

1980

John Call and Clark Jenkins v. City of West Jordan, Utah : Petition For Rehearing and Memorandum In Support of Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN CALL and CLARK JENKINS,)	
)	
Plaintiffs -)	
Appellants,)	Case No. 15908
)	
vs.)	
)	
CITY OF WEST JORDAN, UTAH,)	
)	
Defendant -)	
Respondent.)	

PETITION FOR REHEARING AND
MEMORANDUM IN SUPPORT OF REHEARING

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FILED

JAN - 6 1980

Clk. Sup. Ct. 15

POINT ONE

REHEARING SHOULD BE GRANTED
BOTH AS A MATTER OF STATUTORY
RIGHT AND AS A MATTER OF POLICY

Rehearing should be granted for three reasons:

- A. The Case was Incorrectly Decided.
- B. Petitioner Has a Statutory Right to Rehearing.

In this case, two justices joined in the "majority" opinion. Two justices joined in the "dissent." Justice Stewart concurred in the result. § 78-2-3 U.C.A. states:

The concurrence of three justices of the Supreme Court is necessary to pronounce a judgment; if three do not concur, the case must be reheard. 1/

Here, three justices concurred in the result. However, that is not enough. It is also necessary for three justices to concur in the opinion. Article VIII § 25 of the Utah Constitution states that:

1/ There is some ambiguity in the language. The statute could be read in two different ways:

" . . . if three do not concur [in the result], the case must be reheard."

or

" . . . if three do not concur [in the opinion], the case must be reheard."

However, unless three justices concur in the result, there can be no decision. If there is no decision, there would be no reason for rehearing. Or, in other words, rehearing is only necessary after three justices have concurred in a result (decision) but failed to concur in an opinion. Thus, it would appear that the latter alternative is the only logical construction.

When a judgment or decree is reversed, modified or affirmed by the Supreme Court, the reasons therefore shall be stated in writing, signed by the justices concurring.

In this case, only two justices signed the opinion. Thus, according to § 78-2-3 U.C.A., a rehearing must be granted.

We do not contend that a case can never be decided without a majority opinion (i.e., three justices concurring). However, the thrust of § 78-2-3 U.C.A. clearly gives the losing party a rehearing if there is no majority opinion.

C. Rehearing Should be Granted to Clear up the Confusion on this Important Issue of Law.

As the case now stands, appellant has lost. However, an important issue of law has been left undecided. Here, only two justices signed the majority opinion. Thus, this case can never be cited as precedent.

See for example:

U.S. v. Friedman, 528 F.2d 784, 788 (10th Cir. 1976); People v. Jackson, 212 N.W.2d 918, 921 (Mich. 1973); State ex rel. Vesper-Buick Auto Co., v. Daves, 19 S.W. 2d 700, 707 (Mo. 1929) "The opinion in the Barz case is not authoritative or controlling as a ruling or announcement of any rule or principle of law by this court, inasmuch as the opinion in that case did not have the concurrence of a majority of the judges of this court, only three of the judges having concurred in the opinion, an equal number of judges having dissented to the opinion, and one of the judges concurring only in the result of the decision of the court." [Emphasis from the original.]

Therefore, we have a decision, but an important issue of law is left undecided. This is an area which requires the guidance of this court. (See e.g., Exhibits A, B, and C to

Reply Brief of Plaintiffs-Appellants.) However, this decision will leave the lower courts in hopeless confusion. Indeed, the very unsettled nature of this decision may spawn a whole wave of new litigation. Thus, the court should, as a matter of policy, attempt to end the deadlock and decide the important issues of law presented by this case.

POINT TWO

THE SHORTCOMING OF THE MAJORITY OPINION CAN BE DEMONSTRATED BY A SINGLE EXAMPLE

A. The Example.

Suppose that the old-time citizens (oldtimers) of town are clamoring for a new playground. For the most part, the oldtimers live on the south side of town, and they want the new playground located in their south-side neighborhood. It is estimated that the cost of the new playground will be \$10,000. However, the oldtimers do not want their taxes increased.

At that same time, Mr. Subdivider walks in the door to get his new subdivision approved for the north side of town. The mayor (wishing to get re-elected) sees an opportunity to get the needed \$10,000. The town approves the new subdivision on the condition that the subdivider will pay a \$10,000 fee.

The subdivider (having no real choice) pays the \$10,000 to get his subdivision approved for the north side of town. The town collects the \$10,000 and thereby finances a new playground for the oldtimers. Of course, north-side children are free to use the south-side playground. But, it is far away, and few of them do so.

In this example, the old-time residents found a device by which new residents would finance improvements (in this case a playground) which was for the primary benefit of the oldtimers. Although they paid the bill, the new residents got little or no value from the expenditure.

All of the cases agree that the \$10,000 fee would be illegal. (See Footnote 6 of Green Sheet Opinion--see also Brief of Appellant p. 10-28.) Indeed, the majority opinion pays lip service to the doctrine:

We agree that the dedication should have some reasonable relationship to the needs created by the subdivision.
(Green Sheet Opinion at p. 4.)

B. Application of the Example to the Facts of this Case.

The majority opinion presumes that there is some difference between the example above and the facts of this case. The opinion presumes that West Jordan needs some new parks, playgrounds or flood control. The opinion presumes that the normal sources of revenue are insufficient to finance the improvements. The opinion presumes that the town has some plan in mind (or on paper) to provide the improvements. The opinion presumes that the improvements will benefit every part of town (not just the oldtimers). The opinion presumes that a fee of 7% (times the total number of new subdivisions) will equal the cost of the improvements.

The trouble is that the foregoing is all guesswork. There is absolutely no factual development to confirm how, when

or where the money will be used. For all we really know, the entire \$16,576 from appellants will be used to build a playground for the oldtimers ten miles from the new subdivision.

In anticipation of this problem, the majority tells us:

. . . 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.

However, those truisms won't work. There is not one word in the ordinance which would prohibit West Jordan from using the \$16,576 to build a new playground ten miles from the new subdivision. Or, stated in other words, West Jordan can in full good faith, and without breaching any trust, spend the \$16,576 anywhere in town. The public must be protected by the words of the ordinance--not the good faith of the officials!

In this regard, it is instructive to compare the language of the West Jordan ordinance with the Walnut Creek^{2/} ordinance.

City of West Jordan

Section 9-C-8(a). In addition to all other requirements prescribed under this ordinance the subdivider shall be required to dedicate seven per cent (7.0%) of the land of the proposed subdivision to the

^{2/} The majority opinion relies heavily upon the case of Associated Home Builders of Greater East Bay Inc. v. Walnut Creek, 94 Cal.Rptr. 638, 454 P.2d 606 (1971).

public use for the benefit of the citizens 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.

Section 9-C-8 (b).. The monies received by the City as a result of [this ordinance] . . . shall be used by the City for its flood control and/or parks and recreation facilities.

Walnut Creek

(c) The land, fees, or combination thereof are to be used only for the purpose of providing park or recreational facilities to serve the subdivision.

(e) The amount and location of land to be dedicated or the fees to be paid shall bear a reasonable relationship to the use of the park and recreational facilities by the future inhabitants of the subdivision.

Walnut Creek, supra at 609.

It is obvious that the Walnut Creek ordinance provides clear direction and protection. The West Jordan ordinance is so broad and general as to be almost meaningless. It is no answer to contend that the money was illegally taken but well spent (Robin Hood). This case does not attack the manner of spending. This case attacks the ordinance under which the money was taken.

POINT THREE

THE PRACTICAL EFFECT OF THE
MAJORITY OPINION IS SIMPLY TO
SET UP A "SLUSH FUND" FOR CITY
FATHERS

We suggest that the issue in this case really has nothing to do with statutes, ordinances or prior case law. Rather, the struggle in this case has to do with some hard,

practical realities. The majority is understandably concerned with the explosive growth of smaller Utah communities. The majority espouses the wholly laudable view that town fathers should have the power and the financing to provide "elbow room."

This is a difficult case to prosecute because flood control, parks and recreation are a bit like motherhood--everyone is in favor. Indeed, no one can gainsay the majority's view that:

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.

However, the question is whether the West Jordan ordinance (or for that matter the 7%) really contributes to that end. One might speculate that the ordinance simply gives West Jordan a tidy "slush fund" or "pork barrel." New residents pay into that "slush fund" (through subdivision fees). However, the city fathers are free to spend that money wherever and however they wish so long as the expenditure is generally related to "flood control and/or parks and recreation."

We suggest that the growth of our cities can be managed in other ways. Further, we suggest that the place to begin is in the legislature--not the courts.

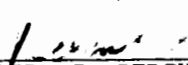
Finally, we observe that there are sound policy reasons against this practice. One of the great bulwarks of our society is the ability of an average family to purchase a home. (Note the concern in the majority opinion over ghettos.)

There are many factors which stand between an average family and their "dream home"--inflation, energy costs, high interest rates, etc. By this opinion, we now add a new burden. A prospective homeowner in West Jordan (and perhaps other communities) must now pay \$500-\$1,000 more for that "dream home" so that the town fathers can administer their "slush fund." ^{3/}

Of course, it is all in the good name of flood control, parks and recreation. If the homeowner is lucky, that new playground will be in his neighborhood. If he is not lucky, it will be ten miles away in the oldtimers' neighborhood. Certainly there is nothing in the ordinance or in the majority opinion which would provide such protection.

DATED this 4th day of January, 1980.

Respectfully submitted,


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^{3/} Of course, the "slush fund" is in addition to all of the standard forms of taxation and revenue.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing
Petition for Reconsideration and Memorandum in Support of
Reconsideration was served upon Nick J. Colessides, attorney
for respondent, by U. S. mail, postage prepaid, this 4th
day of January, 1980.

Sharon Gustafson