

1983

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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,

Defendants-Respondents.

No. 19186

BRIEF OF APPELLANTS

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FILED

AUG 10 1983

Clerk, Supreme Court, Utah

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TABLE OF CONTENTS

	<u>Page</u>
AUTHORITIES CITED	ii
STATEMENT OF THE CASE	1
RELIEF SOUGHT ON APPEAL	1
PROCEDURAL HISTORY	2
FACTS	2
A. <u>Composition of the City of West Jordan</u> . . .	2
B. <u>Recreation for Old-timers</u>	3
C. <u>Flood Control for Old-timers</u>	3
D. <u>Growth of West Jordan</u>	3
E. <u>Traditional Funding for New Facilities</u>	3
F. <u>New Subdivision Fees</u>	4
 <u>POINT I</u>	
WEST JORDAN HAD THE BURDEN OF PRODUCING EVIDENCE	4
A. <u>Discovery Sanctions</u>	5
B. <u>Trust Theory</u>	5
C. <u>Practical Considerations</u>	6
 <u>POINT II</u>	
WEST JORDAN MUST LOSE IF IT FAILS TO MEET ITS BURDEN OF PRODUCING EVIDENCE	7

POINT III

WEST JORDAN HAS FAILED TO PRODUCE EVIDENCE THAT A PUBLIC HEARING WAS HELD AND THAT THE PLANNING COMMISSION PREPARED THE ORDINANCE	8
A. <u>Statement of the Issue</u>	8
B. <u>There is No Evidence of Any Public Hearing and No Evidence that the Ordinance Was Prepared by the Planning and Zoning Commission</u>	10
C. <u>The Failure to Follow Each Statutory Step Renders the Ordinance Invalid</u>	11
D. <u>This Case Does Not Fall Under the Broad Powers Granted in State v. Hutchinson</u>	13

POINT IV

WEST JORDAN HAS FAILED TO MEET ITS BURDEN OF SHOWING THAT THE SEVEN PERCENT FEE IS A RESTRICTED FUND	14
A. <u>Statement of the Issue</u>	14
B. <u>Judge Dee's Findings</u>	15
C. <u>Survey of the Evidence</u>	15
D. <u>Summary</u>	17

POINT V

WEST JORDAN HAS FAILED TO MEET ITS BURDEN OF SHOWING THAT A FLAT SEVEN PERCENT FEE IS APPROPRIATE FOR ALL SUBDIVISIONS	17
A. <u>Statement of the Issue</u>	17
B. <u>Judge Dee's Ruling</u>	19

C.	<u>Survey of the Evidence</u>	19
D.	<u>Summary</u>	20

POINT VI

DEFENDANT HAS FAILED TO MEET ITS BURDEN TO SHOW THAT THE SEVEN PERCENT FEE FALLS EQUALLY ON OLD-TIMERS, NEWCOMERS, AND FUTURE- COMERS	21
A. <u>Statement of the Issue</u>	21
B. <u>Judge Dee's Findings</u>	22
C. <u>Survey of the Evidence</u>	22

POINT VII

THIS CASE HAS NOTHING TO DO WITH THE NEED FOR FLOOD CONTROL AND PARKS	22
---	----

POINT VIII

THIS CASE SHOULD BE CERTIFIED AS A CLASS ACTION	24
A. <u>Procedural History in the Trial Court</u>	24
B. <u>Procedural History in the Supreme Court</u> . . .	24
C. <u>Rule 23(a) (1)--The Class is So Numerous that Joinder of All Members is Impractical</u> . .	25
D. <u>Rule 23(a) (2)--There are Questions of Law or Fact Common to the Class</u>	26
E. <u>Rule 23(a) (3)--The Claims of the Representative Parties are Typical of the Claims or Defenses of the Class</u>	27
F. <u>Rule 23(a) (4)--The Representative Parties will Fairly and Adequately Represent the Class</u>	28

POINT IX

THIS ACTION SHOULD BE MAINTAINED
AS A CLASS ACTION SINCE THE
PREREQUISITES OF RULE 23(b) ARE
PRESENT 28

A. Rule 23(b) (1) (A) --Inconsistent or
Varying Adjudications with Respect
to Individual Members of the Class
Would Create a Risk of Establishing
Incompatible Standards of Conduct
for Defendants 29

AUTHORITIES CITED

Page

A. STATUTES, RULES AND MUNICIPAL ORDINANCES

<u>Utah Code Ann.</u> §10-9-25 (1953)	9
<u>Utah Rules of Civil Procedure</u> , Rule 23	25-30
<u>West Jordan, Utah Ordinance</u> No. 33, §9-C-8 (1975).	1

B. CASES

<u>Albertsons, Inc. v. Amalgamated Sugar Co.</u> , 503 F.2d 459 (10th Cir. 1974)	29
<u>Arkansas Education Ass'n. v. Board of Education of Portland</u> , 446 F.2d 763 (8th Cir. 1971)	25
<u>Banberry Dev. Corp. v. South Jordan City</u> , 631 P.2d 899, 903, 904, 905 (Utah 1981)	2, 6, 17, 18, 21
<u>Blinzler v. Andrews</u> , 519 P.2d 438 (Ida. 1973)	25 18, 21
<u>Bogosian v. Gulf Oil Corp.</u> , 62 F.R.D. 124 (E.D.Pa. 1973)	29
<u>Booth v. General Dynamics Corp.</u> , 264 F.Supp. 465 (N.D.Ill. 1967)	31
<u>Bootery Inc. v. Washington Metropolitan Area Transportation Authority</u> , 326 F.Supp 794 (D.D.C. 1971).	31
<u>Call v. City of West Jordan</u> , 606 P.2d 217, 219, 220 (Utah 1979)	2, 6, 8, 9, 14
<u>Call v. City of West Jordan</u> , 614 P.2d 1257 (Utah 1980)	2
<u>Cass Clay Inc. v. Northwestern Public Service Co.</u> , 18 F.R.Serv.2d 1187 (D.S.D. 1974)	30
<u>Cimarron Corp. v. Bd. of County Commissioners</u> , 563 P.2d 946 (Colo. 1977)	30

<u>City of Montgomery v. Crossroads Land Co.,</u> 355 So.2d 363 (Ala. 1978)	30
<u>Crockett v. Virginia Folding Box Co.,</u> 61 F.R.D. 312 (E.D.Va. 1974)	26
<u>Cypress v. Newport New Gen. and Nonsectarian</u> <u>Hospital Ass'n.,</u> 375 F.2d 648 (4th Cir. 1967)	25
<u>Four Seasons Securities Laws Litigation,</u> 59 F.R.D. 667 (W.D.OKla. 1973)	27
<u>G.M. Leasing Corp. v. United States,</u> 514 F.2d 935 (10th Cir. 1975)	10
<u>George v. United Federal Savings and Loan,</u> 63 F.R.D. 631 (N.D.Ga. 1974)	29
<u>Gerstel v. Continental Airlines, Inc.,</u> 50 F.R.D. 213, 219 (D.Colo. 1970)	28
<u>Gwilliam v. Ogden City,</u> 49 Utah 555, 164 P. 1022, 1024 (1917)	12
<u>Horn v. Associated Wholesale Grocers, Inc.,</u> 555 F.2d 270 (10th Cir. 1977)	25
<u>Horst v. Guy,</u> 211 N.W.2d 723 (N.D. 1973)	30
<u>Hulihee v. Heins of Haeu,</u> 556 P.2d 920 (Hawaii 1976)	25
<u>Kelson v. United States,</u> 503 F.2d 1291 (10th Cir. 1974)	10
<u>Lafferty v. Payson City,</u> 642 P.2d 376, 378 (Utah 1982)	2, 14
<u>Leisner v. New York Telephone Co.,</u> 358 F.Supp 359 (S.D.N.Y. 1973)	26
<u>Lewis v. Kanab City,</u> 523 P.2d 417 (Utah 1974)	12
<u>Matthews v. Massell,</u> 356 F.Supp. 291 (N.D.Ga. 1973)	31
<u>Mersay v. First Republic Corp.,</u> 43 F.R.D. 465 (S.D.N.Y. 1968)	28
<u>Patterson v. Alpine City,</u> 663 P.2d 95 (Utah 1983)	2, 13 19
<u>Sommers v. Abraham Lincoln Federal Savings</u> <u>and Loan Ass'n.,</u> 66 F.R.D. 581 (E.D.Pa. 1975)	26

<u>Staheli v. Farmers Cooperative of Southern Utah,</u> 655 P.2d 680 (Utah 1982)	7
<u>State v. Hutchinson,</u> 624 P.2d 1116, 1126 (Utah 1980)	13
<u>In re Swan,</u> 4 Utah2d 277, 284, 293 P.2d 682, 686 (1956)	7
<u>United States Steel Corp. v. Multistate Tax Comm.,</u> 18 F.R. Serv.2d 287 (S.D.N.Y. 1974)	31
<u>Walker v. Walker,</u> 17 Utah2d 53, 60, 404 P.2d 253, 258 (1965)	6
<u>Walsh v. City of Detroit,</u> 412 F.2d 226 (6th Cir. 1969) . .	25
<u>White v. Gates Rubber Co.,</u> 53 F.R.D. 412 (D.Colo. 1971) .	27

C. OTHER AUTHORITIES

R. Anderson, <u>American Law of Zoning 2d.,</u> §4.11 (1976) . .	11
McQuillin, <u>The Law of Municipal Corporations,</u> §44.05, 44.13	11, 12
Newberg, <u>Newberg on Class Actions,</u> §1105b, 1115c (1977)	26, 27, 28
<u>Notes of Advisory Committee on Rules,</u> 39 F.R.D. 100 (1966)	29, 30
9 <u>Wigmore on Evidence,</u> §2487, p. 293-294	7, 8

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN CALL AND CLARK JENKINS,)

Plaintiff and)
Appellant,)

vs.)

CITY OF WEST JORDAN,)

Defendant and)
Respondent.)

BRIEF OF APPELLANT

Case No. 19186

STATEMENT OF THE CASE

Appellants (hereafter Call) are subdividers. Call sought permission to sell subdivision lots in the City of West Jordan. West Jordan charged a fee of \$16,576.00 as a condition for approval.

The authority for imposing the fee is found in West Jordan City Ordinance 33 §9-C-8 (Appendix A). Plaintiffs claim that the ordinance is unconstitutional. Plaintiffs seek a refund of the \$16,576.00 fee. The complaint was brought as a class action.

RELIEF SOUGHT ON APPEAL

The trial court entered judgment for West Jordan. Call seeks to have that judgment reversed, and judgment

entered in his favor. Call also seeks to have the case certified as a class action.

PROCEDURAL HISTORY

This court has previously written two opinions on this case. In the first case, the Utah Supreme Court affirmed a judgment of dismissal by the trial court. Call v. City of West Jordan, (Call I), 606 P.2d 217 (Utah 1979). That case is attached as Appendix B. Thereafter, the Court granted rehearing. Call v. City of West Jordan (Call II), 614 P.2d 1257 (Utah 1980). That case is attached as Appendix C.

After remand, the case was tried to the court. During pre-trial proceedings, the Court appointed a special master. The initial report of the special master is very crucial to this case. The report is attached as Appendix D. Judge Dee entered judgment for West Jordan. Call appeals.

After Call II was decided, this Court decided three similar cases. Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981), (Appendix E); Lafferty v. Payson City, 642 P.2d 376 (Utah 1982), (Appendix F); and Patterson v. Alpine City, 663 P.2d 95 (Utah 1983), (Appendix G). These cases are each attached as exhibits because they are closely intertwined with this case.

FACTS

A. Composition of the City of West Jordan

West Jordan is not a homogenous community. It is made up from several different sub-communities. There is

the original, or old-timers' community which has existed for many years. There are the newcomers' subdivisions. There is a rural farming community. There is also a business and light manufacturing community (r. 673 at p.5 and p.40, see also r. 673, Tables 1, 2, 3, compare defendant's Exhibit 1).

B. Recreation for Old-timers

West Jordan has one central park of fifty acres. For the most part, that park serves the old-timers. (r. 673 at p. 20).

C. Flood Control for Old-timers

The old-timers utilize an existing flood control system of canals, ditches and storm sewers. It appears that the old existing flood control system has long since been paid off (plaintiff's Exhibit 10).

D. Growth of West Jordan

West Jordan has been experiencing moderate growth. The population in 1970 was 6946. It is estimated that the population will be 18,000.00 in 1995 (r. 673 at p.4, Table 1). This projected growth requires additional facilities for parks and flood control (r. 597-598, 611-626).

E. Traditional Funding for New Facilities

West Jordan has a variety of resources for funding the new facilities:

1. General Bonding Power: The City has \$35 million in unused bonding power, (plaintiff's Exhibit 7, transmittal letter from Allan E. Tolman);

2. Flood Control Bonding Power: The City has \$2 million in unused flood control bonding power (r. 599 see also plaintiff's Exhibit 7);
3. Flood Control Assistance: The City receives \$110,000.00 per year from Salt Lake County for flood control assistance (plaintiff's Exhibit 10, "Storm Sewer Funding");
4. Storm Sewer Fees: West Jordan receives approximately \$219,000.00 per year in storm sewer fees (Exhibit 10 "Storm Sewer Funding").

F. New Subdivision Fees

In 1974, West Jordan formulated a plan to expand its flood control system. This was to be done by building a series of detention basins (r. 610-626).

West Jordan did not use traditional funding sources for the detention basins (see paragraph E above). Instead, West Jordan has resorted to a special tax on subdividers (r. 622-623). Call challenges the constitutionality of that special tax.

POINT I

WEST JORDAN HAD THE BURDEN
OF PRODUCING EVIDENCE

In a traditional trial, the plaintiff (Call) would have the burden of going forward with evidence. That traditional burden was reversed in this case. Here, West

Jordan had the burden of producing evidence. There were three reasons for this shift in the burden:

A. Discovery Sanctions

The primary reason for shifting the burden is that West Jordan frustrated discovery. Therefore, Judge Rigtrup reversed the normal burden as a sanction (see R. 1171-1173; see also r. 1442, 1444, 1446, 1448, 1450-51, 1455-56, 1458, 1460-61, 1463-66, 1468-70, 1472-74). Judge Rigtrup's pre-trial order is attached as Appendix H.

Specifically, Judge Rigtrup ruled that:

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

The trial court reconfirmed Judge Rigtrup's ruling:

The order which was signed by Judge Rigtrup reverses the usual order of trial and this Court is bound by that order that was signed requiring that the defendants herein proceed as though they were plaintiffs and put on their evidence as to what they've done with the funds which were taken from the developers (September 1, 1982 Transcript at p.3).

B. Trust Theory

West Jordan does not keep the seven percent subdivider fee in any segregated or restricted account. Rather, West Jordan simply lumps the money into its general fund.

In the original appeal, Call challenged that practice of mixing funds. This Court held that:

Although the money which was collected from the plaintiffs in this case was deposited in the City's general

fund, it should not be assumed that the money thus becomes usable for other purposes by the City and is of no special benefit to the area sought to be subdivided. On the contrary . . . if money is collected from the public for a specific purpose, it becomes a trust fund committed to the carrying out of that purpose. 606 P.2d at 220

It is well settled that a trustee has the duty of producing evidence regarding the funds held in the trust. This Court has held:

It is the duty of a trustee to keep full, accurate and orderly records and when any question arises as to their sufficiency or accuracy, the burden is upon him to show the correctness of his accounts and doubts may be resolved adversely to him, Walker v. Walker, 17 Ut.2d 53, 404 P.2d 253 (1965).

C. Practical Considerations

There are certain practical reasons for shifting the burden. The financial records are all in the possession of West Jordan. Call cannot attack those financial records until they are produced.

This Court appears to have already recognized that principle:

As the information that must be used to assure that subdivision fees are within the standard of reasonableness is most accessible to the municipality, that body should disclose the basis of its calculations to whoever challenges the reasonableness of the subdividers fees. Banberry Development Corp. v. South Jordan City, 631 P.2d 899, 904 (Utah, 1981).

POINT II

WEST JORDAN MUST LOSE IF IT FAILS TO MEET ITS BURDEN OF PRODUCING EVIDENCE

The Court must find against West Jordan if it is unable to meet the burden of producing evidence.

This Court has held:

[S]ome situations . . . require the party who does not have the burden of persuasion to produce prima facie evidence of the non-existence of such fact in order to support a finding in his favor on such issue. In re Swan, 4 Ut.2d 277, 293 P.2d 682, 686 (1956).

The Court continued:

In other words, the Court must find the facts against a party who fails to satisfy his burden and such finding does not have to be supported by positive evidence. Id. at 686

Recently, this Court affirmed that rule. Even though it involved a bailment issue, the basic procedural rules governing the burden of producing evidence should be the same. The Court held that when the burden of producing evidence is shifted to defendant (as in the present case) and the defendant offers no evidence, the issue must be resolved in favor of the plaintiff, Staheli Farms v. Farmers' Cooperative of Southern Utah, 655 P.2d 680 (Utah 1982).

Speaking of the burden of producing evidence, Wigmore gives the following summary:

He [the judge] may require the opponent [defendant in this case] to produce evidence, under penalty of losing the case by direction of the judge. A duty of producing evidence, under this penalty for default has now arisen for the opponent. 9 Wigmore on Evidence, §2487 p. 294.

If all of these statutes are viewed together . . . it seems plain enough that the ordinance in question is within the scope of the authority and responsibility of the city government Emphasis added Call I, supra at 119.

In other words, the legislature has delegated taxing power only if each of those statutes are satisfied. If not, the chain is broken and the delegation is void. The last statute in this chain of delegation states:

The Planning Commission shall prepare a regulation governing the subdivision of land within a municipality. A public hearing thereon shall be held by the legislative body, after which the legislative body may adopt said regulation for the municipality, Utah Code Ann. §10-9-25 (1953).

After the decision in Call I, Call amended the complaint to include the following allegation:

47. Plaintiffs allege that Ordinance No. 33 was not prepared by the West Jordan City Planning Commission and that no public hearing was held on Ordinance 33 prior to its adoption, as required by the aforementioned statute, and that Ordinance No. 33 is therefore void and invalid, (r. 339).

Thus, the issue in Call I was whether the legislature had delegated power to the defendant to impose the fee. This Court held that taxing power was delegated if a public hearing was held, and if the Planning Commission prepared the ordinance. Call now claims that the ordinance is invalid because those procedural steps were not followed.

B. There is No Evidence of Any Public Hearing and No Evidence That the Ordinance was Prepared by the Planning and Zoning Commission.

There is no evidence in the record of any public hearing on the issue of the seven percent subdivider fee. There is no evidence in the record that the Planning and Zoning Commission prepared the ordinance.

After West Jordan completed its evidence Judge Dee clearly agreed that there was never any public hearing; and that there was never any action by the Planning and Zoning Commission:

. . . no evidence was specifically given to the Court during this hearing concerning the preparation of the ordinance by or under the direction of the Zoning and Planning or Planning and Zoning Commission, and there was no evidence given to the Court during this hearing about a public hearing, (Sept. 2, 1982 Transcript, at p. 72).

West Jordan will likely rely on the findings signed by Judge Dee some months later. (R. 1500 paragraph 22) However, those "canned" findings were prepared by West Jordan, and mechanically signed by Judge Dee some months after hearing the evidence. That practice has been criticized: Kelson v. United States, 503 F.2d 1291 (10th Cir. 1974); G.M. Leasing Corp. v. United States, 514 F.2d 935 (10th Cir. 1975).

Nevertheless, it makes little difference whether Judge Dee signed those "canned" findings. There is simply no evidence in the record to support a finding of a public hearing. Neither is there any evidence to support a finding that the Planning Commission prepared the ordinance.

C. The Failure to Follow Each
Statutory Step Renders the
Ordinance Invalid.

West Jordan can impose a fee if the Planning and Zoning Commission prepares the ordinance, and if a public hearing is held. However, West Jordan did not follow those statutory procedures. That failure is fatal. The ordinance is invalid.

Unlike the usual legislative hearing, the public hearing on a proposed zoning ordinance or amendment is required by law. A notice of hearing to a property owner may be required by the due process clauses of the state and federal constitutions . . . Failure of the legislative body to conduct an appropriate hearing, after notice which affords a fair opportunity to be heard, will render the regulation invalid, R. Anderson, American Law of Zoning 2d, (1976), Section 4.11.

Municipal corporations have no inherent power of taxation. On the contrary, municipal corporations possess with respect to taxation only such power as has been granted to them by the constitution or the statutes . . . It has been frequently stated that, as the power to tax is a governmental function, exercise thereof by a municipal corporation must rest upon a constitutional or statutory grant of power clearly expressed . . . And since the authority to levy taxes is an extraordinary one, it should never be left to implication unless it be a necessary implication. The grant relied on should be evident and unmistakable, and, if there is a doubt as to the existence of the power, such doubt will be resolved against the municipality and in favor of the taxpayer. McQuillin, The Law of Municipal Corporations, Section 44.05.

The grant of any power to tax, made by the state to a municipal corporation, will be, according to the rule accepted by virtually all authorities, construed strictly. A citizen cannot be subjected to the burden of taxation without clear warrant of law.

The power of taxation can be exercised only in the manner prescribed by law. If the authority of the municipality to tax is doubtful, the doubt must always be resolved against the tax. Id. at Section 44.13.

Utah case law is in accord. A case in point is Gwilliam v. Ogden City, 49 Utah 555, 164 P. 1022 (1917). In that case, the legislature delegated power to tax for municipal improvements. The statute required the city to publish a notice twenty days prior to imposing the tax. The city published a notice to levy taxes for a curb and gutter. However, the city did more than simply install a curb and gutter. The city lowered the grade of the street. Plaintiffs allege that the tax was illegal. The Utah Supreme Court concluded that:

. . . The things required of the city by [the statute] are jurisdictional, and unless they are complied with with reasonable strictness the city authorities are without power or jurisdiction to impose a special assessment or tax to defray the cost of the proposed improvement, 164 P. at 1024.

Gwilliam is a vintage case. However, the law has not changed. More recently, our Supreme Court decided the case of Lewis v. Kanab City, 523 P.2d 417 (Utah 1974). In that case, Kanab desired to raise money for a curb and gutter project.

The legislature had delegated power to municipalities to levy a tax for such improvements. However, that statute required the city to follow certain specific steps before assessing the tax. One step required a board of equalization and review. Another step required that notice be mailed to each property owner. Kanab City failed to follow those procedural steps. The Court held that Kanab City had no power to tax unless each of the procedural steps was followed. The tax was therefore invalidated.

The final chapter on this issue was written just months ago in the case of Patterson v. Alpine City, 663 P.2d 95 (Utah 1983). Patterson is almost identical to this case. In Patterson, the municipality had assessed certain sewer fees. Power to impose those fees was delegated from the State for use only where an ordinance was passed by roll call vote. Alpine City did not follow that statutory procedure and the sewer tax was therefore invalidated.

D. This Case Does Not Fall Under the
Broad Powers Granted in State v.
Hutchinson.

In a landmark decision, this Court has dramatically expanded municipal powers. State v. Hutchinson, 624 P.2d 1116 (Ut. 1980). However, Hutchinson was not a blank check for municipalities. The Hutchinson Court specifically held that:

Specific grants of authority may serve to limit the means available under the general welfare clause, for some limitation may be imposed on the exercise of power by directing the use of power in a particular manner.
624 P.2d at 1126

Thus, municipalities do not have any blanket power to impose subdivider fees. That power is granted with specific restrictions. We learn from Call I what those restrictions are. One restriction is a public hearing. A second restriction is action by the Planning and Zoning Commission. Since West Jordan enacted the ordinance without following the rules, the delegation of authority fails and the ordinance is invalid.

POINT IV

WEST JORDAN HAS FAILED TO
MEET ITS BURDEN OF SHOWING
THAT THE SEVEN PERCENT FEE
IS A RESTRICTED FUND

A. Statement of the Issue.

Defendant has no power to impose a fee on subdividers as a general revenue measure.

. . . A reasonable charge for a specific purpose is permissible, whereas a general fee that amounts to a revenue measure is not. Lafferty v. Payson City, 642 P.2d 376, 378 (Utah 1982)

West Jordan's City Ordinance specifies that the seven percent fee will be used for flood control and parks. Thus, a key issue is whether the fee is really used only for flood control and parks, or whether it is used for general revenue measures.

This same issue was preserved in Call I, where the Court stated:

. . . If money is collected from the public for a specific purpose, it becomes a trust fund for carrying out that purpose. 606 P.2d at 220.

The issue was also framed in the pre-trial order:

. . . defendant shall have the burden of producing evidence on the following issues . . .

D. Whether the seven percent 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. (R. 1030-1031)

B. Judge Dee's Findings

Judge Dee made the following finding:

Even though the individual dollars paid by the plaintiffs cannot be individually traced through the accounting records, the Court finds from a preponderance of the evidence that the monies were spent on flood control projects and parks and recreation areas for which the impact fee was assessed . . . (R. 1498)

C. Survey of the Evidence

This is not a matter where the evidence is in conflict or where the judge had to weigh evidence. There is not one iota of evidence to support Judge Dee's finding on this crucial issue.

Plaintiff's expert has testified that defendant did not segregate the funds or treat them as a trust fund. Plaintiff's expert has testified that West Jordan's records do not show how the money was used, (Nov. 18 Transcript, at 11-13 and 16-17).

The special master agrees with plaintiff's expert. The special master has concluded that the defendant's records do not account for these trust funds properly:

With the guidance of paragraphs (2), (4), and (9) of Sections 7-7-101, (Utah Code Annotated), I conclude that the fees should have had a 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 . . . 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 earmarked 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 the revenue account, (plaintiff's Exhibit 9 at p. 9)./

West Jordan did introduce its accounting records. However, those accounting records simply do not answer the question of where or how the seven percent subdivision fee was spent. The only testimony on that issue is as follows:

Q. (By Mr. DeBry) Okay, based upon all the exhibits you've seen at trial, based upon generally accepted accounting principles, based upon all the testimony you've heard at trial, do you have an opinion whether the plaintiffs' 7% fee was spent on any flood control or any park project?

A. I can't form an opinion.

Q. Why not?

A. Because as I stated before, there's no issue that they built these projects, the issue is I don't know whose money was spent. The fund is self-balancing, yes, but I don't know whether we spent a particular sum on the Mayor's car, or whether we spent it on this project, (Nov. 18 Transcript, at p. 16-17).

1. In an action to be tried without a jury, the Court ~~may~~ accept the master's findings of fact unless clearly erroneous.

Rule 53(c)(2) U.R.C.P. *Butler* 2001.

The Master has agreed it is impossible to make any analysis based on those records:

To accomplish Step 3, I would have to determine if any general defendant 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 [Emphasis added.] (plaintiff's Exhibit 9 at p. 7).

D. Summary

West Jordan had the burden of producing evidence to show that the seven percent fee was used for Flood Control and Parks. West Jordan did not meet that burden. Two qualified C.P.A.s (Call's expert and the special master) testified that they cannot determine where or how the money was spent. If the expenditures were not restricted, they amount to more general revenue measures.

POINT V

WEST JORDAN HAS FAILED TO MEET
ITS BURDEN OF SHOWING THAT A
FLAT SEVEN PERCENT FEE IS
APPROPRIATE FOR ALL SUBDIVISIONS

A. Statement of the Issue

This Court has stated that:

The dedication [or fee] should have some reasonable relationship to the need created by the subdivision.

2 See Rule 53 (c)(2) U.R.C.P. cited at footnote 1.

. . . if not, it is forbidden and amounts to confiscation of private property in contravention of the constitutional prohibitions rather than a reasonable regulation under police power, Banberry Development Corp. v. South Jordan City, 631 P.2d 899, 905.

The Supreme Court has also noted that some types of improvements are city wide:

The central facilities that support water and sewer service would generally confer the same benefits in every part of the community . . . Id. at 905.

However, other types of improvements are spread out and vary from neighborhood to neighborhood:

. . . The benefits conferred by recreational, flood control, or other dispersed resources may be measurably different in different parts of the community. Id. at 905.

Of course, this case involves neighborhood-type projects (flood control and parks). These projects "may be measurably different in different parts of the community." Id. at 905.

This issue was clearly preserved in the pre-trial order:

At the first phase, defendant shall have the burden of producing evidence . . . 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% fee received from (all other) subdivisions . . . (R. 1030)

It appears that this issue is especially crucial in

light of this Court's recent ruling in Patterson v. Alpine City, 663 P.2d 95 (Utah 1983). In Patterson, this Court held that a municipality can^{not} arbitrarily assess some residents \$700.00 and other residents \$1,000.00 and other residents \$1,500.00 for the same city-wide water system. This case is just the opposite side of that coin. It is unreasonable to charge all residents of the City a seven percent fee for neighborhood projects when some neighborhoods require flood control projects and some do not.

B. Judge Dee's Ruling

Judge Dee made no finding at all on this crucial issue, (r. 1496, et seq.). Call made a timely motion to make additional findings (R 1256 at paragraph 3). Judge Dee denied the motion (r. 1494).

C. Survey of the Evidence

Defendant's evidence is skimpy. Nevertheless, the evidence suggests substantial differences in flood control needs in various parts of the city. Defendant's Exhibit 7 shows a variety of different flood control projects spread across the city. Costs vary substantially from project to project. For example, subdivisions which drain into Barney's Creek are saddled with capital costs of \$275,703.04. On the other hand, subdivisions which use the 3200 West Storm Drain are obligated to pay only \$38,313.86. (See defendant's Exhibit 4.)

Thus, it would appear that the Barney's Creek

subdivisions would have a much higher assessment than the 3200 West subdivisions. However, that is not the case. The city has charged a flat seven percent to all new subdivisions. Obviously, some subdivisions are overpaying--others are underpaying.

For example: the 1981 budget (see plaintiff's Exhibit 7) notes that \$177,000.00 would be received from the seven percent fee. The budget shows that the major expenditure for that year would be the Barney's Creek Detention Basin. (See plaintiff's Exhibit 10 section titled Storm Sewer Funding.) Therefore, in 1981, all new subdividers must contribute to the Barney's Creek project, even though their subdivision might be in a wholly different part of town.

D. Summary.

In summary, the city is only authorized to impose the fee for specific needs caused by specific subdivisions. However, the city has set a flat tax of seven percent on all subdivisions in all parts of town. There is no relationship between that flat seven percent tax and any specific project for any specific subdivision. That squarely violates Patterson, supra and Banberry, supra. It appears that the seven percent is really used as a general revenue measure, (compare Point III above).

POINT VI

DEFENDANT HAS FAILED TO MEET ITS
BURDEN TO SHOW THAT THE SEVEN
PERCENT FEE FALLS EQUALLY ON
OLD-TIMERS, NEW-COMERS, AND
FUTURE-COMERS

A. Statement of the Issue

This Court has stated that it is unconstitutional to put the entire burden of improvements on newcomers. Rather, the purpose of the seven percent fee is to equalize the financial burdens among old-timers, newcomers, and future-comers.

Stated otherwise, to comply with the standard of reasonableness, a municipality fee related to services like water and sewer must not require newly developed properties to bear more than their equitable share of the capital costs in relation to benefits conferred. To determine the equitable share of the capital costs to be borne by newly developed properties, a municipality should determine the relative burdens previously borne by those properties in comparison with other properties in the municipality as a whole: The fee in question should not exceed the amount sufficient to equalize the relative burdens of newly developed and other properties. Banberry, 631 P.2d at 903.

The Banberry court went on to suggest seven criteria which would equalize the burden among old-timers, newcomers and future-comers. 631 P.2d at p. 904.

B. Judge Dee's Findings

Judge Dee made specific findings that the relative burden on old-timers, newcomers and future-comers had been equalized. However, Judge Dee gave no analysis of the issue. He simply parroted the language from Banberry. (R. 1502 at paragraph 29). Call made a timely motion to amend. (R. 1254 paragraph 14). The motion was denied by Judge Dee. (R. 1494).

C. Survey of the Evidence

This is not a case where the trial judge had to weigh evidence. There was absolutely no evidence to support Judge Dee's finding.

Indeed, defendant's skimpy evidence shows clearly that the old-timers are getting a "free ride." The seven percent subdividers fee was apparently based on a 1974 Study (defendant's Exhibit 7). That study bases the entire cost of the improvements on new subdivisions (Exhibit 7 at p. 11-12). According to that study, the old portions of the City pay absolutely nothing toward the flood control projects. That is a direct violation of the Banberry rule.

The only evidence on this issue came from plaintiffs' expert. Plaintiffs' expert testified that it is impossible to relate the contributions of old-timers, newcomers, and future-comers based upon the evidence and records produced by West Jordan, (Nov. 18, 1982 Transcript at p. 13-16).

POINT VII

THIS CASE HAS NOTHING TO DO
WITH THE NEED FOR FLOOD
CONTROL AND PARKS

Most of defendant's evidence relates to the need for

flood control and parks. Call concedes that West Jordan needs parks. Call concedes that West Jordan needs flood control. However, that has absolutely nothing to do with this case.

This case deals with how to finance the flood control and park projects. One way to finance such projects is by bonding. Of course, the financial burden of bonding would fall equally on all 26,000 residents (see plaintiff's Exhibit 7 at p. 94). However, West Jordan has chosen another scheme. West Jordan has chosen to finance the projects on the shoulders of approximately 100 subdividers.

Thus, the issue in this case is whether West Jordan has constitutional and statutory authority to shift that financial burden from a base of 26,000 people to a base of only 100 people.

Finally, there is a "red herring" in this case. West Jordan pleads poverty. West Jordan really wants this Court to "bend" the rules because of the alleged population explosion and financial need.

In point of fact, West Jordan's revenue from all sources has grown over one thousand percent (1000%) in the past decade, (plaintiff's Exhibit 7 at p. 85.). Indeed, the defendant could raise an additional \$35 million in bonds tomorrow (see transmittal letter from Allan G. Tolman, City Manager, attached with plaintiff's Exhibit 7). In addition, the defendant can probably bond up to \$2 million extra for flood control. Moreover, the defendant gets about \$110,000.00 per year in flood control funds from the Salt Lake County

government. Finally, the defendant receives approximately \$219,000.00 per year in monthly storm sewer fees. (See plaintiff's Exhibit 10, section titled Storm Sewer Funding.)

In summary, there is no objective evidence that the City is poor. All the evidence points in the opposite direction. The increased population means an increased tax base for municipalities.

POINT VIII

THIS CASE SHOULD BE CERTIFIED AS A CLASS ACTION

A. Procedural History in the Trial Court

This case was brought as a class action. A motion to certify the class was made to Judge Winder. The motion was denied, (r. 127). Some three years later the motion to certify the class was renewed to Judge Banks. That motion was also denied. (r. 463).

The motion was renewed before Judge Dee, (r. 908-914). Judge Dee's final ruling denied class certification, (r. 1507-1508 at paragraph 17).

B. Procedural History in the Supreme Court

The class issue was presented to the Utah Supreme Court during the briefing on Call I. The Supreme Court was silent on class issues. After remand, Judge Banks denied class certification. Call petitioned the Supreme Court for intermediate appeal. The petition was denied. Thereafter, Call petitioned to the Supreme Court for a writ of mandamus to compel Judge Banks to enter findings. That petition was also

denied. Thus, the class issue has been to the Supreme Court on three occasions. However, the Supreme Court has not ruled on the class issues.

It is settled that silence on such an issue leaves the matter open for further consideration by the trial court. Walsh v. City of Detroit, 412 F.2d 226 (6th Cir. 1969); Blinzler v. Andrews, 519 P.2d 438 (Ida. 1973); Hulinnee v. Heins of Haeu, 556 P.2d 920 (Hawaii 1976).

C. Rule 23(a)(1)--The Class is so Numerous that Joinder of all Members is Impractical.

The class in this case consists of all subdividers who have been required to pay cash and/or property pursuant to Ordinance No. 33 of the City of West Jordan and the Amendment thereto adding Section 9-C-8. Plaintiffs believe that the class consists of approximately one hundred (100) members. Joinder of all 100 would be impractical because of size alone.

Even if the class contained less than 100 members, Rule 23(a)(1), Utah R. Civ. P., is still satisfied as recent cases have upheld classes consisting of fewer members, Cypres v. Newport New Gen. & Nonsectarian Hospital Ass'n., 375 F.2d 648 (4th Cir. 1967), (class numbering 13 certified); Arkansas Education Ass'n. v. Board of Education of Portland, 446 F.2d 763 (8th Cir. 1971), (plaintiff class of 17 members certified); Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270 (10th Cir. 1977), (reversal of a denial of a class of 46). Furthermore, the difficulty of joining even a smaller

number of plaintiffs in one action has clearly been recognized:

Certainly, when the class is very large, for example, numbering in the hundreds joinder will be impracticable; but in most cases, the number that will in itself satisfy the (a)(1) prerequisite should be much lower. The difficulty inherent in joining as few as 25 or 30 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of 23(a)(1) on that fact alone. Joinder of larger classes might sometimes be practicable, or the action might fail to meet the superiority test of 23(b)(3), and joinder of a smaller class will often be impracticable because of the circumstances of the particular cases; but the plaintiff whose class numbers in the 25 or 30 range should have a reasonable chance of success on the basis of numbers alone, Newberg, Newberg on Class Actions, §1105b at 174 (1977).

D. Rule 23(a)(2)--There are Questions of Law or Fact Common to the Class.

Rule 23(a)(2), Utah R. Civ. P., provides that class treatment is appropriate where there are "questions of law or fact common to the class."

Rule 23(a)(2) does not require that common questions of fact or law predominate. It only requires that they exist, Sommers v. Abraham Lincoln Federal Savings & Loan Association, 66 F.R.D. 581 (E.D. Pa. 1975); Crockett v. Virginia Folding Box Co., 61 F.R.D. 312 (E.D. Va. 1974). Indeed, it has been held that there need be only one question of law or fact in common to satisfy the prerequisite of Rule 23(a)(2): Leisner v. New York Telephone Co., 156 F.Supp. 359 (S.D. N.Y. 1973).

Rule 23(a)(2) is satisfied because all potential

class members paid money or property to defendant pursuant to the same city ordinance. All would benefit if the ordinance was declared invalid. Each must rely on the same law in seeking to have it declared invalid.

E. Rule 23(a)(3)--The Claims of the Representative Parties are Typical of the Claims or Defenses of the Class.

Rule 23(a)(3) Utah R. Civ. P., provides that class treatment is appropriate if "the claims or defenses of the representative parties are typical of the claims or defenses of the class."

Rule 23(a)(3) requires that claims of representative parties be "typical"--not "co-extensive with" or "identical to" those of other class members. The requirement of typicality may be satisfied even though there are varying fact patterns, support claims, or defenses of individual class members, or though there is disparity in damages claimed by representative parties and other members of the class: Four Seasons Securities Laws Litigation, 59 F.R.D. 667 (W.D. Okla. 1973). The typicality requirement of Rule 23 requires only that the named plaintiffs show that other members of the class have suffered the same grievances of which he complains. White v. Gates Rubber Co., 53 F.R.D. 412 (D. Colo. 1971). All members of the class are in the same position since all were required to give up property pursuant to the same ordinance:

Typicality refers to the nature of the claim or defense of the class representative, and not the specific facts from which it arose or to the

relief sought. Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and is based on the same legal theory. Newberg on Class Actions, §1115 c.

See also Gerstel v. Continental Airlines, Inc., 50 F.R.D. 213, 219 (D. Colo. 1970):

To say that plaintiff is not an adequate representative simply because her claim is not identical with that of all other class members is to require, in any class action, that the claims of each member of the class be absolutely identical. The rule does not require this much.

F. Rule 23(a)(4)--The Representative Parties will Fairly and Adequately Represent the Class.

Rule 23(a)(4), Utah R. Civ. P., provides that class treatment is appropriate if "the representative parties will fairly and adequately protect the interests of the class."

The requirement of adequate representation comprises only two elements: (1) that the interests of the representative party must coincide with the members of the class; and (2) that the representative party and his attorney can be expected to prosecute the action vigorously: Mersay v. First Republic Corp., 43 F.R.D. 465 (S.D.N.Y. 1965). Both elements are present in this case.

POINT IX

THIS ACTION SHOULD BE
MAINTAINED AS A CLASS ACTION
SINCE THE PREREQUISITES OF
RULE 23(b) ARE PRESENT

In order to bring a class action, the plaintiffs must

satisfy all four of the requirements of Rule 23(a). However, plaintiffs need meet only one of the requirements of Rule 23(b). Albertsons Inc. v. Amalgamated Sugar Co., 502 F.2d 459 (10th Cir. 1974)

- A. Rule 23(b)(1)(A)--Inconsistent or Varying Adjudications with Respect to Individual Members of the Class would Create a Risk of Establishing Incompatible Standards of Conduct for Defendants.

The focus of Rule 23(b)(1)(A) is to protect the interest of the party opposing the class, George v. United Federal Savings and Loan, 63 F.R.D. 631 (N.D. Ga. 1974). The purpose of the rule is to protect a defendant from the legal quagmire which might result if one court were to order defendant to take certain action which another court orders the same defendant not to take, Bogosian v. Gulf Oil Corp., 62 F.R.D. 124 (E.D. Pa. 1973).

The advisory committee notes to the 1966 Amendments to the Federal Rules of Civil Procedure state:

Clause (A): One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class. The matter has been stated thus: 'The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a

position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways.' Louisell & Hazard, Pleading and Procedure: State and Federal 719 (1962); see Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366-67 (1921). To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowner's rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication. [Emphasis added.] Notes of Advisory Committee on Rules, 39 F.R.D. 100 (1966).

It appears that the present case falls squarely within the rule, (see also, Horst v. Guy, 211 N.W.2d 723 (N.D. 1973)).

In a similar vein, class actions have been upheld under Rule 23(b)(1)(A) on claims that a utility has overcharged its customers, Cass Clay Inc. v. Northwestern Public Service Co., 18 F.R.Serv.2d 1187 (D.S.D. 1974).

Finally, identical cases to the present one wherein subdividers have brought suit against a municipality seeking to have an ordinance requiring dedication of land or payment of money declared invalid, have been maintained as a class action. City of Montgomery v. Crossroads Land Co., 355 So.2d 363 (Ala. 1978); Cimarron Corp. v. Bd. of County Commissioners, 163 P.2d 946 (Colo. 1977).

Finally, this case seems similar to taxpayer class actions. Here, the taxpayer (subdivider) challenges the tax as illegal. Such taxpayer actions are routinely certified as class actions, see e.g. United States Steel Corp. v. Multistate Tax Comm., 18 F.R.Serv.2d 287 (S.D.N.Y. 1974); Mathews v. Massell, 356 F.Supp. 291 (N.D.Ga. 1973); Booth v. General Dynamics Corp., 264 F.Supp 465 (N.D.Ill. 1967); Bootery Inc. v. Washington Metropolitan Area Transit Authority, 326 F.Supp. 794 (D.D.C. 1971)

DATED this 11th day of Aug, 1983

ROBERT J. DEBRY & ASSOCIATES
Attorney for Appellant

By: Robert Debry
by SG

CERTIFICATE OF HAND DELIVERY

I hereby certify that a true and correct copy of the foregoing Appellate Brief on Appeal was hand delivered this 19th day of August, 1983, to the following:

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

Dave Mohr

The City Council of the City of West Jordan ordains as follows:

Section 1. That Ordinance No. 33 of the West Jordan City ordinance relating to subdivisions be amended by adding the following section.

Section 9-C-8 (a). In addition to all the other requirements prescribed under this ordinance the subdivider shall be required to dedicate seven per cent (7.0%) of the land area of the proposed subdivision to the public use for the benefit and use of the citizens of the City of West Jordan and shall convey title of the same to the City by a proper conveyance instrument, 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 the requirements of Section 9-C-8 (a) hereinabove shall be used by the City for its flood control and/or parks and recreational facilities.

Section 2. This ordinance shall become effective twenty (20) days after its posting in three (3) public places or 30 days after publication in a newspaper of general circulation.

Section 9-C-8 (c). In the event the City governing body elects to receive the monies pursuant to Section 9-C-8 (a) said monies shall be paid by the subdivider on or before final approval of the plat is given by the City Council.

PASSED AND ADOPTED this 21st day of January, 1975 by the City Council of the City of West Jordan.

1405

Junius H. Burton

John CALL and Clark Jenkins,
Plaintiffs and Appellants,

v.

CITY OF WEST JORDAN, Utah,
Defendant and Respondent.

No. 15908.

Supreme Court of Utah

Dec. 26, 1979.

Subdividers brought action to challenge validity of ordinance adopted by city which required subdividers to dedicate 7% of proposed subdivision land to city or to pay equivalent of that value in cash to be used for flood control and/or park and recreation facilities. The Third District Court, Salt Lake County, David K. Winder, J., upheld validity of ordinance and denied subdivider's requests for injunctive relief and damages, and subdividers appealed. The Supreme Court, Crockett, C. J., upheld validity of ordinance.

Affirmed and remanded.

Stewart, J., concurred and filed opinion.

Wilkins, J., dissented and filed opinion in which Maughan, J., concurred.

1. Zoning and Planning \approx 86

City had authority to enact ordinance which required subdividers to dedicate 7% of subdivision land area or to pay equivalent of that value in cash, to be used for flood control and/or park and recreation facilities. (Per Crockett, C. J., with one Judge concurring and one Judge specially concurring.) U.C.A. 1953, 10-8-84, 10-9-1, 10-9-3, 10-9-19 et seq., 10-9-20, 10-9-22, 10-9-25.

2. Zoning and Planning \approx 86

Fact that dedication of 7% of proposed subdivision land area or its cash value rebounded to benefit of subdivision as well as to general welfare of whole community did not invalidate ordinance which provided for such dedication. (Per Crockett, C. J.,

with one Justice concurring and one Justice specially concurring.)

3. Trusts \approx 30½(1)

If money is collected from public for specific purpose, it becomes a trust fund committed to carrying out that purpose. (Per Crockett, C. J., with one Justice concurring and one Justice specially concurring.)

4. Eminent Domain \approx 2(1.2)

City, which received \$16,576 from subdividers under ordinance requiring subdividers to dedicate 7% of proposed subdivision land area or to pay equivalent of that value in cash to be used for flood control and/or park and recreation facilities, was not taking land under power of eminent domain without following requirement of paying just compensation but was merely imposing reasonable regulations on subdividers as prerequisite for permitting creation of subdivision. (Per Crockett, C. J., with one Justice concurring and one Justice specially concurring.)

5. Zoning and Planning \approx 602

Question of percentage of land in subdivision to be committed to public purpose is within prerogative of city council to determine, and so long as it is within reasonable limits, so that it cannot be characterized as capricious or arbitrary, courts will not interfere therewith. (Per Crockett, C. J., with one Justice concurring and one Justice specially concurring.)

6. Zoning and Planning \approx 76

Ordinance which required subdividers to dedicate 7% of proposed subdivision land or to pay equivalent of that value in cash to be used for flood control and/or park and recreation facilities was within scope of powers granted to city so that it could plan for general good of community as well as for newly created subdivision. (Per Crockett, C. J., with one Justice concurring and one Justice specially concurring.)

7. Zoning and Planning \approx 382.4

Payment to city of cash equivalent of 7% of subdivision land area, which was made pursuant to ordinance for general

purpose of parks, recreation facilities and flood control, was not necessarily to be used solely for subdividers' subdivision or any other particular one; it did not prevent city from imposing reasonable condition of construction of storm sewers and did not prevent city from refusing to credit subdividers with cost of storm sewers against cash they paid. (Per Crockett, C. J., with one Justice concurring and one Justice specially concurring.)

Robert J. DeBry and Valden P. Livingston, Salt Lake City, for appellant.

Nick J. Colessides, Salt Lake City, for respondent.

CROCKETT, Chief Justice:

Plaintiffs John Call and Clark Jenkins, subdividers, brought this action in which they challenge the validity of an ordinance adopted by the defendant City which requires that subdividers dedicate 7 percent of the land to the city, or pay the equivalent of that value in cash, to be used for flood control and/or parks and recreation facilities. The district court upheld the validity of the ordinance and denied plaintiffs' request for injunctive relief and damages. The latter appeal.

Plaintiffs contend that the ordinance is invalid because: (1) it is not within the City's granted powers; (2) the land or the money required is not for the benefit of the subdivision, but rather the City as a whole; (3) that the City is attempting to exercise the power of eminent domain without following the requirements thereof and paying just compensation; and (4) it unlawfully imposes a tax.

On January 21, 1975, the City amended an existing ordinance (No. 33) relating to subdivisions by adding the following:

Section 9-C-8(a). In addition to all the other requirements prescribed under this ordinance *the subdivider shall be required to dedicate seven percent (7.0%) of the land area of the proposed subdivision to the public use for the benefit and use of*

the citizens of the City 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.*

Sections 9-C-8(a) and (d) further provide that the money received "shall be used by the City for its flood control and/or parks and recreational facilities" and that if the City elects to receive money in lieu of land, payment shall be made "by the subdivider on or before final approval of the plat is given by the City Council."

On May 2, 1977, the plaintiffs presented to the City two plats and maps for a proposed "Wescall subdivision" which, if approved, would result in the future development of 92 lots on about 30 acres of land located in the City. When the City exercised its option to accept money in lieu of land, plaintiff Clark Jenkins paid, under protest, \$16,576.00, representing about 7 percent of the value of his land. The City Council then approved the subdivision and the plats were recorded. The City refused plaintiffs' demand to refund the money and this action resulted.

In rejecting plaintiffs' attack upon the ordinance, the trial court stated in its memorandum decision:

As it affects the plaintiffs, it is the opinion of this Court that the City of West Jordan, Utah's ordinance 33, as amended January 21, 1975, is valid and constitutional. It is further the Court's opinion that there has been no taking of the plaintiffs' property by the defendant without just compensation nor has the defendant levied an invalid tax upon the plaintiffs. See Secs. 10-9-1 through 10-9-30, U.C.A. 1953. [Citing cases.]

The Authority of the City

[1] It is not questioned that cities have no inherent sovereign power, but only those granted by the legislature.¹ But it must be realized that it is impractical for statutes to spell out to the last detail all of the things city governments must do to perform the

1. *Johnson v. Sandy City Corp.*, 26 Utah 2d 22, 497 P.2d 644 (1972).

has imposed upon them to do so. This court has in numerous cases recognized this principle and has held that cities have those powers which are expressly granted and also those necessarily implied to carry out such responsibilities.²

There are a series of statutes through which the City derives its authority to enact ordinances of the character here in question. Sec. 10-8-84, U.C.A. 1953, grants to cities the authority and the duty

to preserve the *health, safety*
and good order of the city and its inhabitants.

This idea is carried forward and echoed in Section 10-9-1, U.C.A. 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.

Further dealing with that subject and more specific as to the establishment of parks, Section 10-9-3 states that such regulations

shall be made in accordance with a comprehensive plan designed to facilitate adequate provision for transportation, water, sewage, schools, parks and other public requirements.

The Municipal Planning Enabling Act³ empowers a city to have a planning commission which may "adopt and certify to the legislative body, a master plan for the planned development of the municipality."⁴

Section 10-9-22 states that the planning commission "shall have such powers as may be necessary to enable it to perform its functions and promote municipal planning."

Significantly, Section 10-9-25 then provides

In exercising the powers granted to it by the act, the planning commission shall

prepare regulations governing the subdivision of land within the municipality. A public hearing thereon shall be held by the legislative body, after which the legislative body may adopt said regulations for the municipality.

[all emphasis herein added.]

If the above statutes are viewed together, and in accordance with their intent and purpose, as they should be, it seems plain enough that the ordinance in question is within the scope of authority and responsibility of the city government in the promotion of the "health, safety, morals and general welfare" of the community.⁵

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.

In modern times of ever-increasing population and congestion, real estate developers buy land at high prices. From the combined pressures of competition and desire for gain, they often squeeze every lot they can into some labyrinthian plan, with only the barest minimum for tortuous and circuitous streets, without any arterial ways through such subdivisions, and with little or no provision for parks, recreation areas, or even for reasonable "elbow room." The need for some general planning and control is apparent, and makes manifest the wisdom underlying the delegation of powers to the cities, as is done in the statutes above referred to.

As undeveloped land is improved, it is also important that some provision for flood control be made. To the extent that the

2. See *Salt Lake City v. Revene*, 101 Utah 574, 124 P.2d 517 (1942), and *Buit v. Salt Lake City Corp.*, Utah, 550 P.2d 202 (1976).

3. 10-9-19 et seq. U.C.A. 1953.

4. 10-9-20, U.C.A. 1953.

5. Language from Sec. 10-9-1, U.C.A. 1953.

establishment of subdivisions increases the need for flood control measures or recreational facilities, it is both fair and essential that subdividers be required to contribute to the costs of providing those facilities.

Lack of Benefit to the Subdivision

[2] In their point No. (2), the plaintiffs attack the ordinance on the ground that the land dedicated (or the money in lieu thereof) is not to be used solely and exclusively for the benefit of the created subdivision. They point to the provision that the land is received "for the benefit and use of the citizens of the City of West Jordan" and the money is used for "its [West Jordan's] flood control and/or parks and recreation facilities."

We agree that the dedication should have some reasonable relationship to the needs created by the subdivision.⁶ But in the planning for the expansion of a city, it is obvious that no particular percentage of each subdivision, or of each lot, could be used as a park or playground in that particular subdivision; and likewise, that it could not be so used for flood control. But it is so plain as to hardly require expression that if the purpose of the ordinance is properly carried out, it will redound to the benefit of the subdivision as well as to the general welfare of the whole community. The fact that it does so, rather than solely benefiting the individual subdivision, does not impair the validity of the ordinance.⁷

[3] These observations are also pertinent: Although the money which was collected from the plaintiffs in this case was

deposited in the City's general fund, it should not be assumed that the money thus becomes usable for other purposes by the City and is of no special benefit to the area sought to be subdivided. On the contrary, 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.⁸

The Eminent Domain Issue

[4] There is an obvious fallacy in the plaintiffs' argument that the City has not followed the proper procedure for taking plaintiffs' property under eminent domain. This is not a proceeding initiated by the City to acquire property.⁹ It has indicated no desire to compel the plaintiff to subdivide their property, nor to dedicate any part of it. The plaintiffs are the moving parties, and as a prerequisite for permitting the creation of the subdivision, the City, under the powers conferred upon it as hereinabove discussed, can and does impose reasonable regulations.¹⁰

Invalidity as a Tax

Plaintiffs urge that the requirements of the ordinance in question are but a revenue-raising scheme for the purpose of meeting the financial needs of the City, and thus constitute an improper levy of a tax upon their property. This labeling is but an ex-

6. See statements in *Aunt Hack's Bridge Estates, Inc. v. Planning Commission of Danbury*, 27 Conn.Supp. 74, 230 A.2d 45 (1967); *Krughoff v. City of Naperville*, 68 Ill.2d 352, 12 Ill.Dec. 185, 369 N.E.2d 892 (1977); *Home Builders Ass'n v. City of Kansas City, Mo.*, 555 S.W.2d 832 (1977).

7. *Ayres v. City Council*, 34 Cal.2d 31, 207 P.2d 1 (1949); *Associated Home Builders, Inc. v. City of Walnut Creek*, 4 Cal.3d 633, 94 Cal. Rptr. 630, 484 P.2d 606 (1971).

8. 15 McQuillin, *Municipal Corporations*, Sec. 39.45 states that: "Special funds are often created for a particular purpose, and in such case the general rule is that they cannot

be used for any other purpose" and that a "fund raised by a municipality for a special purpose is a trust fund, and equity will, in a proper case, interfere to prevent its diversion." (Citing cases.)

9. See *Ayres v. City Council*, *supra*, note 7; *Petterson v. City of Naperville*, 9 Ill.2d 233, 137 N.E.2d 371 (1956).

10. *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182, 187 (1964); *City of Albuquerque v. Chapman*, 77 N.M. 86, 419 P.2d 460 (1966); *Mid-Continent Builders, Inc. v. Midwest City, Okl.*, 339 P.2d 1377 (1959).

...in semantics which misconstrues the purpose of the ordinance to make another attack upon it. It has been adjudicated that such an ordinance, if reasonably designed and carried out for the purpose intended, is a proper form of planning for the good of the community, and is not such a prohibited tax.¹¹

[5] The question as to the percentage of the land in the subdivision (in this instance, 7 percent) to be committed to the public purpose is within the prerogative of the City Council to determine, and so long as it is within reasonable limits, so that it cannot be characterized as capricious or arbitrary, the courts will not interfere therewith.¹²

[6] In harmony with what has been said above, it is our opinion that the ordinance under attack is within the scope of the powers granted to the City so that it can plan for the general good of the community as well as for the newly-created subdivisions.

We have decided the principal issue which was addressed by the parties in the district court, and on this appeal, as to the validity of the ordinance. However, we observe that in the averments of the affidavits, there are other matters which may need to be resolved on remand; and accordingly, it is deemed appropriate that we make some additional comments.¹³

There is no question, but that the ordinance should be applied fairly, and without favoritism or discrimination insofar as that can be accomplished. In view of the averment in plaintiff's affidavit that that principle has been violated, the trial court should be concerned with examination into and resolution of any legitimate issue raised thereon.

[7] In his affidavit, plaintiff Clark Jenkins averred that he not only paid the \$16,576 (assumed to be 7 percent of the value of

the subdivision, \$248,000) but was also required to dedicate .028 acres valued at \$1,500, and to expend about \$19,000 in construction of a storm sewer (which plaintiff urges is flood control) before the City would approve the subdivision. He asserts that these amounts are in excess of the 7 percent required by the ordinance. The City's affidavit states that it received the \$16,576, but says nothing about receiving the other amounts just referred to. It is, of course, essential that the amount the City exacts pursuant to the ordinance is not more than the 7 percent of value of plaintiffs' property it prescribes.

Our final observation is on plaintiffs' urgency that the \$19,000 they expended in constructing a storm sewer should be credited upon their obligation under the ordinance. From what has been said in this decision, it should be sufficiently plain that the 7 percent exacted pursuant to the ordinance is for the general purpose of parks, recreation facilities and flood control, and is to be so administered and expended by the city government for that purpose; and that it is not necessarily to be used solely for the plaintiffs' subdivision or any other particular one. This does not in any way prevent the City from imposing other reasonable conditions upon the approval of a subdivision and proposed construction therein, including requiring a storm sewer if the conditions are such that it is needed in that subdivision for the protection of future residents thereof or other residents of the City. We therefore do not disagree with the City's requirement of the storm sewer, nor with its refusal to credit the plaintiff with the cost thereof on its 7 percent required by the ordinance.

The decision of the trial court is affirmed and the case is remanded for further pro-

11. *Petterson v. City of Naperville*, supra, note 9; *Jenad v. Village of Searsdale*, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966).

12. For an excellent discussion of the various constitutional challenges that have been made regarding subdivision legislation, see *Associat-*

ed Home Builders, Inc. v. City of Walnut Creek, supra, note 7, and authorities therein cited.

13. See Rule 76(a), U.R.C.P.; *LeGrand Johnson Corp. v. Peterson*, 18 Utah 2d 260, 420 P.2d 615 (1966).

ceedings consistent with this opinion. No costs awarded.

HALL, J., concurs.

STEWART, Justice (concurring).

I concur in the conclusion that § 9-C-8(a) of the ordinance of the City of West Jordan is authorized by § 10-8-84 U.C.A. (1953), as amended. This statute delegates to cities general police power to be used for the benefit of the city and its inhabitants. However, the ordinance in question clearly approaches constitutionally protected rights, i. e., the prohibition against the taking of private property without just 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 an unconstitutional forced dedication by a subdivider. The question is certainly one that will recur and ought to be resolved by the Court.

WILKINS, Justice (dissenting).

I respectfully dissent.

The majority opinion forms a perilous new rule today by impermissibly expanding municipal powers, for the first time in this State, beyond those granted cities and towns by our Legislature and beyond those recognized by subdivision, zoning, and municipal government authorities, and it endangers the sound precedent of narrowly construing municipal powers which has been developed in *Salt Lake City v. Revere*,¹ *Ritholz v. City of Salt Lake*,² *Salt Lake City v. Sutter*,³ *Tooele City v. Elkington*,⁴ *Nance v. Mayflower Tavern*,⁵ *Parker v. Provo City*,⁶ *Nasfell v. Ogden City*,⁷ *Bohn v. Salt*

Lake City,⁸ *Lark v. Whittenhead*,⁹ *American Fork City v. Robinson*,¹⁰ *Layton City v. Speth*,¹¹ and other cases.

I shall relate my view of this case, as well as review what I perceive to be the correct legal principles applicable to it. All statutory references are to Utah Code Annotated, 1953, as amended, unless otherwise indicated.

Subdividers have undertaken to develop a subdivision within the City's boundaries and have dedicated land area and installed storm sewer facilities within the subdivision and have additionally paid \$16,576 to the City, all in response to City demands made under authority of the Ordinance as a prerequisite to subdivision approval. The record and briefs indicate a dispute as to whether the land was dedicated and the money paid under protest. No formal written protest appears in the record, but plaintiffs claim they attended a city council meeting in which they orally objected to the land dedication and fee payment.

Subdividers framed their complaint as a class action seeking a declaration of the invalidity of the Ordinance on their own behalf and on behalf of others similarly situated. Other than a general denial in its answer and the allegation that the class consisted of 28 subdividers rather than the 100 alleged by plaintiffs buried within an affidavit on another subject, the City has totally failed to address, either here or below, the Subdividers' class action allegations. The record does not indicate whether the District Court made any of the determinations contemplated by Rule 23(a) or (b), Utah Rules of Civil Procedure, but the Court disposed of the matter in an Order dated April 21, 1978, denying the Subdividers' "Motion for Declaration of a Class Ac-

1. 101 Utah 504, 124 P.2d 537 (1942).

2. 3 Utah 2d 385, 284 P.2d 702 (1955).

3. 61 Utah 533, 216 P. 234 (1923).

4. 100 Utah 485, 116 P.2d 406 (1941).

5. 106 Utah 517, 150 P.2d 773 (1944).

6. Utah, 543 P.2d 769 (1975).

7. 122 Utah 344, 249 P.2d 507 (1952).

8. 79 Utah 121, 8 P.2d 591, 81 A.L.R. 215 (1932).

9. 28 Utah 2d 343, 502 P.2d 557 (1972).

10. 77 Utah 168, 292 P. 249 (1930).

11. Utah, 578 P.2d 828 (1975).

tion." The City's motion to dismiss was created as one for summary judgment. On May 17, 1978, the District Court ruled in favor of the City's motion, and against the Subdividers' motion, that the Ordinance was valid and the City's demands were in conformity with it.

Except for cities which operate under charter¹² and derive their authority from Article XI, Section 5 of the Utah Constitution, the cities of this State are "creatures of statute and limited in powers to those delegated by the legislature, . . ."¹³ All power and authority of our nonchartered municipalities is derived through legislative grant, and for the Ordinance under review here to be upheld, it must have been enacted pursuant to an enabling statute.

Prior to the majority decision here, this Court recognized that legislative authority may be exercised by municipalities in only one of three ways. Justice Wolfe wrote in *Salt Lake City v. Revene* :

It has been repeatedly stated by this court "that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in *express* words; second, those necessarily or fairly implied in or incident to the powers *expressly* granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation,—*not simply convenient, but indispensable*." 1 Dillon Municipal Corporation, 5th Ed., p. 448, § 237; . . .¹⁴ [Emphasis added.]

and held therein that in the absence of a specific legislative grant or power the city had no authority to limit barbershop business hours for health purposes under three statutory grants of power to cities and towns. One statute provided cities power to "license, tax, and regulate" barbershops. A second statute empowered cities to promulgate regulations "to secure the gen-

eral health of the city," and the third broadly delegated to cities authority to enact ordinances for the public health, safety, prosperity, morals, peace and good order, and comfort and convenience of the city and its inhabitants. That third statute now appears in our Code as § 10-8-84 and is relied upon by the City and the majority opinion as authority for the City to enact the Ordinance under attack here.

In *Salt Lake City v. Sutter*,¹⁵ defendant's conviction for violating Salt Lake City's prohibition ordinance was reversed, this Court holding that the statute enabling cities to pass ordinances necessary to provide for the safety, health, morals, comfort and convenience, again the statute relied upon by the City and the majority opinion, did not authorize the City's legislation prohibiting possession of intoxicating liquors.

Whatever power or authority municipalities in this state have is derived from the Legislature.

It will hardly be contended that the ordinance in question is "essential to the accomplishment of the declared objects and purposes of the corporation." As we have seen, it is not included within any express grant; nor is it necessarily or fairly implied as an incident to the powers expressly granted measured by the rule laid down by the authorities.

It may be, and is, contended that the ordinance in question is only carrying out the general policy of the state as reflected by the legislative enactment making it an offense against the state law for any person to knowingly have in his possession without authority intoxicating liquors within the state. But the policy of the state cannot control in determining the powers of a municipality. Those powers must be measured and determined by the grants found in the charter or in the general laws purporting to enumerate such powers.

12. The City in this case does not represent itself to be chartered.

13. *Ritholz v. City of Salt Lake*, *supra*, note 2 at 3 Utah 2d 387, 284 P.2d 703

14. *Supra*, note 1. Although cited by the majority as authority for its position here, *Revene* held, in direct conflict with the majority, that the Ordinance enacted by the City exceeded the City's authority under the enabling statutes.

15. *Supra*, note 3

We can see no escape from the conclusion that the board of city commissioners of Salt Lake City was without authority to enact the ordinance in question on this appeal.¹⁶

The requirement that cities must have express authority to enact ordinances is not unique to Utah. McQuillin in *Municipal Corporations*, and Yokley, in *The Law of Subdivisions*, state as a general proposition that dedication ordinances require enabling legislation.

In some jurisdictions, zoning-enabling statutes authorize local zoning bodies to require, as a condition precedent to development, that subdividers dedicate portions of their property for public purposes, or pay an assessment in lieu of dedication. There must be express statutory authority granting the power to municipalities to impose such conditions, or at least language from which the intention to grant the power may be inferred.¹⁷

Further, judicial scrutiny of a municipal ordinance differs from that imposed in the test of a State statute in that the usual presumption of validity of the sovereign's action does not apply. In the case of an ordinance, any reasonable doubt must be resolved against the municipality's power to enact it, and any questioned power must be denied.¹⁸

Neither party nor the majority opinion cites any Utah statute directly authorizing

the City's enactment of the Ordinance in this case. The City has authority only to § 57-5-3¹⁹ and to Title 10, Chapter 9 of the Utah Code Ann. The majority opinion finds authority for the City's action in § 10-8-84 and various sections in Title 10, Chapter 9, under the theory that the City was acting under those powers necessarily implied to it to carry out those powers expressly granted. Section 57-5-3 governs the nature of maps and plats a subdivider must file and have approved. Title 10, Chapter 9, is a Legislative grant of power to cities and towns for the purpose of enacting zoning regulations to promote the "health, safety, morals and general welfare of the community." Chapter 10 also includes the Municipal Planning Enabling Act, §§ 10-9-19 through 10-9-30, which empowers any city to adopt a master plan for the physical development of the municipality and to promulgate regulations to assure that subdivisions conform to the master plan. The City has adopted a master plan as contemplated by the Act.

Section 10-8-84 is a broad grant of the State's police powers to cities and towns and is frequently referred to as the "general welfare clause."²⁰ It is derived from Utah's earliest laws and states:

They [the cities and towns] may pass all ordinances and rules, and make all regulations, *not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and such as are necessary*

and certified by the surveyor making such plat, if the land is situated in the city. No plat or map of a town such plat or map shall be approved by its governing body, or by some city or town officer for that purpose designated by resolution or ordinance of such governing body.

See also § 57-5-4, which states

Such maps and plats, when made, acknowledged, filed and recorded, shall operate as a dedication of all such streets, alleys and other public places, and shall vest the fee of such parcels of land as are therein expressed, named or intended for public uses in such county, city or town for the public for the uses therein named or intended.

20. *Bohn v. Salt Lake City*, *supra*, note 8; *Lusk v. Whitehead*, *supra*, note 9.

16. *Id.* at 61 Utah 340, 11, 216 P. 237. Also supporting this rule is *Touche City v. Elkington*, *supra*, note 4.

17. 8 McQuillin, *Mun. Corp.* § 25.146a (Rev. 1976); 1 Yokley *Mun. Corp.* § 97 (Supp. 1973, p. 179); Accord, Yokley, *The Law of Subdivisions* § 15 (1963).

18. *Nance v. Mayflower Tavern*, *supra*, note 5; *Parker v. Provo City*, *supra*, note 6; *Nasfeil v. Ogden City*, *supra*, note 7; *Salt Lake City v. Revue*, *supra*, note 1.

19. *Maps and plats to be acknowledged, certified, approved, and recorded*. Such map or plat shall be acknowledged by such owner before some officer authorized by law to take the acknowledgment of conveyances of real estate.

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;

(Emphasis added.)

This section is not, however, authority for the Ordinance under attack here. Cases decided under this statute are emphatic and explicit in limiting its scope. In *Nasfell v. Ogden City*,²¹ the city's power to enact an ordinance declaring that the presence of a vehicle parked in violation upon any public street was prima facie evidence that the registered owner committed the violation, was successfully challenged. Although Chief Justice Crockett reasoned there as here, that what is now Section 10-8-84 implied to the city the power to enact the ordinance, the Court held that the city had been granted no express authority to pass the ordinance, and that the city had no implied power to pass the ordinance based upon this general welfare statute or statutes granting cities the right to regulate the use of streets, traffic and sidewalks.

The Court has also characterized this statute as "merely in aid of the express powers elsewhere granted"²² in invalidating a city ordinance prohibiting keeping a pool table or playing pool. And in *Lark v. Whitehead*,²³ Chief Justice Crockett again dissenting, the Court held that while the cities had been expressly granted Legislative authority to enact an ordinance punishing persons for indecent or disorderly conduct in § 10-8-50, Salt Lake City's ordinance exceeded that statutory grant, and that even under § 10-8-84, the statute relied upon in the majority opinion here, the city had no implied power to enact its ordinance.

The general provisions of Sec. 10-8-84 do not confer authority upon a municipal

body to abrogate the limitations specified in the express provisions of Sec. 10-8-50, U.C.A.1953. In *Salt Lake City v. Sutter* this court cited the principle that where an express authority is given to pass ordinances in a particular class of cases, followed by a general authority to pass all necessary laws, the express authority is a limitation upon the general power so far as it relates to matters which belong to the class of those enumerated, but which are not, in terms, included. A general power granted to the corporation to pass all ordinances necessary for the welfare of the corporation, is qualified and restricted by those other clauses and provisions of the charter or the general law which specify particular purposes for which ordinances may be passed. Otherwise, the general clause would confer authority to abrogate the limitations implied from the express provisions.²⁴

In *Layton City v. Speth*,²⁵ this Court set aside a conviction under a city ordinance which exceeded the statutory grant of authority from the Legislature. In *Layton City*, the city had enacted an ordinance making it illegal for a vehicle owner to knowingly and intentionally permit persons who possess, use, or distribute controlled substances to occupy his vehicle. The State statute in effect at the time the ordinance was enacted granted to cities the power to prohibit distribution of intoxicating liquors, narcotics or controlled substances to persons under the age of twenty-one. This Court held over the dissents of Chief Justice Crockett and Justice Hall, that the ordinance was not necessary for carrying into effect the purposes of the statute, was beyond the scope of Legislative authority granted to the city, and was therefore invalid.

The remaining statutes cited by the City and the majority opinion as implied authori-

21. *Supra*, note 7

22. *American Fork City v. Robinson, et al.*, *supra*, note 10 at 77 Utah 171, 292 P. 250. *Accord*, *Bohn v. Salt Lake City*, *supra* note 9

23. *Supra*, note 9

24. *Id.* at 28 Utah 2d 346, 502 P.2d 559. *Accord*, *Allgood v. Larson*, Utah, 545 P.2d 530 (1976)

25. *Supra*, note 11

ty for the City to enact the Ordinance are zoning statutes found in Title 10, Chapter 9, and §§ 57-5-3 and 57-5-4, the pertinent parts of which are cited in footnote 19 of this opinion. Clearly, these statutes do not grant the City express authority to enact the Ordinance nor do I find in these statutes implied authority to enact the Ordinance to carry out powers expressly granted under the zoning statutes. A generalized difference between zoning statutes and subdivision controls is that zoning normally prohibits certain uses of property, while the title remains in the private owner, and subdivision controls normally make positive exactions, such as conveyance of the title to the city, from the private owner.

[I]t must be kept in mind that zoning regulations, generally, only limit the use of the property, whereas subdivision legislation often exacts a penalty for approval of a desired use.²⁶

Traditionally, zoning and subdivision have been founded on separate legislation and administered separately. Subdivision regulation and zoning are frequently interrelated in purpose and technique;

[N]onetheless, fundamental differences do exist between the two areas. While zoning involves no more than negative prohibitions on certain uses of the owner's property, subdivision regulation often makes positive exactions of the owner. It may require him to construct streets or sewers, to convey a portion of his land to the municipality for public use, or to pay the equivalent of such construction or dedication in cash. It is submitted that this difference necessitates a more specific test of constitutionality, i. e., the legislation should not only be substantially related to the public health, safety, morals, or general welfare, but, insofar as dedications, activities and expenditures are positively required of the subdivider, these requirements should be reasonably

related to the subdivision in question. . . . [S]hould accept types of improvements which municipalities have generally been conceded the power to levy special taxes or assessments.²⁷ [Emphasis added.]

Here, the City is not attempting to reduce the Subdividers' property from residential use to municipal use for schools and parks or to otherwise limit or prohibit its use. In this case, the City is requiring the Subdividers to convey land to it, or to pay it an amount of money equal to the value of the land, without remuneration. In no sense is this a conventional zoning case.

Further, §§ 57-5-3 and 57-5-4 cannot stand as authority for the Ordinance. The statutes automatically vest fee title in the municipal agency upon acknowledgment and recordation of the plat. They do not delegate to the cities and towns the power to enact ordinances exacting property or in lieu fees, without compensation, from private property owners as a condition to subdivision approval. Nor can such exaction be read as necessarily or even fairly implied from those sections.

In his review of State statutory authorizations for subdivision control, Yokley reviews §§ 57-5-1 to 57-5-8 of our Code and states:

A review of these provisions indicates an absence of any standards governing approval of plats except the usual directions for delineation of lots and streets, that is, there seems to be no authority conferred for the promulgation of regulations by the governing body which would require the meeting of certain conditions as a prerequisite to plat approval. The statute itself contains no provisions for meeting conditions before plat approval.²⁸

Anderson, in *The American Law of Zoning*, distinguishes between requiring a subdivision developer to plan for streets and

26. *Noland v. St. Louis County, Mo.*, 478 S.W.2d 363, 366 (1972).

27. Reps & Smith, *Control of Urban Land Subdivision*, 14 *Syracuse L.Rev.* 417, 407 (Spring 1963).

28. Yokley, *The Law of Subdivisions*, § 116 (1963). (Although this text is updated with a 1979 pocket part, Yokley had noted no new developments or changes to his stated position on Utah law in the 1963 text.)

sewers, which he states can be required with or without subdivision controls, and which may be required in this State under §§ 57-5-3 and 57-5-4, and exacting property for other municipal purposes, which he repeatedly states must be done pursuant to strictly construed enabling legislation.²⁹

Finally, the Municipal Planning Enabling Act,³⁰ and specifically § 10-9-25, quoted by the majority opinion, cannot stand as sufficient authority for the City to take the Subdividers' property under its Ordinance. That Section states: "*In exercising the powers granted to it by the act [the Municipal Planning Enabling Act], the planning commission shall prepare regulations governing the subdivision of land within the municipality.*" [Emphasis added.] Nowhere does the act authorize the planning commission or any municipality of this State to take any portion of a subdivider's property. The act enables municipal bodies to adopt a master plan (which the City has adopted), establish an official street map and to zone in conformance with those plans. It gives cities and towns the power to prohibit the issuance of a building permit or approval of a subdivision which does not conform to the master plan, and it makes it a misdemeanor to sell subdivision lots without planning commission approval. Again, in this case, the City is not attempting either to rezone the Subdividers' property or to refuse to approve their subdivision until it conforms to the master plan; the City, here, is appropriating the Subdividers' property.

The Legislature has had two opportunities to expressly expand the powers available to municipalities in controlling problems associated with rapid subdivision development, but it has not, as yet, prescribed that necessary expended power. In 1973, a bill was introduced in the Utah Senate which would have delegated to the cities the power to require fees or dedication of land or both as a condition for approval of a subdivision plat. In 1975, a bill amending

§ 10-9-25 was introduced in the Utah Senate which would have allowed cities and counties to prescribe qualifications upon subdividers, such as providing for storm drainage systems, parks and recreational facilities in order to gain approval of their subdivision plats. Neither bill gained the approval of both Houses of the Legislature.

I have reviewed those statutes characterized by the City and the majority opinion as enabling the City's actions here, and I remain unpersuaded that any or all of them are sufficient to expressly grant or necessarily imply to the City that power which it seeks to exercise by Ordinance No. 33. As noted *ante*, the normal presumptions in favor of the validity of statutes do not generally apply to ordinances, and this especially when the questioned ordinance seeks to appropriate to the government some protected private right.

There is some difference of view with respect to a presumption of power to enact an ordinance and also with respect to burden of proof on that issue. Generally, there is no such presumption of validity of an ordinance as against the objection that no power existed under charter or statute to enact it. In other words, there is no presumption in favor of the validity of an ordinance where it is questioned on the ground of want of power to enact it; on the contrary, power to pass it must appear to have existed when it was adopted, if the ordinance is to be sustained. Accordingly, one claiming under an ordinance must be able to point to existing power to enact it, either granted in express terms or in terms by which the power is fairly and necessarily implied. Also, proof of authority to enact an ordinance has been ruled to be necessary where objection is made to it on the ground that it interferes with common rights. Indeed, the view has been taken that with respect to the exercise of every power by a municipal corporation, any reasonable doubt that arises as to the existence of the power is to be

29. 4 Anderson, *The American Law of Zoning*, § 23.39, p. 141 (1977). See generally §§ 23.05, 23.08, 23.26, and 23.39.

30. Sections 10-9-19 to 30

resolved against the corporation, and the power is to be denied. Consistently, a strict construction against ordinances restricting personal liberty, property, immunity or privilege is followed in many cases.

Certainly, where it is clear that an ordinance exceeds the legislative powers of a city, it will not be presumed to be valid.³¹

Only after ordinances are satisfactorily determined to have been enacted pursuant to Legislative grants of authority may they carry the presumption of validity. In *Marshall v. Salt Lake City*,³² Utah's zoning statutes were declared constitutional and the City's ordinances, enacted pursuant to those express grants of authority, were upheld. At that point, the presumption of validity attaches to the ordinance under attack and it will not be declared invalid unless it is arbitrary, discriminatory or unreasonable, or unless it clearly offends some provision of the Constitution or a statute.³³

It is also only after a subdivision ordinance has been determined valid that it is to be tested as to its reasonableness in application to the particular fact situation. In *Jenad v. Village of Scarsdale*,³⁴ cited in the majority opinion, villages in the State of New York had been delegated sufficient grants of power to require exactions from subdividers, so the question became one of the reasonableness of the application of the ordinance to the facts of that case, unlike our problem here. Applying the presumption test to the facts of this case, the Ordinance should fail for want of authority to enact it.

Several states have enacted statutes authorizing mandatory dedication of land or in lieu fees as a prerequisite to plat approval. These enactments, however, have taken place with a keen eye to protecting the rights of private property owners. In *Asso-*

ciated Home Builders v. City of Walnut Creek,³⁵ a case relied upon by the City and the majority opinion, a dedication ordinance similar to the ordinance here survived attack. But *Associated Home Builders* does not stand for the proposition espoused by the majority opinion, because that case construed an ordinance which had been enacted pursuant to an express State enabling statute and a newly adopted amendment to the California Constitution. And in 1974, California passed statutes³⁶ requiring public agencies benefiting from the subdivision dedication to remunerate the developer-dedicator for his property.

The Subdividers also challenge the Ordinance as an unreasonable exercise of the police power because the City has deposited the in lieu fees into its general account, presumably to be used for general City purposes, and because they claim, the City has not shown that the exaction from them is reasonably related to the demands placed on the City by their subdivisions, and that therefore the exaction benefits others at their subdivision's expense. The affidavit of one of the Subdividers (made a part of the record) states, and the City does not dispute, that the Subdividers' in lieu fees have been used to purchase land for a water-detention basin to receive run-off from subdivisions other than the one developed by the Subdividers herein.

A reading of the Ordinance discloses that the land shall be dedicated or the in lieu fees paid "to the public use for the benefit and use of the citizens of the City of West Jordan" and "shall be used by the City for flood control and/or parks and recreational facilities."

As support for their argument, the Subdividers cite *Weber Basin Home Builders Ass'n v. Roy City*.³⁷ In that case, the Court

31. 6 McQuillin, *supra*, note 17, § 22.31.

32. 105 Utah 111, 141 P.2d 704 (1943).

33. *Id.*; see also *Gibbons & Reed Co. v. North Salt Lake City*, 19 Utah 2d 329, 431 P.2d 559 (1967).

34. 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966).

35. 4 Cal.2d 633, 94 Cal.Rptr. 630, 484 P.2d 606 (1971).

36. Cal.Govnt Code § 66477-80 (West).

37. 26 Utah 2d 215, 487 P.2d 866 (1971).

struck as *arbitrary and discriminatory* in city ordinance raising building permit fees from \$12 to \$112. The money was received and paid into the city's general fund, as also occurred in this case, not for the purpose of meeting increased costs of regulating building construction, but for the purpose of improving the city's water and sewer systems necessitated by the construction of new homes and for other general purposes. The Court observed that equal protection and due process principles are violated by an ordinance which undertakes to impose a greater burden of general government cost on one class of residents than upon others without reasonable basis for classification and held that an ordinance which imposed a greater burden on those who built within the city after the ordinance than before its enactment was constitutionally unacceptable. Chief Justice Crockett, writing for the Court, correctly stated:

The critical question here in whether the ordinance in its practical operation results in an unjust discrimination by imposing a greater burden of the cost of city government on one class of persons as compared to another, *without any proper basis for such differentiation and classification*. It is not to be doubted that each new residence has its effect in increasing the cost of city government; nor that due to the steadily increasing costs of everything, including those involved in rendering such services, the city would have authority to raise the fees charged for such services from time to time. Nevertheless in that connection, the new residents are entitled to be treated equally and on the same basis as the old residents.³⁸ [Emphasis added.]

I am not unsympathetic to the needs of the cities in our State faced with dramatic expansion. I am constrained, however, to review their ordinances with sensitivity to both the constitutionally protected rights of property owners and the limiting nature of the statutory grants of power to those cities. And that sensitivity compels a view on my part that the Ordinance is invalid

and void because of the specific reasons noted in this opinion.

MAUGHAN, J., concurs in the views expressed in the dissenting opinion of WILKINS, J.



STATE of Utah, Plaintiff and
Respondent,

v.

Albert Banard LAMM and Roy Lee
Lamm, Defendants and Appellant.

No. 15888.

Supreme Court of Utah.

Jan. 16, 1980.

Defendants were convicted in the Third District Court, Salt Lake County, G. Hal Taylor, J., of theft by receiving, and they appealed. The Supreme Court, Hall, J., held that evidence was sufficient to establish each element of offense charged, which was based upon alleged concealing or aiding in concealment of stolen property.

Affirmed.

Maughan, J., dissented and filed opinion.

1. Criminal Law \Rightarrow 1159.2(7, 9), 1159.4(2)

It is exclusive function of jury to weigh evidence and to determine credibility of witnesses, and it is not within prerogative of Supreme Court to substitute its judgment for that of fact finder; Supreme Court should only interfere when evidence is so lacking and insubstantial that reasonable men could not possibly have reached verdict beyond reasonable doubt.

...to represent the Commission this the ... empowers the Legislature to employ necessary personnel, including "experts" and "attorneys".⁶ By comparison, there is no statute which even suggests, much less defines, the nature or scope of the Division. The Division's existence is noted in the statutes⁷ but nowhere is the Division granted the right to litigate in its own name or otherwise, or, significantly, to appeal Orders of the Commission.

I believe that, absent express statutory authority granted by the Legislature, the Division of Public Utilities has no standing to appeal Orders of the Public Service Commission. Indeed, the implication of Section 11-1-13 is that the Division on behalf of the executive director of the Department of Business Regulation, is charged to execute any rules, regulations or orders of the public service commission of Utah issued pursuant to its quasi-judicial or rule-making power.⁸ This Court should not allow the Division, and particularly in the absence of a definitive grant of authority by the Legislature, to assume the tension-filled role toward the Commission of both investigator-enforcer and adversary.



John CALL and Clark Jenkins,
Plaintiffs and Appellants.

CITY OF WEST JORDAN, Utah,
Defendant and Respondent.

No. 15908 (Rehearing).

Supreme Court of Utah.

June 27, 1980.

required subdividers to dedicate 7% of proposed subdivision land to city or to pay equivalent of that value in cash to be used for flood control and/or park and recreation facilities. The Third District Court, Salt Lake County, David K. Winder, J., upheld ordinance, and subdividers appealed. The Supreme Court, 606 P.2d 217, affirmed and remanded. On rehearing, the Supreme Court, Wilkins, J., held that ordinance was not unconstitutional on its face, but could not be applied without subdividers being given the opportunity to present evidence to show that dedication required of them had no reasonable relationship to needs, if any, for flood control or parks and recreation facilities created by their subdivision.

Reversed and remanded.

1. Municipal Corporations ⇨ 122(2)

Once it is determined that municipal ordinance is within the scope of powers granted by the legislature, the ordinance is entitled to the presumption of constitutional validity accorded other legislation.

2. Zoning and Planning ⇨ 61, 134

Ordinance which required subdividers to dedicate 7% of proposed subdivision land, or pay equivalent of that value in cash, to be used for flood control and/or park and recreation facilities was not unconstitutional on its face, but could not be applied without subdividers being given the opportunity to present evidence to show that dedication required of them had no reasonable relationship to needs, if any, for flood control or parks and recreation facilities created by their subdivision.

3. Zoning and Planning ⇨ 234

If subdivision generates need for flood control or parks and recreation facilities and municipality exacts fee in lieu of dedi-

6. Section 54-1-6

7. See footnote 2, *supra*

Subdividers brought action to challenge validity of ordinance adopted by city which

See e.g., United States Smelting, Refining & Electrochemical Co. v. Utah Power & Light Co. 58 Utah 2d 197 P. 902 (1921); *Utah Light & Traction Co. v. Public Service Commission* 101 Utah 2d 12 P.2d 653 (1941)

cation of land for such purposes, fees so collected must be used in such a way as to benefit demonstrably the subdivision in question, though the benefit need not be solely to the particular subdivision.

Robert J. DeBry and Valden P. Livingston, Salt Lake City, for plaintiffs and appellants.

Lynn W. Mitton, Sandy, for defendant and respondent.

WILKINS, Justice:

This matter is again before us following our granting of plaintiffs' petition for rehearing. The original majority opinion addressed primarily the issue of whether there was statutory authority for the City of West Jordan to pass an ordinance requiring a subdivider to dedicate land or pay a fee in lieu of dedication as a prerequisite to approval of the subdivision plat.¹ This issue was decided by the majority in the affirmative.² On rehearing this Court limited the scope of review to the issue of whether the ordinance in question is constitutional, and therefore we address only this matter now.

[1] Once it is determined that a municipal ordinance is within the scope of powers

1. The ordinance in question in pertinent part reads as follows:

Section 9-C-8(a). In addition to all the other requirements prescribed under this ordinance the subdivider shall be required to dedicate the seven per cent (7%) of the land area of the proposed subdivision to the public use for the benefit and use of the citizens of the City 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.

2. *Call v. City of West Jordan*, Utah, 606 P.2d 217 (1979). In *Call I*, the author of this opinion filed a dissenting opinion, in which Justice Maughan concurred, and which concluded that there was no statutory authority for the ordinance in question.

3. *Crestview-Holladay Homeowners Association, Inc. v. Engh Floral Company*, Utah, 545

granted by the legislature—as in our 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.³ In this case, the District Court ruled that the ordinance was constitutional and therefore granted West Jordan's motion to dismiss.

[2, 3] While we agree that the ordinance is not unconstitutional on its face,⁴ plaintiffs raise questions as to its constitutionality as applied to them which make disposition of this issue as a matter of law inappropriate. We stated in our prior opinion in this case that “the dedication should have some reasonable relationship to the need created by the subdivision.”⁵ This same requirement has been articulated in the decisions of other jurisdictions addressing this issue. In *Jordan v. Village of Menomonee Falls*,⁶ the Court held:

We conclude that a required dedication of land for . . . park or recreational sites as a condition for approval of the subdivision plat should be upheld as a valid exercise of police power if the evidence reasonably establishes that the municipality will be required to provide more land for . . . parks and playgrounds as a result of approval of the subdivision.

P.2d 1150 (1976); 1 R. Anderson, *American Law of Zoning* 2d (1977), § 3.23.

4. While brevity and succinctness in the drafting of legislation—as in judicial opinions—may be desirable and certainly is appreciated, the ordinance in question when compared with similar provisions from other jurisdictions evidences a paucity of stated purpose and standards of application that borders on rendering the ordinance unconstitutionally vague. See, e.g., the ordinances quoted in *Jordan v. Village of Menomonee Falls*, 28 Wis.2d 608, 137 N.W.2d 442 (1965); *Associated Home Builders v. City of Walnut Creek*, 4 Cal.3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971); *Home Builders Association of Greater Kansas City v. City of Kansas City*, 555 S.W.2d 832 (Mo. 1977).

5. 606 P.2d at 220.

6. 28 Wis.2d 608, 618, 137 N.W.2d 442, 448 (1971).

Home Builders Association of Kansas City v. City of Kansas, 360 Missouri Supreme Court reid.

if the burden cast upon the subdivider is reasonably attributable to its 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 prohibitions rather than reasonable regulation under the police power. *Insofar as the establishment of a subdivision within a city increases the recreational needs of the city, then to that extent the cost of meeting that increase indeed may reasonably be required of the subdivider.* (Emphasis in original.)

In this case the rule adopted by this Court in *Call I*, quoted *ante*, cannot be applied without plaintiffs being given the opportunity to present evidence to show that the dedication required of them had no reasonable relationship to the needs for flood control or parks and recreation facilities created by their subdivision, if any. Implicit in this rule is the requirement that if the subdivision generates such needs and West Jordan exacts the fee in lieu of dedication, it is only fair that the fee so collected be used in such a way as to benefit demonstrably the subdivision in question. This is not to say that the benefit must be solely to the particular subdivision, but only that there be some demonstrable benefit to it.

Decided and remanded for further proceedings not inconsistent with this opinion. No costs awarded.

CROCKETT, C. J., and MAUGHAN, HALL and STEWART, JJ., concur.



STATE of Utah, By and Through the DEPARTMENT OF COMMUNITY AFFAIRS, Plaintiff and Respondent,

v.

UTAH MERIT SYSTEM COUNCIL and William A. Callahan, Defendants and Appellant.

No. 16501.

Supreme Court of Utah.

July 3, 1980.

State sought review of a decision of the Merit System Council ordering the reemployment of an employee of the Department of Community Affairs. The Third District Court, Salt Lake County, G. Hal Taylor, J., reversed, and remanded to the Council to hold a new hearing. Employee appealed. The Supreme Court, Stewart, J., held that the exclusion of the director of the Department of Community Affairs from a portion of the administrative hearing because she was a witness in the proceeding was reversible error and the attendance by a deputy director, who directed another arm of the operation and lacked full knowledge of the case, was not sufficient to provide the Department with appropriate representation.

Affirmed.

1. Officers and Public Employees ⇐72(1)

Both parties to proceeding before Merit System Council were entitled to have testimony taken under oath or affirmation.

2. Officers and Public Employees ⇐72(2)

Failure to place witnesses before Merit System Council under oath was not reversibly erroneous where no objection was raised until State sought review of Council order in district court.

3. Officers and Public Employees ⇐72(2)

Omissions from record of proceeding before Merit System Council were not re-

Exhibit 9

PETERSEN, SORENSEN & BROUGH

CERTIFIED PUBLIC ACCOUNTANTS

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

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

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.

During fiscal year ending June 30, 1979, the City converted to a computerized 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 prior 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 1979:

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. 7/25/77 GENERAL LEDGER POSTING \$ 28,141.89

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

This payment was traced back to supporting invoices from Neilsen, Maxwell & Wangsgard. The \$1,168.21 is part of a total payment of \$13,216.20 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.

\$ 170

- 3/10/78 West Jordan - Storm Drainage
Contract 5860-63

1. Williamsburg Subdivision - area drainage study

Cost Summary:

Engineer 1.5 hrs.

22

- 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

\$ 1,168.

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 CAL. et, al. vs. West Jordan case.

4. 11/22/76 CHECK NO. 0889 TONNESEN SPRINKLER COMPANY \$ 11.15

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

Harvest Estates No. 1

\$ 4.00

Dixie Valley No. 9

\$ 6.00

\$ 11.15

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, 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 portion of a subdivider's total benefit (from Step 2) was provided from City's general obligation and to subtract this benefit from the subdivider's

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 prepare

according to generally accepted accounting principles and 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 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 earmarked 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	5,000	7,600
Total	<u>\$ 12,400</u>	<u>\$ 18,900</u>

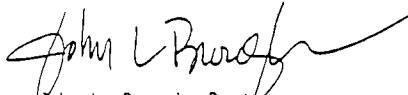
FINAL REPORT

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". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

John L. Brough, Partner
Petersen, Sorensen & Brough

evidence, in my view, of market value in this case. Even if it be conceded that the plaintiff's out-of-court statement as to the value of the well is sufficient to establish the value of the well, the testimony falls far short of providing a reasonable basis for determining market value of the whole parcel without a working well. Surely in this case such evidence would not have been hard to come by. The point cannot be avoided by the general principle that some uncertainty in evidence of damage is to be expected. That principle has especial application in cases dealing with lost profits because of lost sales, see *Winsness v. M. J. Conoco Distributors, Inc.*, Utah, 593 P.2d 1303 (1979); loss of good will; losses occasioned by inability to reduce unit costs; etc. These types of losses inevitably are burdened with considerable uncertainty because of the nature of the factors which must be considered. Market value, as a measure of damages, may give rise to conflicting testimony, but the basic factors to be considered are not so difficult to evaluate. In any event, there must be some evidence of market value, and there is none.

HOWE, J., concurs in the dissenting opinion of STEWART, J.



BANBERRY DEVELOPMENT CORPORATION, McKean Construction Company, Midwest Realty and Finance, Inc., a Utah corporation. Plaintiffs and Respondents.

SOUTH JORDAN CITY, a municipal corporation, Defendant and Appellant.

No. 16872.

Supreme Court of Utah.

June 3, 1981.

Subdividers brought suit against city to challenge the validity of water connection and park improvement fees imposed as a condition to connection to the city water main and as a condition to final approval of the subdividers' plat. The Third District Court, Salt Lake County, Dean E. Conder,

J., sustained validity of the park improvement fee, and granted city's motion to dismiss as to it and held the advance collection of water connection fee contrary to statutory law and granted subdividers' motion for summary judgment and both sides appealed. The Supreme Court, Oaks, J., held that advance collection of water connection fee from subdivider and a park improvement fee designed to raise funds to enlarge and improve sewer and water systems and recreational opportunities would be valid provided they were reasonable.

Reversed and remanded.

Howe, J., filed separate opinion concurring in part and dissenting in part in which Maughan, C. J., joined.

1. Waters and Water Courses ⇐203(6)

Advance collection of water connection fee from subdivider and a park improvement fee designed to raise funds to enlarge and improve sewer and water systems and recreational opportunities would be valid provided they were reasonable.

2. Municipal Corporations ⇐712

Waters and Water Courses ⇐203(6)

To comply with standard of reasonableness, a municipal fee related to services like water and sewer must not require newly developed properties to bear more than their equitable share of the capital costs in relation to benefits conferred.

3. Municipal Corporations ⇐458

To determine equitable share of the capital costs to be borne by newly developed properties, a municipality should determine the relative burdens previously borne and yet to be borne by those properties in comparison with the other properties in the municipality as a whole and important factors to consider include: (1) the cost of existing capital facilities; (2) manner of financing existing capital facilities; (3) relative extent to which newly developed properties and other properties in municipality have already contributed to cost of existing capital facilities; (4) relative extent to which newly developed properties

and other properties in municipality will contribute to cost of existing capital facilities in the future; (5) extent to which municipality is requiring new developers or owners to provide common facilities that have been provided by municipality and financed through general taxation or other means; (6) extraordinary costs in servicing newly developed properties; and (7) time-price differential inherent in fair comparisons of amounts paid at different times.

4. Municipal Corporations ⇨458

In determining reasonableness of a fee for municipal services, courts must concede municipalities the flexibility necessary to deal realistically with questions not susceptible of exact measurement and precise mathematical equality is neither feasible nor constitutionally vital.

5. Municipal Corporations ⇨167

Municipal officials must have legal power to deal creatively with extraordinary or unforeseen circumstances in provision of municipal services.

6. Municipal Corporations ⇨122(2)

A municipality's exercise of its legislative powers is entitled to a presumption of constitutionality.

7. Water and Water Courses ⇨203(12)

Zoning and Planning ⇨685

As the information that must be used to assure that subdivision fees are within the standard of reasonableness is most accessible to the municipality, that body should disclose the basis of its calculations to whoever challenges the reasonableness of its subdivision or water hookup fees.

8. Water and Water Courses ⇨203(12)

Zoning and Planning ⇨685

Once the municipality has disclosed the basis of its calculations for its subdivision or water hookup fees to those who challenge the reasonableness of the fees, the burden of showing failure to comply with constitutional standard of reasonableness is on the challengers.

9. Municipal Corporations ⇨458

Park improvement fees should be fixed so as to be equitable in light of relative benefits conferred on, as well as relative

burdens previously borne by other properties, including newly developed properties, in compliance with the other, and not on a municipality as a whole and fees should not exceed amount sufficient to equate the relevant benefits and burdens of newly developed and other properties.

Michael J. Mazuran, Salt Lake City, for defendant and appellant.

John H. McDonald, Craig S. Cook, Salt Lake City, for plaintiffs and respondents.

OAKS, Justice:

This is a suit by three subdividers against a city to challenge the validity of water connection and park improvement fees imposed as a condition to connection to the city water main and as a condition to final approval of the subdividers' plat. At issue in this appeal are the legality of any such fees, and, if they are legal, the criteria for judging their reasonableness.

The procedure for charging the park improvement fee does not appear in the record. City Ordinance 13-1-5, which the subdividers concede was lawfully enacted and constitutional, requires a subdivider who desires to connect to the city water system to enter into an agreement "specifying the terms and conditions under which the water extensions and connection shall be made and the payment that shall be required." Paragraph 10 of the agreement form adopted by the city and required of all subdividers before plat approval obligates the subdividers to pay the entire cost of all water lines required to serve the subdivision, including extensions from existing water mains and all connecting lines within the subdivision. It also provides that "the City shall charge the Applicant a connection fee in the amount of \$_____ for each individual dwelling unit to be served within the subdivision, which sum shall be payable in full to the City before the subdivision system is connected to any existing City water mains." The required connection fee was \$800 for a 3/4-inch line and \$1,000 for a 1-inch line.

arguing that the collection of the water connection fees in advance from the developers constituted an unlawful tax and an unconstitutional taking of property without due process, the subdividers sought injunctive relief. They challenged the city's park improvement fee of \$235 per lot on the same basis. They also attacked both fees as discriminatory.

On motions in advance of trial, the district court (1) sustained the validity of the park improvement fee and granted the city's motion to dismiss as to it, and (2) held the advance collection of the water connection fee contrary to statutory law, granted the subdividers' motion for summary judgment, and permanently enjoined the city from its enforcement. Both the city and the subdividers have appealed.

I.

THE VALIDITY OF WATER
CONNECTION AND PARK
IMPROVEMENT FEES

[1] The district court ruled that the advance collection of the water connection fee was rendered illegal by the combined effect of U.C.A., 1953, § 10-8-38 and § 17-6-22. Section 10-8-38 empowers the city, for the purpose of defraying costs of construction or operation of a sewer system, to require mandatory hookup and payment of charges when a sewer is available and within 300 feet of any property containing a building used for human occupancy. Section 17-6-22 provides that a municipal corporation which contracts with an improvement district for sewage services shall have authority to make service charges to parties who connect to its sewer system. If the municipality also operates a waterworks system, the section provides that these charges "may be combined with the charge made for water furnished by the water system and may be collected and the collection thereof secured in the same manner as that specified in Section 10-8-38, Utah Code Annotated 1953."

Because § 10-8-38 does not authorize the charging of a sewer connection fee in the case of vacant lots, and because § 17-6-22 provides that the city *may* collect water

fees in the same manner as § 10-8-38 authorizes for the collection of sewer fees, the combination of these two statutes is urged to *forbid* cities from collecting water fees in circumstances not authorized for sewer fees. This does not follow. Section 17-6-22 is permissive, not mandatory. It poses no statutory prohibition against the collection of a water connection fee from a subdivider for each lot in a subdivision at the time the subdivision is hooked up to the city water system.

The validity of a sewer connection fee to raise money to enlarge and improve a sewer system was sustained by this Court in *Home Builders Ass'n v. Provo City*, 28 Utah 2d 402, 503 P.2d 451 (1972), discussed hereafter. In a decision issued after the trial court acted in this case, we sustained a municipality's power to withhold the privilege of city water service until a landowner had paid a valid municipal sewer connection fee. *Rupp v. Grantsville City*, Utah, 610 P.2d 338 (1980). In two other decisions issued after the trial court acted in this case, we sustained a municipality's requirement that subdividers dedicate a portion of subdivision land for recreational purposes (or pay cash in lieu) as a condition of final approval of their plat. *Call v. City of West Jordan*, Utah, 606 P.2d 217 (1979). On rehearing in this same case, we held that the reasonableness of the dedication or cash requirement in a particular case was a question of fact that must be resolved at trial. *Call v. City of West Jordan*, Utah, 614 P.2d 1257 (1980).

These four decisions have resolved the legality of water connection and park improvement fees designed to raise funds to enlarge and improve sewer and water systems and recreational opportunities, as well as the legality of conditioning water hookups or plat approval on their collection. However, these decisions leave open the question of the reasonableness of any individual fee charged or land dedication required. This question of reasonableness must be resolved on the facts in each particular case. We therefore reverse both judgments and remand the entire case for trial

on the reasonableness of the fees the city has imposed in this case.

Because this case is being remanded for trial, it is appropriate for this Court to elaborate on the constitutional standards of reasonableness that should govern the validity of subdivision charges such as these.

II.

THE REASONABLENESS OF SUBDIVISION FEES IN GENERAL

Like so many other municipalities in this state, the City of South Jordan confronts the problems of providing a fast-growing city with adequate services for water, sewer, recreation, and other common needs. In 1978, the city had to deal with the development of about 600 lots (including the 400 in subdividers' development), up from about 65 in prior years. Such growth puts a severe strain on the financial and personnel resources of a small municipality, and if not properly managed could well overburden common facilities like water and sewer to the point where their service would deteriorate severely for the existing occupants and be inadequate for the new ones. An appropriate way to provide adequately for such services is by advance planning and financing.

The conventional means of financing municipal facilities are tax revenues, special assessments, and bonding. In addition, in recent years many local governmental units in this country have employed subdivision plat controls to require fees, such as the water and park fees involved in this case, that force developers to contribute to the centralized capital costs of municipal services in addition to the expediently valid localized costs applicable solely to their development. The courts of this state and others have approved the legality of such fees, but are still struggling to define the limits of reasonableness that must be imposed upon their amount.¹ Without legal limits—imposed by statute or constitution—subdivision charges could easily be used to avoid statutory requirements for bonding

municipal improvements, statutory limits on municipal taxation, and legal limits on restrictive zoning and zoning.

The subdividers argue that the water and park fees will exceed the city's costs in respect to these matters and that the excess would be used in the city's general operating fund. The city maintains in its brief in this Court that the water connection fees would be used to enlarge water lines and storage and pumping facilities, and the park improvement fees would be used to enlarge and develop city parks. The parties differ on whether such an intent was secured by enforceable restriction, such as deposit to a separate fund. These contentions, all relevant to reasonableness, are matters for consideration at trial.

The subdividers also argue that the water connection fee cannot be imposed on the developer, but must be deferred for imposition on the lot owner or homeowner at the time of hookup. We find this argument unpersuasive. This is not a case where the party burdened with the exaction will derive no benefit from it.² When the subdivision is connected to the city's water and sewer systems, the city must be prepared to perform its services on demand, and from that fact the subdividers derive immediate benefit. The provision of standby capacity to a subdivision requires the commitment of substantial capital. The city does not have to wait until someone turns on a tap or flushes a toilet before it requires participation in the cost of providing its services. Subject to the requirements of reasonableness discussed below, a hookup fee that requires a subdivider to make advance payment of some portion of the common capital costs attributable to committing service to the lots in the subdivision is valid. The same is true of the park improvement fee.

The proceedings on remand in this case will be governed by two leading decisions of this Court, one dealing with a municipal service that employs an expensive central

1. J. Johnson, "Constitutionality of Subdivision Control Exactions: The Quest for a Rationale," 52 Cornell L.Q. 871 (1967); Heyman & Gilhoof, "The Constitutionality of Imposing Increased Community Costs on New Suburban Residents

Through Subdivision Exactions," 73 Yale L.J. 1119 (1964).

2. *City and County of Denver v. Greenbaum*, 140 Colo. 402, 344 P.2d 679 (1959).

facility like water or sewer, and the other with a municipal service that employs dispersed resources like recreational land. Though the standards of reasonableness in these two circumstances are essentially the same, their application is somewhat different. The two different types of charges will therefore be discussed separately.

III.

REASONABLENESS OF WATER CONNECTION FEE

[2] *Home Builders Ass'n v. Provo City*, 28 Utah 2d 402, 503 P.2d 451 (1972), sustained the validity of a sewer connection fee (in addition to the monthly sewer charge) for each living unit of newly constructed buildings connected to an existing sewer system. The fee was imposed in order to improve and enlarge the sewer system. It was not a revenue measure or an assessment, the court found, but "a reasonable charge for the use thereof," as authorized by U.C.A., 1953, § 10-8-38. Significantly, the \$100-per-lot charge was derived by dividing the total number of sewer connections in the municipality into the net value of the sewer system, and the funds obtained were to be restricted to the enlargement, improvement, and operation of the sewer system and to the retirement of indebtedness incurred in its construction.

In approving the sewer connection fee in *Home Builders*, this Court relied on *Airwick Industries, Inc. v. Carlstadt Sewerage Authority*, 67 N.J. 187, 270 A.2d 15 (1970). That case approved a connection fee arrangement by which the capital and interest costs of a new central sewage system, although met initially by the actual users, would ultimately be borne by all properties benefited, including lands that were unimproved when the central expenditures were originally made. The municipality did this by including as part of its connection fee what our Court characterized as "a sum of money which would represent a fair contribution by the connecting party toward the expense theretofore met by others."³

The *Home Builders* case established the principle upon which the reasonableness of the water connection fee in this case should be judged. The "fair contribution" of the connecting party should not exceed "the expense thereof met by others." Or, as the New Jersey Supreme Court held in a subsequent case, the rules governing the allocation of improvement costs between city and developer

would ideally have been such as to insure, to the greatest extent practicable, that the cost of extending a municipal water facility would fall equitably upon those who are similarly situated and in a just proportion to benefits conferred. They should be sufficiently flexible to permit consideration to be given to the facts and circumstances of each particular case.

Deerfield Estates, Inc. v. Township of E. Brunswick, 60 N.J. 115, 286 A.2d 498, 505 (1972). Therefore, where the fee charged a new subdivision or a new property hookup exceeds the direct costs incident thereto (as a means of sharing the costs of common facilities), the excess must survive measure against the standard that the total costs "fall equitably upon those who are similarly situated and in a just proportion to benefits conferred." Stated otherwise, to comply with the standard of reasonableness, a municipal fee related to services like water and sewer must not require newly developed properties to bear more than their equitable share of the capital costs in relation to benefits conferred.

[3] To determine the equitable share of the capital costs to be borne by newly developed properties, a municipality should determine the relative burdens previously borne and yet to be borne by those properties in comparison with the other properties in the municipality as a whole; the fee in question should not exceed the amount sufficient to equalize the relative burdens of newly developed and other properties.

Among the most important factors the municipality should consider in determining the relative burden already borne and yet

3. *Home Builders Ass'n v. Provo City*, 28 Utah 2d at 405, 503 P.2d at 453.

to be borne by newly developed properties and other properties are the following, suggested by the well-reasoned authorities cited below: (1) the cost of existing capital facilities; (2) the manner of financing existing capital facilities (such as user charges, special assessments, bonded indebtedness, general taxes, or federal grants); (3) the relative extent to which the newly developed properties and the other properties in the municipality have already contributed to the cost of existing capital facilities (by such means as user charges, special assessments, or payment from the proceeds of general taxes); (4) the relative extent to which the newly developed properties and the other properties in the municipality will contribute to the cost of existing capital facilities in the future; (5) the extent to which the newly developed properties are entitled to a credit because the municipality is requiring their developers or owners (by contractual arrangement or otherwise) to provide common facilities (inside or outside the proposed development) that have been provided by the municipality and financed through general taxation or other means (apart from user charges) in other parts of the municipality; (6) extraordinary costs, if any, in servicing the newly developed properties; and (7) the time-price differential inherent in fair comparisons of amounts paid at different times. *Home Builders v. Provo City*, *supra*; *Rose v. Plymouth Town*, 110 Utah 358, 173 P.2d 285 (1946); *Airwick Industries, Inc. v. Carlstadt Sewerage Authority*, *supra*; *Deerfield Estates, Inc. v. Township of E. Brunswick*, *supra*; *West Park Ave., Inc. v. Township of Ocean*, 48 N.J. 122, 224 A.2d 1 (1966); *Rutan Estates, Inc. v. Town of Belleville*, 56 N.J. Super. 330, 152 A.2d 853 (App.Div. 1959); *Zehman Construction Co. v. City of Eastlake*, 92 Ohio Law Abst. 364, 195 N.E.2d 361 (Ct.App. 1962); *Strahan v. City of Aurora*, 38 Ohio Misc. 37, 311 N.E.2d 876 (Ct.Com.Pleas. 1973); R. Ellickson, "Suburban Growth Controls: An Economic and Legal Analysis," 86 Yale L.J. 385, 467-89 (1977); F. Michelman & T. Sandalow, *Government in Urban Areas*, 533-36 (1970).

[4.5] In adjudicating the validity of any individual application of this standard of

reasonableness, courts must consider municipalities' "flexibility necessary to deal realistically with questions not susceptible of exact measurement. Precise mathematical equality is neither feasible nor constitutionally vital." *Airwick Industries, Inc. v. Carlstadt Sewerage Authority*, *supra*, 270 A.2d at 26. Similarly, municipal officials must also have the legal power to deal creatively with extraordinary or unforeseen circumstances in the provision of municipal services. *Rose v. Plymouth Town*, 110 Utah 358, 173 P.2d 285 (1946). We agree with and adopt the New Jersey court's ruling in *Deerfield Estates, Inc. v. Township of E. Brunswick*, *supra*, 286 A.2d at 507-508:

The rule we lay down must be given a pragmatic application. Complete equality of treatment may sometimes be impossible, especially where a municipality has followed no set pattern with respect to past extensions. Nor should a municipality be denied the right to modify an established pattern where altered circumstances reasonably so dictate. Equality of treatment may upon occasion be forced to give way before some supervening public interest. But insofar as such equality can reasonably be achieved this must be done.

[6-8] The required flexibility will be implemented by the presumption of constitutionality incident to a municipality's exercise of its legislative powers. *Call v. City of West Jordan*, Utah, 614 P.2d 1257, 1258 (1980); *Crestview-Holladay Homeowners Ass'n, Inc. v. Bogn Fiori Co.*, Utah, 745 P.2d 1150 (1976); *Dowse v. Salt Lake City Corp.*, 123 Utah 107, 255 P.2d 723 (1953). Since the information that must be used to assure that subdivision fees are within the standard of reasonableness is most accessible to the municipality, that body should disclose the basis of its calculations to whoever challenges the reasonableness of its subdivision or hookup fees. Once that is done, the burden of showing failure to comply with the constitutional standard of reasonableness in this matter is on the challengers. *Home Builders Ass'n of Greater*

City of Kansas City v. City of Kansas City, Mo., 555 S.W.2d 832 (1977).

IV

REASONABLENESS OF PARK IMPROVEMENT FEE

[9] In *Call v. City of West Jordan, Utah*, 606 P.2d 217 (1979), opinion on rehearing, 614 P.2d 1257 (1980), this Court upheld the validity of a city ordinance that required subdividers, as a condition of plat approval, to dedicate certain proposed subdivision land to the city (or pay cash in lieu) for flood control and/or park and recreation facilities. In remanding the case for trial on the constitutionality of the ordinance as applied (i. e., the requirement that seven percent of the subdivision land be dedicated), this Court ruled that "the dedication should have some reasonable relationship to the need created by the subdivision." *Id.* at 1258. The Court quoted the following from *Home Builders Ass'n of Greater Kansas City v. City of Kansas City, Mo.*, 555 S.W.2d 832, 835 (1977):

[I]f 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 prohibitions rather than a reasonable regulation under the police power.⁴

Reasonableness obviously holds the municipality to a higher standard of rationality than the requirement that its actions not be arbitrary or capricious.

Under the reasonableness test in *Call v. City of West Jordan, supra*, the benefits derived from the exaction need not accrue solely to the subdivision (614 P.2d at 1259); flood control and recreation are needs that cannot be treated in isolation from the rest of the municipality. At the same time, the benefits derived from the exaction must be of "demonstrable benefit" to the subdivision (*Id.* at 1259).

As with water connection fees, the amount of such exactions or fees should be such that the burden of providing these

municipal services "falls equitably upon those who are similarly situated and in a just proportion to benefits conferred." *Deerfield Estates, Inc. v. Township of E. Brunswick*, 60 N.J. 115, 286 A.2d 498, 505 (1971). The measurement of "benefits conferred" may have a more significant impact on the reasonableness of park fees than on water connection fees. The central facilities that support water and sewer service would generally confer the same benefits in every part of the municipality, but the benefits conferred by recreational, flood control, or other dispersed resources may be measurably different in different parts of the municipality. Park improvement fees should therefore be fixed so as to be equitable in light of the relative benefits conferred on, as well as the relative burdens previously borne and yet to be borne by the newly developed properties in comparison with the other properties in the municipality as a whole. The fees in question should not exceed the amount sufficient to equalize the relative benefits and burdens of newly developed and other properties.

The factors to be considered in the determination of relative burden are similar to the factors discussed in Part III in connection with water connection fees. The flexibility to be tolerated within the presumption of regularity and the disclosure of the basis of calculation specified in Part III is also applicable to this type of subdivision charge.

The judgments of the trial court are reversed in the appeal and the cross-appeal, and the cause is remanded for proceedings consistent with this opinion. No costs awarded.

HALL and STEWART, JJ., concur.

HOWE, Justice (concurring and dissenting):

I concur that the defendant city may lawfully require water connection fees to be paid at the time the main line running through the subdivision is connected to the city system and water is brought to the edge of each lot. I arrive at this conclusion

⁴ *Call v. City of West Jordan*, 614 P.2d at 1259.

in view of the authority invested in cities and towns to "construct, maintain and operate waterworks," § 10-8-14 U.C.A.1953; to "fix the rates to be paid for the water use," § 10-8-22; and to "enact ordinances, rules and regulations for the management and conduct of the waterworks system owned or controlled by it," § 10-7-14. It is not unreasonable to require payment of the connection fee when the water is turned into the main line coursing through the subdivision because at that time the defendant city is obligated to furnish water to each and every lot as requested. In order to prepare to do this, the defendant city had to make capital expenditures to enlarge its capacity so that it could meet the new demands to be imposed upon it. I concur that § 10-8-38 is not a prohibition against advance collection.

I also concur with the criteria of reasonableness contained in Parts III and IV of the majority opinion.

I dissent, however, from the holding in the majority opinion that the city may lawfully impose park improvement fees. I concur with the reasoning of Justice Wilkins in his dissenting opinion in *Call v. City of West Jordan*, Utah, 606 P.2d 217 (1979). The imposition of the park improvement fees is even more offensive in this case since the city conditioned the furnishing of water service to the subdivision upon their payment. To me the two subjects are entirely separate and I believe it to be an abuse of the city's authority to own and operate a waterworks system (a proprietary operation) to use the furnishing of water as leverage to collect fees for other unrelated purposes. Section 10-8-38 authorizes cities and towns to discontinue water service to premises where the sewer service charges have not been paid, but I find no authorization to also deny service until park improvement fees have been paid.

MAUGHAN, C. J., concurs in the opinion of HOWE, J.

Betty Harper CULBERTSON, Executrix of the Estate of Joyce K. Culbertson, and as an individual, Plaintiff and Respondent.

v.

CONTINENTAL ASSURANCE COMPANY, a Tennessee corporation, Chicago Bridge and Iron Company Profit-Sharing Plan Trust, an Illinois Trust, Beth Rowley Culbertson Conrad, an individual, Loretta Culbertson, an individual, Richard Culbertson, an individual, Chrystella Culbertson, an individual, and Elizabeth Culbertson, an individual, Defendants and Appellants.

No. 17148.

Supreme Court of Utah.

June 4, 1981.

Decedent's second wife brought action as executrix to have proceeds of a profit-sharing plan and certain insurance policies awarded to decedent's estate rather than to decedent's first wife as his designated beneficiary. The Third District Court, Salt Lake County, Bryant H. Croft, J., awarded plaintiff proceeds of profit-sharing plan and defendant proceeds of insurance policies, and defendant appealed and plaintiff cross appealed. The Supreme Court, Maughan, C. J., held that: (1) defendant was entitled as decedent's first wife to proceeds of profit-sharing plan, interest to which vested in her on decedent's death, where decedent neither changed designated beneficiary nor as moving party in divorce action sought explicit relinquishment of defendant's expectancy, and there were no broad, comprehensive provisions in decree of divorce which could reasonably be construed as a relinquishment or waiver of any or all expectancies, and (2) where decree of divorce between defendant and decedent as her first husband did not by its terms expressly terminate defendant's status as a benefi-



...more, in one of our own cases, is, the following statement fits purposes of the defendant's second point of appeal:

It is significant that there is no indication that the prosecutor made any attempt to use that fact to cast any inference of guilt on the defendant, nor to persuade the jury to do so.

[4, 5] As a matter of protecting the public interest, a prosecutor would ignore his duty if he did not take issue with a remark he did not solicit, that professes innocence. It was the prosecution's duty to clear up discrepancies manufactured by the defendant, so as to give the jury full opportunity for deliberation without speculation.

The jury and verdict are affirmed.

STEWART, J., dissents.

DURHAM, J., does not participate herein.



**Timothy Ross LAFFERTY, Plaintiff
and Respondent,**

v.

**PAYSON CITY, a municipal corporation,
Defendant and Appellant.**

**Timothy Ross LAFFERTY, Plaintiff
and Appellant,**

v.

**PAYSON CITY, a municipal corporation,
Defendant and Respondent.**

Nos. 17534, 17536.

Supreme Court of Utah.

Feb. 17, 1982.

City resident brought suit for declaration that municipal impact and connection fees with respect to newly developed properties were taxes that were illegal and dis-

criminatory under State and Federal Constitutions, for injunction against their enforcement, and for restitution of fees he had paid. The Fourth District Court, Utah County, George E. Ballif, J., entered judgment in favor of resident, as to impact fee and city appealed, resident's motion for summary judgment as to illegality of connection fees was decided and resident appealed. The Supreme Court, Oaks, J., held that: (1) building permit "impact fee" of \$1,000 per family dwelling, deposited in city's general revenues, which ordinance stated was necessary because of emergency situation created by property development within city limits, i.e., city needed additional revenue to offset costs of necessary increases in municipal services, was illegal tax, and (2) measure employed in calculating increases in connection fees for water and sewer services, i.e., expert evidence on unit cost of water and sewer services based on 1979 cost of constructing expansion facilities needed in such areas, and measure employed in calculating increases in connection fees for newly developed properties with respect to electrical services, i.e., expert evidence on unit cost of electrical services based on replacement cost in 1979 of municipality's existing electrical system, did not achieve equitable allocation to newly developed properties of capital costs in relation to benefits conferred.

Affirmed in part; vacated and remanded in part.

1. Municipal Corporations ⇐625

Reasonable charge for a specific service is permissible as building permit fee whereas general fee that amounts to revenue measure is not.

2. Municipal Corporations ⇐601.3

Building permit "impact fee" of \$1,000 per family dwelling, deposited in city's general revenues, which ordinance stated was necessary because of emergency situation created by property development within city limits, i.e., city needed additional revenue to offset costs of necessary increases in municipal services, was illegal tax.

3. Municipal Corporations \Rightarrow 956(1)

Validity of fee imposed to augment general revenues is determined by its legal status at time it is exacted, without regard to how funds are later allocated or spent.

4. Judgment \Rightarrow 186

Denial of motion for summary judgment on alleged facial invalidity of various connection fees and putting city resident to trial on reasonableness of such fees was correct procedure.

5. Municipal Corporations \Rightarrow 458

Factors to be considered in determining relative burden already borne and yet to be borne by newly developed properties and other properties to assure that municipal fees pertaining to newly developed properties do not require them to bear more than their equitable share of capital costs in relation to benefits conferred are cost of existing capital facilities, means by which such facilities have been financed, extent to which properties being charged new fees have already contributed to cost of existing facilities, extent to which they will contribute to cost of existing capital facilities in future, extent to which they should be credited for providing common facilities that municipality has provided without charge to other properties in its service area, extraordinary costs, if any, in serving new property, and time-price differential inherent in fair comparisons of amounts paid at different times.

6. Municipal Corporations \Rightarrow 712**Waters and Water Courses** \Rightarrow 203(6)

Municipality has burden of disclosing basis of its calculations to whoever challenges reasonableness of connection fees, and its allocations need not achieve precise mathematical equality.

7. Municipal Corporations \Rightarrow 712**Waters and Water Courses** \Rightarrow 203(6)

Measure employed in calculating increases in connection fees for water and sewer services for newly developed properties i.e., expert evidence on unit cost of water and sewer services based on 1979 cost of constructing expansion facilities needed

in such areas, did not achieve equitable allocation of capital costs in relation to benefits conferred where it fixed entire cost of new facilities on newly developed properties without assurance that such costs were equitable in relation to benefits conferred and in comparison with costs imposed on other property owners in municipality.

8. Electricity \Rightarrow 11.2(3)

Measure employed in calculating increases in connection fees for newly developed properties with respect to electrical services, i.e., expert evidence on unit cost of electrical services based on replacement cost in 1979 of municipality's existing electrical system, was incomplete without inquiry into factors such as how existing system was financed, and thus did not achieve equitable allocation to newly developed properties of capital costs in relation to benefits conferred.

Dave McMullin, Payson, for defendant and appellant.

Ray M. Harding, American Fork, for plaintiff and respondent.

OAKS, Justice:

This appeal concerns the legality of two fees a municipality imposed on the construction of new homes.

In 1977, Payson City enacted an ordinance requiring the payment of an "impact fee" of \$1,000 per family dwelling prior to the issuance of any building permit. The ordinance stated that this fee was necessary because of an emergency situation created by property development within the city limits; the City needed additional revenue to offset the costs of the necessary increases in municipal services. This fee was in addition to all other municipal fees.

In 1979, the City enacted other ordinances increasing the fees the City charged for connecting residences to various city services. The revised amounts included: \$1,000 for sewer; \$450 for water (¾-inch hookup); \$250 for electricity (100 amp service). Plaintiff Lafferty, a city resident

who apparently desired to construct a single family dwelling, paid the impact fee and the connection fees under protest and then brought this suit for a declaration that these fees were taxes that were illegal and discriminatory under the state and federal Constitutions, for an injunction against their enforcement, and for restitution of the \$2,725 he had paid.

I. THE IMPACT FEE

As to the impact fee, the district court granted plaintiff's motion for summary judgment, holding that the fee was discriminatory in its imposition on new homeowners and not on existing ones, and illegal as a tax not authorized by law. In No. 17534, the City appeals from that decree.

The district court relied on *Weber Basin Home Builders Association v. Roy City*, 26 Utah 2d 215, 487 P.2d 866 (1971), where this Court invalidated an increase in a building permit fee on the basis that it was an illegal tax. The opinion notes that the purpose of the increase was to obtain additional money for the City's general fund, into which the proceeds were deposited. As in this case, the defendant city contended that the additional funds were needed to finance improvements in the city's water and sewer systems necessitated by new home construction.

[1-3] Subsequent decisions have approved connection fees or subdivision fees, subject to the reasonableness limitations discussed hereafter. *Banberry Development Corp. v. South Jordan City*, Utah, 631 P.2d 319 (1981); *Call v. City of West Jordan*, Utah, 606 P.2d 217 (1979); *Home Builders Association of Greater Salt Lake v. Provo City*, 28 Utah 2d 402, 503 P.2d 451 (1972). But in each of these cases, the fees were imposed to finance a specific municipal service or capital expenditure. The

Weber Basin Home Builders case was distinguished on the basis that a reasonable charge for a specific service is permissible, whereas a general fee that amounts to a revenue measure is not. *Home Builders Association of Greater Salt Lake*, 28 Utah 2d at 404, 503 P.2d at 452. We reaffirm that distinction, and agree with the district court's conclusion that the impact fee deposited in the City's general revenues in this case is an illegal tax.¹ *Weber Basin Home Builders Association v. Roy City*, *supra*. The partial summary judgment the City has challenged by its appeal in No. 17534 is therefore affirmed.

II. CONNECTION FEES

[4] The district court denied plaintiff's motion for summary judgment on the alleged facial invalidity of the various connection fees, and put plaintiff to trial on the reasonableness of those fees. That was the correct procedure. *Banberry Development Corp. v. South Jordan City*, *supra*; *Home Builders Association of Greater Salt Lake v. Provo City*, *supra*.

At the conclusion of trial, the court made findings on the per-unit cost of the three services. In each case, the per-unit costs were substantially in excess of the amount of the connection fees. The court therefore concluded that the connection fees were valid because they were "reasonable and represent the cost of creating, maintaining and using the aforesaid utilities." In No. 17536, plaintiff appeals from that decree.

Six months after the district court's decree, this Court issued its opinion in *Banberry Development Corp. v. South Jordan City*, *supra*, which involved water connection fees and park improvement fees. In that case, we outlined "the constitutional standards of reasonableness," 631 P.2d at 903, that govern the validity of connection

1. It appears from the City's answers to interrogatories and requests for admissions that the City has collected \$98,000 by its impact fee, which sum the City has allocated for capital improvements in the following areas: electrical, 20%; sewage treatment plant expansion, 60%; and water, 20%. But these allocations (some now expended and some not) do not

alter our conclusion. The validity of a fee imposed to augment general revenues is determined by its legal status at the time it is exacted, without regard to how the funds are later allocated or spent. This is not a case like those involving connection fees, where the ordinances imposing the fees designated the collections for specific uses.

fees charged by municipalities. Plaintiff contends that this decree must be vacated and the case remanded for reconsideration in light of *Banberry* because the district court's decision that the three connection fees were reasonable was based on only part of the factors this Court subsequently outlined in *Banberry*. We agree.

[5] The *Banberry* opinion identifies seven important factors that should be considered "in determining the relative burden already borne and yet to be borne by newly developed properties and other properties" 631 P.2d at 903-4. In brief, those factors are (1) the cost of existing capital facilities; (2) the means by which those facilities have been financed; (3) the extent to which the properties being charged the new fees have already contributed to the cost of the existing facilities; (4) the extent to which they will contribute to the cost of existing capital facilities in the future; (5) the extent to which they should be credited for providing common facilities that the municipality has provided without charge to other properties in its service area; (6) extraordinary costs, if any, in serving the new property; and (7) the time-price differential inherent in fair comparisons of amounts paid at different times. 631 P.2d at 904.

[6] The objective of the complicated comparison in *Banberry* is to assure that municipal fees pertaining to newly developed properties do not require them to bear more than their equitable share of the capital costs (in comparison with other properties) in relation to benefits conferred. If properly applied, those seven factors should put the new homeowner on essentially the same basis as the average existing homeowner with respect to costs borne in the past and to be borne in the future, in comparison with benefits already received and yet to be received. The municipality has the burden of disclosing the basis of its calculations to whoever challenges the reasonableness of the fees, and its allocations need not achieve precise mathematical equality. *Banberry*, 631 P.2d at 904.

[7] The City's brief in this case states that the increases in connection fees were based on the costs of expansion to future construction in the service areas involved. Thus, the expert evidence on the unit cost of water and sewer services was based on the 1979 cost of constructing the expansion facilities needed in those areas. That measure does not achieve the equitable allocation sought in *Banberry*, since it fixes the entire cost of new facilities on newly developed properties without assurance that these costs are equitable in relation to benefits conferred and in comparison with costs imposed on other property owners in the municipality. For example, if the costs of maintenance and repayment of bonded indebtedness for construction of the existing system are being financed by general tax revenues, service fees, or other payments collected from the entire municipality—including the newly constructed homes—the new homes will be burdened with all of the capital costs of expanding the service capacity plus a portion of the costs of the existing one. In an effort to avoid this kind of unfairness, the seven factors in *Banberry* require a different approach than imposing all costs of expansion of capacity on the newly developed properties.

[8] The expert evidence on the unit cost of electrical services was based on the replacement cost in 1979 of the municipality's existing electrical system. If appropriately discounted for the age and condition of the existing system, that measure would satisfy one of the factors in *Banberry*, but would be incomplete without inquiry into the other factors, such as how the existing system was financed. This is necessary, for example, to assure that a property owner involved in a new home development is not required to buy into the capital value of existing municipal services and then pay for some portion of the same capital value a second time by future tax payments against the bonded indebtedness used to construct them originally.

Since not all of the factors set out in this Court's intervening opinion in *Banberry Development Corp. v. South Jordan City*, su-

ing error in ruling on the reasonableness of these municipal fees, we deem it appropriate to vacate the decree of the district court in case No. 17536 and remand for further proceedings (including the taking of additional evidence, if necessary) consistent with *Banberry* and with this opinion.

So ordered. Each party to bear own costs.

HALL, C. J., and STEWART, HOWE and DURHAM, JJ., concur.



Michael David DOWLAND, Plaintiff
and Appellant,

v.

LYMAN PRODUCTS FOR SHOOTERS, a corporation, Euroarms, The Leisure Group, Inc., and ABC corporations 1 through 10, Defendants and Respondents.

No. 17323.

Supreme Court of Utah.

Feb. 23, 1982.

Products liability action was brought against a rifle manufacturer by rifle purchaser. The Third District Court, Salt Lake County, Peter F. Leary, J., entered judgment for the manufacturer, and purchaser appealed. The Supreme Court, Hall, C. J., held that error, if any, in trial court's admission of expert testimony concerning chemical analysis of gun barrel residue was not prejudicial where evidence from other witnesses concerning purchaser's use of gun powder of type not recommended for rifle supported judgment for manufacturer.

Affirmed.

Appeal and Error — 1051(1)

In products liability action involving exploding rifle, error, if any, in trial court's admission of expert testimony concerning chemical analysis of gun barrel residue was not prejudicial where evidence from other witnesses concerning purchaser's use of gun powder of type not recommended for rifle supported judgment for manufacturer.

M. David Eckersley, Salt Lake City, for plaintiff and appellant.

Craig S. Cook, Max D. Wheeler, J. Anthony Eyre, Salt Lake City, for defendants and respondents.

HALL, Chief Justice:

Plaintiff brought this action against Lyman Products for Shooters, a firearm distributing company, and its parent company, The Leisure Group, Inc., on a strict product liability theory. Following a special jury verdict in favor of defendants, the trial court rendered a judgment of no cause of action. Plaintiff appeals on the ground of improper admission of expert testimony by the trial court.

Plaintiff purchased a rifle distributed by Lyman Products in the summer of 1976 and fired it approximately 50 to 75 times without incident. On September 15, 1976, as plaintiff fired the rifle, it exploded in the area of the breech, injuring his wrist and hand. Plaintiff claims that the explosion was caused by a defect in the design of the rifle which, by incorporating a "dovetail" notch into the barrel, rendered it too weak to withstand the pressure of exploding gun powder. Plaintiff testified that he had always loaded the weapon with black powder, as recommended by the manufacturer, and that he had followed proper procedures in handling and firing it.

Defendants claim that plaintiff's rifle was designed safely and that it could not have exploded under the pressure created by black powder. Defendants introduced evidence to show that plaintiff had actually loaded the rifle with smokeless powder,

Wayne M. PATTERSON, Plaintiff
and Respondent,

v.

ALPINE CITY, a Municipal Corporation,
Defendant and Appellant.

No. 18114.

Supreme Court of Utah.

April 21, 1983.

City appealed from summary judgment rendered by the Fourth District Court, Utah County, J. Robert Bullock, J., declaring sewer connection fee invalid. The Supreme Court, Howe, J., held that: (1) sewer connection fee assessed by city was not established as required by law and was, therefore, invalid where city had not by resolution or ordinance in writing established the sewer connection fee, and (2) if sewer connection fee was to be used to retire bonded indebtedness, all users in the system had to be treated equally, and latecomers could not be subjected to arbitrary increase whereby fee of \$700 in first month was increased to \$1,000 in second month and \$1,500 in third month, which was not required to cover increased costs, but was done to induce early purchase of required 540 connections to raise sum required to be deposited before funding was approved by appropriate federal agencies.

Affirmed.

1. Municipal Corporations ⇨ 106(1)

Language of statute requiring that all resolutions of municipal governments shall be in writing is mandatory. U.C.A.1953, 10-3-506.

2. Municipal Corporations ⇨ 712

Sewer connection fee assessed by city was not established as required by law and was, therefore, invalid where city had not by resolution or ordinance in writing established the sewer connection fee. U.C.A. 1953, 10-3-506, 10-3-717.

3. Municipal Corporations ⇨ 712

Municipalities may make a reasonable charge for the use of a sewer system in order that it be self-sustaining, but no greater charge is authorized. U.C.A.1953, 10-8-38.

4. Municipal Corporations ⇨ 712

If sewer connection fee was to be used to retire bonded indebtedness, all users in the system had to be treated equally, and latecomers could not be subjected to arbitrary increase whereby fee of \$700 in first month was increased to \$1,000 in second month and \$1,500 in third month, which was not required to cover increased costs, but was done to induce early purchase of required 540 connections to raise sum required to be deposited before funding was approved by appropriate federal agencies. U.C.A.1953, 10-8-38.

John C. Backlund, Provo, for defendant and appellant.

Ray M. Harding, Pleasant Grove, for plaintiff and respondent.

HOWE, Justice:

Defendant Alpine City appeals from a summary judgment in favor of plaintiff declaring a sewer connection fee invalid.

In 1976 Alpine City joined with American Fork, Lehi and Pleasant Grove in establishing the Timpanoxos Special Service District to create a waste water treatment facility serving the named cities. In 1977, after obtaining various loans and grants, Alpine City had to deposit the sum of \$375,000 before funding was approved by the appropriate federal agencies. Alpine City estimated that with a projected hookup of 540 sewer connections, the initial price per connection would be \$700.

In 1978 Alpine City enacted an ordinance which provided that a fee for connection to the city sewer system could be fixed from time to time by resolution of the city council.

cil. Thereafter, without written resolution, Alpine City established a plan to sell sewer connection permits for the initial price of \$700. To induce early purchase of the required number (540) of sewer connections to raise the \$375,000, Alpine advised the public that the fee would be increased after one month to \$1,000, and after two months to \$1,500. Anyone could purchase the permits at \$700 for subsequent resale to potential builders or homeowners.

In December of 1979 plaintiff purchased his sewer connection permit under protest for the price of \$1,500 and brought this action to have that fee declared void and unenforceable, and to permanently enjoin Alpine City from assessing the fee. On motion for summary judgment brought by the plaintiff, the court below entered a partial summary judgment in favor of plaintiff ruling (1) that the fee was illegally assessed against the plaintiff because no written resolution had been adopted by the city council before December of 1979, and (2) that the plan was ultra vires under Alpine's statutory authority. The court left for trial the issue of whether plaintiff was entitled to a refund of the full amount of \$1,500. Pursuant to stipulation of the parties, the remaining issue was dismissed and an order making the partial summary judgment final was entered.

Alpine City appeals, contending that summary judgment was not proper and that the sewer connection fee plan adopted by it was a valid exercise of its general police powers.

[1, 2] We now address the two points of law on which the lower court found for plaintiff in order to determine whether summary judgment was proper. Under U.C.A., 1953, § 10-3-717, (Supp.1981) as enacted in 1977, all municipal governments "may exercise all administrative powers by resolution including, but not limited to: (1) Establishing water and sewer rates; . . ." Section 10-3-506, enacted the same year, provides as follows:

A roll call vote shall be taken and recorded for all ordinances, resolutions, and any action which would create a liability against the municipality and in any other

case at the request of any member of the governing body by a "yes" or a "no" vote and shall be recorded. Every resolution or ordinance shall be in writing before the vote is taken.

Alpine City admitted in its response to plaintiff's request for production of documents that "[p]rior to December 1979, defendant had not by resolution or ordinance in writing established a sewer connection fee for connection to the Alpine system." The language of the above statute requiring that all resolutions *shall* be in writing is mandatory. The trial court thus did not err in concluding that the sewer connection fee was not established as required by law and therefore invalid.

Cities and towns are empowered to charge for the use of their sewer systems by § 10-8-38. That statute provides in pertinent part:

Any city or town may, for the purpose of defraying the cost of construction, reconstruction, maintenance or operation of any sewer system or sewage treatment plant, provide for mandatory hookup where the sewer is available and within 300 feet of any property line with any building used for human occupancy and make a reasonable charge for the use thereof. [Emphasis added.]

[3] The scope of power granted by the Legislature under this statute is clear. Municipalities may make a reasonable charge for the use of a sewer system in order that it be self-sustaining. *Home Builders Ass'n. v. Provo City*, 28 Utah 2d 402, 503 P.2d 451 (1972); *Banberry Dev. Corp. v. South Jordan*, Utah, 631 P.2d 899 (1981). *Lafferty v. Payson City*, Utah, 642 P.2d 376 (1982). No greater charge is authorized. We do not purport to know whether \$700, \$1,000 or \$1,500, or none of those amounts, is in fact a reasonable charge to construct, maintain and operate Alpine's system. But all three amounts obviously cannot be reasonable within a two month period.

[4] Alpine City cites *Rupp v. Grantsville*, Utah, 610 P.2d 338 (1980) in support of its contention that the rate increase was proper. That case is readily distinguishable

ble. There an original charge of \$250 for each residence connected to the system was raised to \$300 when it was found that the city had failed to include the price for 18,000 linear feet of necessary sewer laterals. The affected users received letters explaining the mistake, advertisements were run, and a public meeting was held. Following open discussion, the increase was voted upon and approved. Alpine City, on the other hand, does not contend that its subsequent increases in the connection fee were required to cover increased costs, but concedes that they were made to induce early purchase of the required 540 connections. In so doing, Alpine did not uniformly treat all users.

11 E. McQuillin, *The Law of Municipal Corporations* § 31.30a (3d ed. 1982) states that "[t]he charges imposed for using or for making connection with municipal sewers must be reasonable, not arbitrary, and uniform, not discriminatory." See also 3 Yokley, *Municipal Corporations* § 503 (1958), stating that "[t]he rates for municipally owned utilities, such as a sanitary sewer system, must be uniformly applied, or the entire rate structure will be set aside."

Alpine maintains that the "increases were required to enable the city to repay its bonded indebtedness on the project and its share of the bonded indebtedness of the Timpanogos Special Service District, the regional agency providing sewer treatment facilities." If the connection fee is indeed to be used to retire bonded indebtedness, then all users on the system must be treated equally and late-comers cannot be subjected to an arbitrary increase of over 100% in a period of two months. See *Weber Basin Home Builders' Ass'n. v. Roy City*, 26 Utah 2d 215, 487 P.2d 866 (1971).

The summary judgment granted below is affirmed. Costs to respondent.

HALL, C.J., and STEWART, OAKS and DURHAM, JJ., concur.

Elizabeth A. DESCHLER, Plaintiff
and Respondent,

v.

FIREMAN'S FUND AMERICAN LIFE
INSURANCE COMPANY, a corpora-
tion, Defendant and Appellant.

No. 18035.

Supreme Court of Utah.

April 27, 1983.

Action was brought to recover benefits under accidental death policy. The Third District Court, Salt Lake County, G. Hal Taylor, J., rendered summary judgment for beneficiary, and insurer appealed. The Supreme Court, Durham, J., held that waterski kite was a "device for aerial navigation" within meaning of exclusionary clause.

Reversed.

Howe, J., filed dissenting opinion in which Stewart, J., joined.

Insurance ⇄ 438.1

Considering aerodynamic principles which affect ability to become and remain airborne and limited degree of operator control over direction, speed, and timing and place of landing, a waterski kite is a "device for aerial navigation" within meaning of exclusion clause of life policy.

See publication Words and Phrases for other judicial constructions and definitions.

Elliott J. Williams, Bruce H. Jensen, Salt Lake City, for defendant and appellant.

Henry S. Nygaard, Salt Lake City, for plaintiff and respondent.

DURHAM, Justice:

The respondent filed suit below to recover insurance benefits under an accidental



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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-810 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.

E. 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 Rigtrup

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.

ROBERT J. DEBRY - A0849
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiffs/Appellants
965 East 4800 South, Suite 2
Salt Lake City, Utah 84117
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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN CALL and CLARK JENKINS,)	
)	
Plaintiffs and Appellants,)	MOTION TO FILE ADDENDUM
)	TO BRIEF OF APPELLANT
vs.)	
)	
CITY OF WEST JORDAN,)	No. 19186
)	
Defendants and Respondents.))	

This case was briefed under the old appellate rules. The new appellate rules require relevant documents to be reproduced in an addendum (Rule 24f).

Although the addendum was not required at the time briefs were filed in this case, an addendum may be of assistance to the Court. Furthermore, an addendum may save the Court a substantial amount of time in researching the record.

The proposed Addendum (attached hereto) relates to Appellant's Reply Brief, page 5, footnote 1. Specifically, the addendum constitutes the Master Plan of West Jordan. R 673, et seq.)

West Jordan claims that the public hearing which approved the Master Plan, also approved the tax on subdividers. (Ordinance No. 33.)

FILED

JUL 3 1985

West Jordan has not presented any agenda or minutes of the meeting. Thus the only evidence of the content of the meeting is the Master Plan itself.

DATED this 1 day of July, 1985.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff

By: 

ROBERT J. DEBRY

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing MOTION TO FILE ADDENDUM TO BRIEF OF APPELLANT (Call & Jenkins v. City of West Jordan, No. 19186), was mailed, U.S., Mail, postage prepaid, this 2 day of July 1985, to the following:

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

Nola McShine