237; . . . ¹⁴ [Emphasis added.]

and held therein that in the absence of a specific legislative grant of power the city had no authority to limit barbershop business hours for health purposes under three statutory grants of power to cities and towns. One statute provided cities power to "license, tax, and regulate" barbershops. A second statute empowered cities to promulgate regulations "to secure the gen-

eral health of the city," and the third broadly delegated to cities authority to enact ordinances for the public health, safety, prosperity, morals, peace and good order, and comfort and convenience of the city and its inhabitants. That third statute now appears in our Code as § 10-8-84 and is relied upon by the City and the majority opinion as authority for the City to enact the Ordinance under attack here.

In *Salt Lake City v. Sutter*,¹⁵ defendant's conviction for violating Salt Lake City's prohibition ordinance was reversed, this Court holding that the statute enabling cities to pass ordinances necessary to provide for the safety, health, morals, comfort and convenience, again the statute relied upon by the City and the majority opinion, did not authorize the City's legislation prohibiting possession of intoxicating liquors.

Whatever power or authority municipalities in this state have is derived from the Legislature.

It will hardly be contended that the ordinance in question is "essential to the accomplishment of the declared objects and purposes of the corporation." As we have seen, it is not included within any express grant; nor is it necessarily or fairly implied as an incident to the powers expressly granted measured by the rule laid down by the authorities.

It may be, and is, contended that the ordinance in question is only carrying out the general policy of the state as reflected by the legislative enactment making it an offense against the state law for any person to knowingly have in his possession without authority intoxicating liquors within the state. But the policy of the state cannot control in determining the powers of a municipality. Those powers must be measured and determined by the grants found in the charter or in the general laws purporting to enumerate such powers.

12. The City in this case does not represent itself to be chartered.

13. *Ritholz v. City of Salt Lake*, *supra*, note 2 at 3 Utah 2d 387, 284 P.2d 703.

14. *Supra*, note 1. Although cited by the majority as authority for its position here, *Revene* held, in direct conflict with the majority, that the Ordinance enacted by the City exceeded the City's authority under the enabling statutes.

15. *Supra*, note 3.

We can see no escape from the conclusion that the board of city commissioners of Salt Lake City was without authority to enact the ordinance in question on this appeal.¹⁶

The requirement that cities must have express authority to enact ordinances is not unique to Utah. McQuillin in *Municipal Corporations*, and Yokley, in *The Law of Subdivisions*, state as a general proposition that dedication ordinances require enabling legislation.

In some jurisdictions, zoning-enabling statutes authorize local zoning bodies to require, as a condition precedent to development, that subdividers dedicate portions of their property for public purposes, or pay an assessment in lieu of dedication. There must be express statutory authority granting the power to municipalities to impose such conditions, or at least language from which the intention to grant the power may be inferred.

17

Further, judicial scrutiny of a municipal ordinance differs from that imposed in the test of a State statute in that the usual presumption of validity of the sovereign's action does not apply. In the case of an ordinance, any reasonable doubt must be resolved against the municipality's power to enact it, and any questioned power must be denied.¹⁸

Neither party nor the majority opinion cites any Utah statute directly authorizing

the City's enactment of the Ordinance in this case. The City refers us only to § 57-5-3¹⁹ and to Title 10, Chapter 9 of the Utah Code Ann. The majority opinion finds authority for the City's action in § 10-8-84 and various sections in Title 10 Chapter 9, under the theory that the City was acting under those powers necessarily implied to it to carry out those powers expressly granted. Section 57-5-3 governs the nature of maps and plats a subdivider must file and have approved. Title 10 Chapter 9, is a Legislative grant of power to cities and towns for the purpose of enacting zoning regulations to promote the "health, safety, morals and general welfare of the community." Chapter 10 also includes the Municipal Planning Enabling Act, §§ 10-9-19 through 10-9-30, which empowers any city to adopt a master plan for the physical development of the municipality and to promulgate regulations to assure that subdivisions conform to the master plan. The City has adopted a master plan as contemplated by the Act.

Section 10-8-84 is a broad grant of the State's police powers to cities and towns and is frequently referred to as the "general welfare clause."²⁰ It is derived from Utah's earliest laws and states:

They [the cities and towns] may pass all ordinances and rules, and make all regulations, *not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter*, and such as are necessary

and certified by the surveyor making such plat if the land is situated in any city or incorporated town such plat or map shall be approved by its governing body, or by some city or town officer for that purpose designated by resolution or ordinance of such governing body;

See also § 57-5-4, which states:

Such maps and plats, when made, acknowledged, filed and recorded, shall operate as a dedication of all such streets, alleys and other public places, and shall vest the fee of such parcels of land as are therein expressed, named or intended for public uses in such county, city or town for the public for the uses therein named or intended.

20. *Bohn v. Salt Lake City*, *supra*, note 8; *Lari v. Whitehead*, *supra*, note 9.

16. *Id.* at 61 Utah 540, 41, 216 P. 237. Also supporting this rule is *Tooele City v. Elkington*, *supra*, note 4.

17. 8 McQuillin, *Mun.Corp.* § 25.146a (Rev. 1976). 1 Yokley *Mun. Corp.* § 97 (Supp.1978, p. 179); *Accord*, Yokley, *The Law of Subdivisions* § 15 (1963).

18. *Nance v. Mayflower Tavern*, *supra*, note 5; *Parker v. Provo City*, *supra*, note 6; *Nasfell v. Ogden City*, *supra*, note 7; *Salt Lake City v. Revene*, *supra*, note 1.

19. *Maps and plats to be acknowledged, certified, approved, and recorded.* Such map or plat shall be acknowledged by such owner before some officer authorized by law to take the acknowledgment of conveyances of real estate,

and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort and convenience of the city and the inhabitants thereof, and for the protection of property therein;

[Emphasis added.]

This section is not, however, authority for the Ordinance under attack here. Cases decided under this statute are emphatic and explicit in limiting its scope. In *Nasfell v. Ogden City*,²¹ the city's power to enact an ordinance declaring that the presence of a vehicle parked in violation upon any public street was prima facie evidence that the registered owner committed the violation, was successfully challenged. Although Chief Justice Crockett reasoned there as here, that what is now Section 10-8-84 implied to the city the power to enact the ordinance, the Court held that the city had been granted no express authority to pass the ordinance, and that the city had no implied power to pass the ordinance based upon this general welfare statute or statutes granting cities the right to regulate the use of streets, traffic and sidewalks.

The Court has also characterized this statute as "merely in aid of the express powers elsewhere granted"²² in invalidating a city ordinance prohibiting keeping a pool table or playing pool. And in *Lark v. Whitehead*,²³ Chief Justice Crockett again dissenting, the Court held that while the cities had been expressly granted Legislative authority to enact an ordinance punishing persons for indecent or disorderly conduct in § 10-8-50, Salt Lake City's ordinance exceeded that statutory grant, and that even under § 10-8-84, the statute relied upon in the majority opinion here, the city had no implied power to enact its ordinance.

The general provisions of Sec. 10-8-84 do not confer authority upon a municipal

body to abrogate the limitations specified in the express provisions of Sec. 10-8-50, U.C.A.1953. In *Salt Lake City v. Sutter* this court cited the principle that where an express authority is given to pass ordinances in a particular class of cases, followed by a general authority to pass all necessary laws, the express authority is a limitation upon the general power so far as it relates to matters which belong to the class of those enumerated, but which are not, in terms, included. A general power granted to the corporation to pass all ordinances necessary for the welfare of the corporation, is qualified and restricted by those other clauses and provisions of the charter or the general law which specify particular purposes for which ordinances may be passed. Otherwise, the general clause would confer authority to abrogate the limitations implied from the express provisions.²⁴

In *Layton City v. Speth*,²⁵ this Court set aside a conviction under a city ordinance which exceeded the statutory grant of authority from the Legislature. In *Layton City*, the city had enacted an ordinance making it illegal for a vehicle owner to knowingly and intentionally permit persons who possess, use, or distribute controlled substances to occupy his vehicle. The State statute in effect at the time the ordinance was enacted granted to cities the power to prohibit distribution of intoxicating liquors, narcotics or controlled substances to persons under the age of twenty-one. This Court held over the dissents of Chief Justice Crockett and Justice Hall, that the ordinance was not necessary for carrying into effect the purposes of the statute, was beyond the scope of Legislative authority granted to the city, and was therefore invalid.

The remaining statutes cited by the City and the majority opinion as implied authori-

21. *Supra*, note 7.

22. *American Fork City v. Robinson, et al.*, *supra*, note 10 at 77 Utah 171, 292 P. 250. *Accord*, *Bohn v. Salt Lake City*, *supra* note 8.

23. *Supra*, note 9.

24. *Id.* at 28 Utah 2d 346, 502 P.2d 559. *Accord*, *Allgood v. Larson*, Utah, 545 P.2d 530 (1976).

25. *Supra*, note 11.

ty for the City to enact the Ordinance are zoning statutes found in Title 10, Chapter 9, and §§ 57-5-3 and 57-5-4, the pertinent parts of which are cited in footnote 19 of this opinion. Clearly, these statutes do not grant the City express authority to enact the Ordinance nor do I find in these statutes implied authority to enact the Ordinance to carry out powers expressly granted under the zoning statutes. A generalized difference between zoning statutes and subdivision controls is that zoning normally prohibits certain uses of property, while the title remains in the private owner, and subdivision controls normally make positive exactions, such as conveyance of the title to the city, from the private owner.

[I]t must be kept in mind that zoning regulations, generally, only limit the use of the property, whereas subdivision legislation often exacts a penalty for approval of a desired use.²⁶

Traditionally, zoning and subdivision have been founded on separate legislation and administered separately. Subdivision regulation and zoning are frequently interrelated in purpose and technique; . . . [N]onetheless, fundamental differences do exist between the two areas. While zoning involves no more than negative prohibitions on certain uses of the owner's property, subdivision regulation often makes positive exactions of the owner. It may require him to construct streets or sewers, to convey a *portion of his land to the municipality for public use*, or to pay the equivalent of such construction or dedication in cash. It is submitted that this difference necessitates a more specific test of constitutionality, i. e., the legislation should not only be substantially related to the public health, safety, morals, or general welfare, but, insofar as dedications, activities and expenditures are positively required of the subdivider, these requirements should be reasonably

related to the subdivision in question and should concern types of improvement for which municipalities have generally been conceded the power to levy special taxes or assessments.²⁷ [Emphasis added.]

Here, the City is not attempting to rezone the Subdividers' property from residential use to municipal use for schools and parks or to otherwise limit or prohibit its use. In this case, the City is requiring the Subdividers to convey land to it, or to pay it an amount of money equal to the value of the land, without remuneration. In no sense is this a conventional zoning case.

Further, §§ 57-5-3 and 57-5-4 cannot stand as authority for the Ordinance. The statutes automatically vest fee title in the municipal agency upon acknowledgment and recordation of the plat. They do not delegate to the cities and towns the power to enact ordinances exacting property or in lieu fees, without compensation, from private property owners as a condition to subdivision approval. Nor can such exaction be read as necessarily or even fairly implied from those sections.

In his review of State statutory authorizations for subdivision control, Yokley reviews §§ 57-5-1 to 57-5-8 of our Code and states:

A review of these provisions indicates an absence of any standards governing approval of plats except the usual directions for delineation of lots and streets, that is, there seems to be no authority conferred for the promulgation of regulations by the governing body which would require the meeting of certain conditions as a prerequisite to plat approval. The statute itself contains no provisions for meeting conditions before plat approval.²⁸

Anderson, in *The American Law of Zoning*, distinguishes between requiring a subdivision developer to plan for streets and

26. *Noland v. St. Louis County, Mo.*, 478 S.W.2d 363, 366 (1972).

27. *Reps & Smith, Control of Urban Land Subdivision*, 14 *Syracuse L.Rev.* 417, 407 (Spring 1963).

28. Yokley, *The Law of Subdivisions*, § 116 (1963). (Although this text is updated with a 1979 pocket part, Yokley had noted no new developments or changes to his stated position on Utah law in the 1963 text.)

sewers, which he states can be required with or without subdivision controls, and which may be required in this State under §§ 57-5-3 and 57-5-4, and exacting property for other municipal purposes, which he repeatedly states must be done pursuant to strictly construed enabling legislation.²⁹

Finally, the Municipal Planning Enabling Act,³⁰ and specifically § 10-9-25, quoted by the majority opinion, cannot stand as sufficient authority for the City to take the Subdividers' property under its Ordinance. That Section states: "*In exercising the powers granted to it by the act [the Municipal Planning Enabling Act], the planning commission shall prepare regulations governing the subdivision of land within the municipality.*" [Emphasis added.] Nowhere does the act authorize the planning commission or any municipality of this State to take any portion of a subdivider's property. The act enables municipal bodies to adopt a master plan (which the City has adopted), establish an official street map and to zone in conformance with those plans. It gives cities and towns the power to prohibit the issuance of a building permit or approval of a subdivision which does not conform to the master plan, and it makes it a misdemeanor to sell subdivision lots without planning commission approval. Again, in this case, the City is not attempting either to rezone the Subdividers' property or to refuse to approve their subdivision until it conforms to the master plan; the City, here, is appropriating the Subdividers' property.

The Legislature has had two opportunities to expressly expand the powers available to municipalities in controlling problems associated with rapid subdivision development, but it has not, as yet, prescribed that necessary expended power. In 1973, a bill was introduced in the Utah Senate which would have delegated to the cities the power to require fees or dedication of land or both as a condition for approval of a subdivision plat. In 1975, a bill amending

§ 10-9-25 was introduced in the Utah Senate which would have allowed cities and counties to prescribe qualifications upon subdividers, such as providing for storm drainage systems, parks and recreational facilities in order to gain approval of their subdivision plats. Neither bill gained the approval of both Houses of the Legislature.

I have reviewed those statutes characterized by the City and the majority opinion as enabling the City's actions here, and I remain unpersuaded that any or all of them are sufficient to expressly grant or necessarily imply to the City that power which it seeks to exercise by Ordinance No. 33. As *noted ante*, the normal presumptions in favor of the validity of statutes do not generally apply to ordinances, and this especially when the questioned ordinance seeks to appropriate to the government some protected private right.

There is some difference of view with respect to a presumption of power to enact an ordinance and also with respect to burden of proof on that issue. Generally, there is no such presumption of validity of an ordinance as against the objection that no power existed under charter or statute to enact it. In other words, there is no presumption in favor of the validity of an ordinance where it is questioned on the ground of want of power to enact it; on the contrary, power to pass it must appear to have existed when it was adopted, if the ordinance is to be sustained. Accordingly, one claiming under an ordinance must be able to point to existing power to enact it, either granted in express terms or in terms by which the power is fairly and necessarily implied. Also, proof of authority to enact an ordinance has been ruled to be necessary where . . . objection is made to it on the ground that it interferes with common rights. Indeed, the view has been taken that with respect to the exercise of every power by a municipal corporation, any reasonable doubt that arises as to the existence of the power is to be

29. 4 Anderson, *The American Law of Zoning*, § 23.39, p. 141 (1977); see generally §§ 23.05, 23.08, 23.26, and 23.39.

30. Sections 10-9-19 to 30.

resolved against the corporation, and the power is to be denied. Consistently, a strict construction against ordinances restricting personal liberty, property, immunity or privilege is followed in many cases. . . . Certainly, where it is clear that an ordinance exceeds the legislative powers of a city, it will not be presumed to be valid.³¹

Only after ordinances are satisfactorily determined to have been enacted pursuant to Legislative grants of authority may they carry the presumption of validity. In *Marshall v. Salt Lake City*,³² Utah's zoning statutes were declared constitutional and the City's ordinances, enacted pursuant to those express grants of authority, were upheld. At that point, the presumption of validity attaches to the ordinance under attack and it will not be declared invalid unless it is arbitrary, discriminatory or unreasonable, or unless it clearly offends some provision of the Constitution or a statute.³³

It is also only after a subdivision ordinance has been determined valid that it is to be tested as to its reasonableness in application to the particular fact situation. In *Jenad v. Village of Scarsdale*,³⁴ cited in the majority opinion, villages in the State of New York had been delegated sufficient grants of power to require exactions from subdividers, so the question became one of the reasonableness of the application of the ordinance to the facts of that case, unlike our problem here. Applying the presumption test to the facts of this case, the Ordinance should fail for want of authority to enact it.

Several states have enacted statutes authorizing mandatory dedication of land or in lieu fees as a prerequisite to plat approval. These enactments, however, have taken place with a keen eye to protecting the rights of private property owners. In *Asso-*

ciated Home Builders v. City of Walnut Creek,³⁵ a case relied upon by the City and the majority opinion, a dedication ordinance similar to the ordinance here survived attack. But *Associated Home Builders* does not stand for the proposition espoused by the majority opinion, because that case construed an ordinance which had been enacted pursuant to an express State enabling statute and a newly adopted amendment to the California Constitution. And in 1974, California passed statutes³⁶ requiring public agencies benefiting from the subdivision dedication to remunerate the developer-dedicator for his property.

The Subdividers also challenge the Ordinance as an unreasonable exercise of the police power because the City has deposited the in lieu fees into its general account, presumably to be used for general City purposes, and because they claim, the City has not shown that the exaction from them is reasonably related to the demands placed on the City by their subdivisions, and that therefore the exaction benefits others at their subdivision's expense. The affidavit of one of the Subdividers (made a part of the record) states, and the City does not dispute, that the Subdividers' in lieu fees have been used to purchase land for a water-detention basin to receive run-off from subdivisions other than the one developed by the Subdividers herein.

A reading of the Ordinance discloses that the land shall be dedicated or the in lieu fees paid "to the public use for the benefit and use of the citizens of the City of West Jordan" and "shall be used by the City for flood control and/or parks and recreational facilities."

As support for their argument, the Subdividers cite *Weber Basin Home Builders Ass'n v. Roy City*.³⁷ In that case, the Court

31. 6 McQuillin, *supra*, note 17, § 22.31.

32. 105 Utah 111, 141 P.2d 704 (1943).

33. *Id.*; see also *Gibbons & Reed Co. v. North Salt Lake City*, 19 Utah 2d 329, 431 P.2d 559 (1967).

34. 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966).

35. 4 Cal.3d 633, 94 Cal.Rptr. 630, 484 P.2d 606 (1971).

36. Cal.Govnt.Code § 66477-80 (West).

37. 26 Utah 2d 215, 487 P.2d 866 (1971).

struck as *ultra vires* and discriminatory a city ordinance raising building permit fees from \$12 to \$112. The money was received and paid into the city's general fund, as also occurred in this case, not for the purpose of meeting increased costs of regulating building construction, but for the purpose of improving the city's water and sewer systems necessitated by the construction of new homes and for other general purposes. The Court observed that equal protection and due process principles are violated by an ordinance which undertakes to impose a greater burden of general government cost on one class of residents than upon others without reasonable basis for classification and held that an ordinance which imposed a greater burden on those who built within the city after the ordinance than before its enactment was constitutionally unacceptable. Chief Justice Crockett, writing for the Court, correctly stated:

The critical question here in whether the ordinance in its practical operation results in an unjust discrimination by imposing a greater burden of the cost of city government on one class of persons as compared to another, *without any proper basis for such differentiation and classification*. It is not to be doubted that each new residence has its effect in increasing the cost of city government; nor that due to the steadily increasing costs of everything, including those involved in rendering such services, the city would have authority to raise the fees charged for such services from time to time. Nevertheless, in that connection, the new residents are entitled to be treated equally and on the same basis as the old residents.³⁸ [Emphasis added.]

I am not unsympathetic to the needs of the cities in our State faced with dramatic expansion. I am constrained, however, to review their ordinances with sensitivity to both the constitutionally protected rights of property owners and the limiting nature of the statutory grants of power to those cities. And that sensitivity compels a view on my part that the Ordinance is invalid

and void because of the specific reasons noted in this opinion.

MAUGHAN, J., concurs in the views expressed in the dissenting opinion of WILKINS, J.



STATE of Utah, Plaintiff and
Respondent,

v.

Albert Banard LAMM and Roy Lee
Lamm, Defendants and Appellant.

No. 15888.

Supreme Court of Utah.

Jan. 16, 1980.

Defendants were convicted in the Third District Court, Salt Lake County, G. Hal Taylor, J., of theft by receiving, and they appealed. The Supreme Court, Hall, J., held that evidence was sufficient to establish each element of offense charged, which was based upon alleged concealing or aiding in concealment of stolen property.

Affirmed.

Maughan, J., dissented and filed opinion.

1. Criminal Law — 1159.2(7, 9), 1159.4(2)

It is exclusive function of jury to weigh evidence and to determine credibility of witnesses, and it is not within prerogative of Supreme Court to substitute its judgment for that of fact finder; Supreme Court should only interfere when evidence is so lacking and insubstantial that reasonable men could not possibly have reached verdict beyond reasonable doubt.

the public interest.⁵ To accomplish this the Commission is empowered by the Legislature to employ necessary personnel, including "experts" and "attorneys".⁶ By comparison, there is no statute which even establishes, much less defines, the nature or duties of the Division. The Division's existence is noted in the statutes⁷ but nowhere is the Division granted the right to litigate in its own name or otherwise, or, significantly, to appeal Orders of the Commission.

I believe that, absent express statutory authority granted by the Legislature, the Division of Public Utilities has no standing to appeal Orders of the Public Service Commission. Indeed, the implication of Section 13-1-1.3 is that the Division on behalf of the executive director of the Department of Business Regulation, is charged to execute "any rules, regulations or orders of the public service commission of Utah issued pursuant to its quasi-judicial or rule-making power". This Court should not allow the Division, and particularly in the absence of a definitive grant of authority by the Legislature, to assume the tension-filled role toward the Commission of both investigator-enforcer and adversary.



**John CALL and Clark Jenkins,
Plaintiffs and Appellants,**

v.

**CITY OF WEST JORDAN, Utah,
Defendant and Respondent.**

No. 15908 (Rehearing).

Supreme Court of Utah.

June 27, 1980.

Subdividers brought action to challenge validity of ordinance adopted by city which

required subdividers to dedicate 7% of proposed subdivision land to city or to pay equivalent of that value in cash to be used for flood control and/or park and recreation facilities. The Third District Court, Salt Lake County, David K. Winder, J., upheld ordinance, and subdividers appealed. The Supreme Court, 606 P.2d 217, affirmed and remanded. On rehearing, the Supreme Court, Wilkins, J., held that ordinance was not unconstitutional on its face, but could not be applied without subdividers being given the opportunity to present evidence to show that dedication required of them had no reasonable relationship to needs, if any, for flood control or parks and recreation facilities created by their subdivision.

Reversed and remanded.

1. Municipal Corporations ⇌ 122(2)

Once it is determined that municipal ordinance is within the scope of powers granted by the legislature, the ordinance is entitled to the presumption of constitutional validity accorded other legislation.

2. Zoning and Planning ⇌ 61, 134

Ordinance which required subdividers to dedicate 7% of proposed subdivision land, or pay equivalent of that value in cash, to be used for flood control and/or park and recreation facilities was not unconstitutional on its face, but could not be applied without subdividers being given the opportunity to present evidence to show that dedication required of them had no reasonable relationship to needs, if any, for flood control or parks and recreation facilities created by their subdivision.

3. Zoning and Planning ⇌ 234

If subdivision generates need for flood control or parks and recreation facilities and municipality exacts fee in lieu of dedi-

5. See, e. g., *United States Smelting, Refining and Milling Co. v. Utah Power & Light Co.*, 58 Utah 168, 197 P. 902 (1921); *Utah Light & Traction Co. v. Public Service Commission*, 101 Utah 99, 118 P.2d 683 (1941).

6. Section 54 1-6.

7. See footnote 2, *supra*.

eration of land for such purposes, fees so collected must be used in such a way as to benefit demonstrably the subdivision in question, though the benefit need not be solely to the particular subdivision

Robert J. DeBry and Valden P. Livingston, Salt Lake City, for plaintiffs and appellants.

Lynn W. Mitton, Sandy, for defendant and respondent.

WILKINS, Justice:

This matter is again before us following our granting of plaintiffs' petition for rehearing. The original majority opinion addressed primarily the issue of whether there was statutory authority for the City of West Jordan to pass an ordinance requiring a subdivider to dedicate land or pay a fee in lieu of dedication as a prerequisite to approval of the subdivision plat.¹ This issue was decided by the majority in the affirmative.² On rehearing this Court limited the scope of review to the issue of whether the ordinance in question is constitutional, and therefore we address only this matter now.

[1] Once it is determined that a municipal ordinance is within the scope of powers

1. The ordinance in question in pertinent part reads as follows:

Section 9 C 8(a) In addition to all the other requirements prescribed under this ordinance the subdivider shall be required to dedicate the seven per cent (7%) of the land area of the proposed subdivision to the public use for the benefit and use of the citizens of the City of West Jordan or in the alternative at the option of the governing body of the City, the City may accept the equivalent value of the land in cash if it deems advisable

2. *Call v. City of West Jordan*, Utah 606 P 2d 217 (1979). In *Call* the author of this opinion filed a dissenting opinion in which Justice Mughan concurred and which concluded that there was no statutory authority for the ordinance in question.

3. *Crestview-Holladay Homeowners Association, Inc. v. Engh Floral Company*, Utah 545

granted by the legislature—and the prior opinion of this Court indicated that the ordinance in question was—the ordinance is entitled to the presumption of constitutional validity accorded other legislation.³ In this case, the District Court ruled that the ordinance was constitutional and therefore granted West Jordan's motion to dismiss.

[2, 3] While we agree that the ordinance is not unconstitutional on its face,⁴ plaintiffs raise questions as to its constitutionality as applied to them which make disposition of this issue as a matter of law inappropriate. We stated in our prior opinion in this case that "the dedication should have some reasonable relationship to the need created by the subdivision."⁵ This same requirement has been articulated in the decisions of other jurisdictions addressing this issue. In *Jordan v. Village of Menomonee Falls*,⁶ the Court held:

We conclude that a required dedication of land for park or recreational sites as a condition for approval of the subdivision plat should be upheld as a valid exercise of police power if the evidence reasonably establishes that the municipality will be required to provide more land for parks and playgrounds as a result of approval of the subdivision.

P 2d 1150 (1976), 1 R. Anderson, American Law of Zoning 2d (1977), § 3.23

4. While brevity and succinctness in the drafting of legislation—as in judicial opinions—may be desirable and certainly is appreciated, the ordinance in question when compared with similar provisions from other jurisdictions evidences a paucity of stated purpose and standards of application that borders on rendering the ordinance unconstitutionally vague. See, e.g., the ordinances quoted in *Jordan v. Village of Menomonee Falls*, 28 Wis 2d 608, 137 N W 2d 442 (1965), *Associated Home Builders v. City of Walnut Creek*, 4 Cal 3d 633, 484 P 2d 606, 94 Cal Rptr 630 (1971), *Home Builders Association of Greater Kansas City v. City of Kansas City*, 555 S W 2d 832 (Mo 1977).

5. 606 P 2d at 220

6. 28 Wis 2d 608, 618, 137 N W 2d 442, 448 (1965)

Likewise in *Home Builders Association of Greater Kansas City v. City of Kansas City*,⁷ the Missouri Supreme Court held:

... if the burden cast upon the subdivider is *reasonably* attributable to his activity, then the requirement [of dedication or fees in lieu thereof] is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power. *Insofar as the establishment of a subdivision within a city increases the recreational needs of the city, then to that extent the cost of meeting that increase indeed may reasonably be required of the subdivider.* (Emphasis in original.)

In this case the rule adopted by this Court in *Call I*, quoted *ante*, cannot be applied without plaintiffs being given the opportunity to present evidence to show that the dedication required of them had no reasonable relationship to the needs for flood control or parks and recreation facilities created by their subdivision, if any. Implicit in this rule is the requirement that if the subdivision generates such needs and West Jordan exacts the fee in lieu of dedication, it is only fair that the fee so collected be used in such a way as to benefit demonstrably the subdivision in question. This is not to say that the benefit must be *solely* to the particular subdivision, but only that there be some demonstrable benefit to it.

Reversed and remanded for further proceedings not inconsistent with this opinion. No costs awarded.

CROCKETT, C. J., and MAUGHAN, HALL and STEWART, JJ., concur.



STATE of Utah, By and Through the DEPARTMENT OF COMMUNITY AFFAIRS, Plaintiff and Respondent,

v.

UTAH MERIT SYSTEM COUNCIL and William A. Callahan, Defendants and Appellant.

No. 16501.

Supreme Court of Utah.

July 3, 1980.

State sought review of a decision of the Merit System Council ordering the reemployment of an employee of the Department of Community Affairs. The Third District Court, Salt Lake County, G. Hal Taylor, J., reversed, and remanded to the Council to hold a new hearing. Employee appealed. The Supreme Court, Stewart, J., held that the exclusion of the director of the Department of Community Affairs from a portion of the administrative hearing because she was a witness in the proceeding was reversible error and the attendance by a deputy director, who directed another arm of the operation and lacked full knowledge of the case, was not sufficient to provide the Department with appropriate representation.

Affirmed.

1. Officers and Public Employees ⇌72(1)

Both parties to proceeding before Merit System Council were entitled to have testimony taken under oath or affirmation.

2. Officers and Public Employees ⇌72(2)

Failure to place witnesses before Merit System Council under oath was not reversibly erroneous where no objection was raised until State sought review of Council order in district court.

3. Officers and Public Employees ⇌72(2)

Omissions from record of proceeding before Merit System Council were not re-

7. 555 S.W.2d 832, 835 (Mo.1977).

**John CALL and Clark Jenkins,
Plaintiffs and Appellants,**

v.

**CITY OF WEST JORDAN, Utah,
Defendant and Respondent.**

No. 19186.

Supreme Court of Utah.

July 23, 1986.

Rehearing Denied Oct. 29, 1986.

Subdividers brought action to challenge validity of ordinance adopted by city which required subdividers to dedicate 7% of proposed subdivision land to city or to pay equivalent of that value in cash to be used for flood control and/or park and recreation facilities. The Third District Court, Salt Lake County, David K. Winder, J., upheld ordinance and subdividers appealed. The Supreme Court, 606 P.2d 217, affirmed and remanded. On rehearing, the Supreme Court, 614 P.2d 1257, upheld facial constitutionality of ordinance and remanded with instructions. On remand, the Third District Court, Salt Lake County, David B. Dee, J., entered judgment in favor of city and subdividers appealed. On appeal, the Supreme Court, Howe, J., held that city planning and zoning commission failed to comply with statutory requirements of public hearing prior to adoption of impact fee ordinance where advance notice to public was not provided, ordinance being considered had not yet been drafted, and public did not have opportunity to voice their views.

Remanded with instructions.

Stewart, J., dissented.

1. Appeal and Error ⇨1201(3)

District court did not abuse its discretion in allowing developers to amend complaint after remand, where issues in amended complaint were not specifically foreclosed by appellate court during prior review.

2. Zoning and Planning ⇨134, 135

City planning and zoning commission failed to comply with statutory requirements of public hearing prior to adoption of impact fee ordinance where advance notice of purpose of meeting was not provided to public, ordinance in issue had not yet been drafted, and public did not have opportunity to express their views; it was not sufficient that ordinance was adopted at regularly scheduled city council meeting. U.C. A.1953, 10-9-1 to 10-9-30.

3. Parties ⇨9, 11

District court did not abuse its discretion in denying class action status to developers challenging impact fee ordinance, where proposed class members were identifiable, where each claim would require individual consideration by court regardless of class status, and where there was no possibility that inconsistent judgments would be issued if individual claims were brought. Rules Civ.Proc., Rule 23.

Robert J. Debry, Salt Lake City, for plaintiffs and appellants.

Stephen G. Homer, West Jordan City Atty., West Jordan, for defendant and respondent.

HOWE, Justice:

Plaintiffs, John Call and Clark Jenkins, appeal from the trial court's dismissal of their complaint and the entry of judgment in favor of defendant, City of West Jordan.

In 1974, West Jordan formulated a plan to expand its flood control and public park systems to meet the increasing needs of the growing city. As part of its plan, West Jordan decided to impose an impact fee as a condition to granting plat approval to subdivision developers. The fee was seven percent of the land in the subdivision or, at the option of the city, the equivalent value in cash. West Jordan, Utah, Ordinance 33, § 9-C-8(2) (1975). Plaintiffs paid the fees under protest and later brought this action attacking the ordinance.

We have issued two previous opinions in this case. In our first opinion, *Call v. City of West Jordan*, 606 P.2d 217 (Utah 1979) (*Call I*), we held that U.C.A., 1953, §§ 10-9-1 to -30 empowered West Jordan to exact an impact fee to provide for flood control and parks as a condition to granting plat approval. On rehearing, in *Call v. City of West Jordan*, Utah, 614 P.2d 1257 (1980) (*Call II*), we upheld the facial constitutionality of the ordinance, but we remanded to give plaintiffs an "opportunity to present evidence to show that the dedication required of them had no reasonable relationship to the needs for flood control or parks and recreation facilities created by their subdivision, if any." *Id.* at 1259.

[1] On remand, the trial court allowed plaintiffs to amend their complaint to include a claim that the ordinance was invalid because West Jordan had not followed statutory requirements in enacting it. Although West Jordan does not cross-appeal the allowance of the amendment, it urges this Court to limit the case to the constitutional "reasonableness" issue. However, the pleadings may be amended after remand within the sound discretion of the trial court so long as they do not cover issues specifically foreclosed by the appellate court. *Street v. Fourth Judicial District Court, Utah County*, 113 Utah 60, 191 P.2d 153 (1948), Utah R.Civ.P. 15; see *White v. Lobdell*, 196 Mont. 156, 638 P.2d 1057 (1982); *Diversified Capitol Corp. v. City of North Las Vegas*, 95 Nev. 15, 590 P.2d 146 (1979). The trial court allowed West Jordan to argue why the pleadings should not be amended; but after consideration, allowed the amendment. Neither *Call I* nor *Call II* specifically addressed this issue, and we find no abuse of discretion in the trial court's allowing the amendment. Therefore, the issue of whether West Jordan had followed statutory requirements in enacting the ordinance was properly before the trial court.

Because of problems encountered by the plaintiffs in its discovery of information in the possession of West Jordan and because of our decision in *Banberry Development*

Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981), the trial court issued a pretrial order which placed on West Jordan the burden of producing evidence on several issues. These issues may be condensed into two main issues: (1) the reasonableness of the impact fee as applied to plaintiffs, and (2) whether the ordinance had been adopted according to statutory requirements.

It is necessary in this opinion to treat only the second issue. West Jordan was required at the threshold to present prima facie evidence that the city had followed the statutory requirements contained in U.C.A., 1953, §§ 10-9-1 to -30 in enacting the ordinance. Within section 25, the legislature has set forth specific procedures that a municipality must follow to exercise the powers granted to it:

In exercising the powers granted to it by the act, the planning commission shall prepare regulations governing the subdivision of land within the municipality. A public hearing thereon shall be held by the legislative body, after which the legislative body may adopt said regulations for the municipality.

The trial judge held in his conclusions of law that the ordinance was validly promulgated and that "[i]t was not shown by a preponderance of the evidence that the city failed to comply with the provisions of section 10-9-25, Utah Code Annotated, in the promulgation of the ordinance." This conclusion was supported by the court's finding of fact No. 22:

Prior to the adoption of the Ordinance, the governing body of the City conducted a public hearing in which an overall master plan for the development of the city was discussed. This hearing (held in August 1974) was conducted in the West Jordan school auditorium so as to accommodate the large number of citizens in attendance. The specific concept of flood control and having an impact fee paid by new developers was discussed at that public hearing. The Ordinance was prepared by the West Jordan Planning and Zoning Commission, even though the

City Attorney was responsible for the selection of the actual language used in the text of the Ordinance. The plaintiffs submitted no evidence to show that a public hearing was not held or that the Planning and Zoning Commission did not prepare the Ordinance.

We need not rule on the accuracy of this finding to resolve the issues presented in this case. Nevertheless, we are free to substitute our judgment for that of the trial court on the issue of law as to whether these facts satisfy the requirements of section 10-9-25. *Olwell v. Clark*, 658 P.2d 585 (Utah 1982), *Automotive Manufacturers Warehouse, Inc. v. Service Auto Parts, Inc.*, 596 P.2d 1033 (Utah 1979). As mentioned above, the pretrial order placed upon West Jordan the burden of making a prima facie showing that it had satisfied the requirements of section 10-9-25. We hold as a matter of law that it failed to carry this burden.

Some months prior to the August 1974 public hearing, the West Jordan Planning and Zoning Commission had discussed on numerous occasions the idea of requiring developers to dedicate a portion of their subdivision or to pay an equivalent value in cash for parks and flood control. In fact, on March 20, 1974, the Commission adopted a motion to have the city require five percent from subdividers to use for parks. A month later, after the Commission had exacted the five percent fee from at least one subdivider, the city planner told the Commission that the city had no legal basis to impose the fee. During this time, a special committee was preparing the West Jordan Master Plan. The master plan speaks only in general terms about the need for parks and recreational facilities. It also addresses in vague terms who should pay for capital improvements to the city, hinting that incoming residents should pay more than existing residents because "equity in community improvements are [sic] seldom fairly shared through taxation." Nothing in the master plan proposes that developers either dedicate seven percent of their subdivisions or the cash equivalent as a condition to receiving approval for their plats.

West Jordan asserts, however, that the "specific concept of flood control and having an impact fee paid by new developers was discussed" at the public hearing on the master plan. The minutes of the public hearing were not introduced as an exhibit, nor are they included in the record. However, one of the witnesses for West Jordan testified as to what was in the minutes:

[Mr. Moosman:] [T]he minutes reflect that Mrs. Schmidt asked [the city planner] concerning what was going on with the flood control problems. And perhaps I could read that. It would be quicker.

....

[The Court] ... Go ahead and read the pertinent parts. What does Mrs. Schmidt say?

A. [The witness:] She asked [the city planner] to tell what the County Flood Control had in mind for developers in the—

Q. Yeah. Go ahead.

A. [The city planner] then explained that each developer must take care of his own flood water that originates on his property. They have suggested catch basins that can be used both for flood control and recreational use....

It is to be observed that an impact fee was not mentioned. In January 1975, four months after the master plan public hearing, the city council enacted the ordinance which imposed the seven percent impact fee. No evidence of any other public hearing remotely related to the ordinance appears in the record.

[2] One's imagination must be stretched beyond rational limits to accept the master plan public hearing as satisfying the public hearing requirement of section 10-9-25. The ordinance was not even drafted until months after the master plan public hearing. Section 10-9-25 is very clear in this respect. The Commission must first prepare the regulations, one of which would provide for the impact fee. Then a public hearing thereon shall be held by the legislative body, after which the

legislative body may adopt said regulations for the municipality. In requiring a public hearing, our legislature contemplated that interested parties would have an opportunity to give their views, pro and con, regarding a specific legislative proposal, and thereby aid the municipal government in making its land use decisions. See generally 1 R. Anderson, *American Law of Zoning* § 4.11 (2d ed. 1976); 8A E. McQuillin, *The Law of Municipal Corporations* § 25.251 (rev. 3d ed., 1976).

West Jordan also argues that because the ordinance was adopted at a regularly scheduled city council meeting which was open to the public, the public hearing requirement was satisfied. Although the statute does not specifically address the required notice, we hold that because the statute calls for a *public hearing* our legislature contemplated something more than a regular city council meeting held, so far as the record here discloses, without specific advance notice to the public that the proposed ordinance would be considered. See 1 R. Anderson, *American Law of Zoning* § 4.11 (2d ed. 1976). Notice, to be effective, must alert the public to the nature and scope of the ordinance that is finally adopted. *Id.* at 200. Failure to strictly follow the statutory requirements in enacting the ordinance renders it invalid. *Melville v. Salt Lake County*, 536 P.2d 133 (Utah 1975); *Anderson* at 199. This well established rule is followed by the great majority of jurisdictions. Annot., 96 A.L.R.2d 449 (1964); see *Town of Beverly Shores Plan Commission v. Enright*, 463 N.E.2d 246 (Ind.1984) (statute required municipality to publish two notices in newspaper within ten days of hearing—ordinance invalidated where first notice appeared in newspaper eleven days before hearing); *Kalakowski v. Clarendon*, 139 Vt. 519, 431 A.2d 478 (1981); *Morland Development Co. v. Tulsa*, 596 P.2d 1255 (Okla.1979) (city ordinance establishing flood control districts invalidated because of failure to follow statutory requirements). We therefore hold that the West Jordan, Utah, Ordinance 33, § 9-C-8(2) (1975), is invalid and void ab initio.

One further matter must be addressed. Plaintiffs urge that we reverse the trial judge's findings denying class action status to this lawsuit. We will reverse a trial court's decision on class action status only when it is shown that the trial court misapplied the law or abused its discretion. *Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791 (10th Cir.1970); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* § 23.97 (2d ed. 1985); 2 H. Newberg, *Newberg on Class Actions* § 7.39 (2d ed. 1985). In the history of this lawsuit, plaintiffs requested class action certification on three different occasions from three different trial judges. All three denied their requests. Plaintiffs do not assert that the trial court misapplied the law in denying class action status. Thus, we shall review the trial court's decision to determine whether it abused its discretion.

[3] The trial court found that the "putative class is not so numerous that joinder of all parties is impracticable." Plaintiffs assert that the size of the class alone mandates that joinder is impracticable. However, size of the class is not solely determinative of impracticability. We acknowledge that there may be instances where sheer size alone would determine impracticability. One of the salutary effects of Rule 23, Utah R.Civ.P., is that it allows access to the courts for numerous claimants to request redress of claims that are too small to merit the expenses of litigation on an individual basis. 1 H. Newberg, *Newberg on Class Actions* § 3.03 n. 38, § 3.06 at 145 (2d ed. 1985). In other instances, the size and membership of the class may be unknown, which makes joinder impracticable. However, we are here dealing with a class whose members have been identified. They are developers engaged in business whose claims are not so insubstantial that joinder or individual suits would not merit the cost. It is unlikely that denial of class action status would preclude them from pursuing their remedies. See 1 *Newberg* at 145. Judicial economy would be little served because the amount of the claim of each class member

would still need to be determined on an individual basis, regardless of class action status. Because of our ruling on the merits of the case, there is no possibility of inconsistent judgments and no issue of substantial public interest remains. Given the facts of this case, we cannot hold that the trial court abused its discretion in denying class action status.

We remand this case to the trial court to enter judgment consistent with this opinion. Costs to plaintiffs.

HALL, C.J., and DURHAM and ZIMMERMAN, JJ., concur.

STEWART, J., dissents.



**Gustav E. CLAUS, Plaintiff
and Appellant,**

v.

**Marlise CLAUS, Defendant
and Respondent.**

No. 20021.

Supreme Court of Utah.

Aug. 1, 1986.

Divorce decree dividing marital property was entered by the Third District Court, Salt Lake County, James S. Sawaya, J., and husband appealed. The Supreme Court held that: (1) division of marital property was eminently fair; (2) making Internal Revenue Service obligation into husband's separate debt was not abuse of discretion; and (3) award of temporary alimony to wife was not abuse of discretion in view of her inability to earn income during parties' separation.

Affirmed.

1. Divorce \S 252.2, 253(4)

Division of marital property was eminently fair in awarding approximately equal equities despite court not finding values of parties' premarital assets and increase in those values after date of marriage.

2. Divorce \S 252.4

In dividing marital property, making Internal Revenue Service obligation separate debt of husband was not abuse of discretion in light of joint income tax returns disclosing that wife's income was minimal at best.

3. Divorce \S 215

Award of one year of temporary alimony in amount of \$350 per month was not abuse of discretion in view of wife's inability to maintain real estate license or manage parties' rental properties during separation due to pendency of divorce.

J. Richard Bell, Salt Lake City, for plaintiff and appellant.

George H. Searle, Salt Lake City, for defendant and respondent.

PER CURIAM:

In this divorce action, plaintiff appeals from that portion of the decree dealing with the distribution of the parties' marital estate and the award of temporary alimony to defendant. We affirm.

The parties were married four and one-half years before they separated. No children were born of the marriage. Both had been married before and had brought several pieces of real property into the marriage. The trial court awarded plaintiff all the assets of his two corporations, real property owned by those corporations, and a rental unit acquired by the parties during the marriage. Defendant was awarded the home she lived in at the time of the divorce, real property the parties had acquired with proceeds from her real property holdings, and property acquired by the parties under uniform real estate contracts. Plaintiff was ordered to pay to defendant \$350 a