1986

John Call and Clark Jenkins v. City of West Jordan : Corrected Petition For Rehearing

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN CALL and CLARK JENKINS,)
Plaintiffs-Appellants)
vs) Case No. 19186
CITY OF WEST JORDAN, UTAH,)
Defendant-Respondent)

CORRECTED PETITION FOR REHEARING

APPEAL FROM A TRIAL AND JUDGMENT ENTERED
BY THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

The Honorable David B. Dee, District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES AND CASES CITED

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Pursuant to the provisions of Rule 35, Utah Rules of Appellate Procedure, the Defendant-Respondent petitions the Court for a rehearing in the above-entitled matter. In its decision, filed July 23, 1986, [hereinafter referred to as **Call III**], the Court erred in the following particulars:

1. The decision creates new rules concerning the "law of the case", the practical effect of which will "logjam" both trial and appellate courts.

2. The decision deprives the Defendant-Respondent of an opportunity to present its full case in "defense" of the validity of its Ordinance and the impact fee assessed thereunder.

3. The decision improperly adjudicates the validity of the Ordinance BEFORE the defendant was allowed to present its side of the case.

4. The decision authorizes the Plaintiff to assert new claims, while denying to the Defendant the opportunity to assert the appropriate "defenses" against those claims.

STATEMENT OF FACTS

The relevant facts are contained in the original Brief of Respondent. The trial court's Finding of Fact are included as an appendix to the original Brief of Respondent.

ARGUMENT

I

THE DECISION UNINTENDEDLY ABOLISHES THE "LAW OF THE CASE" DOCTRINE BY ALLOWING TO BE RAISED CLAIMS WHICH SHOULD HAVE BEEN RAISED EARLIER AND WHICH SHOULD HAVE BEEN PRECLUDED BY THE COURT'S PREVIOUS DECISIONS

This action---as originally filed in 1978---alleged the invalidity and unconstitutionality of the West Jordan flood control and parks impact fee ordinance [hereinafter "the Ordinance"]. This Court originally decided the Plaintiffs' claims adversely to Plaintiffs by holding that the Ordinance was facially "constitutional" and "valid". Call vs City of West Jordan, 606 P.2d 217 (Utah 1979) [hereinafter Call I].

Thereafter, the Plaintiffs applied for a rehearing. They asserted that the impact fee ordinance was unconstitutional "as applied". 614 P.2d 1257 (Utah 1980) [hereinafter Call II]. This Court stated:

> While we agree that the ordinance is not constitutional on its face, plaintiffs raise question as to its constitutionality as applied to them which make disposition of this issue as a matter of law inappropriate.

614 P.2d at 1258. Emphasis added. This Court concluded:

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

614 P.2d at 1259. Emphasis added.

This Court could have been not more clear as to the limited issues to be considered in further proceedings. One year later in Banberry Development Corporation vs City of South Jordan, 631 P.2d 899 (Utah 1981), this Court wrote:

> In Call vs City of West Jordan, Utah, 606 P.2d 217 (1979), opinion on rehearing, 614 P.2d (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."

631 P.2d at 905. Emphasis added.

In March 1981 the Plaintiffs moved to amend their complaint. The Defendant, asserting that the issues remaining in this case were limited to the "reasonableness" of the impact fee, vigoriously opposed the amendment. Defendant's "Answer" (to the amended complaint) states:

> Defendant asserts the material issues covered the allegations contained in paragraph 29 through 48 have already been decided adversely to the Plaintiff in the Memorandum Decision of the District Court on May 21 1978, and in the opinion of the Utah Supreme Court (filed December 26, 1979, petition for rehearing, June 27, 1980). The inclusion of said allegations and the attendant expansion of Plaintiff's alleged claims violate the Order of the Supreme Court limiting the issues to be presented at trial.

Paragraph 8.

Notwithstanding these objections, the amendment was granted by Judge Sawaya of the District Court. However, when the case was finally tried before Judge Dee of the District Court, the Plaintiffs presented no evidence on any of the expanded issues. At the conclusion of the presentation the Plaintiffs' evidence **AND BEFORE THE CITY PRESENTED ITS CASE IN CHIEF,** Judge Dee correctly ruled that the Plaintiffs had failed in their burden of proof. Judge Dee specifically found no "unreasonableness" in the impact fee.

Now, some eight years after the litigation was filed, this Court has ruled that the Plaintiff can expand the issues. The Court now writes:

> Although West Jordan does not cross-appeal the allowance of the amendment, it urges this Court to limit the case to the constitutional "reasonableness" issue. However, the pleadings may be amended after remand within the sound discretion of the trial court **so long as they do not cover issues specifically foreclosed by the appellate court.**

The foregoing statements (from Call II and **Banberry**) as to the limited issues on remand clearly indicate that "reasonableness" issue was THE SOLE ISSUE to be decided. The nature of the original action (declaratory judgment concerning the validity of the ordinance) and the Supreme Court's approval of the facial validity of that ordinance should have "foreclosed" all issues other than the "reasonableness" of the impact fee---at least for this case filed by these Plaintiffs. THE PLAINTIFFS SHOULD NOT BE ALLOWED TO TAKE SUCCESSIVE "BITES AT THE APPLE".

There was no need for the City to cross-appeal. Judge Sawaya's ruling allowing the amended complaint was not a final order, from which an appeal could be taken. There was no adverse

impact accruing to the City, as Judge Dee had specifically found that the City had held a public hearing in compliance with the law. This specific finding rendered moot any appeal by the City concerning this "new" claim.

The doctrine of "the law of the case" ought to limit the Court's decision in this regard.

WHAT ATTORNEY---ESPECIALLY AN ATTORNEY WHO JUST "LOST" ON HIS CLAIMED INVALIDITY OF AN ORDINANCE IN AN APPEAL OF A DECLARATORY JUDGMENT ACTION---WOULDN'T LIKE THE OPPORTUNITY TO "POLISH" HIS PLEADINGS A LITTLE BY ADDING NEW CAUSES OF ACTION? Rather than rewarding slopping pleadings and the "reservation" of claims, this Court should encourage judicial economy---especially in "declaratory judgment actions" where the facts really are not in dispute and where, as in this case, the matter (the validity of AN ordinance) can be adjudicated at the summary judgment stage!

The Court should be concerned by the fact that the Plaintiffs' initial claims were to the effect that there was NO ENABLING LEGISLATION authorizing the Ordinance. [See the First Cause of Action of the original complaint.][1] Now, AFTER the Plaintiffs lost in Supreme Court in Call I, they claim that there WAS ENABLING LEGISLATION, but that West Jordan didn't follow the statute.

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[1] Plaintiffs' original claims that the ordinance was an invalid "tax" for which there was no enabling legislation [Third Cause of Action] and that the dedication of land or money required under the Ordinance constituted an unconstitutional "taking of property without just compensation" [Second Cause of Action] were similarly decided adversely to the Plaintiffs. Call I.

The broad language of Call III [illegible] subordinate courts to continue to "hold" causes of action "in reserve", rather than pleading everything. Such an approach to our legal system is wasteful, is contrary to the "spirit" of modern jurisprudence and contradicts the Rules of Civil Procedure.

Rather than limiting the issues to be decided, Call III has now expanded the issues. This is particularly aggravating since the claim was originally filed as a "declaratory judgment" claim. The Plaintiff should put in their case ALL OF THEIR CLAIMS as to the invalidity of an ordinance. The decision in Call III rewards the Plaintiffs for sloppy pleading and allows them to take "successive bites at the apple" after their appeal is decided adversely to them in the first instance.

The Court's decision in Call III says to attorneys and to subordinate judges: "It doesn't matter what the Supreme Court says. Our decisions mean nothing and the factors limiting the case and the decision are not to be honored." The Supreme Court ought to say what it means and mean what it says. Certainly the Court cannot expect subordinate judges and attorneys to honor and follow its rulings [i.e. "remanded for trial on a 'constitutionality as applied' issue with "reasonableness" (of the impact fee) the dispositive factor] if it fails to do so. Call III, as presently written, constitutes authority to ignore the Court's rulings and encourages attorneys to file half-hearted pleadings, "holding back" on "sleeper" causes of action.

II

THE COURT'S PRESENT ADJUDICATION ON THE MERITS OF THE ORDINANCE IS PREMATURE AND UNFAIR TO THE DEFENDANT, WHICH HAS BEEN DEPRIVED OF AN OPPORTUNITY TO PRESENT ITS DEFENSE TO PLAINTIFFS' CLAIMS

At the conclusion of the presentation of Plaintiffs' case-in-chief, Judge Dee of the district court ruled that the Plaintiffs failed to prove by proponderance of the evidence that the impact fee assessed against them was "unreasonable". The DEFENDANT WAS NOT REQUIRED TO PRESENT ITS "CASE-IN-CHIEF" TO DEFEND AGAINST PLAINTIFFS' ALLEGATIONS. This ruling precluded the Defendants from an opportunity to present its full defense.

The testimony presented by the Defendant concerning the public hearing was merely in compliance with the Court's pre-trial order. That evidence was not necessarily a complete presentation of the Defendant's case. Judge Dee ruled repeatedly that the Defendant had complied with the pre-trial order. The trial court is in a much better advantage to the position to determine the compliance with the court order yet this Court rules on the basis. Nevertheless, the Court now holds "as a matter of law", that the City failed to comply with the district court's pre-trial order.

It is patently unfair to decide at this level and at this late stage in the litigation to hold that the City has, as "a matter of law", failed to sustain the burdens imposed upon it by the district court's pre-trial order. The district court repeatedly ruled that the City we had complied with its pre-trial order. Judge Dee stated:

> . . . I have already ruled on the question whether I thought he's complied with Judge Rigtrup's order, and I think he has, . . .

Record at 1711-1712. Emphasis added.

To hold---on the basis of the limited evidence presented merely in compliance with the trial court's pre-trial order---that the Ordinance is invalid, is unfair. The City should have the opportunity to make a complete showing as to the holding of the public hearing.

In **Call III** the Court now writes:

> Although the statute does not specifically address the required notice, we hold that the because the statute calls for a public hearing our legislature contemplated something more than a regular city council meeting held, so far as the record here discloses, without specific advance notice to the public that the proposed ordinance would be considered. Notice, to be effective, must alert the public to the nature and scope of the ordinance that is finally adopted. . . .

Citations to cases omitted. The Court correctly notes that the statute does not specifically address any required notice. However, the Court indicates that the public was not put on notice that the ordinance would not be adopted. This is incorrect.

The record---on the basis of the limited evidence---does show that prior to the adoption of the impact fee ordinance in 1975 the public was notified. [Because of the trial court's dismissal of Plaintiff's claims, the Defendant was not required to present any evidence as to the meeting at which the ordinance was actually adopted.] Because the City only presented a limited amount of evidence in compliance with the district court's pre-trial order, there was no necessity to provide the agenda for the January 1975 City Council meeting. Furthermore,

even if there was an advance public notice, the agenda may long have been destroyed. [This particular item is significant, as discussed in the issues outlined in Point III.D below.]

The Court notes that there is no statutory requirement of advance notice but nevertheless holds that the "statute calls for a public hearing" and implies that the "legislature contemplated something more than a regular city council meeting" be held. This, however, does not give any guidance as to what is specifically required. Is advance public notice of the public hearing required? If so, why did not Legislature say so? Certainly this fact must be contrasted with the public notice requirements contained in other statutes. See, for example, §10-9-5: fifteen days advance notice and publication in a newspaper required for zoning ordinance amendments; §10-2-414: twenty days advance notice and publication in a newspaper required before annexations can be effected, 10-2-414, Utah Code. Section 11-23-7 requires a "public hearing" before a special service district can be created, but Section 11-23-8 requires extensive publication of notice in a newspaper.

Admittedly, the Legislature may have intended to required "more than a regular city council meeting." But in Section 10-9-25, the Legislature obviously did not necessary intend that "published notice" be required. Had the Legislature intended as much, it could have easily said so---as it did in these other provisions. The Legislature didn't say so, so it must have intended that there could be LESS (than "published notice"). Thus, if the Court is expecting the City to come forth with a "proof of publicication" affidavit, that is a requirement not necessarily contemplated by the statute.

Furthermore, the Court's ruling ignores the evidence. First, there was direct testimony by Glen Moosman---a city councilman who ATTENDED THE MEETING---that a "public hearing" was held. [This must be contrasted with the total absence of evidence to the contrary.] Secondly, the hearing was held in the auditorium of a local school---NOT THE CITY COUNCIL'S CHAMBERS, which would be the regular place of meeting. Thirdly, there must have been some kind of "notice" given, so as to alert people to the meeting---if only as to the change of location. Fourthly, citizens---including Developers---appeared at the hearing. Fifthly, those in attendance were given the opportunity to speak: a public "hearing"! And lastly, the Ordinance was not adopted until a considerable time later. Obviously, the Ordinance was not "hustled through" the legislative process without the opportunity for public input.

Of particular concern for the Court should be the fact that the Plaintiffs themselves have NOT claimed they were deprived of an opportunity for public input---arguably granted by §10-9-25. The Plaintiffs' land wasn't even within the city limits at the time.

If the Court is inclined to state that the Legislature "contemplated something more than a regular city council meeting, the Court should say what that specific requirement is. As the Court correctly notes, the record does not disclose that advance notice was given. This is because the City---by reason of the trial court's ruling---was not able to present its complete case in defense case-in-chief. This Court should remand the case for the presentation for such evidence.

Furthermore, the Court's present decision ignores the evidence that the Planning and Zoning Commission had required the "dedication" of land (parks and open space) as a condition of development approval beginning in early 1974. When the legality of such was questioned, an ordinance was prepared and the matter was referred to the City Council. The "public hearing" was held in August 1974. The ordinance was finally adopted in January 1975.

This is not the case where the City Council---as a "quickie" and without notice to anyone---decides to adopt an ordinance. The public did have an opportunity for input! On several occasions.

What is particularly aggravating in the case at bar is that this case is not presented as one where THESE DEVELOPERS are claiming they were deprived of the opportunity for input into the decision on the impact fee. These developers weren't even around at the time of the adoption of the ordinance. The property they developed was not even within the city limits at the time of the adoption of the ordinance. [The territory for the Wescall subdivision was annexed in early 1977---two years AFTER the adoption of the impact fee ordinance.]

The Plaintiffs should be estopped from asserting an invalidity to this ordinance. They have never made any claim whatsoever that they were personally deprived in any fashion from giving the West Jordan City Council any input.

III

THE COURT'S EXPANSION OF THE ISSUES
BEYOND THE "REASONABLENESS" OF THE IMPACT FEE ISSUE
JUSTIFIES THE DEFENDANT TO ASSERT ADDITIONAL DEFENSES
ABOVE THE MERE REASONABLENESS OF THE IMPACT FEE

If the Court allows the expansion of issues to invalidate the ordinance beyond a "reasonableness" issue, the Court should likewise allow the Plaintiffs to "amend" its answer to include defenses which would address defenses to the Plaintiffs' claims going beyond the "reasonableness" issue.

A. The "estoppel" defense.

The Plaintiffs should be estopped from asserting the invalidity of the ordinance for anything other than "unreasonableness". The estoppel arises by reason of the fact that the Plaintiffs at the time the ordinance was adopted owned land (if they owned it at all at the time) outside of the city limits! Because they needed to come to the City to obtain municipal services for the subdivision they were intending to build and to make their development profitable and sellable, they petitioned for annexation. Following the annexation into the City, they obtained development approval and paid the impact fee. [It is questionable whether the fee was at that time even paid "under protest". The "protest" did not come until after the development had been approved, the fee paid and work begun.] The Plaintiffs built the subdivision and created the impact (concerning parks and recreation areas and flood-control which the Planning and Zoning Commission generally found, the City Council found, which this Court recognized in its decision in Call I and which THE TRIAL COURT SPECIFICALLY FOUND! Thereafter the lawsuit was filed. The Plaintiffs lost on the merits as to the constitutionality and invalidity of the ordinance. Call I. Then, FOUR YEARS LATER and some six years after the ordinance is passed, they claim that the ordinance is invalid. Petitioning for annexation, accepting the building and development approval

and obtaining the services and the benefits of being in the municipality certainly ought to bar the Plaintiffs at this late stage of the game FROM raising the issue of non-compliance with the statute.

If they had filed the lawsuit BEFORE they had built the subdivision, BEFORE they had paid the fee, BEFORE they had created the impact, declaratory judgment in their favor may be appropriate. But to create the impact and then ask to get the money back under the basis that the ordinance was void ab initio is patently unfair. They ought to be estopped. Certainly the petition for annexation ought to be an implicit agreement to abide by the "rules of the game" to which they (through the annexation) have invited themselves---rather than challenging the rules after the "game" is over.

B. The "unjust enrichment" defense.

The Plaintiffs created the impact the fee was designed to address. That impact was determined and found by the trial court. To have the Plaintiffs have an economic benefit of development and to not required to install the flood-control and parks facilities which they would have had to install but for which they paid the fee, would constitute an unjust enrichment. Surely the Court ought to remand the case for the adjudication of this issue and an opportunity for the Defendants to present its case on this issue.

C. The "mistake" defense.

A similar "defense" arises in that if the City would have known the ordinance was "void ab initio" (as now declared by the Court), the City would not have allowed the Developers to create the impact they created; the developers themselves would have

had to install the parks and flood-control facilities. Obviously, a "mistake" was made by the City (in assuming the validity of the ordinance). Certainly, the developers should be estopped from recovery, which would be an unjust enrichment, by reason of this mistake.

D. Statute of limitation defenses.

The allowance of the filing (in 1981---SIX YEARS after the adoption of the Ordinance and almost FOUR years after the litigation was originally filed) of "new" claims (unrelated to the claims originally pleaded and decided by this Court in Call I and other than the "reasonableness" issue) raises "statute of limitation" defenses, which the City should now be allowed to present.

CONCLUSION

The Court should reconsider its decision and limit its review to the issue of "reasonableness", as determined by the Call II decision. The trial court's finding as to the "reasonableness" of the impact fee assessed against the Plaintiffs should be upheld. Judge Dee correctly applied the law---as established by this Court in Call II---to the case; his decision should be upheld. The judgment entered against the Plaintiffs by reason of their failure of proof should be reinstated.

If the Court is still inclined to now allow the Plaintiff to pursue legal theories beyond the "as applied (reasonableness)" theory [hastily adopted only after the

Plaintiffs had lost in Call I], the Court should allow the Defendant an opportunity to present the appropriate "defenses" to those newly-allowed claims.

The trial court's dismissal of Plaintiffs' claims at the conclusion of the presentation of Plaintiffs' evidence deprived the Defendant of the opportunity to present its "defense". Before the Court can rule on the validity of the ordinance in its entirety, all the evidence---including the complete "defense" evidence, not merely evidence to comply with the trial court's pre-trial order---should be heard. Unless the trial court's judgment is affirmed, the case should be remanded to the trial court to give the Defendant an opportunity to present its "case in chief".

The undersigned certifies that this Petition for Rehearing is presented in good faith and not for the purpose of delay.

Respectfully submitted this 12th day of August, 1986.

Stephen G Homer

STEPHEN G HOMER
Attorney for Defendant-Respondent

CERTIFICATE

I certify that I hand-delived four copies of the foregoing CORRECTED PETITION FOR REHEARING to the office of Mr Robert J DeBry, Attorney at Law, 4252 South 700 East, Salt Lake City, Utah 84107, this 12th day of August, 1986.

Stephen G Homer