1984

John Call and Clark Jenkins v. City of West Jordan : Appellant's Reply Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

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JOHN CALI AND
CLARK JENKINS,

Plaintiffs-Appellants,

vs.

CITY OF WEST JORDAN,

Defendants-Respondents.

No. 19186

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APPELLANTS' REPLY BRIEF

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INTRODUCTION

In order to simplify this brief, it has been separated into three parts.

PART ONE deals with the constitutional delegation of taxing powers. That is, can the state delegate power to the municipality to impose the 7% subdivider fee?

PART TWO deals with the accounting of how West Jordan spent the 7% subdivider fees. That is, did the municipality spend the money properly?

It is important to note that the issues in Part Two are moot if appellant prevails on Part One. In other words, if the delegation of power is defective, appellant wins. There is no need to analyze how the money was spent.

However, if appellant does not prevail on Part One, the court must then move on to analyze Part Two. Thus, if the delegation of taxing power is valid, the court must then analyze if the money was properly spent. In other words, it is not necessary for Call to prevail on both Part One and Part Two. Call wins the case if he can prevail on either Part One or Part Two.

If Call does prevail on Part One or Part Two, the court must go on to analyze the class issues of Part Three.

AUTHORITIES CITED

CASES

CITY ORDINANCES

STATE STATUTES

PART ONE: CONSTITUTIONAL DELEGATION

POINT I

THE CONSTITUTIONAL ISSUE WAS PROPERLY PRESERVED FOR THIS APPEAL.

West Jordan argues that the constitutional issues have already been decided in Call I and Call II. (Respondents Brief at p. 7.)

It is true that Call I and Call II dealt with constitutional issues. However those opinions do not say that West Jordan had an absolute constitutional right to impose the fee or tax. Rather, those opinions hold that West Jordan has a qualified right to impose the tax. (See Brief of Appellant, Point III.)

After Call II was decided, Call amended the complaint. (R. 339.) That amendment claims that West Jordan has power to impose the 7% fee only after a public hearing is held. The amendment further claims that no public hearing was held. Therefore, West Jordan does not have the qualified taxing power.

It is axiomatic that a case can be amended after remand. Any new amendments received by the Court expand the scope of the case. Street v. Fourth Judicial District Ct., 113 Utah 60, 191 P.2d 153.

POINT II

THERE IS NO EVIDENCE OF THE REQUIRED PUBLIC HEARING OR OF THE REQUIRED PARTICIPATION BY THE PLANNING COMMISSION

As stated in Point I, the tax is constitutional only if certain procedural safeguards are met. These include a public hearing and preparation of the ordinance by the Planning Commission. (See Brief of Appellant, Point III.)

Call's opening brief argues that there never was a public hearing or participation by the Planning Commission. (Brief of Appellant, Point III.) West Jordan's brief lists citations which supposedly support the lower court's opinion. West Jordan's citations are misleading and taken in bad faith.

A. Discovery

During the discovery phase, Call sent the following interrogatories:

> 12. State whether a "public hearing" was held prior to promulgating Section 9-C-8(a) to City Ordinance 33.
>
> 13. If your answer to No. 12 is no, state why not.
>
> 14. If your answer to No. 12 is yes, describe the public hearing in reasonable detail, and identify all minutes, notes, or memoranda of such "public hearing."

15. Identify and describe any conversation, meeting or document, wherein the Planning Commission prepared Section 9-C-8(a).
(R. 794)

In response, West Jordan stated:

14. A copy of the minutes of the Council Meeting of January 21, 1975, at which the Ordinance was adopted, is attached. The consideration of the ordinance adopting Section 9-C-8(a) was placed on the agenda which was publicized prior to that meeting. The meeting was open to the public, and the public was welcome to comment on any item of discussion. The minutes do not designate the meeting as a "public hearing." Accordingly, the Defendant is unable to state whether a public hearing was held.
(R. 835, emphasis added, compare R. 859-860.)

As a further answer, West Jordan designated one meeting wherein the Planning Commission supposedly "prepared" the 7% ordinance. The minutes of that meeting state:

> Mr. Reeves made a motion that the City require from all subdivisions 5% minimum of the total amount of land to be donated to the City for park development, trade or sell, or equivalent value of money be turned over for it. Mrs. Schmidt seconded the motion. The motion carried with three for and two against.
> (R. 852)

The first problem is that those minutes bear little resemblance to the final city ordinance. For example, the ordinance requires a 7% fee for parks and flood control. The Planning Commission had authorized 5% to be used exclusively for parks. More importantly, there is no evidence that the Planning Commission "prepared" that ordinance. An example of

the correct procedure for preparing an ordinance is set forth at R. 856.

It is immediately obvious that West Jordan did not fairly answer the discovery requests on that issue. Therefore, Call made a Motion to Compel Discovery or For Default Judgment or For Summary Judgment. (R. 841.) The Court did not grant that motion. However, the Court did reverse the burden of proof as a sanction for West Jordan's failure to make discovery. (See Brief of Appellant, Point IA and Appendix H.)

B. Evidence

i. Public Hearing

During the evidenciary phase, West Jordan radically changed its theories:

During discovery, West Jordan claimed that the January 21, 1975 City Council meeting might have been a public hearing. (R. 859.) When testimony was presented, West Jordan changed its theory. West Jordan relied instead on a meeting of August 27, 1974. Call made a timely objection to the testimony. (R. 1657-1658.)

However, the August 27, 1974 meeting had nothing at all to do with the subdividers 7% fee. (City Ordinance 33.) The August 27, 1974 meeting dealt exclusively with the proposed new master plan of the city. (R. 1656-1658.)

Constitutional Delegation

It is true that one topic at the public hearing was the general, "concepts of flood control and reservation of land for parks and recreation." (R. 1659, Lines 9-10.) It is also true that in answer to one question, a city official, "explained that each developer must take care of his own flood water . . ." (R. 1661, Lines 8-9.)[1] However, even accepting all of that evidence in the light most favorable to West Jordan, there is still not one iota of evidence that a public hearing was advertised and held for the purpose of approving an ordinance requiring subdividers to contribute 7% to be used for flood control and parks.

ii. Planning & Zoning

During the evidenciary phase, West Jordan relied on a single meeting of the Planning Commission. (R. 1670-1673.) However, as stated above, those minutes have nothing to do with the 7% subdivider fee for flood control and parks. Those meetings concerned a proposed 5% fee for parks. It is interesting to note that the conclusion of the Planning Commission was:

> . . .there is no legal basis for this. We can only recommend and suggest that this be given, but the developer can reject it. (R. 1672-1673.)

In addition to the minutes cited above, West Jordan produced the former city attorney as a witness. In its brief,

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1/ The entire Master Plan is included at R 673. Obviously, the Master Plan talks in general terms about the desirability of flood control and parks. However, there is no hint of taxing subdividers to pay for those improvements.

Constitutional Delegation

West Jordan relies strongly on the following testimony from the city attorney:

> In this particular instance, again from memory, when the ordinance was first drafted it would have been sent to Planning & Zoning for their review as well, and after whatever recommendations they would have made it would have come up with the City Council where it would have been discussed again. And if further revision was necessary, further revision would be made, and finally passed by the City Council.
> (Respondent's Brief, at p. 22; Compare R. 1644.)

However, West Jordan takes this testimony completely out of context in an attempt to mislead the Court. The complete colloquy is as follows:

> Mr. DeBry: I have no objection . . . for the purpose of showing what his general custom and practice was or the method in which they transacted business, but I do object and move to strike the testimony if it comes in as his recollection, because he says he doesn't know what happened.
>
> THE COURT: He doesn't know specifically the dates and time because its some time ago but he is now reconstructing this based on the general practice. And I'm admitting this testimony for that general purpose only.
> (R. 1644-1645.)

C. Summary

Call's opening brief claimed that there was no evidence at all of a public hearing or that the ordinance was prepared by the Planning Commission. West Jordan's brief listed a number of citations to support the opposite position. (Respondent's Brief, at pp. 19-20.) West Jordan relies on R. 1548, 1555, 1559-60, 1642, 1646-49, 1653, 1672.

None of those citations support West Jordan's position. Some actually contradict West Jordan. The citations are devoid of merit. Here is an analysis of West Jordan's citations on the public hearing issue:

Pages	
1548	This concerns a Commission meeting, not a "public hearing".
1555	This indicates the committee received input from citizens who were acquaintances of the officials, not from a public hearing.
1559-60	The City's witness actually said he did not recall if there was specific public meeting held on the ordinance.
1642	The City Attorney testified that it was he that "prepared" the ordinance.
1646-49	Does not support any part of the finding.
1653	Deals with a Commission meeting, not a "public hearing".
1672	Does not support any part of the finding.

Obviously none of those citations remotely support West Jordan's position.

PART TWO: THE ACCOUNTING

POINT III

THERE IS NO EVIDENCE THAT THE CITY IS SUBSIDIZING FLOOD CONTROL AND PARKS

West Jordan tells us that $525,000.00 was collected from developers.[2] Next, West Jordan says that the City actually spent $1,200,000.00 for flood control and parks. Thus, West Jordan argues that the developers have nothing to complain about. Indeed, West Jordan claims that the subdividers get a "subsidy" from the City. West Jordan's argument goes like this:

> . . . The City spent more . . . than it took in. This difference was made up by a "subsidy" from other general revenue sources of the City . . . This, however, does not show that the fee was "unreasonable." If anything, it shows the fee was "more than reasonable" and that the developers were being subsidized.
>
> Respondent's Brief, at p. 12.

2/ Throughout this brief, we will use the figure of $525,000.00. However, the true figure is substantially higher. $525,000.00 represents the cash contribution. In addition, the cash subdividers have contributed approximately 26.332 acres of land. (See Exhibits 8 and 16.) That land was typically valued at $15,000.00 per acre (See Exhibit 10 STORM SEWER FUNDING.) Thus, the combined totals for cash ($525,000.00) plus land ($394,980.00) would be $919,980.00.

In addition to land and cash, some subdividers contributed materials and labor. (See Exhibit 8.) It appears that no attempt has been made to account for those donations.

That argument is a "red herring." However it is an important "red herring" that deserves a suitable funeral. We can best demonstrate the fallacy by looking at a few examples:

Example No. 1.

Suppose that all of the "oldtimers" lived on the north side of the City. Suppose that the "oldtimers" had adequate flood control and park facilities. Suppose there was no outstanding debt on those northside parks and flood control projects.

Suppose that the "newcomers" all move to the south side of town. Suppose that the south side of town is completely undeveloped and requires flood control and parks. Suppose that the cost of the flood control and parks for the south side is $1,200,000.00.

If we assume all of these facts to be true, West Jordan's argument is correct. The impact of the new subdivisions was $1,200,000.00. The "newcomers" paid $525,000.00 of that amount. The balance could be seen as a "subsidy" of sorts coming from the general fund.

Example No. 2.

Suppose that all of the "oldtimers" live on the north side of the City. Suppose that the "oldtimers" have no existing flood control or park system. (This was probably the case. See plaintiff's Exhibit 10 "Storm Sewer System.") Suppose the "oldtimers" want to develop flood control and parks on their north side of the City. Suppose the cost of that project is $1,200,000.00.

The Accounting

Suppose that the "newcomers" all move in to the south side of town. Suppose that the south side of town has no immediate need for flood control or parks. Suppose that "newcomers" contribute $525,000.00 which is used to construct parks and flood control on the northside of town.

If we assume all of these facts to be true, the "newcomers" receive no subsidy at all. In fact, the reverse is true. The "newcomers" (who live on the south side of town), are actually subsidizing flood control and park projects for the "oldtimers" (who live on the northside of town).

Summary

The City argues that the subdividers are receiving a subsidy. That is certainly a possibility. However, it is equally possible that the subdividers are paying out a subsidy. Whether the subdividers are paying or receiving a subsidy depends upon numerous factors which are not in evidence. Those factors will be developed in Point IV, below.

POINT IV

THIS COURT HAS GIVEN A FORMULA TO DETERMINE WHETHER ANY SUBSIDY IS PAID

Point I, above, sets out some fairly simple examples. The "oldtimers" all live on the north side of town. The "newcomers" all move in on the south side of town. The parks and flood control are all built on the south side--or the north side--of town. Of course, the case would be very easy if the facts were so simple.

However, in real life the facts are more complex. "Oldtimers" probably live on both the north side and the south side. "Newcomers" probably move in on the north side as well as the south side. Old flood control systems probably service some "oldtimers" as well as some "newcomers." Those old flood control systems are probably partly paid for. New flood control systems probably cut across "oldtimer" neighborhoods and "newcomer" neighborhoods.

Thus, the issue in this case is how to measure the flood control or recreational impact where new neighborhoods crowd into existing neighborhoods. Further, how can the costs of new flood control and parks be fairly apportioned between those old neighborhoods and the new neighborhoods?

Fortunately, this Court has already decided that exact issue. There is no need to re-plow the ground. This Court has given the test. In order to fairly apportion the expenses (between "oldtimers" and "newcomers"), it is necessary to consider the factors in the following test:

1. The cost of existing capital facilities;

2. The manner of financing existing capital facilities;

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;

4. The relative extent to which the newly developed properties and 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 to provide common facilities that have been provided by the municipality and financed through general taxation or other means in other parts of the municipality;
>
> 6. Extraordinary costs, if any, in servicing the newly developed properties;
>
> 7. The time price differential inherent in fair comparisons of amounts paid at different times.
>
> See Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899, 904 (Utah 1981).

"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." Lafferty v. Payson City, 642 P.2d 376, 379 (Utah 1982).

The City's entire case might be summarized as follows:

> The City spent $1,200,000.00 for flood control and parks;
>
> $675,000.00 of that amount came from general revenue;
>
> $525,000.00 of that amount came from subdividers.
>
> Therefore: The subdividers received a subsidy.

However, it is simply impossible to reach that conclusion based upon the data provided on in this record. Unless the Banberry test is followed, it is impossible to know whether the "newcomers" are subsidizing the "oldtimers", or vice versa.

This case is identical to Lafferty v. Payson City, 642 P.2d 376 (Utah 1982). In Lafferty, the trial court approved certain connection fees for water, sewer and electricity. The basis of the trial court's opinion was that, "In each case, the per-unit costs were substantially in excess of the amount of the connection fees." 642 P.2d at 378. Of course, that is the identical argument which West Jordan has made [3]. This Court easily rejected those arguments. This Court held that all of the seven tests of Banberry must be considered.

In summary, West Jordan had the burden of producing evidence. West Jordan did not produce evidence to satisfy the Banberry test. Thus, West Jordan has failed to satisfy its burden, and it must lose.

POINT V

WEST JORDAN HAS THE BURDEN OF PRODUCING THE DATA REQUIRED IN THE BANBERRY TEST.

Call's opening brief argued that West Jordan had the burden of producing that evidence for three separate reasons. (See Brief of Appellant, at p. 4). West Jordan responded that:

> The problem with this argument is that defendant did satisfy this

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3/ West Jordan's argument goes like this:

Certainly the inability to express an opinion would perhaps be critical if the City spent less on such projects than it took in from developers. But, that is not the case here; the City spent more--hundreds of thousands of dollars more--than it took in. Respondents Brief, at p. 12.

> burden . . . The defendant did explain the reason "why" the fee was exacted and "where" the monies were spent . . .
> Respondent's Brief, at p. 15

We will therefore examine what evidence West Jordan has produced--what evidence West Jordan claims it has produced--and what evidence West Jordan has not produced:

1. West Jordan has produced evidence to show that $1,200,000.00 was spent on capital projects;

2. West Jordan has produced evidence to show that $675,000.00 of that amount came from general revenue sources;

3. West Jordan claims that $525,000.00 of that amount came from subdivider fees. However, there is no evidence at all to support that argument. (See Point IV, above.)

At the risk of being tedious, we will now list the evidence that was not produced:

4. West Jordan has not produced any evidence, to show "the cost of existing capital facilities."

5. West Jordan has not produced evidence to show, "the manner of financing existing capital facilities."

6. West Jordan has not produced evidence to show, "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."

7. West Jordan has not produced evidence to show, "the relative extent to which the newly developed properties and other properties in the municipality will contribute to the cost of existing capital facilities in the future."

8. West Jordan has not produced evidence to show, "the extent to which the newly developed properties are entitled to a credit because the municipality is requiring their developers or owners to provide common facilities that have been provided by the municipality and financed through general taxation or other means in other parts of the municipality.

9. West Jordan has not produced evidence to show, "extraordinary costs, if any, in servicing the newly developed properties."

10. West Jordan has not produced evidence to show, "the time price differential inherent in fair comparisons of amounts paid at different times."
Banberry, Id at p. 904.

In summary, West Jordan has produced some evidence. However, West Jordan has left most of the questions unanswered. Until all of these questions are answered by West Jordan, it is impossible for any conclusions to be drawn. Lafferty v. Payson City, 642 P.2d 376. Indeed, unless all of the questions are answered, it is entirely possible that the "newcomers" have paid $525,000.00 for improvements to be used primarily for the benefit of the "oldtimers."

POINT VI

THE SEVEN PERCENT SUBDIVIDERS FEE IS ILLEGAL, AS IT WAS USED FOR GENERAL REVENUE MEASURES.

Call's opening brief argued that the seven percent fee was used as a general revenue measure. (Brief of Appellant, Point IV.) Of course, it would be illegal to use the money as a general revenue measure. Lafferty v. Payson City, 642 P.2d 376, 378 (Utah 1982).

West Jordan replies that the money was not used as a general revenue measure at all. West Jordan argues that the money was all used for flood control or parks. West Jordan says:

> The evidence showed no expenditures were made, except for the specified purposes: flood control and parks.
> Respondent's Brief, at p. 16.

The Accounting

A. The $525,000.00 was Illegally Intermingled with the General Fund, and it is no Longer Possible to Trace the Funds.

The $525,000.00 received from subdivider fees was deposited in the general fund and intermingled with other revenues. In so doing, West Jordan has violated state law:

> 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 [Utah Code Ann.], I conclude that the fees should have had special accounting treatment .
> Initial Report of Master, pp. 8-9
> (Appendix "D" to Brief of Appellant.)

Because the accounts were not properly segregated, it is impossible to trace the funds. Both Call's expert and the master agree that they cannot trace where or how the $525,000.00 was spent. (R. 1728-1729), and (Brief of Appellant, Appendix D, at pp. 5 and 6).

West Jordan totally ignores this failure to properly keep accounting records. West Jordan assumes that the $1,200,000.00 spent for flood control includes the $525,000.00 subdivider fees. Indeed, Judge Dee makes 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. 1496, at paragraph 11.)

The problem with this finding is that there is no testimony at all to support it. Here, two experts testified that the money cannot be traced. Judge Dee not only rejects their testimony--he goes on to trace the funds. We are not aware that Judge Dee is qualified, as an accounting expert, to form such opinions. Certainly, he has not described the accounting theories upon which he has rested his opinion. Nor, has West Jordan put forth any testimony at all on how to trace the funds.

B. According to West Jordan's own accounting, the $525,000.00 was Used as General Revenue.

We have demonstrated in paragraph A, above, that it is not possible to trace the funds. However, for the moment we will assume, arguendo, the accounting approved by Judge Dee.

According to Judge Dee, the $525,000.00 in subdivider fees was, in fact, spent for flood control and parks. However, the trail stops there. We only know that $525,000.00 was spent on flood control and parks on a city-wide basis. There is no way to know which specific flood control project or park was financed by which specific developer.

For example, we have no way of knowing if developers on the north side of town are subsidizing parks on the south side of town. Nor, do we know if the "newcomers" are subsidizing parks to be used primarily by "oldtimers."

It is not sufficient for West Jordan to simply spend money on flood control and parks in some generic sense. The

tax is only legal if, "the fee so collected [is] used in such a way as to benefit demonstrably the subdivision in question." Call v. City of West Jordan (Call II), 614 P.2d 1257, 1259 (Utah 1980), (emphasis added). That requirement can never be satisfied if West Jordan simply spends money on flood control and parks on a city-wide basis.

In Lafferty v. Payson City, 642 P.2d 376 (Utah 1982), this Court struck down an impact fee of $1,000.00 per house. The impact fee was to be used as follows: electrical 20%, sewage treatment plant expansion 60%, water 20%. This Court held that, "a reasonable charge for a specific service is permissible; whereas, a general fee that amounts to a revenue measure is not." 642 P.2d at 378.

Any differences between the "impact fee" in Lafferty and the "subdividers fee" in this case is pure semantic hairsplitting. The fee in Lafferty was to be used for water, sewer, and electricity. The fee in this case was to be used for flood control and parks.

West Jordan will likely argue that Lafferty is distinguishable. In Lafferty the funds were not earmarked. In this case, the funds are earmarked for flood control and parks.

It is true that the cash portion of the subdividers fee is designated for "flood control and/or parks and recreational facilities."[4] However, those funds are not

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4/ See Appendix A to Brief of Appellant

earmarked for any specific flood control project or any specific park project. West Jordan has freely spent the money for all types of flood and recreation projects in various parts of the town. [5]

However, it is important to note that sometimes land--and not cash--was taken. In those cases, there was absolutely no restriction on the use of the funds. The ordinance provides that:

> . . . the subdivider shall be required to dedicate seven percent 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. Appendix A to Brief of Appellant. (Emphasis added.)

Finally, sometimes West Jordan did not take either cash or land. Sometimes the City took labor and materials. (See plaintiff's Exhibit 8.) The statute makes no provision at all for assessing labor and materials. Since there is no statutory restriction, the labor and materials were clearly taken as a general revenue measure.

5/ Plaintiff's Exhibit 10.

It is clear from this document that all of the seven percent subdivider fees are used for general flood control needs. There is no evidence of any attempt to link any specific flood control project with revenues from any specific subdivision. For example, Exhibit 10 shows that revenues from the 1981 subdivisions would likely be used for the Barney's Creek Detention Basin project. On the basis of these documents, it is entirely possible that some subdividers contributed to the Barney's Creek Detention Basin project when their own subdivision did not use--and had no impact on--that project at all.

In summary, the seven percent subdividers fee was not restricted in any meaningful sense. Rather, it was intended, and has been administered, as a general revenue measure.

POINT VII

WEST JORDAN HAS NOT PRODUCED SUFFICIENT EVIDENCE TO PROPERLY EVALUATE EXPENDITURES ON THE "BOOTH PROPERTY" AND THE "BINGHAM CREEK PROJECT

For the most part, West Jordan relies on glittering generalities. West Jordan boasts that it has taken in $525,000.00 from developers--and spent $1,200,000.00 in park and flood control projects. We have demonstrated in Point VI, above, that such general expenditures will not satisfy the Banberry test.

However, West Jordan has identified two specific projects--the "Booth Property" and the "Bingham Creek Project." Of course, this is the appropriate battlefield. The correct analysis is to compare specific projects with specific subdivisions.[6]

A. Need for Additional Funds.

West Jordan claims that the tax of $16,576.00 was justified because of the "Booth Property" and the "Bingham Creek Project."

6/ " . . . it is only fair that the fee so collected be used in such a way as to benefit demonstrably the subdivision in question. Call v. City of West Jordan, (Call II), 614 P.2d 1257, 1259 (Utah 1980).

We have no doubt that West Jordan did spend some money on those projects. We also have no doubt that those projects were in part required by the West Call subdivision. Finally, we have no doubt that those projects, to some extent, benefited the West Call subdivision.

The problem is that a municipality always provides basic services to residents. Indeed, residents are entitled to certain basic services by reason of their property tax and sales tax. The master has explained that:

> . . . 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. 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 benefit.
>
> Plaintiff's Exhibit 9 (Compare Rule 53(c)(2) U.R.C.P.)

In short, it is not enough for West Jordan to identify some projects that happen to be built in the same neighborhood as the West Call subdivision. West Jordan must also show that these projects were not to have been constructed as a part of the City's ongoing municipal services. There is not one iota of evidence on this issue. For example, it is entirely possible that the park could have--and should have--been purchased out of the City's regular revenue sources.

The Accounting

Of course, this question should be resolved by applying the Banberry test. That was not done by West Jordan. (See Point V, above.)

B. Manner of Allocation.

West Jordan claims that the appellant's subdivision created additional needs for the community. Therefore, West Jordan allocates the entire tax of $16,576.00 to the "Booth Property" and the "Bingham Creek Project."

However, this type of allocation cannot be made in a vacuum. For example, West Jordan presumes that the appellant's subdivision has created one hundred percent of the need for additional parks and flood control; and, West Jordan further presumes that appellant's subdivision will get one hundred percent of the benefit; and, that appellant's subdivision should pay one hundred percent of the cost.

Of course, that is completely ridiculous. (R. 1558). For example, there are two subdivisions presently adjoining the "Booth Property" park. However, there is room for a dozen new subdivisions to be built in that area in the future. (Compare R. 1558 and defendant's Exhibit 1.) Apparently, West Jordan wants to allocate one hundred percent of the cost of the "Booth Property" to appellant's subdivision. Then, all of the future subdivisions would get a "free ride."

The same thing can be said of the "Bingham Creek Project". West Jordan wants to allocate the entire $16,565.00 to the "Bingham Creek Project." That action entirely ignores all of the other subdivisions which live along Bingham Creek

and contribute to the flood control problem. (R. 1618-1619). It again appears that West Jordan wants to apportion all of the costs to existing subdividers. Future subdividers will get a "free ride." (R. 1619-1620)

C. Time of Allocation.

By hindsight, West Jordan now claims that the $16,565.00 was used for the "Bingham Creek Project." However, there are no contemporaneous records to show how the money was intended to be used when it was paid in 1977. We learn from Lafferty v. Payson City, 642 P.2d 376, 378 (Utah 1982), that:

> 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.

Astonishingly, West Jordan purchased the "Booth Property" before Call ever paid the $16,576.00. (Compare R. 90 and R. 549.) West Jordan tries to wiggle out of this dilemma by stating that this expenditure was made, "in anticipation of the West Call subdivision . . ." However, there is absolutely no evidence to support that bald assertion. (Cf. R. 547 and 548)

D. Source of Funds.

West Jordan's allocations presume that the $16,565.00 from West Call was in fact used for the "Booth Property" and the "Bingham Creek Project." However, there is no evidence to support that conclusion.

We know that West Jordan did spend some money for the "Booth Property" and for the "Bingham Creek Project." However,

we have no way of knowing whether the $16,565.00 from Call was used for those purposes or to buy a new car for the mayor.[7] (R. 1728-1729; Compare Plaintiff's Exhibit 9; See also Point VI(A), above.)

E. Banberry Requirements.

Even if West Jordan survives all of the other problems (Paragraphs A-D, above), the greatest hurdle remains.

West Jordan cannot simply take money from Call for the general purpose of parks and flood control Nor, can West Jordan take money from Call for the purpose of a specific park or a specific flood control project.

The tax is only legal if the "municipal fees pertaining to newly developed properties do not require them to bear more than their equitable share of capital costs (in comparison with other properties), in relation to benefits conferred." Lafferty v. Payson City, 642 P.2d 376, 379 (Utah 1982).

This Court has given a specific formula to make that comparison. Banberry Development Corp. v. South Jordan City, 631 P.2d 899, 903 (Utah 1981). (See Point III, above.) In this case, West Jordan has the burden of coming forth with the evidence. West Jordan simply claims it has spent some money on

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7/ West Jordan argues that Call's expert retreated from his opinion that the money might have been used for a new car for the mayor. Respondents Brief, at p. 16. However, West Jordan simply mistates the record. Call's expert did not in any way retreat from that opinion. (R. 1748-1749)

some projects; yet, West Jordan did not present one iota of evidence to respond to the Banberry formula. Thus, we cannot know if the allocations for the "Bingham Creek Project, and the "Booth Property" met the Banberry test.

POINT VIII

WEST JORDAN'S SO-CALLED ACCOUNTING IS WITHOUT MERIT.

Call's opening brief gives three separate reasons why West Jordan must account for the seven percent subdivider fees. (Brief of Appellant, Point I)

West Jordan's brief gives a short terse response to this critical issue. West Jordan states:

> Did the City account for those monies so collected? Yes. The aforementioned documents attest the appropriate accounting controls were present.
> Respondents Brief, at p. 16.

That brief response totally ignores the testimony of Call's expert. Jerry Sharkey, a C.P.A., testified that West Jordan's documents do not account for the funds. (R. 1729)

West Jordan's response also ignores the work of the special master[8] who explained that the financial records do not contain a proper accounting:

> After I find a general description of the transaction provided in Step 1, I

8/ West Jordan states that Call "expressly waived" the final master's report. However, that was with good reason. Call was faced with the prospect of paying $18,900.00 for the final master's report. However, the burden to provide that evidence was on West Jordan. (R. 727-729)

[illegible] The findings of fact in the master's [illegible] report are binding on the Court.

[illegible] R.C.P.

> 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 $10,000.00 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 park planning. With engineering help, I believe 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, such 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.
>
> ***
>
> 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 the information is not provided in the existing accounting records, it will have to come from other records and, again, 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.
>
> (Plaintiff's Exhibit 9, emphasis added.)

Furthermore, the master has explained that West Jordan has violated state law by failing to separate the subdivider fees:

> First, Section 10-10-29 [Utah Code Annotated] 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 [Utah Code Annotated] 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 the 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 Section 10-10-29 [Utah Code Annotated], 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.
> See Plaintiffs Exhibit 9.

West Jordan says that its financial records contain a complete accounting. Yet, those records are riddled with deficiencies:

> General fixed assets have been acquired for general city purposes and at the time of purchase were recorded as expenditures in the General Fund or the Capital Improvements Fund of the City. However, the City has not maintained a record of its general fixed assets and, accordingly, a statement of general fixed assets, required by generally accepted accounting principles is not included in the financial statements.
> Plaintiff's Exhibit 6 at p. 14 (General Fixed assets).
>
> ***
>
> As a result of not maintaining detailed records, the Water and Sewer Fund has not been able to determine the cost of assets retired and, accordingly, such assets have not been removed from the Water and Sewer Fund's accounting records. The amount of such assets, and the effect on the financial statements of the Water and Sewer Fund, is not determinable at June 30, 1980.
> Plaintiff's Exhibit 6 at p. 16 (Utility Plant in Service)

The Accounting

***

> As discussed in Note 1, the City has not maintained detailed records related to its general fixed assets. This is in violation of the State of Utah Fiscal Procedures Act and not in accordance with generally accepted accounting principles.
>
> Also, as discussed in Note 9, $720,000.00 of water and sewer connection fees which were restricted for use in improving the utility plan in service, were transferred to other funds for use other than improvements to the water and sewer utility plant in service.
>
> Plaintiff's Exhibit 6 at p. 17 (Legal Compliance).

In summary, West Jordan has a clear duty to render an accounting. However, West Jordan has intermingled the funds with general City funds. West Jordan's notion of an accounting is to simply hand over a batch of unsorted check vouchers (Defendant's Exhibit 24), and leave Call to sort out the mess.[9] That may be an accounting of sorts; however, it falls well short of satisfying the fiduciary and constitutional safeguards:

> . . . if money is collected from the public for a specific purpose, it becomes a trust fund committed to the carrying out of that purpose.
>
> Call v. City of West Jordan (Call I), 606 P.2d 217, 220 (Utah 1979)

9/ West Jordan's entire accounting is contained in defendant's Exhibit 24. The Court should physically look through that exhibit. It will be immediately apparent that the so-called accounting is a farce.

PART THREE: CLASS ISSUES

POINT IX

THE CASE SHOULD BE CERTIFIED AS A CLASS ACTION.

A. Size of the Class

Call's opening brief argues that the size of the class (approximately 100), is sufficient to satisfy Rule 23(a)(1) U.R.C.P.[10]

West Jordan does not oppose the estimated size of the class.[11] West Jordan simply argues that a class of approximately 100 members is too small.

West Jordan does not cite any cases in support of its position. Nor, does West Jordan attempt to distinguish any of the cases cited by Call. West Jordan simply makes a naked dogmatic argument.

If it were helpful, Call could go on and cite numerous other cases where classes of less than 100 members were certified; e.g.:

> Philadelphia Electric Co. v. Anaconda American Brass, 43 F.R.D. 452 (E.D. Pa. 1968), (Class of 25 members certified); Sabala v. Western Gillette Inc., 362 F. Supp. 1142 (S.D. Tex. 1973); (Class of 26 members certified);

10/ One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable. (Rule 23(a)(1)) U.R.C.P.)

11/ We know that there were 73 class members as of October 31, 1980. (R. 191-192) Presumably, more subdivisions were added after that time.

> Walls v. Bank of Greenwood, 20 Fed R. Serv.2d 112 (N.D. Ms. 1975); (Class of 23 members certified); Horn v. Associated Wholesale Grocers Inc., 555 F.2d 270 (10th Cir. 1977); (Reversal of denial of class of 46); King v. Carey, 405 F. Supp. 41 (W.D. N.Y. 1975); (Class of 38 members certified.)

Nor, is it necessary for the plaintiff to know the exact number or identity of the class members. Carpenter v. Davis, 424 F.2d 257 (5th Cir. 1970); Tober v. Chanita Inc., 58 F.R.D. 74 (M.D. Pa. 1973); Doe v. Charleston Area Medical Center, Inc. 529 F.2d 638 (4th Cir. 1975)

In Butkis v. Chicken Unlimited Enterprises, 15 Fed R. Serv.2d 1067 (N.D. Ill. 1971), the Court approved a class of 35 members and noted, "the difficulties involved in having thirty-five intervenors, all with their respective attorneys, attempt to go through the formal motions required for entrance into and participation in the suit."

If the class is not certified, what will happen? In School District of Philadelphia v. Harper & Row Publishers, Inc., 267 F. Supp. 1001 (E.D. Pa. 1967), defendants successfully opposed class certification. Subsequently, more than 40 individual suits were filed in 8 judicial districts. In the later case of State of Illinois v. Harper & Row Publishers Inc., 301 F. Supp. 484 (N.D. Ill. 1969), the Court noted that an unnecessary waste of judicial resources could have been avoided if the class had been certified in the first place.

B. Interest of Class Members

West Jordan argues that this should not be a class action because the other class members simply don't care about the case. Again, West Jordan fails to cite any authority for this position.

Indeed, this argument assumes that all of the other class members know about the lawsuit, and have elected to abstain. But, there is no showing that this is the case. Moreover, it would be very unlikely for other subdividers to turn their backs on an award if they knew the full story.

It appears that the courts have unanimously rejected West Jordan's contention. A case in point is Lanner v. Wimmer, 662 F.2d 1349 (10th Cir. 1981). In that case, plaintiffs challenged the policy of releasing students from public school to attend seminary classes. The trial court certified a class consisting of parents. The appellate court upheld class certification. The court pointed out that a class could be certified even though some members of the class disagreed with the litigation.

In Jacobi v. Bache & Co. Inc., 16 Fed. R. Serv.2d 71, 73 (S.D. N.Y. 1972), the court certified a class composed of employees of certain brokerage houses. The court pointed out that:

> The fact that some members of the class may differ as to the desirability of a particular remedy for the antitrust violation, or even desire the maintenance of the status quo, does not preclude their being included within the class bringing the action.

Class Issues

See also:

Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920* (2d Cir. 1968); Hawkins v. Holiday Inns Inc., 1975 Trade Cases ¶60,153* (WD Tn 1975); Leisner v. New York Tel. Co., 358 F. Supp. 359* (S.D. N.Y. 1973); Davy v. Sullivan, 354 F. Supp. 1320* (M.D. Al. 1973); Jacobi v. Bache & Co., 16 Fed. R. Serv.2d 71* (S.D. N.Y. 1972); Rosado v. Wyman, 322 F. Supp. 1173* (E.D. N.Y. 1970); Sullivan v. Houston Independent School Dist., 307 F. Supp. 1328* (S.D. Tx. 1969); Snyder v. Board of Trustees of University of Illinois, 286 F. Supp. 927* (N.D. Ill 1968); Cf Dierks v. Thompson, 414 F.2d 453* (1st Cir. 1969); Housing Auth Omaha Nebraska v. U.S. Housing Auth, 54 F.R.D. 402* (D Nb. 1972); Moss v. Lane Co. Inc., 50 F.R.D. 122* (W.D. Va. 1970), affd in part, remd in part 471 F.2d 853* (4th Cir. 1973). But see Ward v. Luttrell, 292 F. Supp. 165 (E.D. La. 1968).

C. Individual Defenses

West Jordan states that the class device is not appropriate because the City has individual defenses against various subdividers. Again, West Jordan cites no authorities. West Jordan simply makes bald assertions.

However, the rule does not require claims of class members to be identical. Rather, the rule requires common issues (Rule 23(a)(2)), and typical issues (Rule 23(a)(3)).

The "hornbook" law on that issue is that:

> Nowhere in the rule is there a requirement that all questions of law and fact be common to the class. Newberg on Class Actions §1110d

* * *

> Typicality refers to the nature of the claim or defense of the class representative, and not to 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 class members, and is based on the same legal theory.
> Newberg on Class Actions, §1115c

* * *

> Though at least one court has suggested that differences in the amount of damages claimed will make a plaintiff's claim atypical, most courts have declined even to consider that argument, and nearly all of those that have ruled on it have rejected it outright. If differences in amounts of individual damages made a class action improper, a class action for damages would never be possible . . .
> Newberg on Class Actions §1115d

An excellent example is the case of Coley v. Clinton, 635 F.2d 1364 (8th Cir. 1980). In that case, plaintiffs challenged the constitutionality of commitment proceedings. The trial court denied class certification. The appellate court reversed. The appellate court reasoned that, where the constitutionality of the procedures provided a common question of law for all class members, it was no bar to certification that remedies might have to be individually tailored. See also: Doss v. Long, 93 F.R.D. 112 (N.D. Ga. 1981); Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982); Stallings v. Califano, 86 F.R.D. 140 (N.D. Ill. 1980); Petty v. Peoples Gas Light & Coke Co., 86 F.R.D. 336 (1979).

D. Notice of Claim

West Jordan claims that it has a unique defense against the unnamed class members because they did not file a "notice of Claim" pursuant to §63-30-12 Utah Code Ann.[12]

However, this is not the type of case that requires a notice of claim. It was never necessary for Call or any other class member to file a notice of claim. El Rancho Enterprises Inc. v. Murray City Corp., 565 P.2d 778 (Utah 1977).

E. Timeliness of the Motion

West Jordan complains that Call is not entitled to renew the claim for class certification.

It is true that Call has been persistent. However, a motion for class certification is always interlocutory. Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 N.11 (1978), 57 L.Ed.2d 351, 98 S.Ct. 2454,. Thus, there is no reason why Call could not--and should not--renew the motion at different stages of the proceedings.[13]

12/ This argument is raised for the first time on appeal. It was never considered by the trial court.

13/ The trial court should enter findings when ruling on the class issue.

Judge Winder and Judge Banks failed to make findings. (R. 127, 463) Compare Price v. Lucky Stores, Inc., 501 F.2d 1177 (9th Cir. 1974); Gulf Oil v. Bernard, 452 U.S. 89, 68 L.Ed.2d 693, 101 S.Ct. 2193 (1981).

Judge Dee made only perfunctory findings which parrot the rule. (R. 1507-1508)

Finally, the issue is properly presented in this court for, "an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff." Coopers & Lybrand v. Livesay, 437 U.S. 463, 469; 98 S.Ct. 2454, 2458; 57 L.Ed.2d 351, 358 (1978).

F. Common Issues

This case should be certified as a class action because all of the subdividers are in the same boat. They all lost money pursuant to the same municipal ordinance. In all cases, the money was mixed with the general fund.

The master has testified that:

> Also such 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.
> (R. 437.)

Thus, there is no practical alternative to a class action. Any analysis must, perforce, include all subdivisions. Any decision for Call will necessarily involve all other subdividers.

In short, this case became a class action on the day that West Jordan violated state law and violated its fiduciary duty by intermingling the funds.

SUMMARY

What will happen if Call wins? The sky will not fall. West Jordan will not lose a single park or a single flood control project.

What will happen is simply that West Jordan will refund the money to the subdividers. Next, West Jordan will float a bond issue to refinance the improvements.

The end result will be a redistribution of the costs. Those costs now rest on the shoulders of approximately 100 subdividers. After refinancing by a bond issue, the burden will fall equally on all citizens of West Jordan.

DATED this 1 day of Feb., 1984.

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By: _____