1981

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

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, and Cross-Appellants, vs. SOUTH JORDAN CITY, a Municipal Corporation, Defendant-Appellant, and Cross-Respondent.	No. 16872

REPLY TO RESPONDENTS AND CROSS-APPELLANTS BRIEF

Appeal from Summary Judgment and from Denial of Motions
of the Third Judicial District Court of Salt Lake County
The Honorable Dean Conder, Judge

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

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REPLY TO PLAINTIFFS-RESPONDENTS AND CROSS-APPELLANTS BRIEF

COMES NOW the Defendant-Appellant and Cross-Respondent, South Jordan City and respectfully submits this brief in reply to the Plaintiffs-Respondents, Cross-Appellants' Brief.

SUPPLEMENTARY STATEMENT OF FACTS

For purposes of clarity and the convenience of the Court the Plaintiffs sub-dividers who are both Respondents, Cross-Appellants in this action will be referred to as "Plaintiffs", and South Jordan City will be referred to as "Defendant" throughout this Reply Brief.

In the Statement of Facts contained in Plaintiffs' Brief, Plaintiffs have referred to the fact that they are presently developing approximately four hundred (400) lots

within the City of South Jordan. (Brief of Plaintiffs, pp. 3-4). Prior to 1978, the Defendant City experienced development of approximately sixty-five (65) lots average per year. In the instant case, Plaintiffs' four hundred (400) lots represent approximately two-thirds (2/3) of the total lots being developed within the City during the year of 1978. As evidenced by these facts, the Defendant City is experiencing dramatic and explosive growth. The Mayor and City Council as the governing body of the Defendant, are attempting to deal with the tremendous impact this growth is having on the present size and capacity of the City's water system and related facilities. In order for the Defendant City's water system to handle the increased connections required by reason of subdivision of lands within the City, it has become necessary to immediately enlarge water lines, storage facilities, pumping facilities and related facilities presently existing in the City's water system. In order to meet these increased demands, the City Council enacted Ordinance 13-1-5, and has adopted in connection therewith the Subdivision Water Service Extension Agreement (Exhibit "D-2") requiring subdivision developers to pay the water connection fees for all lots within their subdivison at the time the subdivision water system is connected to any existing City water main. The funds are then placed in a separate account for use in enlarging the water lines, storage facilities, pumping facilities and related facilities of the City's water system.

The park improvement fees received by the Defendant City are used for the enlargement and development of City parks which are needed due to growth in the City arising from subdivision of properties located therein.

ARGUMENT

POINT I

DEFENDANT CITY'S FEE STRUCTURE FOR WATER CONNECTION FEES IS NOT CONTRARY TO THE UTAH CONSTITUTION OR THE UNITED STATES CONSTITUTION.

Plaintiffs have previously admitted through their Counsel, and have stipulated that the Defendant City's Ordinance 13-1-5 is constitutional as it is written, (August 3, 1979 - T.3) Plaintiffs specifically object to the administration of the ordinance through Paragraph 10 of the Subdivision Water Service Extension Agreement, which is set forth on Page 5 of Plaintiffs' brief.

Plaintiffs are now attempting to assert before this Court that said Water Extension Agreement violates due process and the equal protection clauses of the United States Constitution and Article 1, Section 2 and Section 7 of the Utah Constitution. Plaintiffs claims are without merit.

Plaintiffs attempt to rely on a 1960 Oregon case, Stanfield v. Burnett, 353 P.2d 242. In that case the Oregon Supreme Court held that a charge for prospective use of a sewer may not be made unless it is levied as an assessment. This

decision was based upon limited statutory authority under Oregon law which provided a statutory scheme for assessments, which was not followed properly by the City of Stanfield. The Oregon Court found there was a lack of uniformity in the assessments levied and that accordingly the charges were not valid assessments. The Court further found there was no contract between the parties and that there was no statutory authority under Oregon Law to charge for service, maintenance and operation. The Stanfield case is not controlling or applicable here. The statutory framework in Utah is not akin to Oregon's and the connection fee is not a charge for operation and maintenance, but for service rendered in enlarging and furnishing the City's water facilities to Plaintiffs' subdivisions. Plaintiffs wrongly and repeatedly assert in the instant action that they will receive no service or benefit for the fees paid, and that no burden will be imposed by the City. (Brief of Plaintiffs', p. 13) Such is simply not the case and serves to point out ever more clearly the genuine dispute existing in this case as to many material facts. Plaintiffs argue that they receive no immediate benefit and therefore the Defendant City's Extension Agreement is unconstitutional as a denial as a due process because it amounts to a taking of property without due process. Plaintiffs are asking the Supreme Court of Utah to ignore the tremendous burdens placed upon the Defendant City by reason of the growth Plaintiffs are causing within

its boundaries and to overlook the clear, immediate and direct benefits received by the Plaintiffs in connecting to the Defendant City's water system. Some of the benefits received by the Plaintiffs are as follows:

(a) At the time Plaintiffs' subdivision systems are physically hooked into the City's water main, City water flows through that system to the lot boundary of each lot within the subdivisions. By reason of this connection, the City has obligated itself to furnish water to each of the subject lots. Implicit in such obligation is the fact that the City thereafter guarantees full and uninterrupted water service to each and every lot at all times, including sufficient water, water storage capability and pressure in the lines. The City has thereupon "furnished" water to each lot within the developers subdivision which may be used from that day forward by the Plaintiffs or their successors. Section 10-7-10, Utah Code Annotated (1953) provides the City may require the owners of premises or a lot to sign a written application for water that he will pay for all water furnished according to the City's ordinances or rules. Webster's Twentieth Century Dictionary, unabridged 2d Edition, defines the word "furnish" as follows: to supply; to provide; to give. Clearly, then, the Defendant City has furnished water to the Plaintiffs for use as Plaintiffs determine. The City must raise substantial capital to enlarge its water systems to supply this water to Plaintiffs' subdivision. Plaintiffs have admitted using some of

this water to settle trenches, contain dust, and to water test their subdivision lines, which is an admission of actual use. (June 15, 1979 - T. 22, 24). The Defendant City is faced with the obligation that once a connection is made to its water main, that is must enlarge lines, increase and extend storage capacity, and enlarge pumping capabilities in order to maintin water supply and pressure through its existing system. Due to the fact that the City has not yet been able to file an answer in this action, and has been unable to allege the extent of these burdens, but the same must be recognized in making a fair disposition of the instant action. The City is presently faced with constructing a 2.5 million gallon storage tank required because of the dramatic growth of subdivisions within the City.

(b) addition to the foregoing, the Plaintiffs are benefited by the improvement made to their undivided raw land. The availability of a culinary water supply at each lot vastly enhances the value of each such lot and Plaintiffs then offer thgese lots for sale to the public as fully improved lots and the price is set for an improved lot and not for raw land. This increase in value is an admitted direct benefit to the Plaintiffs. (June 15, 1979 T. 19-20).

(c) In addition, the Plaintiffs receive a benefit in that the City is obligated from the time of connection to maintain the subdivision water main.

The charging of the connection fee does not result in a wrongful taking of property by the City, but in specific defined benefits to the developers. The Utah Supreme Court has recognized this reality in its case of Homebuilders Association of Greater Salt Lake v. Provo City, 503 P.2d 451 (1972). This case has been widely recognized, cited and followed in majority opinions throughout the United States. In that action, the Provo City Commission enacted an ordinance which imposed a connection fee of One Hundred Dollars ($100.00) for each living unit of newly constructed buildings connecting to the existing sewer system. The ordinance was passed as a result of a number of studies which determined that a sewer connection fee, in addition to monthly service charges would be necessary to provide the requisite funds to improve and enlarge the sewer system. The funds were used to pay for new collector lines, replacement of existing sewer lines, enlargement of the seweage treatment plant and related facilities, required in order to render the existing sewer system adequate to meet the demands placed upon Provo City due to the tremendous increases in building rental and apartment units throughout the City by developers. This Court held that Provo City was within its statutory authorization to exact a reasonable charge for the right to connect to the sewer system. The Court discussed the burden reasonably anticipated to be imposed upon the City's sewerage system, and the Court cited the Airwick Industries,

Inc. v. Carlstadt Sewage Authority case, 57 NJ 107,270 A2d 18 (1970), in which the New Jersey Court found that while properties actually using the sewer should alone pay for the costs of operation and maintenance, all properties, where service is available, whether actually using the system or not should pay for the construction and installation expense of the system and that these properties receive some benefits and corresponding increase in value.

Plaintiffs also seek to envoke the protection of the Equal Protection Clause of the Utah and United States Constitutions alleging that Plaintiffs as subdividers are being treated differently from the owners of other residential property. Plaintiffs argument is not supported by the facts. In the first instance, Plaintiffs are ignoring the existence of a valid distinction between subdividers and owners of individual lots. There is a clear distinction existing between a person owning a single lot and the impact he causes upon a municipal water system and the tremendous impact caused by the four hundred (400) lots of the Plaintiffs on the same system. This is a most valid and clear distinction. Notwithstanding such distinction, it is also equally clear that there is no unfair or differing treatment afforded the owners of single lots who are also required to pay a connection fee to the City for their lot at the time of hooking it on to the City's water main.

A distinction between subdividers and the single lot owners, must and can be fairly drawn when one considers their impact upon the resources and facilities of a small community like South Jordan City. The Supreme Court has further considered these matters more recently in the case of Call v. City of West Jordan, 606 P.2d, 217 (1979) and upon rehearing of the same, 614 P.2d, 1257 (1980). In that case, Justice Wilkins stated on rehearing:

> Once it is determined that a municipal ordinance is within the scope of powers granted by the legislature--and the prior opinion of this Court indicated that the ordinance in question was--the ordinance is entitled to the presumption of constitutional validity accorded other legislation. p. 1258.

The Court in that case remanded the matter to the trial court to allow the Plaintiff developers the opportunity to present evidence to show that the dedication required of them had no reasonable relationship to the needs of flood control or parks and recreational facilities created by their subdivision.

South Jordan City's Appellant Brief previously filed in this action addresses itself to the issues germane in this case as to the scope of powers granted by the legislature to the Defendant City to enable it to pass Ordinance 13-1-5 challenged in this action.

Defendant submits that a recent decision by the Utah Supreme Court handed down in the State of Utah v. Hutchinson,

slip opinion (filed December 9, 1980, Utah No. 16087) is controlling in this action. In that case, the Court recognized the tremendous challenges facing local government entities in these complex times and recognized the merit in allowing local government leaders to legislatively choose the means necessary to solve problems affecting local governments, so long as the same are not unreasonable or inconsistent with the constitution of this state or the United States. The Court stated:

> Several counties in this state, for example, currently confront large and serious problems caused by accelerated urban growth. The same problems, however, are not so acute in many other counties...The problems that must be solved by these counties are to some extent unique to them. According a plain meaning to the legislative grant of general welfare power to local government units, allows each local government to be responsive to the particular problems facing it. p.17

This decision is fully applicable in the instant case and should be followed here.

POINT II

THE TRIAL COURT CORRECTLY GRANTED DEFENDANT CITY'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT AS TO THE VALIDITY OF THE PARK IMPROVEMENT FEE.

Defendant City adopts the majority opinions of Justice Stewart in State of Utah v. Hutchinson, slip opinion (Utah, December 9, 1980 No. 16087) and Justice Crockett in Call v. City of West Jordan, 606 P.2d 217 to 222, in support of their argument that Plaintiffs' Complaint failed to state a claim

against the Defendant upon which relief may be granted. The trial court dismissed Plaintiffs' Third, Fourth and Fifth Causes of Action and that decision should be affirmed on this appeal.

The Defendant City is empowered, under Utah Law to pass all ordinances and rules and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers or duties conferred by this chapter, and such as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort and convenience of the City and the inhabitants thereof and for the protection of property therein. Section 10-8-84, Utah Code Annotated (1953) as amended. In addition, 10-8-8, Utah Code Annotated, (1953) provides that cities may layout, establish, open, alter, widen, narrow, extend, and otherwise improve...parks. The power of the City is further established by Section 10-9-1, Utah Code Annotated (1953) which provides that for the purpose of promoting health, safety, morals and the general welfare of the community, the legislative body of cities and towns is empowered to regulate and restrict...the location and use of buildings, structures and land for trade, industry, residence or other purposes. Section 10-9-3 provides for the establishment of parks. Section 10-9-25 provides that the Planning Commission of the Defendant City may prepare regulations governing

the subdivision of land within the municipality and that the legislative body may adopt such regulations for the municipality.

CONCLUSION

The lower court incorrectly entered summary judgment against the Defendant City. The Supreme Court should alter, and/or amend the judgment of the trial court by granting Defendant City's Motion to Dismiss Plaintiff's Complaint. The imposition of the water connection fee requirement upon the Plaintiffs is permitted by Utah Law and does not violate the due process or the equal protection clauses of the United States Constitution or the Constitution of the State of Utah. In the alternative, the Summary Judgment should be reversed and the case remanded to the trial court for trial on the merits, for the reasons cited in the Defendant City's Briefs on file herein.

Respectfully submitted.

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/s/
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DELIVERY CERTIFICATE

I hereby certify that I delivered a true and correct copy of the above and foregoing Reply to Plaintiffs-Respondents and Cross-Appellants Brief to the following to JOHN H. McDONALD and CRAIG S. COOK, Attorneys for Plaintiffs-Respondents and Cross-Appellants, 320 South 300 East, Suite 1, Salt Lake City, Utah 84222, on this 5th day of February, 1981.

BY: _____