

1988

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

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

STATE OF UTAH

JOHN CALL AND
CLARK JENKINS,

Plaintiffs/Appellants

vs.

CITY OF WEST JORDAN,

Defendant/Respondent.

Civil No. 880047CA

APPELLANT'S REPLY BRIEF

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JUN 30 1988

COURT OF APPEALS

STATE OF UTAH

Civil No. 880047CA

APPELLANT'S REPLY BRIEF

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SUMMARY OF ARGUMENT

POINT I:

An award of attorney fees would benefit Call, personally, because he has realized only 1/3 of his actual loss. An award of attorney fees would also benefit the attorney personally; however, the United States Supreme Court has permitted such claims under the common fund doctrine.

POINT II:

Call has asked to join additional parties under Rules 19 and 21. West Jordan's response is that the class certification was denied; therefore, there can be no joinder. That argument is not supported by any authority and is not taken in good faith.

POINT III:

Call claims that there was never any evidence that a public hearing was held. West Jordan does not marshall any evidence. Rather, West Jordan simply says that the lower court agreed. There is no good faith basis for West Jordan's curious argument.

POINT IV:

West Jordan's bad faith was not only exhibited in the trial court, the bad faith has continued in the processing of this appeal.

POINT V:

Contrary to Call's claims, the preliminary master's report criticizes West Jordan's accounting procedures. Furthermore, it made no economic sense for Call to invest \$18,400 on a final master's report in hopes of winning \$16,576.

POINT VI:

The Supreme Court mandated the trial court to ". . . enter judgment consistent with this opinion." The civil rights claim is "consistent with this opinion." Therefore, Call was entitled to a judgment on his civil rights claim.

POINT VII:

Call's civil rights claim was raised by the pleadings. However, it became moot when the trial court originally ruled that a public hearing had been held.

POINT I

THERE IS NOTHING EVIL ABOUT

AN ATTORNEY WHO WANTS TO BE PAID

West Jordan makes much of the fact that the attorney's fee issue will benefit Call's attorney personally. (Brief of Respondent, at p. 10, 17, 23.)

It is simply not true that an award of attorney fees will only benefit the attorney. The client (Call) has already paid his attorney's fee. If the Court awards attorney fees, the clients gets a refund; and the trial court was so advised. (September 11 Tr., at p. 3.) In this case, the judgment (before interest) was \$16,576. (R. 1977.) However, after attorney fees and costs, Call, personally, got only about one-third of that amount¹. (Compare R. 1854 and R. 1987.) It is no wonder that Call (personally) is interested in the attorney's fee award.

Of course, the attorney would also personally benefit from an award of attorney fees. In this case, Call's attorney earned substantially less than five dollars (\$5.00)

¹ Judgment before interest:	\$16,576.00
One-third contingent fee:	5,500.00
Accounting fees and Master fees:	<u>5,245.00</u>
Net:	\$ 5,831.00

per hour for his ten years of work². There is nothing wrong with an attorney who wants to be paid. The Supreme Court of the United States has called this the common fund doctrine.

The common fund doctrine operates when a lawyer creates, increases or preserves a fund, and other persons benefit from that fund³. In such a situation, the U.S. Supreme Court has held that a successful plaintiff can assert a claim for payment of legal expenses, including attorney fees, from the common fund. Trustees v. Greenough, 105 U.S. 527 (1881). See also, Central R.R. & Banking Co. v. Pettis, 113 U.S. 116 (1885); Sprague v. Ticonic National Bank, 307 U.S. 161 (1939).

²Call's attorney accepted the case on a contingent fee. (R. 1854). As such, the attorney accepted the risk of losing. However, the attorney did not accept the risk of West Jordan's bad faith which mushroomed the litigation.

³The common fund was created when the Utah Supreme Court declared that the 7% fees were held in trust. (Call I, at p. 320.) Because West Jordan illegally collected the fund (See Call III), the monies must now be returned to those who paid into the fund. (See cases collected at Brief of Appellant, at p. 24.) The trouble is that, except for Call personally, West Jordan hasn't refunded a dime to anyone. Nor is it likely that other subdividers even know of their rights. Therefore, the necessity to add parties under Rules 19 and 21. (See Point II below.)

The traditional common fund model was first set forth in Trustees v. Greenough, supra. In that case, Florida had transferred millions of acres of state land to certain trustees. The plaintiff alleged dissipation of the assets of the trust. The plaintiff also alleged a collusive sale of hundreds of thousands of acres land. The plaintiff prevailed. In awarding attorney's fees, the Court stated:

It would be very hard on the plaintiff to turn him away without any allowance except the paltry sum which could be taxed under the fee bill. It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution.

Greenough, at 532.

Four years later, Greenough was expanded in Central R.R. & Banking Co. v. Pettis, supra. The original action was a complaint brought in an Alabama state court to reach the assets of the debtor, a railroad. The original action had been framed as a class action. After successfully reaching the assets of the railroad, the attorneys for the plaintiff petitioned for fees directly from the fund. The Supreme

Court held in favor of the attorneys. The court first held that the lawyers had standing to claim a fee directly from the fund.

When an allowance to the complainant (out of the common fund) is proper on account of solicitor's fees, it may be made directly by the solicitors themselves without any application by their immediate client.

Id. at 124-25.

Next, the court concluded that the attorneys were entitled to attorney fees.

The creditors who are entitled to the benefit of the decree had only to await its execution in order to receive the full amount of their claims; and that result was due to the skill and diligence of the attorneys, so far as a result of the litigation can, in any case, be referred to the labors of counsel. . . [accordingly, counsel were] entitled to reasonable compensation for their professional services in establishing a lien, on behalf of the unsecured creditors.

Id. at 126-27.

The third case, which establishes the basic principles of the common fund doctrine is Sprague v. Ticonic Natl. Bank, supra, an opinion by Justice Frankfurter. In Sprague, the plaintiff established a trust with the defendant bank. The bank secured the trust with certain bonds. The security for the bonds was in dispute. Sprague brought a

successful suit to establish her own right, (as one of the beneficiaries) to share in the proceeds of the bonds. Having established her own right to share in the bond proceeds, Sprague petitioned for reimbursement of her counsel fees to be paid from the fund. Unlike Greenough and Pettis, Sprague had only indirectly established the rights of others when she obtained a decree for her own individual relief:

When such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation--the absence of an avowed class suit or the creation of a fund, as it were, through stare decisis rather than through a decree--hardly touch the power or equity in doing justice as between a party and the beneficiaries of his litigation.

Id. at 166.

Every federal court and, virtually, every state court⁴ follows the "common fund" line of reasoning in awarding attorney's fees. See e.g., Robison v. Katz, 717 P.2d 586 (N.M. 1986); Guild, Hagen & Clark, Ltd. v. First National Bank of Nevada, 600 P.2d 238 (Nev. 1979); Moses v.

⁴The common fund doctrine has never been adopted or rejected in Utah. The issue has simply not come up. See Turtle Management, Inc. v. Haggis Mgt., 645 P.2d 667, 671 n.1 (Utah 1982). However, it seems likely that our Supreme Court will follow the lead of the United States Supreme Court on that issue. See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 257-260 (1975).

McGarvey, 614 P.2d 1363 (Ak. 1980); Means v. Montana Power Co., 625 P.2d 32 (Mon. 1981).

In summary, Call (personally) has every right to press for attorney fees and joinder of other parties. Call's attorney (personally) also has every right to press for attorney fees and joinder.

POINT II

WEST JORDAN HAS MADE NO GOOD FAITH ARGUMENT ON THE JOINDER ISSUE

Call argued that the trial court should have joined additional parties. (Brief of Appellant, at p. 23)⁵. In response, West Jordan makes a curious argument. West Jordan says there can be no joinder because the Supreme Court denied class certification. (Brief of Respondent, at p. 22.)

West Jordan completely ignored cases cited by Call in which joinder was triggered after class certification was denied. Mathies v. Seymour, 270 F.2d 365 (2d Cir. 1959); Stevens v. Loomis, 334 F.2d 775, 778 n.9 (1st Cir. 1964).

⁵Rule 21, Utah Rules of Civil Procedure, states:

Parties may be dropped or added by order of the court on motion of any party or on its own initiative at any time.
(Emphasis added.)

See also, Reichenberg v. Nelson, 310 F.Supp. 248 (D. Neb. 1970); and Harris v. Palm Springs Alpine Estates, 329 F.2d 909 (9th Cir. 1964)(dictum).

Likewise, West Jordan completely ignored binding precedent from the Utah Supreme Court which requires joinder of necessary parties at the latest possible stage of the litigation. Hiltsey v. Ryder, 738 P.2d 1024 (Utah 1987).

Furthermore, West Jordan completely ignored the fact that our Supreme Court declared, in this very case, that West Jordan is holding the money of all developers in trust (Call I, at p. 320). Finally, West Jordan has ignored the absolute legal duty of a trustee to disgorge the trust funds if the trust fails. (See cases collected at Brief of Appellant, p. 24.)

There is simply no good faith basis for West Jordan's argument that adding parties (Rules 19 and 21) is somehow the same as a class action (Rule 23). The relationship between Rules 19, 21 and 23 is described as follows:

Interpleader, intervention, and use of the class actions are several methods of permissive joinder of parties, but each has its own distinctive properties. . .

The rules regarding class actions and permissive joinder are similar in that before joinder or a class action is proper, there must be common questions of law or fact. The rules differ, of

course, in that a finite number of persons are joined under F.R.C.P. 20, while a class action is maintainable only if the class is so numerous that joinder of all members of the class is impracticable.

A named plaintiff in a purported class action may move for the joinder under F.R.C.P. 20 of additional named plaintiffs who would otherwise be potential class members, however, such representation is not necessary if class certification is granted, and may not be permitted if it is prejudicial. Alternatively, if class certification is denied, joinder of parties under F.R.C.P. 20 may still be available. . . (Emphasis added.)

26 Fed Proc., L.Ed. §59.148.

There is no showing on this record that other developers even know about this case (or their right to a refund). Thus, they cannot file their own lawsuits. If the developers are not joined under Rules 19 and 21, West Jordan will keep its ill-gotten gains because of the sheer luck that the other developers don't know they were cheated.⁶

⁶In legal terms, West Jordan's position is that a trustee has no duty to disgorge the corpus of an illegal trust so long as the settlors of the trust don't learn of the illegality and make separate and independent claims.

POINT III

WEST JORDAN HAS NOT CITED A
SINGLE IOTA OF EVIDENCE TO SHOW A
GOOD FAITH BASIS FOR THE UNDERLYING LITIGATION

Call claims that West Jordan did not have a good faith basis for its claims that a public hearing had been held. (See Brief of Appellant, at p. 19.) It would have been helpful if West Jordan's Brief had cited the evidence upon which it relied to form its good faith belief. However, West Jordan has not cited one iota of evidence to show its basis for any good faith belief. Thus, this court is left in the dark as to exactly what West Jordan's good faith basis might have been.

Federal court's regularly demand some factual showing that a party has made some good faith investigation. See e.g., Thomas v. Capital Security Services, Inc., 836 F.2d 866, 875 (5th Cir. 1988)⁷. If counsel for West Jordan had done any minimal fact investigation, he would have discovered that no public hearing had ever been held. In Florida Monument Builders v. All Faith's Memorial Gardens, 605 F.Supp. 1324, 1326 (S.D. Fla. 1984), sanctions were imposed where counsel, among other things, failed to examine

⁷Thomas also holds that the trial court must award sanctions once a violation of Rule 11 is found.

pertinent public records available in the State Capitol. Cf. Fuji Photo Film U.S.A., Inc. v. Aero Mayflower Transit Co., 112 F.R.D. 664, 668 (S.D. N.Y. 1986)(counsel failed to check state records to see if potential defendant was a corporation).

Rather than presenting a factual basis to support its good faith, West Jordan has relied upon pure legal argument. West Jordan claims that there can be no bad faith because West Jordan won in the trial court (Brief of Respondent, at p. 19-20)⁸. West Jordan cites no authority for that novel argument. On the contrary, there are numerous cases which hold that an appellate court can reverse a trial court on a Rule 11 issue. See e.g., Thomas v. Capital Security Services, Inc., supra; Eastway Const. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985); Westmoreland v. C.B.S., 770 F.2d 1168 (D.C. Cir. 1985).

⁸Specifically, West Jordan says:

In any event, the finding of the trial court (Judge Dee) that a public hearing had been held vitiates any and all claims that the defendant's defense was asserted or maintained in bad faith."

(Brief of Respondent, at p. 20.)

Indeed, if the trial court denies sanctions without any justification in the record, the appellate court should make a rigorous review. Thomas v. Capitol Security Services, Inc., supra. at p. 883.

It is true that Judge Dee sided with West Jordan at trial. However, Judge Dee's vote does not necessarily mean that West Jordan acted in good faith. Rather, the opposite is equally possible. Perhaps, West Jordan's bad faith was so successful that Judge Dee was fooled.

It is for that reason that many Federal courts review Rule 11 issues on a de novo basis. See Hudson v. Moore Business Forms, Inc., 827 F.2d 450, 452-453 (9th Cir. 1987). Other courts adopt a three-tier approach: The findings of fact supporting the trial court's decision are reviewed under the clearly erroneous standard⁹; the legal conclusion that the facts constitute a Rule 11 violation are reviewed de novo; and, the amount and type of sanctions are reviewed under the abuse of discretion standard. Zalvidar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986); Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987);

⁹Here the trial court made no findings. It merely denied the motion. Cf. Thomas v. Capital Security Savings, supra., at p. 882-883.

Eastway Construction Corp. v. City of New York, 762 F.2d 243, 254n.7 (2d Cir. 1985); Westmoreland v. C.B.S., supra.

This has been an enormously complex, expensive, and protracted litigation. However, at bottom lies a simple fact issue. Did West Jordan hold the required public hearing? The answer is that there was never anything remotely akin to a public hearing. If West Jordan had admitted that simple fact, Call could have saved years of time and substantial attorney fees. West Jordan should now pay for its bad faith.

POINT IV

WEST JORDAN'S BAD FAITH CONTINUES

Call claims that West Jordan delayed this case for several years by its frivolous claim that a public hearing had been held¹⁰. (See Point III, above.) However, the bad faith continues throughout the post-trial motions and this appeal.

¹⁰Actually, West Jordan switched its position on the "public hearing" at trial. During all of the discovery, West Jordan had relied on a meeting of January 21, 1975. At trial, West Jordan suddenly switched its position and relied on the August 27, 1974 Master Plan meeting. The last second switch in strategy violated a prior court order, and is further evidence of West Jordan's pattern of bad faith. (R. 1179, 1851-1853.)

First, during the post-remand motions, Call moved for a judgment on the civil rights claim. See Point I, above. During the briefing on that issue, West Jordan relied on the doctrine of "qualified immunity." West Jordan relied on the case of Monell v. Dept. of Social Services, 436 U.S. 659 (1978). However, Call has demonstrated that West Jordan's reliance on the doctrine of "qualified immunity" is totally frivolous. (See Exhibit A.)

Second, in the briefing of this appeal, West Jordan again dug up the case of Monnell v. Dept. of Social Services, supra. This time, West Jordan argued that Monnell can not be applied retroactively. (Brief of Respondent, at p. 16.) West Jordan's retroactivity argument is also totally frivolous. See Tosti v. City of Los Angeles, 754 F.2d 1485 (9th Cir. 1984).

Third, in this appeal, West Jordan argued that adding parties (Rules 19 and 21, Utah Rules of Civil Procedure) is the same thing as class certification (Rule 23, Utah Rules of Civil Procedure). (See Point II above.) The argument is totally frivolous. West Jordan cited absolutely no authority--and, indeed, no reasoning to support the novel argument.

Fourth, in this appeal, West Jordan argued that an appellate court cannot overrule a trial court judge on issues of bad faith. (See Point III, above.) Again, West Jordan cited no authority and no reasoning to support the novel argument.

Fifth, throughout its brief, West Jordan set forth a highly biased and highly distorted procedural history. However, West Jordan failed to make a single citation to the record! See Rule 24(e), Rules of the Utah Court of Appeals. For example, West Jordan continually argues that it never presented its case-in-chief at trial. (See Brief of Respondent at p. 6, 14, 19.) That is simply incorrect. In Call III, at p. 181, the Supreme Court stated:

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 upon West Jordan the burden of producing evidence on several issues. . . .

(Compare Exhibit B.) The Supreme Court also issued a writ of mandamus prohibiting the trial court from reopening West Jordan's case-in-chief. (See Exhibit C). For West Jordan to

continue, to this very day, to claim that it was prevented from presenting evidence is egregious bad faith.

Sixth, in this appeal, West Jordan argues (without citation to the record) that it was unfairly prevented from arguing that Call had not paid the 7% fee under protest. (Brief of Resp. at p. 14.) Again, this is a totally frivolous argument because Call was not required to pay under protest. See Cox v. Utah Mtg. & Loan, 716 P.2d 783 (Utah 1986). Moreover, our Supreme Court ruled that the 7% fee is not a tax. (Call I, at p. 220-221.) Therefore, no protest was necessary. See §59-2-1411, Utah Code Ann. Nor, was this issue ever preserved in the pleadings. (See R. 344-346.) In any case, since the Utah Supreme Court ordered that judgment be entered in favor of Call, it is far too late for West Jordan to raise the issue of payment under protest.

Seventh, in this appeal, West Jordan argues (without any citation to the record) that the Master was only required because Call's counsel "continued to 'play dumb' by claiming the records of the City were unintelligible to him" (Brief of Resp. at p. 20). There was no good faith basis for that argument. On this issue, the Master has stated:

Since this information is not provided in the existing accounting records, it will have to come from other records and, again, from the help of a trained

engineer. It is also possible that such information may not be available at all for some transactions, therefore, the analysis would be impossible.

(Exhibit D at p. 7.)

POINT V

WEST JORDAN MISREPRESENTED THE MASTER'S REPORT

Call asked for a refund of master fees and accounting fees. Brief of Appellant, at p. 27¹¹. West Jordan replied that Call had waived the final master's report (Brief of Respondent, at p. 21.) West Jordan does not explain why or how such a waiver should make any difference as to who should pay costs.

The master's report is included at Exhibit D. As the court will see, the cost of the final report would have been \$12,400 to \$18,900. (Exhibit D, at p. 10.) The potential recovery was only \$16,576 (Call I, at p. 221). It would make little sense for Call to risk \$18,900 in addition to attorney fees for a chance to win \$16,576. Thus, Call had no practical alternative. He had to waive the expensive final report. However, the preliminary report of the master

¹¹The verified Memorandum of Costs is at R.1978 and 1994.

was used in both the trial and on appeal (R. 1231-1232 and Brief of Appellant, Utah Supreme Court, Case No. 19186.) Thus, the final master's report was not needed. The preliminary master's report was all the ammunition Call needed.

West Jordan also claims (without any citation to the record) that, "The master found nothing wrong with the City's records." (Brief of Respondent, at p. 21.) In fact, the master criticized West Jordan's records as being in violation of the Uniform Municipal Fiscal Procedures Act. (Section 10-10-29, Utah Code Ann.) (See Exhibit D, at p. 7 and 8.) If the records had been kept in the proper fashion, the cost of the final master's report would have been 10 to 20% less (Exhibit D, at p. 11.)

West Jordan also argues that, "the plaintiff lost on the master type issues." It is true that the trial court ruled against Call on those issues. However, Call appealed. On appeal, the supreme court did not reach the accounting issues. (Call III, at p. 181.) This court is welcome to review the briefs in Call III, de novo. Such a review would reveal that Call would have easily won the accounting issues if the supreme court had reached those issues.

However, there is an easier way to reach the same result. The master's fees and the accounting fees were necessary to pursue an alternative theory of recovery.¹² However, that alternative theory should not have been necessary. If West Jordan had, in good faith, admitted that no public hearing had been held; Call would not have needed to pursue that alternate theory with its associated accounting costs. Judgment should have been entered years ago on the simple basis that no public hearing was held. (See Point III, above.) Thus, the master's fees and the accounting fees should be allowed under Rule 11 U.R.C.P. if not under Rule 54(d), (See Point III, above.)

¹²The first theory of recovery was simply that no public hearing had been held. Therefore, West Jordan lacked power to exact the fee. (See Call III, at p. 181.) No master or accountant was necessary to present this first theory.

The second theory of recovery was that the 7% taken from Call had no reasonable relationship to the flood control and recreation needs created by the new subdivision. (See Call II.) This theory involved substantial accounting testimony.

The theories are overlapping. That is to say Call need prevail on either (but not both) of the alternative theories to win the case. Call III found in Call's favor on the first theory (no public hearing). Therefore, the Supreme Court had no reason to rule on the second theory (no reasonable relationship).

POINT VI

CALL'S CIVIL RIGHTS CLAIM IS
WITHIN THE SCOPE OF THE SUPREME COURT'S MANDATE

Call's opening brief argued that the trial court should have entered judgment on the civil rights claim. (Brief of Appellant, at p. 9-15.) In reply, West Jordan cited numerous authorities for the proposition that the trial court must strictly follow the mandate of the Supreme Court. (Brief of Respondent, at p. 8-14.)

Call agrees. The trial court has no power to change or vary the mandate of the Supreme Court. The mandate of the Supreme Court is, ". . .to enter judgment consistent with this opinion." Call III at p. 184. Thus, the question is what judgment or judgments are "consistent with this opinion."

It is immediately apparent that the decision in Call III only decided a single fact issue! The single fact issue decided in Call III was that no public hearing was held in connection with City Ordinance No. 33, §9-C-8(2). Therefore, the mandate of the Supreme Court is to ". . .enter judgment consistent with [the fact that no public hearing was held]."

The trial court granted a judgment refunding the monies paid (R. 1976-1977). However, there was absolutely no basis for the trial court to single out one particular remedy (viz. a refund) while excluding other remedies (viz. civil rights).

Call's civil rights claim was raised by the pleadings (R. 331, at para. 38). Furthermore, the Supreme Court's fact finding (viz. that no public hearing had been held) is consistent with Call's civil rights claim. (See Brief of Appellant, at p. 9-15.) Since the civil rights claim is "consistent with this opinion," the trial court should have entered a judgment granting relief under the civil rights claim.

The case of Costa v. Sunn, 697 P.2d 43 (Haw. App. 1985) is squarely on point. In the first appeal¹³, the Hawaii Supreme Court declared that certain state welfare rules were invalid because no public hearing was held. (Just as in Call III.) The Hawaii Supreme Court remanded with instructions, ". . .for entry of a judgment consistent with this opinion." (Just as in Call III.) Upon remand, the trial court entered a judgment that the new welfare rules

¹³Costa v. Sunn, 642 P.2d 530 (Haw. 1982).

were invalid. (Just as in Call III.) However, the trial court went further. The trial court reinstated the old welfare rules and ordered retroactive benefits to be paid pursuant to the old rules. The State appealed. On the second appeal, the State argued that the trial court had no power under the mandate (viz. "to enter judgment consistent with this opinion") to award affirmative relief for money damages. The appellate court easily disposed of the argument by stating: "DSSH's argument that the action of the circuit court is not authorized by the remand is without merit." Costa, supra at p. 47 n. 8.

In summary, the mandate was, ". . .to enter judgment consistent with the opinion." (Call III at p. 184.) Since the civil rights claim is ". . .consistent with this opinion," the trial court had no discretion. The trial court was bound to enter judgment on the civil rights claim.

POINT VII

CALL DID NOT WAIVE HIS CIVIL RIGHTS CLAIM

West Jordan argues that Call's civil rights claim was waived¹⁴. Specifically, West Jordan says that the civil

¹⁴Apparently, West Jordan concedes that a civil rights violation occurred. West Jordan's only response is the procedural defense of waiver; and the argument on retroactivity. (See p. 13 and 19 above.)

rights claim was not argued to the trial court or to the Supreme Court. (Respondent's Brief, at p. 15.)

The only specific fact necessary to support the civil rights claim was that no public hearing was held. (See Brief of Appellant, at p. 10-15.) West Jordan had the burden of proof to establish the fact that a public hearing had, in fact, been held (Exhibit B at para. 2D). The trial court ruled that West Jordan sustained the burden: or in other words, the trial court ruled that a public hearing had been held. (R. 1496, at para. 22.)

Because of the trial court's fact finding (viz. that a public hearing had been held) legal argument on the civil rights claim was moot. It was only when the Supreme Court reversed the trial court's fact finding (viz. that no public hearing was held) that the civil rights issue became ripe for further consideration.

Costa v. Sunn, supra is again on point. In Costa, there was no argument in the first trial or on the first appeal that the state should grant money damages under the old welfare rules. The only issue in the first trial and first appeal was that the new welfare rules should be

nullified. However, after the Hawaii Supreme Court nullified the new welfare rules, the trial court went further to grant all legal relief (viz. money damages) which logically flowed from that finding. On appeal, the State argued that the mandate of the Supreme Court did not permit the new issues. The appellate court easily affirmed the lower court's action.

CONCLUSION

This case should be remanded with instructions for the trial court to:

1. Assess bad faith damages against West Jordan.
2. Join all other developers who paid 7% into the illegal fund.
3. Enter a judgment on Call's civil rights claim.
4. Increase the costs allowed to Call to allow for the master's report and the accounting fees.

DATED this 30 day of June, 1988.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff

By Robert J. Debry
ROBERT J. DEBRY

MAILING CERTIFICATE

I certify that on the 30 day of June,
1988, a true and correct copy of the foregoing APPELLANTS'
REPLY BRIEF, was mailed, postage prepaid, by depositing a
copy of the same in the U.S. mail, to the following:

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



/ek/jc

EXHIBIT A

FILED IN CLERKS OFFICE
SALT LAKE COUNTY, UTAH

SEP 30 9 11 AM '87

H/D. L. CLERK
BY Richard Jenkins
DEPUTY CLERK

ROBERT J. DEBRY - A0849
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiffs
4001 South 700 East, Fifth Floor
Salt Lake City, Utah 84107
Telephone: (801) 262-8915

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOHN CALL AND
CLARK JENKINS,

Plaintiffs,

vs.

CITY OF WEST JORDAN,

Defendant.

AFFIDAVIT OF ROBERT J.
DEBRY IN SUPPORT OF
ATTORNEY FEES FOR BAD
FAITH RELIANCE ON
QUALIFIED IMMUNITY

Civil No. C78-829

JUDGE PAT BRIAN

STATE OF UTAH

COUNTY OF SALT LAKE

)
:
ss.
)

My name is Robert J. DeBry. I give the following
testimony under oath.

1. I am the attorney for plaintiffs in this
action.

2. On or about September 9, 1987, defendant
filed its Memorandum in Opposition to Plaintiffs' Motion for
Summary Judgment.

3. As a part of that memorandum, defendant argued
that the City of West Jordan was entitled to "qualified
immunity." Defendant relied on the case of Monell v. Dept.
of Social Services, . 436 U.S. 659 (1978).

4. The evening before the hearing, I had retired to bed early, and I was reviewing the briefs in preparation for the hearing the next morning. When I came upon the argument regarding "qualified immunity," I realized that I was on unfamiliar terrain. Therefore, I got out of bed and went to the Law School Library.

5. I found that Monell is a very lengthy opinion which doesn't discuss "qualified immunity" at all. However, I was concerned that I may miss something, so I shepardized Monell. That review led me to Owen v. City of Independence, 445 U.S. 621, 100 S.Ct. 1398, 63 L.Ed.2d 673.

Owen does discuss the doctrine of "qualified immunity" as that relates to a municipality. However, Owen holds squarely that municipalities do not have such immunity. At 100 S.Ct. 1415, the Court holds:

In sum, we can discern no "tradition so well grounded in history and reason" that would warrant the conclusion that in enacting 1 of the Civil Rights Act, the 42d Congress sub silentio extended to municipalities a qualified immunity based on the good faith of their officers. Absent any clearer indication that Congress intended so to limit the reach of a statute expressly designed to provide a "broad remedy for violations of federally protected civil rights," Monell v. New York City Dept. of Social Services, 436 U.S., at 685, 98 S.Ct. at 2033, we are unwilling to suppose that injuries occasioned by a municipality's unconstitutional conduct were not also meant to be fully redressable through its sweep.

6. During the course of argument, West Jordan's attorney stated:

. . .I am not going to pat myself on the back, but I am [familiar] with these things because cities somehow are being sued under civil rights, so I, as City Attorney have to pay attention to these things. . .

7. Virtually all cases in our office are done on a contingent fee, thus I have no established hourly fee. However, it is my observation that senior experienced litigators in this community are paid \$100-150 per hour.

8. I have spent five hours (including three hours library time) in preparing and arguing this motion.

DATED this 28 day of Sept, 1987.

Robert J. DeBry
ROBERT J. DEBRY

SUBSCRIBED AND SWORN TO BEFORE me this 28 day of Sept, 1987.

Linda L. Korb
NOTARY PUBLIC
Residing at:
Salt Lake

My commission expires:

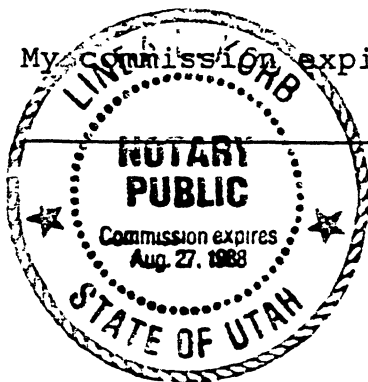


EXHIBIT B

ROBERT J. DEBRY & ASSOCIATES
Attorney for Plaintiff
965 East 4800 South #2
Salt Lake City, Utah 84117
Telephone: (801) 262-8915

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOHN CALL and CLARK JENKINS)	A M E N D E D
Plaintiffs,)	O R D E R
vs.)	Civil No. C-78-829
)	
CITY OF WEST JORDAN, UTAH,)	
Defendant.)	

Plaintiffs' Renewed Motion for Sanctions (July 29, 1982) was heard on August 6, 1982. Plaintiffs were represented by Robert J. DeBry. Defendant was represented by Stephen Homer. After considering the arguments of counsel, it is hereby ordered that:

1. The trial is hereby bifurcated into two phases.
2. At the first phase, defendant shall have the burden of producing evidence on the following issues:

A. Defendant to provide an accounting of the trust funds paid to defendant in the form of a 7% subdivider's fee. The accounting should, inter alia, specify how defendant has spent the 7% subdivision fees paid by plaintiffs. The accounting shall also compare how defendant has spent the 7% fees received from the other subdivisions listed in Defendant's Response to Discovery dated May 26, 1982, Call v. City of West Jordan, 606 P.2d 217, 220 (Ut. 1979).

B. Defendant to disclose the calculations upon which it relies to assure that the 7% fees are within the standard of reasonableness. This shall, inter alia, include the data upon which defendant relies to show that 7% (as opposed to 10% or some other amount) is a reasonable amount. This shall further include the data upon which defendant relies to show that the newly

developed properties bear their equitable share of costs in relation to benefits conferred. Banberry Dev. Corp. v. South Jordan City, 631 P.2d 889, 904 (Ut. 1981).

C. Whether the 7% subdivision fee was in practice used as a reasonable charge for a specific purpose, or whether it was in practice used as a general fee that amounts to a revenue measure. Lafferty v. Payson City, 642 P.2d 376, 378 (Ut. 1982).

D. Whether Section 9-C-8(2) of West Jordan City Ordinance 33 was prepared by the Planning and Zoning Commission, and whether a public hearing was held prior to promulgating the ordinance. Call v. City of West Jordan, 606 P.2d 217, 219 (Ut. 1979).

3. Plaintiffs may reserve all cross-examination on the foregoing issues until the second phase of the trial.

4. After defendant has introduced its evidence, the trial shall be recessed for a period convenient to the Court, but no less than thirty (30) days. After the Court resumes session, plaintiffs may conduct their cross-examination of defendant's witnesses.

5. After plaintiffs have conducted their cross-examination and after allowing for appropriate re-direct and re-cross examination, plaintiffs shall proceed to put on their case-in-chief.

6. This second phase of the trial shall include the theories listed below. Plaintiffs shall have the burden of proof with respect to each matter listed below:

A. Whether the 7% fee required of plaintiffs had any reasonable relationship to the needs for flood control, parks, and recreation facilities created by their subdivision. Call v. City of West Jordan, 614 P.2d 1257, 1259 (Ut. 1979); Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899, 903 (Ut. 1981).

B. Whether the 7% fee has required the newly developed properties to bear more than their equitable share of capital costs in relation to the benefits conferred. Banberry Dev. Corp. v. South Jordan City, 631 P.2d 903 (Ut. 1981).

C. Whether defendant should pay attorney fees as a sanction for failure to make discovery and, if so, in what amount.

D. All other theories raised by the pleadings.

7. Plaintiffs have waived their demand for a jury trial. Plaintiffs further contend that a jury trial is not guaranteed by the constitution (Utah or United States) for issues raised in this trial. Defendant demands a jury trial. Request for jury trial is denied for the reason that the principal issue to be determined in this case is whether Section 9-C-8(2) of West Jordan City Ordinance 33 is constitutionally valid. This involves a law determination primarily.

DATED this _____ day of August, 1982.

BY THE COURT:

Honorable Kenneth Rigttrup

CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand delivered a true and correct copy of the foregoing AMENDED ORDER to:

STEPHEN HOMER
1850 West 7800 South
West Jordan City, Utah 84084

on this _____ day of August, 1982.

EXHIBIT C

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

April 6, 1987

OFFICE OF THE CLERK

Robert J. DeBry
ROBERT J. DEBRY & ASSOCIATES
4001 South 700 East, Fifth Floor
Salt Lake City, UT 84107

John Call and Clark Petition for Writ of Mandamus
Jenkins,
 Plaintiffs and Appellants

v. No. 870098

Honorable David B. Dee and
Any Successory Judges of the
Third District Court,
 Defendants and Respondents.

THIS DAY, Petition for Writ of Mandamus is granted and writ
shall issue.

Geoffrey J. Butler, Clerk

ROBERT J. DEBRY - A0849
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiffs-Appellants
4001 South 700 East, Fifth Floor
Salt Lake City, Utah 84107
Telephone: (801) 262-8915

IN THE UTAH SUPREME COURT

JOHN CALL and CLARK
JENKINS,

Plaintiffs-
Appellants,

vs.

HONORABLE DAVID B. DEE
and ANY SUCCESSOR JUDGES
OF THE THIRD DISTRICT COURT,

Defendants-
Respondents.

MEMORANDUM IN SUPPORT
OF PETITION FOR
WRIT OF MANDAMUS

Case No. 870098

FACTS

Plaintiffs are real estate developers. Plaintiffs subdivided property in the City of West Jordan. West Jordan imposed a 7% fee as a condition for approval of the subdivision. Plaintiffs challenged the 7% on constitutional and other other grounds.

PROCEDURAL HISTORY

This case has been before this Court on three prior occasions: Call v. City of West Jordan, 606 P.2d 217 (Ut. 1979) (Call I); Call v. City of West Jordan, 614 P.2d

FILE COPY

1257 (Ut. 1980) (Call II); and, Call v. City of West Jordan, 727 P.2d 180 (Ut. 1986) (Call III).

In the final pretrial skirmishing (prior to Call III), Judge Rigtrup¹ reversed the normal burden of producing evidence.² (Exhibit B.) Specifically, the court ruled:

The trial is hereby bifurcated into two phases. At the first phase, defendant shall have the burden of producing evidence on the following issues:

* * * *

Whether Section 9-6-8(2) of West Jordan City Ordinance 33 was prepared by the Planning and Zoning Commission, and whether a public hearing was held prior to promulgating the ordinance.

(Exhibit B at paragraphs 1 and 2(d).)

This Court approved of that ruling:

As mentioned above, the pretrial order placed upon West Jordan the burden of making a prima facie showing that it has satisfied the requirements of Section 10-9-25. We hold as a matter of law that it failed to carry this burden.

727 P.2d at 182.

Thereafter, West Jordan filed a Petition for Rehearing in this Court. The petition argues, in part, that:

The testimony presented by the defendant concerning the public hearing was merely in compliance with the Court's pretrial order. That evidence was not neces-

¹Eventually, Judge Dee presided at the trial.

²This was imposed as a discovery sanction.

sarily a complete presentation of the defendant's case. . .the City should have the opportunity to make a complete showing of the public hearing. (Emphasis from original.)

The petition for rehearing was denied and the case was remitted to the Third Judicial District Court.

In the Third Judicial District Court, West Jordan filed a Motion to Allow Amendment to Pleadings and/or Reopening of Case to Allow Presentation of Defendant's Case in Chief. (Exhibit C.)

the motion was supported by a memorandum. (Exhibit D.) In that memo, West Jordan again argues that:

The testimony presented by the defendant concerning the public hearing was merely in compliance with the Court's pretrial order. That evidence was not necessarily a complete presentation of the defendant's case.

* * * *

The City should have the opportunity to make a complete showing as to the holding of the public hearing. (Emphasis from original.)

On his last day on the bench, the motion was granted by Judge Dee. (Exhibit A.) Specifically, Judge Dee ruled that West Jordan could reopen its case-in-chief to present some new evidence as to whether or not a public hearing had been held.

ARGUMENT

The ruling by Judge Dee violates §78-7-19, U.C.A.:

If an application for an order, made to a judge of a court in which the action or proceeding is pending, is refused in whole or in part. . .no subsequent application for the same order can be made to any other judge, except to a higher court. . .

In substance, West Jordan has persuaded Judge Dee to overrule Judge Rigtrup. Indeed, West Jordan has persuaded Judge Dee to overrule this Court! The motion was completely frivolous. Judge Dee had no power and no discretion to act on that issue.

CONCLUSION

The writ of mandamus should issue vacating Judge Dee's recent order (Exhibit A), which reopened the trial.

DATED this 4th day of March, 1987.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiffs-
Appellants

By: 

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS (Call, et al. v. Honorable David B. Dee, et al.), was mailed, U.S., Mail, postage prepaid, this 4th day of March, 1987, to the following:

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

Linda L. Horw

EXHIBIT D



Exhibit 1

PETERSEN, SORENSEN & BROUGH

CERTIFIED PUBLIC ACCOUNTANTS

MEMBERS OF
AMERICAN INSTITUTE OF
CERTIFIED PUBLIC ACCOUNTANTS
UTAH ASSOCIATION OF
CERTIFIED PUBLIC ACCOUNTANTS

44 EAST 7200 SOUTH
MIDVALE, UTAH 84047
TELEPHONE: (801) 566-5644

September 11, 1981

Third Judicial District Court
Of Salt Lake County
For The State Of Utah

RE: ORDER APPOINTING MASTERS, Civil No. C-78-829
JOHN CALL AND JOHN CLARK JENKINS - Plaintiffs'
vs.
CITY OF WEST JORDAN, UTAH - Defendant

Sir:

As the appointed master of the court in the above referenced proceeding, I have completed a survey of the available accounting records at the City of West Jordan. In accordance with this order, the purpose of this survey was to determine if the City's records could provide information as to: (1) the amount of consideration paid by various subdividers related to the City's Flood Control and Park Fee Ordinance, (2) what the city did with each fee or land recovered from each subdivider, and (3) estimate the cost of extracting this information from the City's records. This preliminary report presents the results of my survey.

ACCOUNTING RECORDS AVAILABLE

For each of the fiscal years ending June 30, 1975 through 1978, the following records were available: (1) general ledgers, (2) cash receipt Journals, (3) cash disbursement journals. These ledgers and journals are the complete records kept by the City and it appears that no records are missing.

APPENDIX "D"

During fiscal year ending June 30, 1979, the City converted its accounting system. This system provides generally the same journals and ledgers as the prior hand posted records; however, the City is missing cash receipt journals from March 1979 through June 1979. For the fiscal year 1980, all similar records are available.

ACCOUNTS USED FOR FLOOD CONTROL AND PARK FEES

The City has used a series of accounts within the general fund to account for flood control and park fee transactions. The following accounts were used in fiscal years 1975 through 1978:

RECEIPTS

Flood Control Revenue

EXPENDITURES

Flood Control
Parks - Equipment and Operating Supplies
Parks - Buildings and Grounds
Parks - Sundry Charges
Parks - Land Purchases
Parks - Improvements Other Than Buildings
Parks - Equipment
Parks - Professional Services

For fiscal years 1979 and 1980 the following accounts were used:

RECEIPTS

Flood Control

EXPENDITURES

Flood Control - Salaries
Flood Control - Benefits
Flood Control - Public Notices
Flood Control - Travel
Flood Control - Equipment and Supplies Maintenance
Flood Control - Professional Services
Flood Control - Miscellaneous Supplies
Flood Control - Miscellaneous Services
Flood Control - Land Acquisitions
Flood Control - Improvements Other Than Buildings

Generally, the same accounts were used year to year except in 1979 and 1980 the expenditure accounts were all under the general account title of flood control rather than parks.

SURVEY WORK PERFORMED

With an understanding of the accounting records available and the accounts used for the flood control transactions, I selected a few transactions for review back to supporting documentation. The transactions I reviewed and my findings are presented below:

Receipts

1.	<u>7/25/77 GENERAL LEDGER POSTING</u>	<u>\$ 28,141.89</u>
----	---------------------------------------	---------------------

This transaction was traced back to two cash receipt documents as follows:

7/20/77	Clark Jenkins	\$ 16,576.00	Wes Call
7/20/77	Ensign Dev.	<u>11,565.89</u>	Bunker Hill
		<u>\$ 28,141.89</u>	

Cash receipt documents were found and I traced this amount to a bank checking account deposit.

Expenditures

1.	<u>5/11/77 CHECK NO. 3152 NEILSEN, MAXWELL & WANGSGARD</u>	<u>\$ 1,168.21</u>
----	--	--------------------

This payment was traced back to supporting invoices from Neilsen, Maxwell & Wangsgard. The \$1,168.21 is part of a total payment of \$19,215.20 and is supported by the following individual invoices:

- 4/11/78 West Jordan - Storm Drainage
Contract - Project Number 5860-63
1. Williamsburg Subdivision - area drainage study
2. Browns Meadow - area drainage study
3. Area #'s 5 and 6 - area drainage study

Cost Summary:
Engineer 18.0 hrs. \$ 375.00

- 3/10/78 West Jordan - Storm Drainage
Contract 5860-63
1. Williamsburg Subdivision - area drainage study

Cost Summary:
Engineer 1.5 hrs. 33.00

- 4/11/78 Project Number 5878-53
1. Professional engineering services for construction
surveying and inspection for the 2700 West Storm
Drain Project

Cost Summary:
Project Inspection 28 hrs.
Surveyor 20 hrs.
Technician 2 hrs.
Travel \$ 31.64
759.26
\$ 1,168.21

2. 5/18/78 CHECK NO. 3163 NOLAN & SON \$ 10,000.00

This check is a partial payment on a total invoice of \$19,644.61
related to installation of the 2700 West storm drain.

3. 5/31/78 CHECK NO. 3260 NICK J. COLLESSIDES \$ 472.00

The \$472.00 is part of a total check for \$1,172.00. \$472.00 was
traced to a supporting invoice related to legal services on the CALL
et, al. vs. West Jordan case.

4. 11/22/76 CHECK NO. 0889 TONNESEN SPRINKLER COMPANY \$ 11,150.00

This transactions was traced to a supporting invoice for
sprinkling systems as follows:

Harvest Estates No. 1 \$ 4,765.00
Dixie Valley No. 9 \$ 6,385.00
\$ 11,150.00

5. 6/24/77 CHECK NO. 1740 JORDAN SCHOOL DISTRICT \$ 80,000.00

This payment is for 8 acres of ground at \$10,000 per acre. The total property purchase was 15.371 acres at 7000 South, 3200 West. A second check for the balance of \$73,710.00 was paid on the same date and was charged to the Parks - Land Purchases account.

Conclusions

With the understanding I gained from the sample tests above, I can draw the following conclusions about the rest of the work the court has requested:

1. Cash receipts are generally adequately documented, and I can determine from the existing accounting records the individual contributions made by each subdivider.
2. In order to determine the way the City has spent each individual subdivider's fees, I will need to perform the following steps:

Step 1

I will need to determine what each of the individual flood control and parks disbursements were for. From the sample tests above, I believe that the transactions are well documented and that I can determine the purpose of each disbursement.

Step 2

After I find a general description of the transaction provided in Step 1, I will need to determine who benefited from each individual transaction. From the sample tests above, I know that often the accounting records do not provide an explanation of the individual benefits to subdividers. For example, from the accounting records, I have no way of knowing who benefited from the \$10,000 payment for the 2700 West storm drain. To determine the individual subdivider's benefit from this type of

transaction, I will need the help of an engineer who is competent in flood control systems and parks planning. With engineering help, I believe that an allocation of these joint benefits can be made to individual subdividers; however, various subjective decisions would have to be made from the facts available on each transaction. Also, such an analysis would require a review of all related transactions in each fiscal year. I do not believe that a single subdivider can be examined individually.

Step 3

From Steps 1 and 2 I will have an understanding of what all the flood control and parks transactions were for and who benefited from them. Step 3 requires additional depth in the benefit analysis because the City has spent money for flood control and parks that has come from sources other than Flood Control and Park Ordinance fees. These other funds can come from Federal or State sources or from general tax revenues. For clarification in language, I will call these other funds "general city funds" and I will call the Flood Control and Park Ordinance fees "flood control fees". The City has not segregated funds from these two sources; therefore, the accounting records do not reflect which source of money is being used when a disbursement is being made. The problem at this point is, then, that for some types of projects, it appears that the City is responsible for providing a benefit to subdividers from general City funds and that this benefit is not properly considered as part of the benefit the City is responsible to provide individual subdividers for their flood control fee. (Note that Step 2 has given the subdividers credit for the benefits from these general City funds.)

The objective of Step 3, then, is to attempt to determine what (if any) portion of a subdivider's total benefit (from Step 2) was provided from the City's general obligation and to subtract this benefit from the subdivider

total benefit. This will leave only the pure flood control benefit for each subdivider. To accomplish Step 3, I would have to determine if any general City obligation for benefit to subdividers existed for each flood control and park transaction and project. Since this information is not provided in the existing accounting records, it will have to come from other records and, again, from the help of a trained engineer. It is also possible that such information may not be available at all for some transactions, therefore, the analysis would not be possible.

PROPERTY RECEIVED AS FEES

The City has on occasion received property as a fee from the Flood Control and Parks Fee Ordinance. These transactions are not recorded in the accounting records of the City but are recorded in the minutes of the City. I reviewed one of these transactions and found it to be in good order. I did not, however, attempt to follow the transactions past the entry in the minutes. I should be able to follow these transactions into recorded deeds and perform procedures similar to those provided above.

COMPLIANCE WITH THE UNIFORM MUNICIPAL FISCAL PROCEDURES ACT FOR UTAH CITIES

The court was somewhat confusing in it's instructions related to my determination of West Jordan City's compliance with the Uniform Municipal Fiscal Procedures Act for Utah Cities (the Act). Paragraph 2 of the order which stated "The master shall report to the court as to whether the documents are being kept in accordance with Utah Fiscal Procedures Act and general accounting principles" was stricken from the work I was instructed to do. However, Paragraph 3 states that "If the documents are not being kept according to regular established accounting principles in accordance with the Fiscal Procedures Act, the master shall also estimate the cost of the report had the records been prepared

according to generally accepted accounting principles and/or in compliance with the Fiscal Procedures Act". This paragraph requires me indirectly to determine compliance in these two areas. I feel that the Act is more applicable to this situation than generally accepted accounting principles, therefore, I will present only my opinions related to the Act.

First, Section 10-10-29 FUNDS TO BE ESTABLISHED of the Act states that "Each City shall maintain, according to its own needs, some or all of the following funds or ledgers in its system of accounts: (paragraph (9)) A ledger or group of accounts in which to record the details relating to the general fixed assets of the municipality." West Jordan City did not maintain a property ledger until recently, however, within the scope of this survey I could not determine its accuracy related to prior transactions.

Second, Paragraph (2) of Section 10-10-29 also requires a City to maintain "Special revenue funds, as required, such as a fund financed by a special-purpose tax being earmarked for a specific purpose", and paragraph (4) requires "... capital improvement funds to otherwise account for funds allotted annually to specific construction or improvement projects derived from sources other than the proceeds of general obligation bond issues or general long-term debt."

Neither of these paragraphs are exactly related to the accounting problem of flood control and parks fees, however, I think that they both provide guidance on the proper method of recording these transactions. First, while these fees may not be taxes, I think they are within the theme of paragraph (2) in that they are for a special purpose and earmarked specifically for that purpose. Secondly, these fees were collected for flood control and parks construction or improvement projects, therefore, paragraph (4) seems to apply. The City has recorded these transactions as year-to-year revenue and expenditures and has not given them special accounting treatment.

With the guidance of paragraphs (2), (4) and (9) of Sections 10-10-29, I conclude that the fees should have had special accounting treatment. First, I think the City should have prepared a fixed asset ledger that recorded a description of all fixed assets purchased, date of purchase, cost and any other applicable information. This ledger should also have included the property received as Flood Control and Parks Ordinance Fees. Secondly, I think that the Flood Control and Parks Fee receipts should have been recorded directly into a restricted equity account within the general fund, which would represent earmark funds for flood control and parks. As the City determined allowable uses for these funds, they should have made a transfer from the restricted equity account to a revenue account. It appears that the expenditures have been recorded properly. This accounting method would have provided an equity account that reflected any unused portion of these funds collected. It would not however, require the City to document the individual subdividers benefit from the expenditures or how his individual funds were spent. I cannot find any provision in the Act that requires accounting records to be maintained so as to document an individual's benefit or how an individual's funds were spent.

COSTS TO COMPLETE THE EXAMINATION

I can objectively evaluate the time necessary to analyze the receipts from subdividers and the general nature of the total disbursements by the City. I have to use a very subjective analysis, however, in determining the time necessary to allocate the benefits of all costs to individual subdividers and to determine any general obligation benefit that I referred to in Step 3 above. For this reason I must provide the following very broad range of fees to complete this work:

	Minimum Estimated Fee	Maximum Estimated Fee
Analysis of fees received and the general nature of the disbursements (Step 1)	\$ 2,400	\$ 3,700
Step 2	5,000	7,600
Step 3	<u>5,000</u>	<u>7,600</u>
Total	<u>\$ 12,400</u>	<u>\$ 18,900</u>

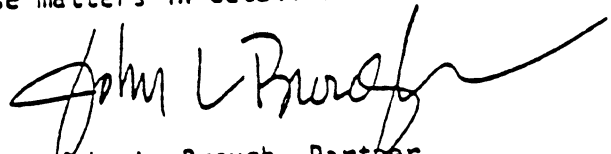
FINAL REPORT

If the court should request me to complete this work, I will issue our final report in accordance with Statement on Auditing Standards No. 35 - Special Reports Applying Agreed Upon Procedures to Specified Elements, Accounts or Items of a Financial Statement, issued by the Auditing Standards Executive Committee of the American Institute of Certified Public Accountants. Because my procedures will not constitute a complete examination in accordance with generally accepted auditing standards, I will not express an opinion on the financial statements of the City. Also, if I was to perform additional procedures or if I was to perform an audit in accordance with generally accepted auditing standards, other matters might come to my attention that I would report to the court.

Again, it is a subjective matter of determining how much the above fee estimates would be if the records had been prepared in accordance with the accounting methods I have suggested in my comments related to compliance with the Uniform Fiscal Procedures Act for Utah Cities. It would obviously be easier to find recorded property received for fees, and any unused fees could easily be identified in total. These records would not help in the analysis of the individual subdividers benefit from expenditures or in determining how his

individual fees were spent. It appears reasonable that these records would have reduced the fees above by 10 to 20 percent. If the city would have kept individual records for each subdivider on specifically how his money was spent or how he benefited from joint expenditures, then the above fees would have been reduced substantially, but as I stated above, I cannot find a requirement that such records were necessary.

I will be happy to discuss these matters in detail at the courts request.

A handwritten signature in black ink, appearing to read "John L. Brough", with a long, sweeping horizontal line extending to the right.

John L. Brough, Partner
Petersen, Sorensen & Brough