

1980

John Call and Clark Jenkins v. City of West Jordan, Utah : Substitute 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,)

vs.)

CITY OF WEST JORDAN, UTAH,)

Defendant -)

Respondent.)

SUBSTITUTE

AND MEMORANDUM

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Salt Lake City, Utah

* See court order dated

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN CALL and CLARK JENKINS,)

Plaintiffs -)

Appellants,)

vs.)

CITY OF WEST JORDAN, UTAH,)

Defendant -)

Respondent.)

Case No. 15908

SUBSTITUTE PETITION FOR REHEARING*

AND MEMORANDUM IN SUPPORT OF REHEARING

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Pursuant to Rule 76(e), appellant moves this court to reconsider its decision in this matter. In support of this motion, appellant relies on the following points and authorities.

POINT ONE

RECONSIDERATION IS MANDATORY
BECAUSE THE COURT HAS NOT YET
RULED ON CONTROLLING CONSTITUTIONAL
ISSUES

Appellant (hereafter Call) presented a subdivision plat to respondent (hereafter West Jordan) for approval. Pursuant to a local ordinance, West Jordan required Call to pay \$16,576.00 in order to proceed with the subdivision. Thereafter, Call filed suit to challenge that payment. In part Call alleged, inter alia, that:

17. The defendant has required the named plaintiffs, in accordance with Ordinance No. 33 of West Jordan, to pay the sum of Sixteen Thousand Dollars (\$16,000.00) to the City of West Jordan for the public purpose of flood control and/or parks and recreation.

18. Plaintiffs have received no compensation for such payment, and the above taking was made without the commencement of any action for eminent domain by the City of West Jordan.

19. Other Plaintiffs within the class have been required to dedicate land or pay money to the City of West Jordan under Ordinance No. 33. No compensation has been received by such plaintiffs for the land dedicated or payments made and no actions for eminent domain have been instituted by the City of West Jordan.

20. The actions of the defendant in requiring the dedication of land or payment of money as a condition for approval of a subdivision constitute the taking of private property for public use without just compensation, in violation of the Utah Const. art. I, § 22, and the U.S. Const. amend. v.

See also paragraphs 23 through 27 of the Complaint for

Constitutional challenges on other grounds.

The constitutional issues were duly briefed and presented to the court. (See Brief of Appellant p. 10-30, and Reply Brief of Appellant p. 21-25.)

Two members of this court have written that the city ordinance is not unconstitutional. (See Majority Opinion at p. 5 of Green Slip Opinion.) Two other members of the court have written that the city ordinance is unconstitutional. (See Dissenting Opinion at p. 17 and 18 of Green Slip Opinion.)

If we read the opinion correctly, that makes a two-two tie on the constitutional issues. It appears that the fifth justice (and the swing vote) is still neutral on the constitutional issue.

STEWART, Justice: (Concurring)

However, the ordinance in question clearly approaches constitutionally protected rights, i.e., the prohibition against the taking of private property without the 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 unconstitutional force of dedication by a subdivider. The question is certainly one that will recur and ought to be resolved by the Court.

Green Slip Opinion at p.7.

Thus, the critical constitutional issue remains undecided by this court's opinion.

POINT TWO

THE ISSUES ALREADY DECIDED BY
THE COURT WILL BE MOOT IF THE
WEST JORDAN ORDINANCE IS FOUND
TO BE UNCONSTITUTIONAL

A crucial issue in this case was whether West Jordan had power to enact local ordinance 9-C-8(a). In a three-two decision, this court has ruled that the ordinance was authorized under the general grant of "police power." (§ 10-8-84 U.C.A.)

However, that ruling is moot if the ordinance itself is unconstitutional. Or, in other words, the State of Utah did not (and indeed cannot) delegate power to the City of West Jordan to pass an unconstitutional ordinance. As the court stated in Pioneer Trust and Savings Bank v. Village of Mount Prospect, et al., 176 N.E.2d 800 (Ill. 1961).

Is it reasonable that a subdivider should be required under the guise of a police power regulation to dedicate a portion of his property to public use; or does this amount to a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations?

Of similar import see Colis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976).

While in general subdivision regulations are a valid exercise of the police power, made necessary by the problems subdivisions create--i.e., greater needs for municipal services and facilities--, the possibility of arbitrariness and unfairness in their application is nonetheless substantial: A municipality could use dedication regulations to exact land or fees from a subdivider far out of proportion to the needs created by his subdivision in order to avoid imposing the burden of paying for additional services on all citizens via taxation. To tolerate this situation would be to allow an otherwise acceptable exercise of police power to become grand theft.

See also Land/Vest Properties, Inc. v. Town of Plainfield, 379 A.2d 200, 203 (N.H. 1977).

As an exercise of the state's police power, however, such condition [subdivider's dedication of property] must not only be reasonably necessary to protect the public safety but also otherwise constitutional.

POINT THREE

THE CONSTITUTIONAL TEST IS
SATISFIED ONLY IF THERE IS A
"RATIONAL NEXUS" BETWEEN THE
NEEDS CREATED BY THE SUBDIVISION
AND THE SEVEN PER CENT FEE

We begin the analysis by noting that "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. (Green Slip Opinion at p. 4.)

It should be clear enough that appellant is not against "flood control, parks and recreation." The issue is how to fairly finance such laudable goals. As Mr. Justice Holmes has stated:

The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. [Citation omitted.] When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at

last private property disappears. But that cannot be accomplished under the constitution of the United States. . . . A strong desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 160, 67 L.Ed. 322.

Thus, competing interests clash. On one hand, there is a public interest in improving the community. On the other hand, there is a personal interest in the control and ownership of private property. The courts have devised a constitutional test which balances those competing interests:

If the need is generated by the subdivider's own activities, i.e., by the subdivision of land for the purpose of its development by dwellings to be sold, transferred, rented to, and occupied by persons who will directly benefit from the installation of improvements, then the constitutionally required relation to the public health, safety, morales and general welfare has been established.

Rathkopf, 3 The Law of Zoning and Planning, Chap. 71 at p. 55 (3d Ed. 1972).

The vast majority of all cases have, with some minor variations, adopted the Rathkopf test.

Accordingly, we conclude that where offsite improvements can properly be required of a subdivider, the subdivider can be compelled "only to bear that portion of the cost which bears a rational nexus to the needs created by, and [special] benefits conferred upon, the subdivision.

Land/Vest Properties, Inc. v. Town of Plainfield, 379 A.2d 200, 204 (N. Hamp. 1977).

If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the requirement 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.

Pioneer Trust & Savings Bank v. Village of Mount Prospect et al., 176 N.E.2d 800 (Ill. 1961).

But the plain rationale of these cases is that . . . a subdivider may be compelled only to assume a cost which bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision Beyond that, Planning Board impositions, although purportedly authorized by the Planning Act or the local ordinance, amount to impermissible exactions.

Brazer v. Borough of Mountainside, 262 A.2d 857 (N.J. 1970).

We have heretofore held in this opinion that the involuntary dedication of land is a valid exercise of the police power only to the extent that the need for the land required to be donated results from the specific and unique activity attributable to the developer. The validity of a requirement of a voluntary donation being so limited, we think a regulation requiring a donation of "at least 7%" is clearly arbitrary on its face.

Frank Ansuini, Inc. v. City of Cranston, 264 A.2d 910 (Rhode Is. 1970).

The test which has been generally applied in determining whether a requirement that a developer set aside land for parks and playgrounds as a prerequisite to the approval of a subdivision plan is whether the burden cast upon the subdivider is specifically and uniquely attributable to his own activity. Where the requirement is uniquely attributable to the subdivider's activity, it has been held to be a permissible exercise of the police power.

Aunt Hack Ridge Estates, Inc. v. Planning Commission, 273 A.2d 880 (Conn. 1970).

See also:

Haugen v. Gleason, 359 P.2d 108 (Ore. 1960);

Sanchez v. City of Santa Fe, 481 P.2d 401 (N. Mex. 1971);

State ex rel. Noland v. St. Louis County, 478 S.W.2d 363 (Mo. 1972);

Admiral Development v. City of Maitland, 267 So.2d 860 (Fla. App. 1972);

City of Mequon v. Lake Estates Co., 190 N.W.2d 912 (Wis. 1971).

Cf.:

Cimmaron Corp. v. Board of County Commissioners,
563 P.2d 945 (Colo. 1977);
City of Montgomery v. Crossroads Land Co., 355 So.2d
363 (Ala. 1978);
Krughoff v. Naperville, 369 N.E.2d 892 (Ill. 1977);
Collis v. Bloomington, 246 N.W.2d 19 (Minn. 1976);
Billings Properties, Inc. v. Yellowstone County,
394 P.2d 182 (Mont. 1964).

POINT FOUR

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

The majority opinion pays lip service to the doctrine discussed in Point Three.

We agree that the dedication should have
some reasonable relationship to the needs created
by the subdivision.

Green Sheet Opinion at p. 4.

However, the majority gives with the right hand, but takes away
with the left hand. A single example will demonstrate the short-
coming of the majority view.

A. The Example.

Suppose that the old-time citizens (old-timers) of town
are clamoring for a new playground. For the most part, the old-
timers live on the south side of town, and they want the new play-
ground located in their south-side neighborhood. It is estimated
that the cost of the new playground will be \$10,000. However,
the old-timers 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 old-timers on the south side of town. 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 old-timers. Although they paid the bill, the new residents got little or no value from the playground on the other side of town.

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 old-timers). 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 old-timers 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 entire \$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 constitutional safeguard lies in 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^{1/} 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

^{1/} The majority opinion relies heavily upon the case of Associated Home Builders of Greater East Bay, Inc., v. Walnut Creek, 94 Cal. Rptr. 638, 484 P.2d 206 (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,

Based on specific language of the statute, the court in Walnut Creek said:

Whether or not such a direct connection is required by constitutional considerations, Section 11546 provides the nexus which concerns [the developer] Associated. The act requires that the land dedicated or the fees paid are to be used only for the purpose of providing park or recreational facilities . . . [and] that the amount and location of land or fees shall bear a reasonable relationship to the use of the facilities by the future inhabitants of the subdivision.

Walnut Creek, 484 P.2d at 612.

It seems obvious that the Walnut Creek case is no precedent for this case.

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 wisely spent (Robin Hood). This

case does not attack the manner of spending. This case attacks the ordinance under which the money was taken.

POINT FIVE

NO RECORDED CASE SUPPORTS THE CONCLUSION REACHED BY THE MAJORITY

The "majority" opinion cites a number of cases in support of its conclusion. However, no recorded case has stretched the Constitution as far as this case.

There are perhaps two or three dozen cases to be considered in analyzing this matter. Yet each case construes the language of a different statute or ordinance. In each case, the form of taking (or dedication of property) is different. In each case, the land or money was used in a different fashion. Thus, the concept of precedent is particularly elusive in this case.

For example, the majority relies primarily on the case of Associated Home Builders, Inc., v. City of Walnut Creek, 484 P.2d 606 (Cal. 1971). As we have pointed out in Point Four above, that case relies upon an ordinance substantially different from the ordinance before this court. Likewise, the majority relies on the case of Ayres v. City Council, 207 P.2d 1 (Cal. 1949). In that case, the developer challenged a requirement concerning the width of certain streets within the subdivision. Factually, that presents a much different problem than this case. Here, the city ordinance exacts a cash fee which goes into the general fund of the city. In like fashion, other cases cited by the majority are each distinguishable on their peculiar facts.

In our research, we have found no reported case which has approved an ordinance as broad and indiscriminate as the Jordan ordinance now before this court.

In surveying the various cases, it appears that the closest case factually is the case of Admiral Development Corp. v. City of Maitland, 267 So.2d 860 (Fla. App. 1972). That case reviewed a city ordinance virtually identical to the West Jordan ordinance. The Maitland ordinance reads:

(a) When lands are subdivided within the city, at least five per cent (5%) of the gross area of such lands shall be dedicated by the owner to the city for park and recreation purposes. The location of such park and recreation area shall be recommended by the planning and Zoning commission, to the city council for its approval.

(b) If, in the judgment of the city council, the land to be subdivided is too small for a park or recreation area to be dedicated from such land, then the owner shall pay to the city a sum of money, equal to five per cent (5%) of the value of the gross area, which shall be held in escrow and used by the city for the purpose of acquiring parks and recreation areas and for no other purpose.

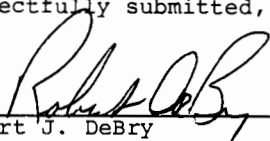
In that case the court had little trouble in finding that, "... the language of said section is so overbroad as to render the section invalid."

CONCLUSION

The court should re-hear the case to consider the constitutional issues. The court should rule the West Jordan ordinance unconstitutional.

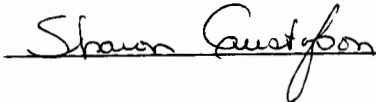
DATED this 28th day of January, 1980.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Substitute Petition for Rehearing and Memorandum in Support of Rehearing was served upon Nick J. Colessides, attorney for respondent, 610 East South Temple, Suite 202, Salt Lake City, Utah, 84102, by U.S. mail, postage prepaid, this 28th day of January, 1980.


Shawn Gustafson