1983

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

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)

RESPONDENT'S BRIEF

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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STATEMENT OF THE NATURE OF THE CASE

This case involves the claimed (the trial court found otherwise) "unreasonableness" of a municipal "impact fee" assessed and collected from land developers within the City of West Jordan as a condition of subdivision development approval; the facial constitutionality of the "impact fee" ordinance has been previously upheld by decision of the Utah Supreme Court.

ISSUE PRESENTED UPON APPEAL

This appeal presents the following issue: whether or not the trial court, following presentation of the Plaintiffs' evidence, properly dismissed the Plaintiffs' claims and entered judgment in favor of the Defendant by reason of the Plaintiffs' failure to prove, by a perponderance of the evidence, their claims, including that the "impact fee" assessed against them was "unreasonable."

DISPOSITION IN LOWER COURT

In 1978 the Plaintiffs filed this litigation to challenge the constitutionality of a ordinance which provided that an "impact fee" be paid by land-developers (subdividers). In 1979 the Utah Supreme Court upheld the facial constitutionality of the "impact fee" ordinance. **Call vs City of West Jordan, Utah**, 606 P.2d 217 (Utah 1979). [Hereinafter **"Call I"**] However, following Plaintiffs' petition for rehearing, the Supreme Court in 1980 remanded the case for trial in the district court on the issue of whether the impact fee assessed against the Plaintiffs was "reasonable". **Call vs City of West Jordan, Utah**, 614 P.2d 1257 (Utah 1980). [Hereinafter **"Call II"**]

In November 1981, following the denial by Judge Banks) of Plaintiffs' renewed motion for class action certification, the Plaintiffs filed an interlocutory appeal on the class action issues. Supreme Court Docket No. 18098. That interlocutory appeal was denied without formal opinion. December 8, 1981.

Thereafter the Plaintiffs filed an original proceeding in the Supreme Court seeking a writ of mandamus against the Honorable Jay E Banks, Judge of the Third District Court, requiring him to enter formal findings concerning his refusal to certify the class action. Supreme Court Docket No. 18217. This Court denied to issue the writ of mandamus. February 10, 1982.

In December 1982 the trial court, following presentation of Plaintiffs' evidence, dismissed Plaintiffs' claims, holding that the Plaintiffs had not presented sufficient evidence to sustain their burden of proof. [The "Memorandum Decision" of the trial court is attached as Appendix "A", herein.]

FACTS

The Plaintiffs ignore and gloss over the material facts involved in this case. It is necessary for the Court to examine those facts to fully appreciate these issues.

The City of West Jordan [hereinafter referred to as "City"], present population of about 30,000, is located in the southwestern quarter of Salt Lake County. In the mid-1970's the City became concerned with the problems associated with the tremendous growth which was occurring within the city limits. Record at 1533-1538.

Previously unimproved farmlands were transformed into residential subdivisions. The City's population grew from 4000 in 1970 to 27,000 in 1980. That growth brought two problems. First, the increased population placed increased demands upon existing recreational facilities. Secondly, the improvement of the previously-unimproved farmlands increased the flood-control problem.

In the mid-1970's, the City Planning and Zoning Commission regularly required developers to "donate" to the City "green areas". Such "green areas" were to be reserved for recreational uses and parks. These donations were based upon a percentage of land-area developed; the percentage ranged from 5% to 10%. This practice was done on an informal

basis; that is, it was voluntary on the part of the developer and not based upon an actual ordinance adopted by the City Council. See Record at 1533-1538, 1648-1673.

In 1974, the City Council commissioned the engineering firm of Nielsen, Maxwell & Wangsgard of Salt Lake City to undertake a study of the City's flood-control needs and methods to solve those needs. The engineering study culminated in the thirty-five page document, "Master Storm Drainage Plan for the City of West Jordan, Utah", dated November 1974. [Exhibit D-7] See also Record at 1563-1569.

In 1975 the City Council adopted the present "impact fee" ordinance. The Ordinance requires the developers of land to donate to the City seven percent of the value of the land developed to the City. The money so developed is utilized for flood-control and recreation purposes. The City adopted a solution involving facilities called "detention basins." These "basins" were to be strategically located throughout the community. Some basins were engineered to be able to accomodate the run-off water from more than one subdivision. Into these basins would be routed the run-off water collected from the individual subdivisions. The run-off water would accumulate in the basin immediately following a storm, but would thereafter be allowed to "trickle off" at a controlled rate---through existing storm lines---following the storm. The reduced flow could be safely released into adjoining "receiving waters" (such as a canal, a creek, or the Jordan River) without adversely creating a problem for everyone downhill and downstream. The "basins" would be improved: grass would be planted and recreation equipment (swings, slides, picnic tables, etc.) would be located in the basin for use by the public at "good weather" times.

Under the "impact fee" ordinance, approximately $525,000 was collected from developers. This money was placed into a special account (the "flood control" account) within the "General Fund" of the City. Although over the years the account numbers of this "flood control" account were changed to reflect changes in the sophistication of the City's accounting controls, the actual concept of the special account did not change. From the "flood control" account the City expended approximately $1,200,000 for capital expenditures for flood-control and for parks and recreation projects. Evidence adduced at trial, even from Plaintiffs' own witness, showed that none of the $1,200,000 in expenditures went for items other than the capital projects for

flood-control, parks and recreation, as specified in the Ordinance adopted in 1975. [See specifically the trial court's Findings # 7, 8, 9, 10, and 11, included herein as Appendix "B", and the Record at 1691-1695 and 1746-1749. See also Exhibit D-4.]

In February 1977---at Plaintiffs' request---the Plaintiffs' property was annexed into the City. In July 1977 the Plaintiffs paid an "impact fee" of $16,576 as a condition to develop a 30-acre, 96-single-family dwelling unit residential subdivision, the "Wescall Subdivision", in the City.

ARGUMENT

POINT I

THE "REASONABLENESS" OF THE "IMPACT FEE" ASSESSED IS THE ONLY ISSUE TO BE DECIDED

This Court in **Call I** has already upheld the facial constitutionality of the City's "impact fee" ordinance. 606 P.2d 217 (Utah 1979). That facial constitutionality was reaffirmed in the **Call II** decision. 614 P.2d 1258 (Utah 1980). However, in **Call II**, the the case was remanded for trial to determine---at Plaintiffs' request---the sole issue of the "as applied" constitutionality of the assessed fee. Justice Wilkins, writing for a unanimous court, wrote:

> 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 . . .

614 P.2d at 1259. Emphasis added.

Notwithstanding the explicit rulings of this Court in both **Call I** and **Call II** and the clear direction as to the limited issue reserved for trial following remand, the Plaintiffs still are asserting that the "impact fee" ordinance is "unconstitutional" on its face.

Certainly the **doctrine of "the law of the case"** prevents a re-examination of these issues. That "doctrine" states that once a case has been adjudicated and appealed, the law as announced by the appellate court [this Court] ought to be followed for all subsequent proceedings in

that case. The purpose of the doctrine has been articulated by this Court in the case of **Richardson vs Grand Central Corporation**, 572 P.2d 395 (Utah 1977), in which the Court wrote:

> The purpose of the doctrine of "the law of the case" is that in the interest of economy of time and efficiency of procedure, it is desirable to avoid the delays and difficulties involved in repetitious contentions and rulings upon the same proposition in the same case.

572 P.2d at 397. Emphasis added.

Certainly the Plaintiffs' continual claims of the invalidity of the "impact fee" ordinance---when the constitutionality of the ordinance has been already upheld TWICE by this Court in this case involving these SAME PLAINTIFFS---are "repetitious contentions" which the doctrine seeks to avoid. The decisions of this Court in **Call I** and **Call II** must be held to be binding upon the Plaintiffs, especially when they challenged, in a declaratory judgment action, the validity of the "impact fee" ordinance under a number of theories. The Court has ruled that the ordinance was valid and constitutional. To allow the Plaintiffs to re-litigate those issues or to inject new issues (which should have been filed originally in the declaratory judgment action in 1978) is patently wasteful of precious judicial resources; this "Johnny come lately" approach cannot be countenanced. Otherwise, there will be no end to this litigation.

The Plaintiffs rely heavily on this Court's decision in the case of **Banberry Development Corporation vs South Jordan City**, 631 P.2d 899 (Utah 1981), decided after **Call I** and **Call II** were announced. This Court, in **Banberry**, made it absolutely clear what the issues were to be in THIS LITIGATION, when the Court wrote:

> In Call v. City of West Jordan, Utah, 606 P.2d 217 (1979), 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. . . . In remanding the case **for trial on the constitutionality of the ordinance as applied** . . ., 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.

The "reasonableness" of the "impact fee", "as applied" against the present Plaintiffs, is the sole issue for determination in this case. The Plaintiffs should not be allowed to re-litigate issues previously decided, even if those issues are somewhat disguised to mask their true character.

On the "reasonableness" issue, the Plaintiffs were "given the opportunity to resent evidence" to show the impact fee assessed against them was "unreasonable." The November 18, 1982 trial was that "opportunity." THE PLAINTIFFS PRESENTED NO EVIDENCE ON THE ISSUE. Accordingly, the trial court, upon timely motion by the Defendant, dismissed Plaintiffs' claims, held that the Plaintiffs had failed to prove by a preponderance of the evidence their claims, and held that "no cause of action had been shown", and that judgment should be entered in favor of the Defendant. [See the trial court's "Memorandum Decision" (Appendix "A", herein) and the discussion at **Point II**, below.]

POINT II

THE PLAINTIFFS FAILED TO SUSTAIN THEIR BURDEN TO SHOW THAT THE IMPACT FEE WAS UNREASONABLE

As indicated above, the issue reserved for trial by the Supreme Court was the"reasonableness" of the "impact fee" assessed against the Plaintiffs.

The Plaintiffs HAVE BEEN GIVEN the "opportunity to present evidence" concerning the "unreasonableness" of the West Jordan "impact fee". The November 18, 1982 trial was that "opportunity." THE PLAINTIFFS PRESENTED ABSOLUTELY NO EVIDENCE to show that the fee was unreasonable. This lack of evidence was predicted by Mr DeBry, counsel for the Plaintiffs, prior to the beginning of the presentation of his evidence. He remarked:

> Your Honor, our case this morning will be very short. **It's the only case in my career that I remember where the testimony will be shorter than the opening statement.**

Emphasis added. Record at p. 1716.

Plaintiffs' only evidence presented was the testimony of the accountant, Mr. Sharkey. His twenty minutes of testimony [Record at 1720-1765.] can be summarized as follows:

DIRECT EXAMINATION

> I am a certified public accountant and I have examined the West Jordan City records and exhibits previously admitted in this case. The aforementioned examination took approximately 23 hours. I also heard the testimony of the City's witnesses at the September 1st and 2nd evidentiary hearing. On the basis of my examination of the records and the exhibits admitted into evidence and the testimony of the City's witnesses from the September 1st and 2nd hearing. I **am unable to formulate an opinion** as to whether or not the monies collected pursuant to

the Flood Control Impact Fee Ordinance of West Jordan from the present Plaintiffs were expended for flood control and parks purposes.

CROSS EXAMINATION

I found no evidence to show that any of the fees collected and deposited into the "flood control" account of the general fund were utilized for anything other than capital expenditures for flood control and parks and recreation area projects. I found no records indicating that expenditures were made for improper purposes. The City records, indicated that the fund balance in the flood control account was zeroed out each year at the end of the fiscal year. The City records showed that the City collected from developers approximately $525,000 pursuant to the"impact fee" ordinance and deposited the same in the "flood control" account; the City records showed that the City expended from the flood control account within the general fund approximately $1,200,000 for capital projects for flood control and parks and recreation areas.

Mr. Sharkey's testimony---at least as the same can be utilized for persuasive evidence for Plaintiffs' assertions--- can be summarized to a single sentence:

I am unable to formulate an opinion.

The Plaintiffs have had the "opportunity to present evidence" to show that there was "no reasonable relationship" between the "impact fee" paid and the needs their subdivision created. The trial court was correct in ruling that this evidence did not show by a preponderance of the evidence that the West Jordan Ordinance was "unreasonable."

The trial court complied with this Court's directive (i.e. to give the Plaintiffs an "opportunity to present evidence"). The Plaintiffs did not produce one recreation expert to testify. The Plaintiffs themselves (Mr John Call and Mr Clark Jenkins)---allegedly so aggrieved by the alleged unconstitutional application of the ordinance---did not testify!! Mr. Sharkey, the accountant, openly acknowledge that he was not an expert in these other disciplines and could give no testimony on those related issues. Record at 1764.

The Plaintiffs' sole evidence is the testimony of Mr. Sharkey concerning **his inability to formulate an opinion.** Had Plaintiffs truly been interested in proving the "unreasonableness" of the "impact fee", they could have hired an engineer to testify concerning the "unreasonableness" of that "impact fee." This the Plaintiffs did not do.

In his opening statement prior to the presentation of evidence, Mr. DeBry acknowledged to the court:

> Now, we still have the burden of persuasion, we've got to persuade the court. But what we have to use to persuade the court with is their evidence. We've simply got to look at their records and their documents and their minutes, analyze that and use that material to persuade the court. Then it brings us down to our witnesses today, your honor. Our evidence will be very **short.** I have a certified public accountant who will take the stand. He will testify that he looked at all of their evidence, he has heard the evidence in the trial, he's looked at the exhibits, **and he cannot form any conclusions**, that based on the evidence they've given us, based on their own financial records, he cannot answer the questions set out by the **Banberry** court.

Record at pp. 1719-1720. Emphasis added.

The Defendants rely significantly upon the Master's Report. Yet the Master's Report was only A PRELIMINARY REPORT.[The preparation of the "final report" was expressly waived by the Plaintiffs. Record at 760.] In that Master's Report the Master himself realized that he would have to DO MORE THAN MERELY EXAMINE THE CITY'S **ACCOUNTING** RECORDS. Page 2 of the Master's Report [Exhibit 25] contains the following statement:

> Since the information is not provided in the accounting records, it will have to come **from other records** and again **from the help of a trained engineer.**

Emphasis added. It is interesting to wonder where Plaintiffs assumed that the "accounting records" MUST show the "reasonableness" of the "impact fee". **Call I** and **Call II** didn't say that; **Banberry** didn't say that. Even the court-appointed Master---a certified public accountant, not a lawyer---recognized that HE WOULD HAVE TO DO MORE THAN LOOK AT THE CITY'S ACCOUNTING RECORDS to determine if the fee was "reasonable" or "unreasonable."

Yet the Plaintiffs' approach still continues to be "that it must be shown in the accounting records that the fee is 'reasonable' or else the City loses". [See the discussion at C, below.] The accounting records of the City reflect only monetary items; the do not reflect subjective issues such as the "benefits conferred" to a particular subdivision. To determine those "benefits conferred", one must---as the Master clearly indicated---consult with a trained engineer. THIS THE PLAINTIFFS DID NOT DO!

Plaintiffs produced but one witness, Mr. Sharkey, who indicated:

1. That the Master was correct in his analysis in that the Master would be required to talk to engineers. [Record at 1756]

2. That he had talked to the city engineer "for about ten minutes". [Record at 1757]

3. That he has never observed the Wescall Subdivision. [Record at 1763]

4. That he had no particular expertise concerning the needs created by the residents who live in the subdivision, those needs being parks and recreation facilities. [Record at 1764]

5. That he had no way of disputing the engineers testimony and analysis concerning run-off created by that subdivision. [Record at 1764]

6. That he had no technical expertise to know what kind of flood control problems the subdivision might create. [Record at 1764]

7. That he had taken much less time to inspect the City's records than was actually necessary.

This last point was correctly keyed upon by Judge Dee, who remarked:

> THE COURT: I understand that in Mr. Sharkey's affidavit that it would take 50 to 100 hours and he didn't spend that time, he spent 8 hours.

Record at 1755.

Obviously the trial court judge was unconvinced by the inadequate preparation the Plaintiffs had arranged. The Plaintiffs had failed to show by a preponderance of the evidence that the fee assessed against them was "unreasonable". The lack of evidence furnished by the Plaintiffs cannot contradict the evidence presented in the September 1982 hearings concerning the needs created by the Wescall development. Indeed, Plaintiffs' counsel in his opening remarks admitted that he had no evidence on these issues. [Record at 1717-1718]

The Plaintiffs assert that the Defendant had failed to comply with the pre-trial order of Judge Rigtrup. On the contrary, the trial judge (Judge Dee) specifically found that the City had complied with the pre-trial order of Judge Rigtrup. 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.

However, the Plaintiffs ignore the burdens placed UPON THEM by the pre-trial order. The pre-trial order (Paragraph 6) specifically provided:

> . . . the 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. (Citation to cases omitted)
>
> B. Whether the 7% fee has required the newly developed properties to bear more than there equitable share of capital cost in relation to the benefits conferred. (Citation to **Banberry** case omitted.) . . .

Obviously, the Plaintiffs have failed to comply with the pre-trial order which recited the obligations which had been imposed upon the Plaintiffs by **Call II** and **Banberry**.

All the Plaintiffs presented was testimony concerning the lack of documentation within the City records. Mr. Sharkey was unable to express an opinion concerning whether or not the City spent the money for the projects indicated. Certainly, the inability to express an opinion does not prove by a preponderance of evidence that the "impact fee" was not spent in the manner the City had claimed. Indeed, by Mr. Sharkey's own admission, the City took in approximately $525,000 from developers as monies pursuant to the "impact fee" ordinance. During that same time the City expended almost $1,200,000 for flood control and parks projects. Mr. Sharkey admitted that the City's practice was to zero out the account at the end of each year. [See Finding No. 10]. Mr. Sharkey testified that he uncovered no evidence to show that any expenditures from the "flood control account" were made for anything other than the capital improvements for parks and recreation projects represented by the numerous exhibits. [Finding No. 11]

Certainly the inability to express an opinion would perhaps be critical if the City had spent LESS on such projects than it took in from developers. But that is not the case here; the City spent MORE---hundreds or thousands of dollars more---than it took in. This difference was made up by a "subsidy" from other general revenue sources of the City. [Finding No. 9]. Indeed, the development impact fee assessed against the developers, including the Plaintiffs, simply WAS NOT SUFFICIENT TO ADEQUATELY ADDRESS THE NEEDS CREATED BY THE DEVELOPMENT. [Record at 1613] This, however, does not show that the fee was "unreasonable". If anything, it shows that the fee was "more than reasonable" and that the

developers were being subsidized. In actuality they were paying for less than the true impact they were creating. Certainly the showing made by the Plaintiffs was properly understood.

The City's response was and has always been that it was pooled with other monies so as to provide these flood control and parks and recreation projects. This pooling has certainly been allowed. In specific response, the City purchased the Booth property immediately adjacent to the Wescall Subdivision. The purchase of the "Booth Property" was made expressly because of the development of the Wescall subdivision and one other residential subdivision. See Exhibit 13-D. Testimony was given by Mr. Olson that the Wescall residents would require 1.45 acres of additional park area. [Record at 1700] The cost for this real estate so purchase at $9,000 per acre would be in excess of $13,000. This expenditure was made concerning the Booth property in anticipation of the Wescall Subdivision being approved the following month. [Record at 1556-1558, 1681, 1684, 1697, 1700] The $13,000 figure DOES NOT include the capital expenditures for the park which may run thousands of dollars more, nor does it include any fee concerning the flood-control costs incurred by the Wescall development.

Witnesses testified concerning that the Wescall development would increase the run-off into Bingham Creek by 17 cubic feet of water per second for every second of duration of the storm. [Record at 1734] Certainly the Plaintiffs should be expected to pay for the increased run-off created by their development! The Plaintiffs presented no evidence even to attack, let alone rebut, the Defendant's evidence presented on that point. Indeed, Mr. Sharkey admitted that he had no evidence concerning that item. [Record at 1764]

Defendant's witnesses testified that immediately "downstream" (i.e. downhill from the Bingham Creek channel, into which the run-off from the Wescall Subdivision was discharged) was a residential subdivision which was frequently flooded. [Record at 1598-1601] The trial court properly found that Plaintiffs should be held to pay for part of the "impact" (i.e. increased run-off which may flood the "downstream" subdivision) the Plaintiffs' development created. [Findings Nos. 16 and 17]

B

The Plaintiffs have incorrectly analyzed the burden placed upon them by the **Call II** decision. The Plaintiffs did not utilize taking "the opportunity to present evidence" that the fee "bore no reasonable relationship to the needs created by their subdivision." Rather, the Plaintiffs claim the burden is upon the Defendant. This improper approach can be readily determined by reading the headings for argument in Plaintiffs' brief, as discussed in subparagraph C, below.

This approach (that the "burden is upon the City") totally ignores the clear directive of **Call II**: the case was remanded so that PLAINTIFFS COULD SHOW the "impact fee" was "unreasonable". The approach further ignores the clear language from **Banberry**:

> Once [the municipality has disclosed the basis of its calculations to whoever challenges the reasonableness of its subdivision fees], **the burden of showing failure to comply** with the constitutional standard of reasonableness in this matter **is on the challengers.**

631 P.2d at 904. Emphasis added. Bracketed material added for clarity.

The "basis" for the City's "impact fee" could have been disclosed to Plaintiffs when they paid the impact fee in July 1977; because neither of the Plaintiffs testified we do not know if this was done. In any event, during the course of the litigation, that basis has been disclosed to the Plaintiffs. See Defendant's responses to Plaintiffs' Interrogatories, dated January 7, 1982. [Record at 780] In any event, the "basis" was fully disclosed to the Plaintiffs at the September 1982 hearings before the Court. Not only was the "basis" presented, under oath, but Plaintiffs had an opportunity to cross-examine that evidence!!

C

A brief response should be made to Plaintiffs' unsubstantiated (and legally incorrect) claims:

POINT I. WEST JORDAN HAD THE BURDEN OF PRODUCING EVIDENCE. West Jordan did disclose the "basis" of the "impact fee" ordinance. It disclosed to the Plaintiffs its accounting records, both in response to

pre-trial discovery and during the September 1982 hearing. The "impact fee" proceeds were deposited into a "segregated" account: the "flood control" account. The trial judge ruled that the Defendant had met its burden under the case law AND Judge Rigtrup's pre-trial order.

POINT II: WEST JORDAN MUST LOSE IF IT FAILS TO MEET ITS BURDEN OF PRODUCING EVIDENCE. As noted, this is an incorrect analysis out ignore the fact that the TRIAL COURT RULED the Defendant HAD METS ITS BURDEN. Plaintiffs' argument is summarized, in Plaintiffs' brief [p.8], as follows:

> Thus, in this case, the order of proof is as follows:
>
> A. West Jordan has the burden to come forward with the evidence of why and how and where the seven percent was spent.
>
> B. Plaintiff has the burden of persuasion to show that such expenditures are unreasonable.
>
> However, if the defendant does not satisfy its burden with respect to A, we never will get to step B.

The problem with this argument is that DEFENDANT DID SATISFY THIS BURDEN. The trial court so ruled. The Defendant did explain the reason "why" the fee was exacted and "where" the monies were spent. [See Exhibit 4-D, which summarized several hundred pages of billings and checks (Exhibit D-24)---which had been submitted to the Plaintiffs (July 1982) pursuant to their discovery request---showing the disbursements made from the"flood control" account.] It is incredible that Plaintiffs continually ignore this evidence!

Those exhibits and discovery documents disclose every penny spent for capital projects from the "flood control" account. Not only do they disclose where "impact fees" were expended, but they also represent the expenditures of hundreds of thousands of dollars of "subsidy" because the 7% impact fee was not enough.

POINT III: WEST JORDAN HAS FAILED TO PRODUCE EVIDENCE THAT A PUBLIC HEARING WAS HELD AND THAT THE PLANNING COMMISSION PREPARED THE ORDINANCE. This point is more fully discussed at Point III, below. It should suffice to note that the trial court found that there was such a public hearing held and that the ordinance was properly prepared. See Finding No. 22.

Additionally, the court found:

> The Plaintiffs submitted no evidence to show that a public hearing was not held or that the Planning & Zoning Commission did not prepare the Ordinance.

Finding No. 22.

POINT IV: WEST JORDAN HAS FAILED TO MEET ITS BURDEN OF SHOWING THAT THE SEVEN PERCENT FEE IS A RESTRICTED FUND. Monies collected pursuant to the "impact fee" ordinance WERE PLACED INTO A RESTRICTED FUND: the "flood control" account of the general fund. On this point, the Court must be cognizant that the particular accounting "label" is not significant; rather, the concept is important. Did the City account for those monies so collected? Yes. The aforementioned documents attest the appropriate accounting controls were present. The evidence showed no expenditures were made, except for the specified purposes: flood control and parks. Mr. Sharkey "retreated" from his testimony that the money may have been used for an improper purpose (i.e. "on the Mayor's car"---quoted on P. 16 of Plaintiffs' brief). [Record at 1749, line 7.] Certainly, if such an expenditure (for the Mayor's car or any other illegitimate purpose) had been made, it would have been paraded by the Plaintiffs as their prime exhibit. Not one of the checks, etc., contained within Exhibit D-24 shows any such improper expenditure.

POINT V: WEST JORDAN HAS FAILED TO MEET ITS BURDEN OF SHOWING THAT A FLAT SEVEN PERCENT FEE IS APPROPRIATE FOR ALL SUBDIVISIONS. Again, the burden is not on the City to make such a showing. Indeed, if such a showing (that the uniform impact fee was appropriate for ALL subdivisions in the city) were required, the trial would have lasted one hundred days!!

Rather, as noted above, the issues at trial were to be limited to Plaintiffs' subdivision. Further, that Plaintiffs had the burden of showing the "unreasonableness" of the fee. Again, Plaintiffs are injecting new issues. This litigation will never finish if such an approach is countenanced.

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. Again, **Banberry** clearly placed this burden upon the Plaintiffs, as "challengers." The Plaintiffs presented NO EVIDENCE on this point and accordingly, Plaintiffs' claims were properly dismissed.

Also, the specific nature of this case is factually significant from **Banberry**. In this case the "impact fee" was assessed only because of the "needs created" for parks and flood-control. These "needs" have been quantified. The expenditures have been made. The capital improvements for parks and flood control are much easier to isolate than the capital improvements necessary for a new sewage treatment facility made necessary by the new development.

The Wescall "impact fee" was a one-time payment, used to off-set the impact upon parks and flood-control. There are no "on going" charges (such as sewer service fee) to take into account. Similarly, the "impact fee" WAS NOT USED BY THE CITY AS A GENERAL REVENUE MEASURE. Nor was the basis of the fee and the purposes for its use "retroactively" established by the City Council. Contrast **Lafferty vs Payson City**, 642 P.2d 376 (Utah 1982). The "purposes" for the "impact fee" were set by the ordinance at its adoption in 1975: flood-control and parks and recreation areas. The evidence showed no variance from those purposes.

In any event, the burden is upon the challengers.

POINT VII: THIS CASE HAS NOTHING TO DO WITH THE NEED FOR FLOOD CONTROL AND PARKS. At this point, after Plaintiffs have flip-flopped back and forth on the issues, one wonders what this case does deal with.

As a minimum, the Plaintiffs analysis is incorrect. The existence of "other methods" available to finance these projects is immaterial to the issues involved. **Call I, Call II,** and **Banberry** all affirm the principle that an "impact fee" CAN BE ASSESSED against developers to pay for the needs created by that development.

Plaintiffs imply that the City should have financed these projects through "bonding" or other methods. To have done so would merely shifted the burden created by the "few" to be borne by the "many". That is patently unfair to the "many": those "old" residents should not be required to pay, even in part, for the additional "needs" created by the "new" development, especially when the developers have profited by the development creating those needs.

POINT III

COMPETENT EVIDENCE SUPPORTS THE TRIAL COURT'S FINDINGS AND JUDGMENT

Plaintiffs, at page 10 of their brief, assert that "canned" findings were prepared by West Jordan and were:

> . . . **mechanically signed** by Judge Dee some months after hearing the evidence. That practice has been criticized.

Emphasis added.

Such could not be further from the truth. The findings WERE NOT "mechanically signed" by the trial judge. They were signed only AFTER the Plaintiffs had submitted to the court seven pages of objections to the proposed findings [Record at 1251-1256A] and oral argument had been heard on March 14th. Thereafter, the Plaintiffs submitted an additional 204 pages of supporting documentation (cases, argumentative briefs and exhibits, court orders, etc. [See Mr. DeBry's letter to Judge Dee, dated March 29, 1983. Record at 1260-1491]

On April 22, 1983, Judge Dee, certainly being apprised of all relevant issues and after he had had ample opportunity to inspect the additional information furnished by the Plaintiffs, signed the Findings. Certainly, the signing of the Findings cannot be characterized as being "mechanically signed".

The fact that the signing occurred "some months after hearing the evidence," is totally of the Plaintiffs' making. First, the order of trial was reversed by Judge Rigtrup because Plaintiffs claimed they could not understand the discovery documents furnished to them. [Mr Sharkey later admitted that prior to the August 6, 1982 hearing before Judge Rigtrup he made only a "cursory examination" of the discovery materials (Exhibit D-24) furnished to Plaintiffs the month earlier. Record at 1736.] Judge Rigtrup required the City to present evidence on limited issues. The City" went first" on these limited issues. Then, at the November 18, 1982 hearing---scheduled more than two months earlier---so Plaintiffs would have time to inspect the documents and investigate the sworn testimony---the Plaintiffs presented their case. Closing arguments were in the form of a written brief by Plaintiff's counsel. The Court took the matter under advisement and allowed Defendant's counsel time to prepare a responsive brief. On December 22, 1982 the trial court rendered its "Memorandum Decision" [Appendix "A"] . Findings of Fact and Conclusions of

Law were prepared by the prevailing party---as expressly directed by the trial court---and forwarded to the court and opposing counsel in mid-January 1983. In late-January 1983, Plaintiffs' counsel submitted his "objections" to the proposed findings and scheduled oral argument on those "objections" for March 14, 1983. After the argument, Plaintiffs' counsel submitted the 200+ pages of briefs, etc., to the Court as supportive documentation. The Findings were not signed by the trial judge until April 21, 1983.

Regardless of when the Findings were signed is the fact that the trial judge---ostensibly when the evidence was "fresh" in his memory and without any improper suggestion from zealous counsel---ruled THAT PLAINTIFFS HAD FAILED TO PROVE THEIR CLAIMS BY A PREPONDERANCE OF THE EVIDENCE. See the trial court's "Memorandum Decision", Appendix "A".

Plaintiffs assert that there was no evidence to support the court's findings. This is incorrect. The following table indicates the pages of the Record of testimony presented to the trial court supporting these specific findings.

FINDING NO.	PAGE OF RECORD WHERE TESTIMONY ON ISSUE WAS PRESENTED
1	Not in Dispute
2	1565-1570, 1572, 1581-1582, 1622
3	1541, 1552
4	1617
5	Not in Dispute
6	1696, 1703-1704
7	1688-1689, 1691
8	1763, 1676, 1678-1680, 1694-1695
9	1747
10	1744-1745, 1762
11	1745-1746, 1748-1750, 1687, 1592, 1594, 1598, 1614
12	1616-1619, 1624, 1626, 1630, 1634, 1700
13	1581-1582, 1623
14	1582-1583, 1594, 1622-1623
15	1584, 1632
16	1593-1594, 1598, 1616, 1619, 1624, 1636
17	1598-1601, 1619-1622
18	1617, 1700
19	1699
20	1700
21	1556-1558, 1681, 1684, 1697, 1700
22	1542-1543, 1548, 1551-1553, 1555, 1559-1560,1642, 1644, 1646-1649, 1653, 1655-1659, 1661, 1672, 1673
23	1537-1538, 1548, 1576
24	1731-1733, 1736, 1740, 1742
25	1745-1746, 1748-1750
26	441, 760, 1752
27	1606, 1612-1613, 1617, 1620, 1636

28	1613, 1617, 1620
29	1613, 1617, 1620, 1636, 1761

The Findings and Judgment of the trial court are entitled to a presumption of correctness. The appellant must sustain the burden of showing error. The Supreme Court should review the record in a light most favorable to the findings of the trial judge and should not to disturb them if the Supreme Court finds substantial support in the evidence. **Kohler vs Garden City,** 639 P.2d 162 (Utah 1981); **Piacitelli vs Southern Utah State College,** 636 P.2d 1063 (Utah 1981); **Litho Sales Inc. vs Cutrubus,** 636 P.2d 487 (Utah 1981); **Score vs Wilson,** 611 P.2d 367 (Utah 1982); **Highland Construction Co. vs Stephenson,** 636 P.2d 1034 (Utah 1981); **Knight vs Leigh,** 619 P.2d 1385 (Utah 1980); and **Search vs Union Pacific R. Co.,** 649 P.2d 48 (Utah 1982).

The trial court's findings will not be disturbed on appeal unless they are clearly against the weight of the evidence. **Ute-Cal. Land Development vs Intermountain Stock Exchange,** 628 P.2d 1278 (Utah 1981).

It is not the Supreme Court's prerogative to determine whether the evidence preponderated on one side or the other; that is the responsibility of the trier of fact. **Reimchiissel vs Russell,** 649 P.2d 26 (Utah 1982).

The Supreme Court should not substitute its view of the evidence for that of the District Court. **Nielsen vs Chin-Hsien Wang,** 613 P.2d 512 (Utah 1980); **Fisher vs Taylor,** 572 P.2d 393 (Utah 1977); **Hidden Meadows Dev. Co. vs Mills,** 690 P.2d 1244 (Utah 1978); **Bustamente vs Bustamente,** 645 P.2d 40 (Utah 1982).

On review, the Supreme Court will accord considerable deference to the judgment of the trial court due to its advantaged position and will not disturb action of that court unless the evidence clearly preponderates to the contrary or the trial court abuses its discretion. **Openshaw vs Openshaw,** 639 P.2d 177 (Utah 1981); **Christensen vs Christensen,** 628 P.2d 1297 (Utah 1981).

The foregoing cases clearly and unequivocably indicate that this court should defer to Judge Dee's findings. The Plaintiffs' blanket assertions that there was no evidence, are incorrect. As shown in the table above, there was considerable evidence to support the trial court findings.

Again, this existence of evidence must be contrasted with the Plaintiffs' evidence in the form of testimony by Mr. Sharkey who openly admitted he was "unable to formulate an opinion" concerning the expenditure of the funds. This lack of evidence cannot be considered to outweigh the overwhelming preponderance of evidence which showed that the subdivision did create needs and that the monies collected pursuant to the Impact Fee Ordinance was expended in the furtherance of those needs.

The findings and judgment of the trial court, in its advantaged position to fully weigh and savor the evidence, should not be disturbed. Those findings and judgment should be upheld by the Supreme Court.

Plaintiffs claim [p. 8 of their Brief] that the Planning & Zoning Commission did not prepare the ordinance and there was no public hearing held prior to the preparation of the "impact fee" ordinance. Again, this is incorrect. There was evidence on this point.

Ronald Olson, the West Jordan City Recorder, testified concerning the preparation of the ordinance. The Planning & Zoning Commission had an informal policy of requiring the voluntary deduction of "green areas" by subdividers. The "minutes" of the April 17, 1974 meeting of the Planning & Zoning Commission [which were read into the Record at pp. 1672-1673] reflect the following entry:

> Mr. Buchanan has researched the deduction of property from a subdivision for public use, and there is no legal basis for this. We can only recommend and suggest that this be given but the developer can reject it. He, also, mentioned that **the City Attorney should work on the wording so that it can be used for the general public and not just one subdivision. . .**

Emphasis added.

Glen Moosman, a former city councilman, testified concerning the genesis of the "impact fee" ordinance:

> **There was a public hearing for the consideration of** the Master Plan of the City of West Jordan and **the ordinances and various concepts,** and it was held in the West Jordan Junior High.

Emphasis added. Record at 1656.

Mr. Moosman further testified that the meeting was publicized through flyers and that the meeting was held in the school auditorium---not the normal meeting place for the West Jordan City Council---to accommodate the large number of persons in attendance. Even some developers were in attendance. Record at 1657. Moosman indicated that:

> **"these concepts of flood control and reservation of land for** parks and recreation issues [were] discussed at that meeting."

Record at 1659.

Mr. Moosman further testified that there was a question from the audience---a Mrs. Schmidt---concerning flood control. Moosman testified:

> He [Mr. Buchanan, the City Planner] then explained that each developer must take care of his own flood water that originates on his property. They have suggested catch basins that can be used both for flood control and recreational use.

Record at 1661. Bracketed material added for clarity.

Moosman then quoted the City Council minutes for that August 1974 public hearing:

> Good examples of this type of use is the football field at East High and the Sugarhouse Park.

Record at 1661.

Mr. Nick Colessides, the then City Attorney for West Jordan, testified concerning the preparation of the "impact fee" ordinance:

> The Planning Commission--any ordinance relating to matters pertaining to planning and zoning would have to have been passed by the Planning Commission prior to its arrival to the City Council for final passage and posting. **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.**

Record at 1644. Emphasis added.

Certainly the "time frame" under which the "impact fee" ordinance was adopted is consistent: from April 1974 (when the City Attorney was directed Planning Commission "to work on the wording") to August 1974 (when the public hearing was held in the junior high school) to January 1975 (when the ordinance was finally adopted). The "impact fee" ordinance was not just the product of hastily perceived need, but rather the well-founded, properly publicized and fully-explained plan to solve a pressing "public welfare" issue within the local community.

In any event the Plaintiffs presented absolutely NO EVIDENCE to show the public hearing was not held or that the "impact fee" ordinance was "prepared" by the Planning & Zoning Commission. The trial court's "Findings" indicate:

> **The Plaintiffs submitted no evidence** to show that a public hearing was not held or that the Planning and Zoning Commission did not prepare the Ordinance.

Findings No. 22.

POINT IV

THIS ACTION SHOULD NOT BE CERTIFIED AS A CLASS ACTION

When this action was filed in 1978, it was designated as a "class action." In April 1978 Judge David K. Winder, then a state judge, ruled that the action should not be certified. His decision (regarding the non-certification) was appealed to the Utah Supreme Court [even though the Plaintiffs' counsel later represented to Judge Banks that the issue HAD NOT been appealed; see Record at 420]. In **Call I** and **Call II**, the Court did not discuss the issue with the use of the terms "class action", the Court did rule on the general issue: namely, that a "class action certification" was not appropriate.

In the summer of 1981---following remand to the district court---the Plaintiffs renewed their motion for "class action certification". That motion was heard by Judge Jay E. Banks, who denied the motion for class action certification. Plaintiffs thereupon filed an "interlocutory appeal" to this Court. [Docket No. 18098] This Court denied, without opinion, the interlocutory appeal. Thereafter, the Plaintiffs filed in this Court an original proceeding seeking a writ of mandamus against Judge Banks, requiring him to enter formal Findings of Fact and Conclusions of Law as to why he had denied the certification of the "class action." [Docket No.18217] The City---as real-party-in-interest---responded. The Court, without written opinion, denied to issue the writ of mandamus.

On September 1, 1982---the first day of trial---Plaintiffs again renewed their motion for class action "certification". The Motion was heard by Judge Dee, who took the matter under advisement---after receiving Plaintiffs' lengthy Memorandum of Law in support of the Motion. In December 1982 Judge Dee ruled that the action should not be "certified." [See the trial court's "Memorandum Decision", Appendix "A", herein.] Judge Dee also made extensive findings as to WHY A CLASS ACTION IS INAPPLICABLE FOR THIS CASE. See Findings 30-33.

A

THIS LITIGATION IS NOT "CLASS ACTION" MATERIAL

The Plaintiffs have been able to assemble---from the literally thousands of cases discussing "class actions"---and quote some authorities as to why this action should be a class action. They simply overlook the simple facts as to why it should not be a class action.

A class action ought to be granted [illegible] number of parties is so numerous that it [illegible] 23(a). We don't have that problem here. [illegible] less than seventy in number---could be joined. [illegible] don't even care about joining in. What we have here is just one set of subdividers who wants to represent everyone.[1] If the Plaintiffs were a number of developers who were a "cross section" of the proposed "class", it might be proper to certify. But we've only got the one set of plaintiffs and they certainly aren't a representative cross section.

Secondly, we do not have a situation where a number of lawsuits has been filed on the same issue (here it would be the constitutionality of the ordinance). In that situation, the class action becomes a method of consolidating the trials---and preventing future trials, because all the class members can be bound by the one judgment. Here, we have only the ONE LAWSUIT. The other sixty-nine developers DO NOT SEEM TO CARE---and that's even after the case attracted widespread attention. Certification will not consolidate any trials, because there are none. It will not prevent future trials, because there will be none.

Further, certification does not prevent "inconsistent" conduct on the part of the City vis-a-vis the class members. It likewise will not prevent such "inconsistent" adjudications, because there will be no other claims to adjudicate. And there are likely to be none. This is confirmed by the fact that the fee has been assessed since 1975 and with today's financial market what it is, no developer---have paid the fee "under protest"---is going to sit around for five or six years to bring suit to get it back, if he thought he had a legal claim.]

THE FACIAL CONSTITUTIONALITY OF THE ORDINANCE WAS UPHELD BY THE UTAH SUPREME COURT. The Court remanded the case for trial on an "as applied" basis. Such **individualized** ("as applied") issues are not the proper subject of "class action litigation."

---

1 Plaintiffs' continued motion for "class certification", when the same has been expressly denied on three occasions by three separate trial judges and implicitly denied by the Utah Supreme Court, has long since gone beyond the realm of zealous advocacy. The named Plaintiffs are not harmed in any way by the denial of class action certification. On the other hand, the "repetitious contention" of Plaintiffs' counsel---sole object of which is to bring in more party-litigants (so as to perhaps justify a bigger attorney's fee) ---borders, in my opinion, on unethical professional conduct: improper solicitation of clients and stirring up litigation.

[illegible] are "individualized" in this respect: the "[illegible]" was imposed against individual developers. The money was [illegible] to purchase the equipment and to install flood control facilities. These facilities would benefit the subdivision creating the need for the facilities. In such a case it is fundamental for each developer to see how "his" flood control moneys were spent. In this sense, each subdivision would "stand alone" (although in a limited way, some subdivisions may be interconnected to the same detention basin, as was discussed above) in its flood control needs and solution. Whether the City spent the fee so collected in a manner "demonstrably benefitting" subdivision "A" has no bearing on whether the City spent the money collected from subdivision "Z". Certification as a "class action" does not make the resolution of this issue easier; rather, certification makes it more complex. Certification blurs, by lumping into one pot, the distinctions the Supreme Court felt dispositive. The Supreme Court has already decided the fundamental concept behind the 7% fee. By lumping each of the 70 or so subdivisions into a single category (via the "class action" certification" and adjudicating the issue does not make any sense. The "as applied" issue **cannot** be adjudicated on that basis. It requires individualized consideration.

Separating the class members into subclasses (as proposed by the Plaintiffs) is similarly unsuitable. There would have to be **one subclass for each member.** It simply does not make sense to lump everyone together, adjudicate the general issue [WHICH THE SUPREME COURT HAS ALREADY DECIDED] on a group basis---via the "general fund" issue Plaintiffs raise---and then break everyone out into an "individualized subclass (of one member each)" to adjudicate the "as applied" issue concerning "demonstrable benefit." Logic and common sense dictate that such a manner of approaching and handling litigation is wasteful. If anything, class actions are supposed to be efficient, not wasteful of time and resources.

The fact that the money collected pursuant to the Ordinance was deposited into the "general fund" does not, as Plaintiffs suggest, mandate "class action" handling of this matter. Prior to the **Call I**, the law (statutory and the regulations issued thereunder by the Office of the State Auditor) required municipalities to deposit such moneys into the "general fund"; having a separate "fund" was not allowed. Thus, the City was merely following the law. Just because the moneys were co-mingled with fees from other developers does not render the issue a "class

action." Rather, the issue is whether or not the money was spent in a manner which would "demonstrably benefit" the subdivision which created the need for the facilities.

B

THE CITY POSSESSES "INDIVIDUALIZED" DEFENSES AGAINST THE CLASS MEMBERS

Under Rule 23 specific criteria must be present before a class action can be maintained. Plaintiffs have failed to show a number of essential elements. One of these is that there are "individualized" defenses which the City can assert.

Obviously, the "as applied" nature of the issues raises individualized defenses. How the money from one developer is spent has no effect on how the money from another developer is spent. One developer may have a valid claim: the "impact fee" collected from him may be totally "unreasonable," because his development may have created no needs. On the other hand, that invalidity has no bearing as to the "impact fee" assessed against another developer WHO DID CREATE THE NEEDS.

The City's second defense is that each of the unnamed class members did not file a "notice of claim" with the City, as required by Sections 63-30-12, Utah Code Annotated. Because such notices have not been filed within the statutory time period, the claims are "forever barred." Thus, the City has an absolute defense against the claims of such members. Certification would then require a division of the plaintiffs into two subclasses: those who had filed the statutorily-required "notice" [here only the named Plaintiffs] and those who had not filed the "notice." When the subclasses are so structured, it is obvious that John Call and Clark Jenkins cannot represent those unnamed members who belong to the other subclass. First, their interests are dissimilar. [This situation adequately indicates the problem in having a "class action" prosecuted by a single plaintiff: when it gets down to the nitty-gritty issues involved, that sole plaintiff cannot represent everyone, especially when he does not constitute a "cross section" of the potential plaintiffs. It doesn't make any difference here that there are two named plaintiffs; both of the name plaintiffs were partners developing a single subdivision at issue.]

C

THE NAMED PLAINTIFFS DO NOT ADEQUATELY REPRESENT THE INTERESTS OF THE UNNAMED CLASS MEMBERS

By their past conduct in this litigation, Plaintiffs have evidenced a lack of concern towards the interests and rights of the unnamed class members. As an example of such disregard, I point out that on September 1, 1982---the first day of trial---again they moved the court for class certification. Anybody who brings a "class action" and then waits the day of trial to notify the unnamed class members (whose rights he seeks to represent **and bind**) cannot be said to "adequately represent" their interests, as required by the Rule. The Plaintiffs claim that "notice" to the putative class members is not required for this "spurious" class action. If they (the class members) do not need to be notified of the action, then why do they have to be NOW included?

D

CERTIFICATION AS A "CLASS ACTION" IS IN DIRECT CONFLICT WITH THE WRITTEN DIRECTIONS OF FORMER DECISIONS OF THIS COURT

In **Call II** this Court noted:

> . . .
>
> 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 a way as to benefit demonstrably **the subdivision** in question. This is not to say that the benefit must be solely [emphasis in original text] 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.**

614 P.2d at 1259. (Except where noted, all emphasis added.)

It is obvious that this Court---presented with the "class action" issue on appeal---decided that a class action was not the method for trial. Rather, the Court mandated the issues to be those of "reasonable relationship . . . to the needs . . . created by **their subdivision.**" (Emphasis added.) Subdivisions throughout the City were not to be

included. ONLY this ONE SUBDIVISION---and its impact and fee---were to be litigated. The City's obligation was to use the fee "in a way as to demonstrably benefit **the subdivision in question.**" The Court could not have been more clear on the issue.

Obviously, certification as a "class action" violates the Court's directive that further proceedings "not inconsistent with this opinion" be held.

In **Banberry** the Court stated:

> 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 or recreation facilities. In remanding the case **for trial on the constitutionality of the ordinance as applied** (i.e., the requirement that the 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.
>
> . . .
>
> 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).

531 P.2d 905 (Emphasis added.)

The language quoted above could more clearly indicate the Court's feeling on the "individualized nature" of the issues to be tried. It does violence to that simple language to even consider approaching these issues on a "class action" basis. To do so is certainly "inconsistent with" both the express written opinion of the Supreme Court and the "spirit" of that written opinion.

Obviously, "class action" certification of this litigation is very inappropriate. This is especially so by reason of the late stage the proceedings are now at.

Accordingly, the motion for "class action" certification must be denied.

CONCLUSION

The sole "issue" to be determined in this matter, following the **Call II** decision, was the "reasonableness" of the "impact fee" as applied to the individual Plaintiffs. The Plaintiffs presented absolutely no evidence to show that the "impact fee" assessed against them was "unreasonable."

The trial court properly dismissed the Plaintiffs' claims for their failure to show, by a preponderance of the evidence, that the "impact fee" was unreasonable.

There was presented substantial, competent evidence---most, if not all of which was unrebutted---to show that the Wescall Subdivision created needs within the municipality. The trial court found that the monies collected from the Plaintiffs as the "impact fee" were used to address those needs created by the Plaintiffs' development.

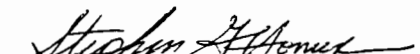
Not only does the Supreme Court not have the time to re-evaluate the evidence submitted (as Plaintiffs seem to ask it to do), but for policy reasons the Supreme Court should not attempt to overrule the trial court. The trial court sits in an advantaged position to fully weigh the evidence; its findings should not be disturbed. This is especially true when there was substantial evidence presented to support those findings.

Plaintiffs' motion for "class action" certification is improperly motivated. The Plaintiffs are in no way harmed if the action is not certified, especially at this late stage. There are many reasons why the action should not be certified as a class action; the trial court found some of these reasons. Certainly the trial court ought to be granted some deference in this type of decision which so severely hampers the trial court and the party-litigants.

Accordingly, Plaintiffs' appeal should be dismissed. The judgment of the trial court should be affirmed and the Defendant be awarded its costs in defending this action.

In the alternative, the case should be remanded to the district court for the full presentation of the Defendant's case-in-chief.

Respectfully submitted this 5th day of October, 1983.

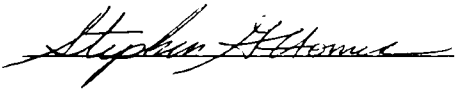


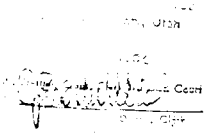
STEPHEN G. HOMER

Attorney for Defendant

CERTIFICATE

I certify that I mailed two copies of the foregoing RESPONDENT'S BRIEF to Mr Robert J DeBry, 965 E. 4800 South, Salt Lake City, Utah 84117, this 5th day of October, 1983.





IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOHN CALL and CLARK JENKINS,

Plaintiffs,

vs.

CITY OF WEST JORDAN, UTAH

Defendant.

MEMORANDUM DECISION

Civil No. C-78-829

The trial of the above-captioned matter on a procedural basis came on before this Court September 1 and 2, 1982 following the previous Pretrial Order of Judge Rigtrup, with plaintiff being represented by Robert J. Debry, Esq., and defendant being represented by Stephen G. Homer, Esq., City Attorney for West Jordan. At that procedural hearing, limited issues of defendant's projected case in chief were presented for the purpose of allowing discovery to be continued on behalf of the plaintiff. Then, on November 18, 1982, trial commenced with plaintiffs producing witness Gerald Sharkey, a C.P.A., who went over the information which had been obtained by defendant as a result of the discovery previously allowed.

At the conclusion of the plaintiffs' presentation, the defendant prior to putting on its case in chief, moved the Court to dismiss plaintiffs' Complaint or grant Judgment in favor of the defendant, and the Court at that juncture requested that counsel for both sides provide written memoranda concerning their position so that the Court could make the appropriate ruling. The Court after having received

APPENDIX "A"

written memoranda on the two issues raised at this juncture, now makes and enters its Memorandum Decision as follows

The two issues for determination are

1. Whether the matter herein involved should be certified for class action under Rule 23, Utah Rules of Civil Procedure, and

2. Whether defendant's motion to dismiss plaintiffs' Complaint or as characterized, grant a motion in favor of defendant against the plaintiffs should be granted.

On the first issue concerning the certification of class action, the Court after having reviewed the prior decisions of Judge Banks and Judge Winder as they are limitedly shown in the file, together with the information supporting those prior motions and the present status of the file and the authorities presented by defendant, now rules that the matter should not be certified for class action, and the motion for such certification is denied.

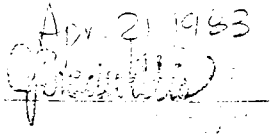
On the second issue, it seems clear from the testimony of the witness presented by the defendants, and also by an examination of the accounting records as testified to by Mr. Sharkey, that the impact fee assessed against the Wescall Subdivision was not unreasonable, and on this issue the Court finds that the plaintiffs failed to convince this Court by a preponderance of the evidence that there was an unreasonable fee assessed, and on this basis, therefore, the Court grants the defendant's motion to dismiss plaintiffs' Complaint, and no cause for action.

Mr. Stephen G. Homer is directed to prepare the appropriate Findings of Fact, Conclusions of Law and Judgment, not inconsistent with this Memorandum Decision.

Dated this 22 day of December, 1982.

DAVID B. DEE, DISTRICT JUDGE

STEPHEN G HOMER
West Jordan City Attorney
1850 West 7800 South
West Jordan, Utah 84084
Telephone 561-1463
Attorney for Defendant



IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

JOHN CALL and CLARK JENKINS,
Plaintiffs

vs

CITY OF WEST JORDAN, UTAH,
Defendant

FINDINGS OF FACT

Civil No. C-78-829

The Court, having heard oral testimony on September 1st and 2nd and November 18th, 1982 and having fully examined the exhibits received into evidence and having heard the arguments of counsel thereon and having been fully apprised in all premises herein, now enters the following

FINDINGS OF FACT

1. The Plaintiffs are the owners and developers of a 30-acre tract of real property, located in the extremely southwestern corner of the city limits of the City of West Jordan, said real property having been subdivided and developed and being now known as the Wescall Subdivision.

2. The City of West Jordan, Utah, is a small community in the southwest portion of Salt Lake County and is located between the Jordan River and the Oquirrh Mountains.

APPENDIX "B"

3. On January 21, 1975, the then governing body of the City of West Jordan adopted an ordinance [hereinafter "the Ordinance"] which required developers of real property within the City to dedicate to the City seven percent of the land so developed or to donate to the City the cash equivalent thereof, said donations and dedications to be used for flood control and park and recreation purposes.

4. In July 1977 the Plaintiffs obtained approval from the governing body of the City to develop their parcel of real property, which was subsequently thereto developed into a residential subdivision consisting of 96 lots upon which single-family residential dwellings have been constructed.

5. As a condition of subdivision development approval, the Plaintiffs were required to donate to the City the sum of $16,576 as equivalent to seven percent of the value of the land developed. Said $16,576 was received by the City from the Plaintiffs in July 1977.

6. The $16,576 paid by the Plaintiffs and similar monies paid by other developers for other subdivisions were placed into the general fund of the City in an account bearing the designation "Flood Control". Over the years since 1975, this "flood control" account has had different accounting designations applied to it. From the "flood control" account, expenditures were made by the City for capital improvements for flood control and for parks and recreation areas.

7. Since 1975 the City collected from developers approximately $525,000 in impact fees under the Ordinance.

8. Since 1975 the City expended from the aforementioned "flood control" account approximately $1,200,000 for the construction of capital improvements

for flood control projects and for parks and recreation areas in the city.

9. The difference between the money actually collected from the impact fees paid by the developers pursuant to the Ordinance and the amounts actually expended by the City represents a subsidy on the part of the City to the effect that the City contributed additional amounts from other revenue sources to finance the flood control projects, parks and recreation areas.

10. The City of West Jordan follows generally accepted accounting principles for municipal governments and the provisions of state law by not having a fund balance in the "flood control" account beyond the then-current budget year. For each year since January 1975 the City has zeroed-out the fund balances in the revenue portions of the "flood control" account. No evidence was presented by the Plaintiffs to show that such funds were not expended in the City's fiscal year (July to June) in which the impact fees had been collected.

11. 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. No instances were shown where monies from the "flood control" account of the City were spent for items other than the capital improvements for flood control and for parks and recreation areas. No unauthorized or improper expenditures, such as gifts of personal property to elected or appointed officials, were made from such "flood control" account.

12. The development of the Wescall Subdivision by the Plaintiffs generated needs specifically for flood control and parks and recreation areas within the city.

13. The topography of the land within the City is such that the land slopes downhill generally from west to east and from south to north. The natural drainage patterns flow in a generally easterly or notheasternly direction towards the Jordan River, the main natural drainage channel of the Salt Lake valley.

14. Storm-water run-off created by and within the Wescall Subdivision will generally pass through the entire City before said run-off waters would be discharged into the Jordan River.

15. Natural precipitation (rainfall) falling upon undeveloped land of the soil and vegetation type customarily found in the City of West Jordan will run-off at a rate of 15 to 25 percent. Precipitation falling upon impervious structures (such as driveways, sidewalks, streets, patios, roofs and other structures and surfaces associated with the development of a modern residential subdivision, including the Wescall Subdivision) will run-off at a rate of 90 percent.

16. The development of the Wescall Subdivision has created and will continue to create additional flood control run-off waters, which are for the most part discharged into the natural drainage channel known as Bingham Creek, which generally runs in an easternly direction through the city.

17. The City has undertaken a project known as the "Bingham Creek Project" to pipe the drainage channel of Bingham Creek to avoid flooding in areas downstream from the Wescall Subdivision. The cost of this project will exceed several hundred thousand dollars. The storm-water run-off created by the Wescall Subdivision contributes in part to the costs of the Bingham Creek Project. Were it not for

the additional storm-water run-off generated by the development of the Wescall Subdivision, the Bingham Creek Project could utilize a smaller size of pipe to handle a lesser quantity of storm-water run-off.

18. The development of the Wescall Subdivision, together with the Plaintiffs' sale of the lots for residential purposes, has created and will continue to create needs for parks and recreation areas for the residents of the Subdivision.

19. In the Wescall Subdivision there are in excess of 400 new residents who want and need parks and recreation areas.

20. To maintain the status quo ratio of parks acreage to population existing at the time of the Wescall Subdivision development, the City had to obtain in excess of one acre of additional park area.

21. To provide parks and recreation facilities in the area of the Wescall Subdivision and one other neighboring subdivision, the City purchased in 1977 the 2.5 acre "Booth Property" for use as a park. The cost to purchase this land was $9,000 per acre for a total of $22,500. The funds from this purchase came from the aforementioned "flood control" account.

22. Prior to the adoption of the Ordinance, the governing body of the City conducted a public hearing in which an overall master plan for the development of the city was discussed. This hearing (held in August 1974) was conducted in the West Jordan school auditorium so as to accomodate the large number of citizens in attendance. The specific concept of flood control and having an impact fee paid by new developers was discussed at that public hearing. The Ordinance was prepared by the West Jordan Planning and Zoning Commission, even though the

City Attorney was responsible for the selection of the actual language used in the text of the Ordinance. The Plaintiffs submitted no evidence to show that a public hearing was not held or that the Planning and Zoning Commission did not prepare the Ordinance.

23. The impact fees assessed under the Ordinance are calculated on the basis of the percentage of the land developed or, in the alternative, the cash value thereof. The Defendant disclosed the basis of its calculations to the Plaintiffs who challenged the reasonableness of the impact fee.

24. The Plaintiffs were afforded numerous opportunities to examine the financial and other records of the City and undertook, through their counsel and other agents, such an examination. The City presented oral testimony and documents during a two-day (September 1st and 2nd, 1982) evidentiary hearing before the Court in which the City's witnesses explained the accounting records and concepts for the benefit of the Plaintiffs and their attorney.

25. The Plaintiffs' accounting expert (Mr. Sharkey) examined the City's records for approximately 23 hours. Mr Sharkey indicated that on the basis of his examination of said records, he was unable to express an opinion as to how the impact fees collected pursuant to the Ordinance were spent. Mr Sharkey did concede that the expenditures from the "flood control" account, as claimed by the City and reflected in the City's records admitted into evidence, had in fact been made and that he (Mr. Sharkey) had found no improper or unauthorized expenditures from said "flood control" account or the existence of any kind of "fund balance" in which proceeds from the impact fees collected pursuant to the Ordinance were being retained beyond the expiration of the then-current fiscal year of the City.

26. The court-appointed master, whose final report was expressly waived by the Plaintiffs, indicated in his preliminary report to the Court that he felt it would take approximately two hundred hours to fully examine the City's financial records on the issues raised in this action.

27. There is a reasonable relationship between the impact fee assessed against the Plaintiffs under the Ordinance and the needs created by the development of the Wescall Subdivision.

28. The monies collected pursuant to the Ordinance from the Plaintiffs were used by the City in such a way as to demonstrably benefit the Wescall Subdivision and its residents, even though there may have been a secondary benefit granted to other subdivisions and residents.

29. The impact fee under the Ordinance did not require the Plaintiffs, as developers of the Wescall Subdivision, to bear more than their share of the capital costs in relation to the benefits conferred. That portion of the impact fee used for parks and recreation areas is equitable in light of the relative benefits conferred on, as well as the relative burdens previously borne and yet to be borne by the Wescall Subdivision and its residents in comparison with the other properties in the city. The impact fee assessed under the Ordinance did not exceed the amounts sufficient to equalize the relative benefits and burdens of the Wescall Subdivision and other properties. The impact fee assessed against the Plaintiffs under the Ordinance was utilized solely for the construction of capital improvements (flood control projects and parks and recreation areas) made necessary by the development of the Wescall Subdivision.

30. The putative class is not so numerous that joinder of all parties

is impracticable.

31. The defenses which could be asserted by the Defendant are not typical for all members of the class; specifically, what may be a "reasonable" fee for one subdivision may be "unreasonable" for another, when the specific needs, etc. of that latter subdivision are examined.

32. Prosecution of separate actions by individual members of the class would not create the risk of inconsistent or varying adjudications or adjudications which would as a practical matter be dispositive of the interests of other members not parties to the action.

33. Questions of law or fact common to the members of the putative class do not predominate over questions affecting only individual members.

Entered this 21 day of ~~January~~ April, 1983.

BY THE COURT:

DAVID B DEE, District Judge

CERTIFICATE

I certify that I mailed a copy of the proposed FINDINGS OF FACT to Mr Robert DeBry, Attorney for Plaintiffs, 965 E. 4800 South, Salt Lake City, Utah 84117 this 14th day of January, 1983.

STEPHEN G HOMER
West Jordan City Attorney
1850 West 7800 South
West Jordan, Utah 84084
Telephone 561-1463
Attorney for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

JOHN CALL and CLARK JENKINS,
Plaintiffs

vs

CITY OF WEST JORDAN, UTAH,
Defendant

CONCLUSIONS OF LAW

Civil No. C-78-829

The Court, having heard oral testimony on September 1st and 2nd and November 18th, 1982 and having fully examined the exhibits received into evidence and having heard the arguments of counsel thereon and having been fully apprised in all premises herein and having heretofor entered Findings of Fact, now enters the following:

CONCLUSIONS OF LAW

1. The City has disclosed to the Plaintiffs the basis upon which the impact fee under the 1975 Ordinance was calculated. The burden of showing failure to comply with the constitutional standard of reasonableness in this matter is upon the Plaintiffs, as challengers.

2. The Plaintiffs were given the opportunity to present evidence to show the dedication and/or donation required of them had no reasonable

APPENDIX "C"

relationship to the needs for flood control or parks and recreation facilities created by the Wescall Subdivision.

3. The Plaintiffs had the burden to show that the impact fee assessed under the Ordinance was unreasonably applied against them.

4. The Ordinance in question is entitled to a presumption of constitutional validity. The Utah Supreme Court has expressly upheld the facial constitutionality and validity of the Ordinance.

5. The Plaintiffs have failed to show by a preponderance of the evidence that the Ordinance was unreasonable, in that the dedication required of the Plaintiffs had no reasonable relationship to the needs for flood control or parks and recreation facilities created by their subdivision.

6. There is a reasonable relationship between the impact fee assessed against the Plaintiffs under the Ordinance and the needs created by the development of the Wescall Subdivision.

7. Monies collected pursuant to the Ordinance from the Plaintiffs were used by the City in such a way to demonstrably benefit the Wescall Subdivision and its residents, even though there may have been a secondary benefit granted to the other subdivisions and residents.

8. The impact fee under the Ordinance did not require the Plaintiffs, as developers of the Wescall Subdivision, to bear more than their share of the capital costs in relation to the benefits conferred. That portion of the impact fee used for parks and recreation areas is equitable in light of the relative benefits conferred on, as well as the relative burdens previously borne and yet to be borne by Wescall Subdivision and its residents in com-

parison with the other properties in the City. The impact fee assessed under the Ordinance did not exceed the amounts sufficient to equalize the relative benefits and burdens of the Wescall Subdivision and other properties. The impact fee assessed against the Plaintiffs under the Ordinance was utilized solely for the construction of capital improvements (flood control projects and parks and recreation areas) made necessary by the development of the Wescall Subdivision.

9. The impact fee collected from the Plaintiffs was used by the City in such a way as to demonstrably benefit the Wescall Subdivision even though there was a secondary benefit incurred for other subdivisions and residents.

10. The impact fee under the Ordinance does not require the newly developed properties to bear more than their fair share of the capital costs in relation to the benefits conferred. The amounts required of the Plaintiffs are actually less than their fair share of the costs for the needs created by the development of the Wescall Subdivision.

11. The fact that there may be other funding methods (such as bonding and increasing the property tax mill levy) available to the City to raise revenues from which to construct flood-control projects and parks and recreation areas, as suggested by the Plaintiffs, does not invalidate the impact fee method (under the Ordinance) chosen by the City to pay for the costs in solving such needs. These measures for alternative sources of revenue ignore the concept of an "impact fee", which has been approved by the Utah Supreme Court.

12. The accounting and financial records which have been maintained by

the City to account for the impact fees collected under the Ordinance are and have been maintained in compliance with generally accepted accounting principles and the relevant provisions of Utah law pertaining to such records.

13. The Ordinance was valid and promulgated by the governing body of the City of West Jordan. It was not shown by a preponderance of the evidence that the City failed to comply with the provisions of Section 10-9-25, Utah Code Annotated, in the promulgation of the Ordinance.

14. The fact that the initial studies prepared by the engineering firm for the City indicated that the impact fee was to be $300 per acre does not render the impact fee actually charged the Plaintiffs in this case to be "unreasonable". In this regard, the Court determined that upon the basis of the testimony concerning the needs created by the development, together with such other factors as inflation and the fact that the engineering study only addressed flood control needs and did not take into account parks and recreation areas, sustain the reasonableness of the fee.

15. The putative class is not so numerous that joinder of all party is impracticable.

16. The defenses which could be asserted by the Defendant are not typical for all members of the class; specifically, what may be a "reasonable" fee for one subdivision may be "unreasonable" for another, when the specific needs, etc. of that latter subdivision are examined.

17. Prosecution of separate actions by individual members of the class would not create the risk of inconsistent or varying adjudications or

adjudications which would as a practical matter be dispositive of the interests of the other members not parties to the action herein.

18. Questions of law or fact common to the members of the putative class do not predominate over questions effecting only individual members.

19. The Court has considered the extent and nature of any litigation concerning the controversy already commenced by other members of the class and the Court takes notice that no other action against the City on this particular issue have been previously filed. The Court likewise has considered the desirability or undesirability of concentrating the litigation of claims in the particular forum and has also considered the difficulties likely to be encountered in the management of the class action, particularly at this late date where certification of the class was sought on the first day of trial. The Court finds that no notice could reasonably be given to the other class members involved in the controversy and accordingly the Court determines that a class action is not superior to other available methods for the fair and efficient adjudication of the controversy.

Entered this 21 day of ~~January~~ April, 1983.

BY THE COURT:

DAVID B DEE, Judge of the District Court

CERTIFICATE

I certify I mailed a copy of the foregoing proposed CONCLUSIONS OF LAW to Mr Robert DeBry, Attorney for Plaintiffs, 965 E. 4800 South, Salt Lake City, Utah 84117 this 14th day of January, 1983.

STEPHEN G HOMER
West Jordan City Attorney
1850 West 7800 South
West Jordan, Utah 84084
Telephone 561-1463
Attorney for Defendant

FILED
SEP 21 19 [illegible]
H. DIXON
BY Bradwilkes

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

JOHN CALL and CLARK JENKINS,

Plaintiffs

vs

CITY OF WEST JORDAN, UTAH,

Defendant

Bk 178 Pg. 3499
4-22-83 2:21 P.M.

JUDGMENT

Civil No. C-78-829

The Court, having heard oral testimony on September 1st and 2nd and November 18th, 1982 and having fully examined the exhibits received into evidence and having heard the arguments of counsel thereon and having been fully apprised in all premises herein and having heretofor entered Findings of Fact and Conclusions of Law,

IT IS THEREFORE ADJUDGED, ORDERED AND DECREED:

1. The impact fee assessed against and paid by the Plaintiffs is constitutionally reasonable. The impact fee has not been "applied" to the Plaintiffs in an impermissable or unconstitutional manner.

2. The impact fee Ordinance adopted by the City on January 21, 1975 and the impact fee assessed and collected thereunder from the Plaintiffs are valid. All Plaintiffs' claims against the Defendant are dismissed, with

APPENDIX "D"

prejudice, and final judgment is entered in favor of the Defendant.

3. The Defendant is awarded its costs in defending this action. Counsel for the Defendant shall submit to the Court and to counsel for the Plaintiffs a written Memorandum of Costs Incurred within 5 days of entry of this Judgment.

Entered this 20 day of April, 1983.

BY THE COURT:

DAVID B. DEE
Judge of the District Court

ATTEST
H. DIXON HINDLEY
CLERK

CERTIFICATE

I certify that I mailed a copy of the foregoing proposed JUDGMENT to Mr Robert DeBry, Attorney for Plaintiffs, 965 E. 4800 South, Salt Lake City, Utah 84117 this 14th day of January, 1983.