1980

Banberry Development Corporation, Mckean Construction Company, Midwest Realty and Finance, Inc. , A Utah Corporation v. South Jordan City, A Municipal Corporation : Brief of Respondents and Cross Appellants

Utah Supreme Court

MICHAEL J. MAZURAN; Attorney for Appellant-Cross Respondent JOHN H. McDONALD, CRAIG S. COOK; Attorneys for Respondents-Cross Appellants

IN THE SUPREME COURT

OF THE STATE OF UTAH

BANBERRY DEVELOPMENT CORPORATION, McKEAN CONSTRUCTION COMPANY, MIDWEST REALTY AND FINANCE, INC., a Utah corporation, Plaintiffs-Respondents, Cross-Appellants, vs. SOUTH JORDAN CITY, a Municipal Corporation, Defendant-Appellant, Cross-Respondent.	No. 16872

BRIEF OF RESPONDENTS AND CROSS APPELLANTS

Appeal from the Judgment
of the Third Judicial District
Court in and for Salt Lake County
The Honorable Dean Conder, Judge

JOHN H. McDONALD
320 South 300 East, Suite 1
Salt Lake City, Utah 84101

CRAIG S. COOK
3645 East 3100 South
Salt Lake City, Utah 84109

Attorneys for Respondents-
Cross Appellants

MICHAEL J. MAZURAN of
STRINGHAM, LARSEN, MAZURAN & SABIN
A Professional Corporation
200 North Main Street, Suite 200
Salt Lake City, Utah 84103

Attorneys for Appellant-
Cross Respondent

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MICHAEL J. MAZURAN of
STRINGHAM, LARSEN, MAZURAN & SABIN
A Professional Corporation
200 North Main Street, Suite 200
Salt Lake City, Utah 84103

Attorneys for Appellant-
Cross Respondent

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NATURE OF THE CASE

This is an action brought under the Declaratory Judgment Act against South Jordan City by three subdividers for a determination as to the validity of certain ordinances and regulations relating to water connection fees and park improvement fees.

Plaintiffs alleged in their Complaint that the water connection fee of South Jordan City: (1) constitutes an unlawful taking of property without due process of law; (2) that the fee is unreasonable and constitutes an unlawful and unconstitutional tax on the plaintiffs; (3) that the park improvement fee constitutes an unlawful taking of property without due process of law; (4) that the park improvement fee is unreasonable in its amount and also constitutes an unlawful taking; and (5) that the water connection fee and park improvement fee constitutes economic discrimination against the plaintiffs in violation

of Title 42, Section 1983 of the United States Code. Plaintiffs sought a temporary restraining order, a declaration that the ordinances as applied are unconstitutional and void, and money damages.

DISPOSITION IN THE LOWER COURT

The Honorable Dean Conder granted Plaintiffs' Motion for Summary Judgment as to Count I of the Complaint and entered a permanent injunction restraining and enjoining South Jordan City from requiring the payment of the water connection fee for each lot by the plaintiff subdividers as a condition for final plat approval.

The lower court granted Defendant's Motion to Dismiss as to Counts III, IV and V and held that the park improvement fee was valid.

On January 2, 1980, the trial court entered its order denying the Defendant's Motion to Alter and/or Amend the Judgment. This appeal was taken by the defendant on January 16, 1980. (R. 71). Plaintiffs cross-appealed from the Order dismissing the Third, Fourth and Fifth Causes of Action on January 30, 1980.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek affirmance of the lower court order nullifying the water connection fee charged subdividers as a prerequisite to water service. Plaintiffs also cross-appeal and seek an order of this Court that the park recreation fee is also void or, in the alternative, seek the remand of that issue to the lower court for a trial on the merits.

STATEMENT OF FACTS

Because plaintiffs-subdividers are both respondents and cross-appellants, they will be referred to as "plaintiffs" and South Jordan City as "defendant" throughout this brief for the convenience of this Court and the parties.

Plaintiffs do not dispute the Statement of Facts contained in the South Jordan City brief with certain limited exceptions. Defendant failed to note that the parties stipulated that it was necessary for any developer to pay a "Park Improvement Fee" in the sum of $235 per dwelling unit before being allowed to connect to the city's water main. (R. 102-103). While it is true that plaintiffs have "repeatedly admitted that defendant-appellant city has the right to collect a water connection fee," plaintiffs have never admitted that such fee now charged by the city is reasonable or that the method of computation charged for the subdividers is reasonable. Rather, plaintiffs have admitted that some type of connection fee is justified both as to the connection made by the subdividers to the city's water line and as to the charge to each individual property owner to the subdivision water line.

The magnitude of the ordinances in question was also omitted by the defendant city. The collective amounts owing to the city by the three plaintiff subdividers is in the area of a quarter of a million dollars in water connection fees and park improvement fees. (R. 126). Under the present statutory scheme, this amount of money would have to be paid to the city before a single resident completed his home on one of the approximately 400 lots presently

being developed by the plaintiffs.

Finally, defendant omits to note that plaintiffs have cross-appealed in this case as to the lower court's order dismissing their complaint for the imposition of a park fee to be paid by plaintiffs prior to water service being commenced.

Plaintiffs will first respond to the arguments raised by South Jordan City in its brief and will then assert its own arguments on its cross-appeal.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT AS TO THE INVALIDITY OF THE WATER CONNECTION PRE-PAYMENT FEE.

This controversy concerns the imposition of water connection fees by the defendant upon the plaintiffs, who are real estate subdividers. Each of the plaintiffs own parcels of land within the South Jordan City boundaries and have undertaken to develop these parcels into residential housing subdivisions.

The South Jordan City Council enacted Ordinance No. 13-1-5 (Exhibit D-1) which stated the following:

> Application for water connection by subdividers. Whenever a subdivider desires or requires to install a water connection and extension for a subdivision, the subdivider shall enter into a written extension agreement which shall constitute an application for permission to make said extension and connection and an agreement specifying the terms and conditions under which the water extensions and connections shall be made and the payment that shall be required.

Accordingly, a "Subdivision Water Service Extension Agreement" was devised by the defendant corporation. (Exhibit D-2).

The Extension Agreement required various plans, bonds, and inspections concerning the construction of a water system and provides requirements which are generally in accordance with other extension agreements of surrounding counties.

However, paragraph 10 of the Extension Agreement is unique to South Jordan City. It states the following:

> Cost of Construction. The Applicant hereby agrees to bear the total cost of constructing all water lines required for the servicing of the subdivision or development (to include extensions from existing city water mains to the subdivision, the water system within the subdivision and service lines to each lot in the subdivision). In consideration therefor, the city shall charge the Applicant a connection fee in the amount of $_____ for each individual dwelling to be served within the subdivision, which sums shall be payable in full to the city before the subdivision system is connected to any existing city water main. (Emphasis added.)

It is thus undisputed by the parties that the Extension Agreement now in effect and required to be signed by all real estate developers provides that the developer must pay to the city the aggregate dollar amount of all the potential water connection fees within that subdivision. In other words, if the subdivision would support 100 homes, the developer must pay 100 times the water connection fee to the city before the city will allow the subdivision to be connected to the city water supply. This is true even if there are no homes in the subdivision which are actually using the water.

A. Defendant's Fee Structure for Water Connection is Contrary to Utah Statutory Law.

Plaintiffs do not disagree with defendant that municipalities in Utah are granted broad powers for the protection of the health

and welfare of their residents. Neither do plaintiffs disagree that a variety of state laws have been enacted concerning the powers of municipalities to provide water and sewer services. (Brief of South Jordan City, pp. 8-9).

Plaintiffs do dispute, however, the right of South Jordan City to charge plaintiffs a "use or service" charge when no "use or service" has actually been performed. Utah law is clear that the city in this instance is acting well beyond its statutory power.

This Court on at least two occasions has held that sewer connection fees are neither revenue measures, taxes, nor assessments but are payments for services furnished. Murray City v. Board of Education of Murray City School District, 16 U.2d 115, 396 P.2d 628 (1964); Home Builders Association of Greater Salt Lake vs. Provo City, 28 U.2d 402, 503 P.2d 451 (1972). Likewise, this Court in the recent case of Rupp v. Grantsville City, slip opinion (Utah, March 27, 1980), held that an ordinance requiring a $300 sewer hookup connection charge was proper since each person required to join the system benefited from its use.

There is no specific Utah case concerning a connection fee for water service. All prior cases have dealt solely with sewer hookups. However, Utah statutory law explicitly gives cities the power to couple water service with sewage service. Section 10-8-38, Utah Code Annotated (the section cited by the lower court in its decision) requires mandatory hookups to any sewer system when the sewer "is available and within 300 feet of any property line with any building used for human occupancy" and provides that the town may charge for

In addition, the law states that when the city is also operating its own water works system that it may make one charge for both water service and sewer service. In the event an occupant fails to hook up to the sewer service the town is authorized to shut off the water until such time as the hookup into the sewer has occurred.

In the instant case, Defendant was not operating its own sewer system but was contracting this to a sewer improvement district. Section 17-6-22, U.C.A. (also relied upon by the lower ourt) provides that it may also charge its water fee concurrently with the sewer fee and that the enforcement may be secured in the same manner as that enumerated in Section 10-8-38. This Court in Rupp, supra, also approved the use of the discontinuance of water service as a method of enforcing mandatory sewer connections.

Defendant relies upon Section 10-7-10 which states that a city does not have to "furnish" water unless the owner agrees in writing that he will pay for all water furnished to any "house, tenement, apartment, building, place, premises or lots." This provision is nearly identical to Section 10-8-38, U.C.A., which also permits a city to require the owner to agree to pay for both sewer and water before such services need be furnished.

It is thus obvious that the Utah legislature has treated sewer and water connections as virtually inseparable. It can thus fairly be said that if a sewer hookup fee is a payment for services furnished (Murray City, supra, and Home Builders Association of Greater Salt Lake, supra), then the connection of a water line is also a payment for services furnished.

The Legislature did not require the hookup of a sewer system in areas where there is not a building used for human occupancy within 300 feet of the sewer line. Thus, an owner of an empty lot does not have to pay a sewer hookup fee. There is likewise no requirement that the owner of a vacant lot must pay a water hookup fee, although such an owner could, if he desired, request water service to the empty lot and would under the terms of Section 10-7-10 be required to pay for the cost of furnishing the water. Thus, if the hundreds of lots involved in this litigation were all sold tomorrow to separate purchasers, the city could not mandate them to connect either to the sewer or to the water lines until such time as buildings used for human occupancy had been completed.

In an effort to avoid the statutory commandment, Defendant has sought to charge plaintiffs the water connection fee for each and every lot in the subdivision prior to any building on the lots by individuals. Defendant has attempted to do this not by ordinance but by its "Subdivision Water Service Extension Agreement," which supplements the ordinance.

The city has incurred no pecuniary expenditure whatsoever in the development of these subdivisions. Paragraph 10 of the Agreement required plaintiff to "bear the total cost of constructing all water lines required for the servicing of the subdivision or development." Plaintiffs have completely built the water system within the subdivision and have only asked to connect to the pre-existing city water lines. For this privilege, defendant city has sought a "connection charge" not for the one

connection to the main line, but for the aggregate of potential connections to the subdividers' total number of lots.

Utah statutory law clearly does not allow this type of action. Defendant city is attempting to charge for a use and service to hundreds of lots when in fact there has been no use or service to any lot. Aside from the fact that the subdivision water pipes would be full of city water, the city itself has suffered no loss nor has it had to increase any of its services to provide water. The city is asking for a total of nearly $300,000 because three feeder pipes of three subdivisions have been attached to the existing water lines of the city. Defendant city is therefore given a windfall of some $300,000 when it has, in fact, done nothing or incurred no further obligation than before the subdivision systems were hooked into the city lines.

Plaintiffs have already incurred substantial expenses in laying the water system within the subdivision itself. It is not the responsibility of plaintiffs to contribute to the city water system's construction and maintenance when it does not in fact use such system. Under Utah law there are several ways a city may provide funds for a water system. First, Section 10-7-7, U.C.A. allows the city to issue bonds for the purpose of supplying the city with water. Similarly, the Metropolitan Water District Act provides that if a water district is created bonds may be issued. Section 73-8-26 to Section 73-8-31, U.C.A.

The municipality may also establish a special improvement district and charge a special assessment for capital improvements under the provisions of Section 10-15-1, U.C.A., the "Municipal

Improvement District Act." Under the provisions of this Act, procedures are required in which the property owners are given notice of proposed improvements and hearings must be held before the special improvement district can be created. Section 10-16-4 through Section 10-16-7, U.C.A. The assessment allowed in such a special improvement district is stated as follows:

> Assessments shall be levied on all blocks, lots, parts of lots, tracts or parcels of property bounding, abutting upon or adjacent to the improvements or which may be inspected or specially benefited by the improvements to the extent of the benefits to such property by reasons of the improvements . . . Assessments shall be equal and uniform according to the benefits received.

In the instant case the City of South Jordan has not elected to either issue bonds nor to create a special assessment tax for a water system. Instead, the city has required the plaintiffs to provide their own internal subdivision water systems. Any external water system feeding such subdivision should be financed by the entire community through either bonds, assessment districts.

Defendant South Jordan City argues repeatedly that Section 10-7-10 gives the city statutory authority to require the fee imposed against the plaintiffs in this case. As noted previously, this section states that a town does not have to furnish water to its inhabitants for "the use in any house, tenement, apartment, building, place, premises or lots" unless the owner signs an application that he will pay for all water "furnished." Defendant's argument continues that it has furnished water since it is now flowing through the subdivision's line and thus a water

connection fee should be collected by the city.

Defendant's argument is entirely without merit. Section 10-7-10 was written for the express purpose of requiring owners of property to be responsible for the use of any water on that property even though it is an agent or tenant which utilizes the water. Under the city's argument the subdividers would be "owners" and would therefore be responsible for all future use of the water in the subdivision and would be perpetually assessed a monthly charge for all water consumed by all residents of the three subdivisions. This clearly is not what the defendant intended in its own Agreement. Specifically, in fact, paragraph 6 of Defendant's Subdivision Water Service Agreement" states the following:

> As each house is connected to the line, the owner thereof shall be required to sign the city's standard application for service and agree to abide by the city's rules and regulations and to pay the city's monthly service charge. All repair and maintenance expenses for water facilities and lines located on individual lots within the subdivision or development shall be borne by the respective owners of said lot. (Emphasis added.)

It is obvious from this language that the city fully intended that each lot owner would be responsible for his own water charges and that separate agreements would be written between the city and each lot owner. The city cannot, on the one hand, say that plaintiffs own the entire subdivision and are thus responsible for the connectin fee while, at the same time, saying that the monthly charges should be assessed to the individual lot owners. Clearly, both the connectionfee and the monthly fees are proper service charges only to the lot owner and not to the subdivider.

In conclusion, plaintiffs do not dispute that city may charge the three subdividers a "connection fee" based upon the expenses actually incurred in connecting the subdividers' lines to the water line of the city. Such a charge would be legitimate since it would cover the cost actually incurred. However, for the city to charge each subdivider for the aggregate number of potential lots which may utilize the system is clearly an abuse of any intended statutory authority a city may have in charging hookup fees. For these reasons, the trial court was correct in finding that Utah law does not permit this type of fee scheme.

B. Defendant's Fee Structure for Water Connection is Contrary to the Utah Constitution and the United States Constitution.

The present Extension Agreement how required by South Jordan City violates Article I, Section 2 and Section 7 of the Utah Constitution as well as the "Equal Protection" and "Due Process" clauses of the United States Constitution. This violation occurs because of a wrongful taking of property (the hookup fees) and because of an unequal application of the fees to differing persons within the same class of people.

As to Plaintiffs' first contention of taking of property without due process, the case of Stanfield v. Burnett, 353 P.2d 242 (Or. 1960) is closely on point. In that case a local ordinance was enacted which required charges for property whether connected or not to a sewer system and which required various charges based upon the type of property involved.

The Supreme Court of Oregon rejected the ordinance as a

valid assessment and held that the charges were not based upon total construction costs and "any attempted assessment prior to construction in determination of total costs is nullity." Id. at 245. The court then stated:

> Since the amounts attempted to be collected are not assessments, may they be justified as charges for use? Obviously not, since the charges are not based upon use but upon the fact that the property was within 200 feet of the sewer line.
>
> * * *
>
> Because there is no constitutional or statutory authority in this state for making a charge for Prospective use, we hold such charge may not be made unless it is levied as an assessment, which was not done here. We say this for several reasons. First, if it be sustained as a charge for prospective use, then it would necessarily follow that it was based upon benefit to the property and not upon the user, and, hence, it could only be sustained if it was a valid assessment under the rules above referred to. Secondly, a charge for the use of a sewer is not a tax or assessment but is a charge for a service rendered and is based upon contract.
>
> * * *
>
> The transaction really amounts to an offer by the municipal corporationand an acceptance by the party who takes the water, thus forming a contract. Since there was no actual user shown in this case, there could be no acceptance, and hence, no contract. Therefore, it is inescapable that Plaintiff by this proceeding is attempting to confiscate private property without any legal basis therefor. The fact that the property may have been incidentally benefited is not enough in the absence of statutory or constitutional authority. Id. at 246. (Emphasis added.)

This same argument against "prospective" use is applicable in the instant case since the Plaintiffs are being forced to pay for water connection fees where the Plaintiffs themselves will receive no service or benefit and no burden will be imposed on the city until such time as individual property owners occupy each lot. If the city is attempting to obtain construction funds

for a city-wide water system, it is obligated to issue bonds or create a special assessment district for such purposes rather than to attempt utilization of a "hookup" fee for such purpose.

Even in cases where a city has created a special assessment district for the purpose of making capital improvements, the courts have uniformly held that any ordinance which requires a property owner to pay an assessment fee for which his property does not receive an immediate benefit is unconstitutional. In City and County of Denver v. Greenspoon, 344 P.2d 679 (Colo. 1959) the Colorado Supreme Court held that a special assessment tax would amount to confiscation without due process of law when it was not shown that the property included in the assessment area would receive a benefit and in fact it was shown that the property could never use the improvement.

The court in that case quoted a previous Colorado decision in which the rule was stated;

> Special assessments for local improvements are authorized and permitted upon the theory that the property against which they are levied derives some special, immediate, and peculiar benefits by reason of the improvement, other, in addition to, and different from that enjoyed by other property in the community outside of the district in which the improvement is made. 344 P.2d at 681 (Emphasis added.)

Defendant's reliance upon Call v. City of West Jordan, 606 P.2d 217 (Utah 1979) is misplaced. In that case this Court upheld an ordinance which required a subdivider to dedicate seven percent of its land to the city or pay an equivalent in cash for flood control and/or park and recreation facilities. In a three to two decision this Court concluded that under

general statutory authority the city was empowered to provide for its parks and flood controls and could legitimately require a subdivider to contribute either land or money to this end.

While Plaintiffs disagree with the majority holding in this case, as will be discussed infra, this case relates to parks and flood control which are entirely different from the statutory requirements of water use fees. Whereas the city may be obligated to provide flood control and parks for its citizens regardless of whether it is requested to or not, the city does not have to provide water connections for individuals who do not desire to utilize the water service. Thus, while a city can legitimately assess a lot owner for flood control, for parks, and for capital improvements, it cannot force the lot owner to pay a "connection fee" to a water line when there is no building on the lot requiring the mandatory sewer connection.

A requirement that the plaintiffs pay a fee for services which will never be rendered to them as subdividers and which require plaintiff to pay 100 percent of the "hookup" charges when no hookups have occurred is clearly a taking of property without due process. Since there is no assurance that any of these lots will ever be hooked up to the city water system, the constitutional violation is even greater.

In addition, the application of the Extension Agreement also violates the "equal protection" clause of the Utah and United States Constitutions since it is treating plaintiffs subdividers differently from other owners of residential property.

The ordinance as written does not violate constitutional principles. However, the ordinance as applied by its extension agreement does create unfair discrimination. The rule has been stated as follows:

> A law, though fair on its face and impartial in appearance, which is of such a nature that it may be applied and administered with an evil eye and unequal hand so as to make an unjust and illegal discrimination is, when so applied and administered, within the prohibition of the Federal Constitution. Hence, in a consideration of the classification embodied in a statute, regard should be given not only to its final purpose but likewise to the means provided for its administration. 16 Am. Jur. 2d, Section 540, pp. 929-930.

This same authority also makes the following distinction:

> Due process of law is denied when any particular person of a class or of the community is singled out for the imposition of restraints or burdens not imposed upon, and to be borne by, all of the class or of the community at large, unless the imposition or restraint is based upon existing distinctions that differentiate the particular individuals of the class to be affected from the body of the community. 16 Am. Jur. 2d, Section 551, pp. 950-951.

In this case, the Plaintiff subdividers are required to pay in advance for services to all lots in the subdivisions even though no service is rendered. On the other hand, an individual property owner who owns his own lot and who is not in a subdivision is only required to pay the fee at the time the connection is actually amde. There is no valid distinction between these two classes of individuals since in both cases the services of the city are not used until the connection is made and no greater burden is placed upon the city in either case.

In addition, the present application is discriminatory against Plaintiff when compared to previous subdividers who

developed their property prior to the formulation of the extension agreement. These subdividers were not required to prepay the water fee before being able to build upon their property.

In the case of Watts v. Alpine City, 4th Dist. Ct. No. 48-518 (1979) two plaintiffs filed an action against Alpine City alleging that an impact fee which required them to pay 1.5 percent of the total valuation of any new construction before a building permit was issued was a denial of equal protection of the law since old residents whose homes had previously been built did not have to pay this impact fee. In ruling on behalf of the plaintiffs, the Honorable George Ballif in granting plaintiffs' motion for summary judgment stated the following:

> Alpine City's so-called impact fee, Ordinance No. 02-77, enacted February 14, 1977, puts an undue and discriminatory burden upon the new building residents of Alpine City as contrasted with the old residents whose homes have been built since the impact fee was placed in effect. Said ordinance, therefore, is in violation of the fundamental rights established in Section 2 of Article 1 of the Utah State Constitution granting citizens equal protection of law.

This Court recently in the case of Continental Bank and Trust Company v. Farmington City, 599 P.2d 1242 (Utah 1979) again stated the principle that a law is discriminatory in the sense of being arbitrary and unconstitutional where some persons or transactions excluded from the operation of law are, as to its subject matter, in no different class than those included in its operation. See also Weber Basin Home Builders Association v. Roy City, 487 P.2d 866 (Utah 1971). (Building Permit fee

discriminatory since it charged new residents higher rates than older residents).

Here, an owner of a vacant lot in South Jordan City which has a city water line running next to it is not obligated to pay the $1,000 "connection fee" until such time as he builds a building and installs a sewer. On the other hand, plaintiffs who presently own hundreds of lots are required to pay these "hookup charges" even though the water is never hooked up and even though it will never be used by the plaintiffs. In addition, other subdividers who have built in the area previously did not have to incur the prepayment penalties and were thus given an unfair economic advantage over plaintiffs.

For these reasons, as an alternate ground, the ordinance as supplemented by the Water Service Agreement is patently unconstitutional.

POINT II

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' COMPLAINT AS TO THE VALIDITY OF THE PARKS IMPROVEMENT FEE.

The District Court dismissed plaintiffs' Third, Fourth and Fifth Causes of Action finding that "no statutory prohibition exists as collecting park fees in advance and that such fees are valid and do not violate the due process nor equal protection provisions of the Constitution." (R. 54). It is from this Order that plaintiffs cross appeal.

A. <u>There is No Statutory Authority Allowing the City to Charge the Park Improvement Fee, and, in Addition, Such Fee is</u>

Unconstitutional.

Plaintiffs adopt the dissenting opinion of Justice Wilkins and Maughn in Call v. City of West Jordan, 606 P.2d 217, 222-229 in support of their argument that Utah law does not allow the city of South Jordan to charge a park improvement fee to plaintiffs when such park will never be utilized by plaintiffs and any parks built will be for the benefit of the city as a whole.

Plaintiffs would urge this Court to reexamine its decision in Call in light of the circumstances of this case. Unlike the cases relied upon by defendants in Call, there are no state statutes authorizing either a fee or dedication of land for park purposes. See, e.g., Associated Home Builders of Greater East Bay Incorporated v. City of Walnut Creek, 484 P.2d 606 (Cal. 1971) (Section 11546 of the Business and Professional Code). Unlike these states, Utah statutory authority only gives its cities the power to make assessments or levy taxes for the benefit of its park system.

The imposition of a park fee as a condition for completion of a water system shows the extremes in which this type of scheme can carry. In addition, the city of South Jordan has placed the park funds obtained from the plaintiffs into its general funding which, as Justice Wilkins observed, is contrary to previous Utah law requiring special funds to be established. 606 P.2d at 228-229.

If Utah wishes to utilize a land planning concept it should do so by means of specific statutory authority as has been done in other states. To allow or require the taking of money and property

of private individuals and corporations for these purposes, without statutory authority, is clearly an ultra vires act on the part of municipalities. It is for the legislature, not the courts, to provide a statutory system which meets constitutional requirements if land or money is to be appropriated.

For this reason, plaintiffs respectfully request that the Call decision be reconsidered in light of the circumstances of this case.

B. In the Alternative, the Reasonableness of the Park Impact Fee Must be Decided by a Full Evidentiary Hearing.

Plaintiffs' Fourth Cause of Action allege that the $235 park improvement fee "is far in excess of defendant's cost for developing and maintaining the said park," and in their Fifth Cause of Action maintain that plaintiffs will not derive any benefit from the payment of a park improvement fee. Thus, plaintiffs assert that the statutory fee is unnecessary for the development of a park system in the subdivision and is in excess of any reasonable amount to be levied for such purposes.

This Court in Call v. City of West Jordan, slip opinion (filed June 27, 1980, Utah) on rehearing stated that a dedication of private land or a substitute fee "should have some reasonable relationship to the need created by the subdivision." This Court then quoted a Missouri case which stated:

> . . . If the burden cast upon the subdivider is reasonably attributable to his activity, then the requirement [of dedication or fees in lieu thereof] is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibition rather than reasonable regulations of the police power. Insofar as the establishment of a subdivision within the city increases

needs of the city, then to that extent the cost of meeting that increase indeed may reasonably be required of the subdivider.

Quoting Homebuilders Association of Greater Kansas City v. City of Kansas, 555 S.W. 2d 832, 835 (Mo. 1977).

Thus, even under the present status of the law as established by the Call case, plaintiffs are entitled to a trial as to whether the park fee is reasonably related to any increase need for recreation in the area created by the subdivision. For this reason, the lower court's dismissal of plaintiffs' Complaint should be vacated and the matter remanded for trial.

CONCLUSION

The lower court correctly entered summary judgment against Defendant. The imposition of a "hookup" fee for plaintiffs based upon all total lots in the subdivisions is clearly not permitted by Utah law. Plaintiffs are being charged for services to hundreds of lots which might not ultimately occur for many years. Other cities charge hookup fees only as each individual lot is developed -- Defendant must do the same. In addition, this prepayment scheme is unconstitutional since it violates both due process and equal protection.

Finally, the lower court erred by dismissing plaintiffs' Complaint as to the Park Improvement Fee since it too is not authorized under Utah law. In any event, plaintiffs are entitled to attack the reasonableness and necessity of such a fee in a trial on the merits as stated in the last Call decision.

For these reasons, the order of summary judgment should be

affirmed and the order of dismissal reversed.

Respectfully submitted,

JOHN H. McDONALD

CRAIG S. COOK
Attorneys for Plaintiffs