

2007

Jeffrey R. Gittins v. Smithfiled City : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Gittins v. Smithfiled City*, No. 20070289 (Utah Court of Appeals, 2007).
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IN THE UTAH COURT OF APPEALS

JEFFERY R. GITTINS,
Appellant

Appellate Case No. 200~~X~~70289-CA

vs.

SMITHFIELD CITY,
Appellee

BRIEF OF APPELLANT

Appeal from the First Judicial District Court, Cache County, Judge Gordon J. Low

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FILED
UTAH APPELLATE COURTS
UTAH APPELLATE COURTS
OCT 23 2007
OCT 22 2007

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IN THE UTAH COURT OF APPEALS

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vs.

SMITHFIELD CITY,
Appellee

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to § 78-2a-3(2)(b)(i) and/or (2)(j), Utah Code.

STATEMENT OF THE ISSUES PRESENTED FOR APPEAL

First Issue: Was the declaratory judgment a final order from which an appeal may be taken as a matter of right?

The issue of finality of a judgment is not one of review, but rather a threshold question of jurisdiction. *In re Estate of Morrison*, 933 P.2d 1015, 1016 (Utah Ct. App. 1997).

Second Issue: Did the trial court err in ruling that Smithfield City's rezone decision of February 8, 2006 was not illegal?

The standard of appellate review is for correctness. Land use decisions of a municipality are presumed valid. § 10-9a-801(3)(a)(1), Utah Code. The same standards that apply to a district court for review of a municipal land use decision also apply to appellate review of the district court's decision. *Gardner v. Perry City*, 2000 UT App 1, ¶¶ 7-8, 994 P.2d 811.

This issue was preserved in the trial court in the Petitioner's Memorandum Opposing Smithfield City's Motion for Summary Judgment, R 562-68, and in the incorporated memoranda supporting Petitioner's Motion for Summary Judgment. R 454-59, 540-44.

Third Issue: Did the trial court err in stating that Appellant was not prejudiced by the City's action?

The standard of appellate review is as follows:

“Summary judgment is appropriate only when there are no genuine issues of fact and the moving party is entitled to judgment as a matter of law.” *Springville Citizens for a Better Community v. City of Springville*, 979 P.2d 332, 336 (Utah 1999) (citing Utah R. Civ. P. 56(c)). “We review the district court's grant of summary judgment for correctness, according no deference to the court's legal conclusions, and accept the facts and inferences in the light most favorable to the losing party.” *Macris & Assoc., Inc. v. Neways, Inc.*, 986 P.2d 748, 750 (Utah Ct. App. 1999) (citations and internal quotations omitted).

Gardner v. Perry City, 2000 UT App 1, ¶7, 994 P.2d 811.

This issue was preserved in the trial court in the Petitioner's Memorandum Opposing Smithfield City's Motion for Summary Judgment R 564-65.

STATEMENT OF DETERMINATIVE LAWS

Rule 3(a), Utah Rules of Appellate Procedure, provides in pertinent part:

Filing Appeal From Final Orders and Judgments: An appeal may be taken from a district or juvenile court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. . . .

§ 10-9a-801(3), Utah Code provides:

(a) The Courts shall:

(i) presume that a decision, ordinance, or regulation made under the authority of this chapter is valid; and

(ii) determine only whether or not the decision, ordinance, or regulation is arbitrary, capricious, or illegal.

(b) A decision, ordinance, or regulation involving the exercise of legislative discretion is valid if the decision, ordinance, or regulation is reasonably debatable and not illegal.

(c) A final decision of a land use authority or an appeal authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal.

(d) A determination of illegality requires a determination that the decision, ordinance, or regulation violates a law, statute, or ordinance in effect at the time the decision was made or the ordinance or regulation adopted.

§ 2.08.030, Smithfield Municipal Code (“SMC”) provided at all relevant times:

Rules of Procedure: Except as otherwise specifically required or provided by law, this chapter, or by resolution of the governing body, the most current edition of “Robert’s Rules of Order” shall govern the procedure and conduct of the meetings of the governing body.

STATEMENT OF THE CASE

Appellant (“Gittins”) challenged in the district court a rezoning decision of Smithfield City (“the City”) made on February 8, 2006 on grounds of procedural illegality. R 9-12. The district court, Judge Gordon J. Low presiding, denied Gittins’ motion for summary judgment and granted the City’s cross motion for summary judgment, ruling that the rezone was not illegal. R 599-601. The court also stated that Gittins was not prejudiced by the City’s action. R 600. It is from the decision granting the City a declaratory judgment that Gittins appeals.

Before the trial court considered summary judgment, it denied the City’s earlier motion to dismiss, but stated that it would award the City attorney’s fees on the filing of an affidavit. R 534. The attorney’s fee affidavit was not filed until after the signing of the declaratory judgment, R 606, and the filing of the notice of appeal. R 602.

STATEMENT OF THE FACTS

Following is a statement of the facts relevant to the issues presented for review. These are drawn primarily from the statement of facts presented by Gittins in support of his motion for summary judgment.¹ Abbreviations and defined terms used below are consistent with those used in the previous statement of facts.²

In December of 2005, two parties (“the Developers”) applied to the City (“the Application”) for a rezone of approximately 25 acres from residential/agricultural and agricultural zones to a residential zone (single-family lots with minimum 12,000 sq. ft). F 29. Gittins owns and operates a dairy near the proposed development. F 44-45, 96, 165. After notice and a public hearing, P&Z recommended denial of the Application. F 46.

The City’s zoning ordinance (“ZOS”), § 17.08.040, includes the following requirements for a rezone:

¹ The statement contained 165 separate facts, none of which were contested. A copy of the statement is included in the addendum to this Brief. As used in this Brief, “F ___” refers to the enumerated fact(s) contained in the statement.

² “Board/AA” is the City’s Board of Adjustment / Appeal Authority
“Chair” means the chairperson of the Board/AA, Robert Buckley
“Council” means the City’s Council; its governing body.
“Manager” means the City’s manager, James P. Gass (unelected);
“Mayor” means the City’s mayor, Chad E. Downs (elected);
“Council Member” means a member of the (elected) Council, including Brent Butters, Deon G. Hunsaker, Kris Monson, Dennis Watkins, and Dee Wood;
“P&Z” means the City’s Planning and Zoning Commission; and
“Staff” means and includes unelected City employees and officers.

The ordinance codified in this title, including the maps, may be amended from time to time by the Smithfield city council after fifteen (15) days' notice and public hearing . . .

F 13. Adequate advance notice was given, and a public hearing on the Application was held by the Council as part of its January 25, 2006 regular meeting. F 54, 56.

After a motion to approve the Application was made and seconded, the following occurred:

Question on the motion:

Council Member Monson asked that a modification be considered. Move the line south. Then Ms. Monson would like to re-open the General Plan and put the balance of that area back in the agricultural zone.

The northern line of the re-zone request be moved south to the point directly in line with the south boundary of the Lundberg, Johnson, Jacobson property on the west side of what would be 600 West. This would eliminate four rows of proposed houses.

Council Member Hunsaker asked about just one egress from the development.

Council Member Wood and Council Member Watkins agreed to the modification.

F 62. This change amounted to a substantial reduction in the size of the rezone.³ After further discussion, the amended motion was unanimously adopted, and the meeting adjourned. F 66, 69.

³ The parties disagree on the size of the reduction. Gittins maintains that boundary, hence size, was ascertainable. The stated property-line boundary is superimposed over a sketch of the Developers' proposed subdivision at R 261, which is reproduced in the Addendum. The area of the amended rezone, by this reckoning, is approximately 10 acres. See F 30-42, 76-85. The City claims the northern boundary of the amended rezone was uncertain. Staff (later) prepared four alternate amended drafts with acreage ranging from 7.46 to 15.51. F 76-85.

At the next regular Council meeting on February 8th, the Application was again on the agenda, exactly as it had been two weeks earlier. F 86-87. A motion “to approve Ordinance 06-01 as requested” was made and seconded. F 100. Council Member Monson failed to persuade the moving Council member to amend, and the motion passed on a vote of four to one. F 101.

Gittins approached the Mayor to air concerns about the procedures followed by which the February 8th decision was reached, and to ask a series of questions about how the Council could possibly have reversed itself in so short a time and without any public discussions or deliberation. F 110. The Mayor told Gittins that it was doubtful that the Council “would revisit the re-rezone question”, and confirmed that view in writing received by Gittins on March 1st. F 110. On that same day, Gittins delivered to the City a handwritten appeal of the February 8th decision to the Board/AA. F 111. In a letter dated March 3rd, the Manager acknowledged Gittins’ visit to the City’s offices, and commented at length on Gittins’ attempt to appeal, concluding that Gittins’ opportunity to appeal, if any, was to the district court, and not to the Board/AA. R 185-86.

On March 10th Gittins petitioned the district court to review the City’s February 8th decision. F 27.

SUMMARY OF ARGUMENTS

This Court has jurisdiction of this appeal because the Declaratory Judgment granting the City's entire summary judgment request, is a final judgment within the meaning of Rule 3(a), Utah Rules of Appellate Procedure. The tell-tale award of attorney's fees connected with a previously resolved motion does not ruin the finality of the Declaratory Judgment for purposes of an appeal as a matter of right. Applying a pragmatic test to the Declaratory Judgment, this Court should consider the Declaratory Judgment final and appealable because it leaves no clue of a latent attorney's fee issue. Treating the Declaratory Judgment would promote rather than reduce judicial economy.

The City's February 8th decision essentially rezoned property as to which there was no pending rezone application, the previous one having been disposed of at the City's January 25th meeting. Consequently, none of the state-mandated or City-ordained procedures prerequisite to a rezone had been attempted, let alone completed as of February 8th. The City's three interlocking theories on which its application resuscitation efforts depend each crumble under the weight of law, including the City's own procedural ordinances.

Reconsideration of the January 25th decision was prohibited by the City's procedural rules. So the City retroactively unshackled itself from ordained procedures by pretending other unwritten "informal" rules existed by which reconsideration was permitted. Even if the City had previously trashed its own rules (contrary to evidence provided by Gittins), the City's course of action

violated Utah's statutorily-mandated zoning scheme (contained in the Municipal Land Use, Development, and Management Act, §§ 10-9a-101, et seq., Utah Code ["MLUDMA"]), by allowing rezones via reconsideration. Despite these problems with the City's position, the trial court erroneously swallowed whole the City's notion that its (written) rules could be disregarded.

The Council was not at liberty to define or fix where the northern boundary of the rezone lay, beyond the action taken on January 25th. Doing so violated the City's boundary ordinance referring boundary clarification issues immediately and ultimately to the Board/AA. Doing so also ran contrary to MLUDMA in that rezoning by the Council under the guise of boundary clarification could thereby be carried out sans procedural protections mandated by Utah law. Doing so was unnecessary in the first place, because the January 25th decision left no question about the northern boundary that could not be readily answered by resort to the City's boundary ordinance and a look at the plat map. But the veneer of a boundary clarification soon fell away at the February 8th meeting when instead of picking one of the alternative northern boundaries then presented, the Council opted to dump the changeable boundary altogether in favor of the original and entire requested area. The trial court erred in implicitly endorsing this approach.

There was no fatal flaw in the January 25th rezone, and no one challenged it on technical or any other grounds. The absence of a typed metes-and-bounds description in a proposed ordinance on January 25th did not render it "null and void" as masochistically asserted by the City. The City's belated professions of

concern over this issue should be ignored, as the City had the means to avoid the faux pas, and was specifically advised by Gittins to prepare written amendments in advance of the January 25th meeting.

The trial court's stray statement that Gittins was not prejudiced was probably meant as a comment on the effect of the court's upholding of the February 8th decision. A determination that the City's actions were legal makes unnecessary and nonsensical a further analysis about how the City's decision would have been different if legal procedures were followed. Any ruling that Gittins was not prejudiced would be erroneous, especially at the summary judgment stage. There were multiple independent evidentiary reasons why the trial court was precluded from denying Gittins his day in court on the prejudice issue: (a) a revote on the January 25th rezone was precluded by law; (b) the Council voted differently (on January 25th) when the proceedings were free from taint; (c) the City's evidence failed to negate a showing of prejudice; and (d) Gittins requested and should have been allowed the opportunity to "permit affidavits to be . . . opposed by depositions," etc. under Rule 56(e), Utah Rules of Civil Procedure.

ARGUMENT

I. THE DECLARATORY JUDGMENT IS A FINAL ORDER

Appeals may be filed as a matter of right from “all final orders and judgments.” Rule 3(a), Utah Rules of Appellate Procedure.

On its face, the Declaratory Judgment disposes of all of the pending claims and defenses asserted by the parties:

The action by the Defendant, in adopting the Ordinance re-zoning the real property at issue in this action, was not inappropriate, the re-zone Ordinance is valid, and Summary Judgment by way of Declaratory Judgment is hereby granted in favor of the Defendant, Smithfield City.

R 601. Judge Low characterized the action as one for declaratory judgment in which the parties had filed cross motions for summary judgment. R 599. The City’s motion did not include “partial” in the title, nor was there any indication therein that the granting of the motion would do less than dispose of the whole action. R 481-82.

The City denies the Judgment is final because earlier in the case the court awarded attorney’s fees⁴, but the amount was not fixed at the time of the Declaratory Judgment. Notwithstanding the un-liquidated state⁵ of the attorney’s

⁴ The award was a *sua sponte* sanction made for Gittins’ delay in filing a motion for summary judgment, and was granted in process of denying the City’s motion to dismiss. R 534.

⁵ The City filed an attorney’s fee affidavit after Gittins had filed a notice of appeal, along with a proposed order reciting a dollar amount. R 606-14. The district court signed the order. R 613. Gittins requested relief from the order pursuant to Rule 60(b), Utah Rules of Civil Procedure. R 617. That motion is still pending with the district court. R 658.

fees emanating from the prior motion to dismiss, the Declaratory Judgment was still “final” when the notice of appeal was filed.

Prior to the decision in *ProMax Development Corp. v. Raile*, 998 P.2d 254 (Utah 2000), a judgment providing for an award of attorney’s fees could still be considered final even where the fee amount was expressly reserved for later determination. The *ProMax* holding made clear that, for reasons of judicial economy, such judgments become final when the trial court finishes the attorney’s fee exercise.

If the Declaratory Judgment in this case had included the fee award, or expressly reserved the issue, or referred to the earlier award, or repeated the trial court’s solicitation of an attorney’s fee affidavit from the City, there would be no trouble applying *ProMax* and readily concluding the Judgment was not final. Unlike the orders in *ProMax* and its progeny, the Declaratory Judgment contains no expression pointing back to an unresolved attorney’s fee issue.

In analyzing whether a judgment is final, this Court may employ a “pragmatic test” or “case-by-case” approach. See *In re Estate of Morrison*, 933 P.2d 1015, 1016 (Utah Ct. App. 1997). If the latent attorney’s fee award is treated as an unresolved claim, this Court can still take into account the following and determine that the Declaratory Judgment is final and subject to appeal as a matter of right.

The Judgment is devoid of reference to an attorney’s fee award.

The attorney's fee award was made *sua sponte*. Therefore, no motion for an award was ever pending and unresolved.

The attorney's fee award related to the City's overruled motion to dismiss and was a sanction, rather than an award of attorney's fees as part of a determination on the merits.

The trial court solicited, but did not require the City to submit an affidavit, or to take advantage of the award.

The Judgment was prepared by counsel for the City.

Where an otherwise-final judgment makes no reference to a prior award, the City's approach would effectively vest the City with the power to render the judgment final or not, depending on whether (and when) the beneficiary chooses to take advantage of the award.

The goal of judicial economy is the worthy basis for the *ProMax* holding. This goal would be furthered, not harmed, by the pragmatic expectation that interim fee awards such as sanctions, if not reduced to judgment before the order concluding the case on its merits, ought to at least be mentioned therein if finality is to be indefinitely postponed.

II. THE RE-REZONE WAS ILLEGAL

The City's action of February 8th (the "Re-Rezone") is presumptively valid. § 10-9a-801(3)(a)(i), Utah Code. This presumption may be overcome if the Re-Rezone "is arbitrary, capricious, or illegal." Sub(3)(a)(ii). If the Re-Rezone involves "the exercise of legislative discretion" it is still valid if "reasonably debatable" and "not illegal." Sub (3)(b).

A determination of illegality requires a determination that the decision, ordinance, or regulation, violates a law, statute, or ordinance in effect at the time the decision was made or the ordinance or regulation adopted.

Sub (3)(d). Because the Re-Rezone violated an extant "law, statute, or ordinance" it was illegal. The violation need not be gross, nor must the law be "important" in order to render the decision illegal. "Substantial compliance" is not the test. A City must adhere to its own procedural mandates.

While substantial compliance with matters in which a municipality has discretion may indeed suffice, it does not when the municipality itself has legislatively removed any such discretion. . . .

Municipal zoning authorities are bound by the terms and standards of applicable zoning ordinances and are not at liberty to make land use decisions in derogation thereof. . . . Stated simply, the City cannot "change the rules halfway through the game." . . . Because the City did not properly comply with the ordinances . . . we conclude that . . . the City's decision . . . was illegal.

Springville Citizens for a Better Cmty. v. City of Springville, 1999 UT 25, ¶¶29-30, 979 P.2d 332 (citations omitted). City councils must follow their own procedural ordinances in the context of rezoning. *Gardner v. Perry City*, 2000 UT App 1, ¶¶15-18, 994 P.2d 811.

**A. THE TRIAL COURT ERRED IN ALLOWING THE CITY TO
DISREGARD ITS OWN PROCEDURAL ORDINANCE**

As permitted by § 10-3-606, Utah Code, the City adopted Robert’s Rules of Order to govern its procedure. § 2.08.030, SMC, provided⁶:

Rules of Procedure: Except as otherwise specifically required or provided by law, this chapter, or by resolution of the governing body, the most current edition of “Robert’s Rules of Order” shall govern the procedure and conduct of the meetings of the governing body.

Roberts Rules of Order Newly Revised, 10th Edition, *see* F 18, (“Roberts Rules” or “RR”) was therefore binding upon the City, in all cases:

When a society or an assembly has adopted a particularly parliamentary manual – such as this book – as its authority, the rules contained in that manual are binding upon it in all cases where they are not inconsistent with the bylaws (or constitution) or any special rules of order of the body, or any provision of local, state, or national law applying to the particular type of organization.

RR § 2; F 20.

The trial court expressly accepted the City’s argument that Roberts Rules “are not to be considered elevated to the level of Ordinance.” R. 600. The court minimized the significance of the City’s rules of procedure by imagining that the purpose for their adoption was limited “to facilitate the order of [the governing body’s] meetings.” *Id.* The court concluded, therefore, that Roberts Rules “are not in themselves Ordinances.” *Id.*

⁶ Later in 2006, the City replaced § 2.08.030 with the following ordinance (06-15):

Rules of Procedure: Except as otherwise specifically required or provided by law, this chapter, or by resolution, the governing body may establish rules that govern the procedure and conduct of the meetings of the governing body.

The trial court's disregard of Roberts Rules contravenes well-established rules of construction of city ordinances. If the "plain language" of the ordinance is unambiguous, other methods of interpretation are unnecessary. *M&S Cox Investments, LLC v. Provo City Corp.*, 2007 UT App 315 ¶ 27 (Sept. 27, 2007). In the case at bar there is no ambiguity in the ordinances or in the rules that are clearly incorporated therein by reference. The court below did not identify any ambiguities. The skirting of Roberts Rules by the trial court was erroneous.

The justification offered by the City for disregard of its procedures was that they had been routinely ignored through the years, and that an informal system of ad hoc procedures developed within the City. R 501-25. Several affidavits were offered to this effect, including one by the City's manager, tracing the passing by of Roberts Rules back twenty-three years, and accusing Gittins, formerly a City council member, of being a party to the "informal" rules. R 519-20. This testimony was countered by the affidavits of two former mayors and Gittins in which adherence to Roberts Rules as the City's governing procedure was confirmed. R 547-52. Although the trial court ruled out contested material issues of fact, it acknowledged that some issues were contested, but downplayed their importance.

There are no material issues of fact which are in dispute, but minor issues and construction or interpretation of actions taken or things said, may be considered differently.

R. 600. Where the district court relied on the City's informal rules, it was error to do so at the summary judgment stage, Gittins having supplied contesting evidence.

B. THE ORIGINAL REZONE WAS NOT SUBJECT TO RECONSIDERATION

The City claimed that the first rezone of January 25, 2006 was “brought back to the city council for reconsideration” two weeks later. F 89-91. The City’s own characterizations of the action on February 8th included “again reviewed” F.91, “exactly the same” F 90, and “present again for consideration” F 95.

Reconsideration of the January 25th rezone decision was prohibited by law.

To protect against abuse, a motion to reconsider has unique characteristics:

The making of this motion is subject to time limits, as follows: In a session of one day – such as an ordinary meeting of a club or a one-day convention – the motion to *Reconsider* can be made only on the same day the vote to be reconsidered was taken.

RR § 37; F 26. As indicated, a session may consist of one meeting. RR § 1; F 19.

In a permanent society whose bylaws provide for regular weekly, monthly, or quarterly meetings that go through an established order of business in a single afternoon or evening, each “meeting” of this kind normally completes a separate session . . .

RR § 5; F 23. The City’s council meeting of February 8th was a new and separate session from the meeting of January 25th.⁷ The falling gavel on the night of January 25th drove the last nail into reconsideration’s coffin, because the decision was made that day, with no hint of further action.

⁷ Both meetings were announced as “regularly scheduled.” F 47, 74. The January 25th meeting adjourned at 10:40 pm on January 25th. F 69. The February 8th meeting commenced two weeks later. F 86. Even if the meetings were treated as parts of one multi-day session, reconsideration is still limited to the same day of the original vote. RR § 37, p. 305. This hand-tying feature of multi-day sessions is cited as a reason why multi-day sessions are considered “unwise” for standing organizations. RR § 5; F 23.

There were additional violations of procedure showing the February 8th “reconsideration” to be invalid.

Reconsideration cannot materialize from thin air; it is brought before the body by a motion, made and seconded by (Council) members, followed by the chair (Mayor) stating the “question on the motion.” RR §§ 3-4; F 21-22. A debate ensues after which the Mayor “puts the question” (calls for a vote) and after the vote, announces the result. RR § 4; F 22. The motion dies with a rejection. But

[t]he effect of the adoption of the motion to *Reconsider* is immediately to place before the assembly again the question on which the vote is to be reconsidered – in the exact position it occupied the moment before it was voted on originally.

RR § 37; F 26. Another vote is then taken – on the question put to the members just prior their first vote. *Id.* It is not taken for granted that the second vote will achieve a different result from the first one.

There was no motion to reconsider made in the February 8th meeting; nor any of the other elements prerequisite to a vote on a motion to reconsider. There were two indicators in the minutes that the Council was about erasing the January 25th action. First was the following cryptic exchange (??) in the minutes: “Council Member Watkins asked if the previous motion was gone. Yes.” F 97. Second, another Council Member (Wood) offered that he misunderstood something when he voted on January 25th. The Council went straight to reconsideration without bothering to vote on whether to reconsider.

The City Manager originally took the position that reconsideration was a viable option at the subsequent meeting.

It is not uncommon or unlawful for a city council to reconsider a previous decision either in the meeting when the initial decision is made or in a subsequent meeting provided if it is done in a subsequent meeting that the meeting is open to the public and properly noticed as a public meeting.

F 126. In response to Gittins' motion for summary judgment, the City conceded broadly that "Roberts Rules of Order were not followed . . . during the February 8, 2006 meeting when the rezone in question was being considered." R 489. The City admittedly violated its own rules by pretending to reconsider its decision two weeks after the event. It was error for the trial court to brush off the City's unwillingness to abide by its own ordinances.

The City's laws did not forever bar consideration of a rezone of the acreage left out of the January 25th rezone. The developers were always welcome to seek a change in the zoning. That is how the rezone question arrived before the City council in the first place. The process, though, would have to start over. With roughly two-thirds of the property already rezoned on January 25th, the developers' petition would necessarily be different from the original one. It was not an option, however, to skip the notice and public hearings before the P&Z that were mandated by state law, §§ 10-9a-201-206, 404, 502-503, Utah Code. Nor could the developers come before the City Council without prior notice⁸ and a

⁸ It is noteworthy that the 15 days' advance notice for a zoning public hearing is longer than the usual interval between Council meetings, including the time between January 25th and February 8th.

public hearing required under the City’s zoning ordinance. § 17.08.040, ZOS; F 13. The City’s zoning ordinances are restrictive⁹ and mandatory¹⁰, consistent with §§ 10-9a-104 & 201, Utah Code. Additionally, Council procedure, and provisions for reliable agendas, business, and minutes further guarantee no surprises. §§ 2.08.030, 040, 050, and 060, SMC; F 3-6. These laws assuring fair and open decision-making were honored through January 25th, F 29-30, 43-48, 54-64, 66. The City’s reversal of its decision two weeks later gutted the notice and hearing protections of MLUDMA, regardless of the City’s dismantling of its own rules in favor of an amorphous flex plan.

The City’s notion that a rezone may be re-done at any “subsequent meeting” without these deemed “extras,” F 123-26, is untenable since recurrent revisits could turn the zoning map into a mirage with no more than a day’s notice

⁹§ 17.04.030, Zoning Ordinances of Smithfield (“ZOS”), F 9, provides:

Interpretation: In interpreting and applying the provisions of this title, the requirements contained herein are declared to be the minimum requirements for the purposes set forth.

§ 17.04.040, ZOS, F 10, provides:

Conflict: Wherever higher or more restrictive standards are established by the provisions of any other applicable statute, ordinance, or regulation that are established by the provisions of this title, the provisions of such other statute, ordinance, or regulation shall govern.

¹⁰ § 17.04.070, ZOS, F 12, includes the following: “‘Shall’ is always mandatory.”

on the City’s website.¹¹ What about re-reconsiderations? Under the City’s informal approach (now apparently ensconced in the revised procedure ordinance, *see* fn 6, *supra*) there is no limit to the number of times a single zoning amendment may be revisited, revised, or reversed.¹²

It was error for the trial court to indulge the City in giving the developers a quick and free pass around zoning laws.

C. THE RE-REZONE WAS NOT VALID AS A BOUNDARY DEFINITION

The City claimed that “confusion” arising about the rezone boundary-line was part of the justification for the matter coming before the Council on February 8th. F 65, 71, 92, 125. Under this theory, a clarification was needed as to what the Council intended, so the matter was brought before the Council again.¹³

The City’s boundary-clarification rationale quickly evaporates in the glare of the decision the Council reached on February 8th. Rather than clarify the location of an allegedly uncertain boundary, the Council scrapped the boundary

¹¹ The City ironically accused Gittins of trying to make mincemeat of the City’s ordinance book. “The result of Petitioner’s position can reach back years and shake an otherwise well-enforced ordinance out of the City’s tree.” R 491.

¹² Maybe there is an informal limit. Petitioner’s fresh concerns were turned away because the Mayor believed the Council would not re-reconsider. F 110.

¹³ The trial court made no comment in its rulings on this aspect of the City’s defense. It is nevertheless discussed here to dispel the possibility that the trial court’s ruling may be upheld on alternate grounds than those expressed in the decision below.

idea by rezoning the entire area. On January 25th the Council unquestionably and unanimously rezoned an area pared-back from the rezone request. On February 8th the Council, with one dissent, reversed itself and granted the entire request. Under this construct the Council clarified the boundary by eliminating it.

The Council was not confused about the January 25th rezone boundary. The motion to exclude property north of the “south boundary of the Lundberg, Johnson, Jacobson property” was clear and simple. F 62. That property line was readily ascertainable from the Application or recorder’s plats. F 30-39. The Manager’s “big” drawing bore the mark of the moving Council member, made the day before in the presence of the Manager and Mayor, and pointed out at the January 25th meeting. F 49, 63. The Council discussed the proposed reduction with the Manager, who also visually pointed out the revised boundary-line’s location to the Council. F 63. Before the vote was taken, the Manager satisfied himself that there were no questions about the revised boundary among the Council members. F 64. The Council expressed no confusion for the rest of the meeting, which adjourned over 100 minutes later. F 66-69.¹⁴

¹⁴ Any “confusion” arising on January 26th, as claimed by the City F 70-71, could not have been on the part of the Council because such post-meeting discussions would have violated Utah’s Open Meetings Act, §§ 10-3-601, 52-4-101, et seq., Utah Code. A parenthetical was added to the minutes of the January 25th meeting describing a request for clarification that occurred the next day. F 70. The fact that those references were (improperly, § 2.08.060, SMC) included in the minutes should not be taken as an indication that confusion existed within the Council. The Manager’s stated justification for the failure of the Staff and Mayor to follow through on the January 25th decision – “due to confusion on the part of the council” – (R 186) is therefore legally and factually incorrect.

Whatever uncertainty arose about the rezone boundary should have been resolved by reference to the City's ordinances governing zoning boundary determinations.¹⁵ The "south boundary of the Lundberg, Johnson, Jacobson property" was the northern boundary of the rezone by applying these ordinances' cardinal rules of construction, even absent the specificity of Council Member Monson.

It was illegal for "confusion" regarding the boundary line to be submitted to the Council for determination. The Council had no legislative discretion to

¹⁵ § 17.04.050, ZOS, F 11, provides:

Determination of Zoning District Boundaries: Where uncertainty exists with respect to the boundaries of the various zones, the following rules shall apply:

- A. Where the indicated boundaries on the zoning map are approximately street, railroad, public right of way, or alleyways, the centerline of the street, railroad, public railroad, public right of way or alley shall be construed to be the zone boundaries unless otherwise indicated.
- B. Where the indicated boundaries are approximately lot lines, the lot lines shall be construed to be the zoning district boundaries unless otherwise indicated.
- C. Where land has not been subdivided into lots and/or blocks, the zoning district boundaries shall be determined by use of the scale measurement shown on the map unless otherwise indicated.
- D. Where uncertainty continues to exist, the planning department shall interpret the map. That interpretation may be appealed to the board of adjustments.

§ 17.44.040, ZOS, F 17, provides, in pertinent part:

Rules for Locating Boundaries: Where uncertainty exists as to the boundary of any zone, the following rules shall apply:

- A. Wherever the zone boundary is indicated as being approximately upon the centerline of a street, alley or block, or along a property line, then, unless otherwise definitely indicated on the map, the centerline of such street, alley or block or such property line, shall be construed to be the boundary of such zone. . .
- C. Where the application of the rules in this section does not clarify the zone boundary location, the board of adjustment shall interpret the map.

interpret its own rezoning decision, because doing so invites re-rezoning in the guise of fixing an uncertain boundary. Once the Council legislates zoning, it cannot do so again without adherence to all of the legal prerequisites. Otherwise, § 10-9a-503, Utah Code and § 17.08.040, ZOS, governing rezone procedures, would be rendered meaningless in all cases where a nearby rezone had previously occurred. Hence there is wisdom and integrity in the City's system mandating direct or appellate routing of persisting boundary confusion to the Board of Adjustment, *see* fn 15, *supra*, complete with jurisdictional empowerment. §§ 17.02.030-040; F 14-15. Likewise, it was inappropriate for the Council to interpret its zoning ordinances in a way which re-invested the Council with a role in boundary clarification. Not only was the Council's interpretation incorrect, it was in the province of the Board/AA to interpret the City's zoning ordinances. § 10-9a-701(3)(ii), Utah Code.

Gittins' first attempt to bring the matter before the Board/AA was initially turned away, not by the Board/AA but by the City Manager. F 111, 114. Gittins then filed a second appeal to the Board/AA, this time challenging the Manager's accompanying interpretation of the City's zoning ordinances and asked that the first appeal be reinstated. F 127-131. The Board/AA held a hearing on April 27th. F 154. After considerable discussion centered primarily on jurisdiction, the Board/AA continued the hearing indefinitely, awaiting a determination from the court action, or some judicial guidance if the Board/AA were called upon to complete the appeal. F 163-64. The proceedings before the Board/AA have been

notable for the extensive ex parte efforts of the City to influence the Board, specifically the Chair, to deny Gittins' administrative appeals.¹⁶ On remand, the district court should be instructed to provide the Board/AA with the judicial guidance that it is still awaiting, so that Gittins' appeal from the City's zoning interpretations can be completed, and so that the body the City appointed to resolve zoning boundary questions can define the northern rezone boundary, if it is still deemed uncertain. Additionally, some provision should be made for the independence of the Board/AA. See § 10-9a-701(5), Utah Code. Such provision should include independent legal advice, as requested by the Board, along with appropriate procedures safeguarding the interests of all participants.

The Re-Rezone was an illegal method of rezoning a parcel left over from a previous rezone, under the pretext of "clarifying" an already-certain boundary.

D. THE RE-REZONE WAS NOT LEGAL AS FORMALITY CURE

The City claimed that the January 25th decision was "null and void" due to a perceived defect "that the Council must have the final written ordinance in front of them" before a vote may be taken. F 67, 70-72. This claim has apparent reference to the last sentence in § 10-3-506, Utah Code: "Every resolution or ordinance shall be in writing before the vote is taken."

¹⁶ The Chair and the Board/AA responded admirably, despite being frustrated at having no independent legal guidance. F 157. At the hearing, the Chair disclosed the details of the City's ex parte advocacy, F 157, and the Board/AA heard both sides before opting to table their decision. F 159-64.

Though this law speaks in mandatory terms, the violation of it does not render an ordinance “null and void.” It is not hard to imagine the havoc that the City’s position could inflict on its own ordinances. The appropriate rule is:

[A]n ordinance passed in pursuance of authority is not necessarily invalid because it omits some of the details of method or procedure mentioned in the charter or statute, unless the details are made prerequisite to its validity, as where it is declared that the ordinance shall be void if the method or procedure prescribed is not followed.

McQuillin Mun Corp § 16:10. The January 25th vote was not fatally defective.

Under §10-3-506, Utah Code, the January 25th vote was not defective at all. There was an ordinance draft in writing before the vote was taken. F 51-53. The Manager’s map with Council Member Monson’s mark on it¹⁷ was in writing before the vote was taken.¹⁸ F 63.

If the lack of a completed metes-and-bounds description prior to the vote were as problematic as the City claims, for dual reasons the City is not in a posture to decry the validity of the January 25th rezone. The Manager was previously aware of the location of a likely amendment. F 63. The Manager should have

¹⁷ The City has not produced this document. Discovery regarding the Manager’s “Big Map” with a “mark” on the boundary would be appropriate after remand.

¹⁸ The two written documents before the council (map/sketch and draft ordinance) contained enough information to result in a metes-and-bounds description. The City’s ordinance governing zoning boundary clarification, § 17.44.040, ZOS, F 17, presupposes that a valid ordinance may be lacking in specificity.

been prepared¹⁹ with whatever documentation would be needed to handle the anticipated business. Simple changes to the draft, such as hand written exceptions, would have satisfied the most imaginative concern. Staff was also apprised prior to the January 25th meeting, by an experienced former Council member (Gittins) to be prepared with possible written amendments. F 50. These warnings were ignored by Staff, apparently based on some legal advice or analysis. F 50. The City should not be heard to complain about the contrary after-the-fact perception that the vote was defective for want of a draft.

The written draft hullabaloo amounted to the City's raising, advocating and granting an un-filed appeal from the City's rezone decision of January 25th. If anyone were aggrieved by the City's partial rezone (probably the developers), they would be obliged to file a petition for review in the district court within 30 days (or commence a rezone request afresh) No one did so. Apparently Staff was convinced that such an appeal would have been meritorious . . . if it had ever been filed. Rather than wait to see if the original rezone solidified in 31 days, the City assumed the role of advocate for the original zoning application and created an opportunity for the earlier restriction to be destroyed.

The City pretends that the only potential cure for the supposed defect in the January 25th vote was the re-opening of the whole question to the Council. If there were a real problem with the amendment ordinance not having been in writing

¹⁹ The position of city manager is, by ordinance, for someone "highly skilled." § 2.04.010, SMC, F 2. The City's Manager by all indication fills that bill, with 23 years of experience. R 516.

before the January 25th vote, the perceived defect could have been cured in at least two ways: First, an ordinance faithful to the motion (using verbatim language from the minutes) could have been prepared, signed by the Mayor, attested by the Recorder, and posted. Under §§ 10-3-704-705, 712, Utah Code, the ordinance would have become effective, and not subject to challenge within a short time. Second, an ordinance faithful to the motion could have been prepared for the next meeting, and put on the “consent” agenda for a unanimous vote. RR § 4, Pp. 51-15; R 357-59.

The Re-Rezone was an illegal method of “curing” a non-defect.

III. THERE WAS EVIDENCE OF PREJUDICE

As shown above, the City’s land use decision of February 8, 2006 is illegal due to breach of procedural laws. The Utah Supreme Court has added an element, labeled “prejudice,”²⁰ that a challenger must show before obtaining relief from a procedurally illegal land use decision.

[P]laintiffs must establish that they were prejudiced by the City’s noncompliance with its ordinances or, in other words, how, if at all, the City’s decision would have been different and what relief, if any, they are entitled to as a result.

Springville Citizens for a Better Community v. City of Springville, 1999 UT 25, ¶ 31, 979 P.2d 332, 338. The prejudice requirement was reiterated by this Court in

²⁰ §10-9a-801(2)(a), Utah Code limits standing to a person “adversely affected” by a land use decision. There is no Utah case law correlating and distinguishing the statutory “adversely affected” requirement with the new common-law “prejudice” element.

Gardner v. Perry City, 2000 UT App 1, ¶¶ 19-20, 994 P.2d 811 (citing *Springville Citizens*).

The solitary mention of “prejudice” by the trial court in its decision was the following: “The Plaintiff was not prejudiced by the City’s action.” R 600.

It is unclear whether Judge Low intended this statement to be a ruling on the *Springville Citizens* “prejudice” element. Immediately following the statement, and still within the same paragraph, the trial court discussed the illegality element and concluded that the rezone was valid. As articulated in *Springville Citizens*, a prejudice analysis would be rendered pointless dictum in this situation. It is reasonable to interpret Judge Low’s statement as an expression that Gittins was not prejudiced because the rezone was valid. Without more elaboration on the part of Judge Low, it is an unreasonable stretch to assume the trial court intended to rule that if (contrary to the trial court’s view) the re-rezone were illegal, there was no evidence on the record from which a trier of fact could conclude or reasonably infer that prejudice had occurred, meaning that the City’s decision would have been different.

This Court should, in these circumstances, remand the matter to the trial court upon overruling the legality determination, and provide the trial court with instructions to consider the evidence the parties have provided and will provide on the issue of prejudice. *See Gardner* at ¶20.

Supposing Judge Low's statement was a ruling that Gittins did not demonstrate "how, if at all, the City's decision would have been different" if legally adequate procedures had been followed, that ruling was in error.

The trial court granted the City's motion for summary judgment. Summary Judgment is appropriate where there are no genuine issues as to material facts, and the moving party is entitled to judgment (on those facts) as a matter of law. Rule 56, Utah Rules of Civil Procedure. When examining the evidence at this stage, it must be viewed in the light most favorable to the non-moving party, and any doubts must be resolved in favor of allowing both parties the opportunity to present their respective cases to the trier of fact. *Lach v. Deseret Bank*, 746 P.2d 802 (Utah 1987); *Utah State University of Agriculture and Applied Science v. Sutro & Co.*, 646 P.2d 715 (Utah 1982). Therefore, Judge Low's prejudice ruling would necessarily include the determination that there was no evidence of "prejudice" as that element is used in the above-cited opinions.

In order to evaluate evidence of prejudice, one must first build a factually theoretical foundation by erasing the (procedural) illegalities. The next step is to predict whether and how the decision would have been different as a result of the hypothetical correction(s). Finally, the challenger should demonstrate a linkage between that projected difference in outcome to the relief the challenger is seeking.

As expressed in *Springville Citizens*, the burden of constructing this abstract house of evidence is on the challenger. As noted by this Court, the burden

may be “difficult – if not impossible” for a challenger to carry. But Gittins should be allowed to make the attempt. As demonstrated below, there is ample reason to expect that Gittins has shown and will show “prejudice.”

First, if the City had followed its procedures, there would not have been any reconsideration of the January 25th rezone. The Council did not have the option on February 8th to undo or redo what was done on January 25th. This is not a case involving legislative discretion, or the “reasonably debatable” standard. Gittins is defending, not attacking, the City’s January 25th decision.

Second, there is direct evidence that the Council would have made a different decision in a procedurally legal setting. The Council made a decision on January 25th. That decision was different from the one made on February 8th.

Third, the City provided no competent evidence to the effect that the decision would have been the same. In other words, the City’s motion for summary judgment, as related to the prejudice element, was factually unsupported. The City supplied the affidavits of all five of the Council Members present at the February 8th meeting. R 501-15. Paragraphs 10 of the affidavits of the four Council Members voting in favor of the Re-Rezone were identical:

The issue of whether or not Robert’s Rules of Order were strictly followed had no effect on my vote in favor of said Ordinance 06-01 on February 8, 2006. My vote in favor of adopting said Ordinance 06-01 would have been the same whether Robert’s Rules of Order were strictly followed or not.

R 506, 509, 512, 515. These terms are vague and conclusory. Testimony that Roberts Rules weren’t followed does not reach the other ordinance-related

illegalities in the February 8th vote. The affiants are silent on which of the Roberts Rules they are referring to, which ones were actually not followed, and which ones, in their hypothetical, would have been followed. Use of the qualifier “strictly” lends an added fog of generality. The only way to translate what each Council Member says about the unstated conditions in their unspecified hypothetical is through raw speculation.

Fourth, Gittins requested the opportunity, under Rule 56(e), Utah Rules of Civil Procedure, to “permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.” R 65-66. That this request was ignored is further indication that Judge Low did not intend to rule out the element of “prejudice.” If the City’s proof on this point is deemed relevant and competent, Gittins should have the chance to explore and test the City’s self-serving affidavits before the courtroom door closes.

CONCLUSION

The presumption of validity afforded the February 8th re-rezone has been overcome. That decision was illegal, made in violation of Utah's statutes and the City's ordinances. This Court should reverse the Declaratory Judgment and remand to the district court with instructions to: (a) enter partial summary judgment for Gittins declaring the decision to be illegal and void; (b) proceed with discovery and trial on the question of prejudice; (c) provide to the Board/AA guidance as to its role under the City's zoning ordinances, including boundary determinations; and (d) direct the City to provide the Board/AA with resources and safeguards so that the Board/AA's independence is protected, at least through the conclusion of proceedings related to this action.

RESPECTFULLY SUBMITTED October 22, 2007.

CHRIS DAINES LAW

A handwritten signature in black ink, appearing to read 'Chris Daines', is written over a horizontal line.

Chris Daines
Attorney for Appellant

CERTIFICATE OF SERVICE

On October 22, 2007, I hand-delivered two copies of the foregoing Brief of

Appellant, with Addendum, to the following:

James C. Jenkins
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A handwritten signature in black ink, appearing to read "Chris Daines", is written over a horizontal line.

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Tab 1

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IN THE FIRST DISTRICT COURT, CACHE COUNTY, STATE OF UTAH

JEFFRY R. GITTINS,
Petitioner,
vs.

SMITHFIELD CITY,
Defendant.

**MEMORANDUM SUPPORTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT –
STATEMENT OF FACTS**

Case No. 060100558

Judge Gordon J. Low

Petitioner respectfully submits the following Memorandum in support of Petitioner's motion for summary judgment – statement of facts. Argument will be presented separately.

STATEMENT OF MATERIAL FACTS

Pursuant to Rule 7(c)(3)(A), Utah Rules of Civil Procedure, Appellant makes the following statement of material facts as to which Appellant contends no genuine issue exists.

Pertinent Smithfield City Ordinances

1. Each section of the Smithfield Municipal Code ("SMC") and Zoning Ordinance of Smithfield, Utah ("ZOS") quoted below was an ordinance of Smithfield City in effect on February 8, 2006. Petitioner requests that the Court take judicial notice of each of these ordinances pursuant to Rule 201, Utah Rules of Evidence. Copies of the ordinances, taken from

11-20-06
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(12)

Smithfield City's website in March of 2006, are provided as Exhibits (referred to hereafter as "Tabs") 26-40.

2. § 2.04.010, SMC, titled "**Established**," provides in part as follows (Tab 26, Pp. 1-2):

- A. Established: There is established a manager form of government for Smithfield, Cache County, Utah. . . .
- F. General Description: Performs highly skilled administrative work involving a wide variety of responsibilities in the management of city government.
- G. Supervision Received: Shall be at all times under the direction of the mayor and the city council.
- H. Supervision Exercised: Has supervision over all department heads. Appoints, with advice and consent of the mayor and council, all department heads and statutory officers. May suspend or remove employees subject to personnel policies and report same to mayor and council. . . .
- I. Example of Duties: Duties shall include, but not be limited to, below:
 - 1. Attend all council meetings and take part in discussion but without right to vote;
 - 2. Implements the policies and programs established by the council; . . .
 - 3. Submits to the council plans and programs established by the council.
 - 7. Has primary responsibility for handling public relations and reviewing citizen complaints; . . .
 - 11. Assumes additional duties of engineer and building inspector.

3. § 2.08.030, SMC, titled "**Rules of Procedure**," provides as follows (Tab 26, p.3):

Except as otherwise specifically required or provided by law, this chapter, or by resolution of the governing body, the most current edition of "Robert's Rules of Order" shall govern the procedure and conduct of the meetings of the governing body.

4. § 2.08.040, SMC, titled "**Agenda**," provides as follows (Tab 27):

All reports, communications, ordinances, resolutions, contract documents or other matters to be submitted to the governing body shall be delivered to the recorder/clerk, at least twenty four (24) hours prior to each governing body meeting, whereon the recorder/clerk shall immediately arrange a list of such matters according to the order of business and furnish each member of the governing body, and when present, the attorney, with a copy of the same prior to the governing body meeting and as far in advance of the meeting as time for preparation will permit. Only the foregoing matters shall be presented to the governing body by administrative officials, except those of an urgent nature, provided that the governing body may, by motion, waive the requirements of this section.

5. § 2.08.050, SMC, titled “**Order of Business**,” provides as follows (Tab 28):

A. At the time and place set for each meeting of the members of the governing body, the business of the municipality shall be taken up for consideration and disposition as provided for by the agenda.

6. § 2.08.060, SMC, titled “**Record of Proceedings**,” provides as follows (Tab 29):

The recorder/clerk shall keep a record of proceedings of the meetings of the governing body, except that minutes of the executive session shall not be available to the public until such time as the governing body shall make them public or by an order of court.

7. § 2.40.030, SMC, titled “**Organization**,” provides in part as follows (Tab 30):

The board of adjustment shall elect a chairman and may adopt such rules for its own proceedings as are deemed necessary. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. . . .

8. § 17.04.020, ZOS, titled “**Purpose of Title**,” provides as follows (Tab 31):

This title is designed and enacted for the purpose of promoting the health, safety, and welfare, and promote the prosperity, improve the morals, peace and good order, comfort, convenience, and aesthetics of the present and future inhabitants and businesses of Smithfield, Utah, including, among other things, the lessening of congestion in the streets or roads, securing safety from fire and other dangers, providing adequate light and air, protecting the tax base, securing economy in governmental expenditures, fostering the city’s commercial and industrial growth and the protection of both residential and nonresidential development.

9. § 17.04.030, ZOS, titled “**Interpretation**,” provides as follows (Tab 32):

In interpreting and applying the provisions of this title, the requirements contained herein are declared to be the minimum requirements for the purposes set forth.

10. § 17.04.040, ZOS, titled “**Conflict**,” provides as follows (Tab 33):

Wherever higher or more restrictive standards are established by the provisions of any other applicable statute, ordinance, or regulation that are established by the provisions of this title, the provisions of such other statute, ordinance, or regulation shall govern.

11. § 17.04.050, ZOS, titled “**Determination of Zoning District Boundaries**,” provides as follows (Tab 34):

Where uncertainty exists with respect to the boundaries of the various zones, the following rules shall apply:

- A. Where the indicated boundaries on the zoning map are approximately street, railroad, public right of way, or alleyways, the centerline of the street, railroad, public railroad, public right of way or alley shall be construed to be the zone boundaries unless otherwise indicated.
- B. Where the indicated boundaries are approximately lot lines, the lot lines shall be construed to be the zoning district boundaries unless otherwise indicated.
- C. Where land has not been subdivided into lots and/or blocks, the zoning district boundaries shall be determined by use of the scale measurement shown on the map unless otherwise indicated.
- D. Where uncertainty continues to exist, the planning department shall interpret the map. That interpretation may be appealed to the board of adjustments.

12. § 17.04.070, ZOS, titled “**Definitions**,” provides as follows (**Tab 35**):

For the purposes of this title, the following terms and words and their derivations shall have the meaning as given in this section. When not inconsistent with the context, words used in the present tense include the future, words in the singular number include the plural, and the plural the singular. “Shall” is always mandatory. Words not included in this section, but which are defined in the building code, shall be construed as defined therein. Words which are not included herein or in the building code shall be given their usual meaning as found in the English dictionary, unless the context of the words clearly indicates a different meaning. Definitions of words applicable particularly to certain chapters shall be included in those chapters.

13. § 17.08.040, ZOS, titled “**Changes and Amendments**,” provides as follows (**Tab 36**):

The ordinance codified in this title, including the maps, may be amended from time to time by the Smithfield city council after fifteen (15) days’ notice and public hearing but all proposed amendments shall be first proposed by the planning commission or shall be submitted to the planning commission for its recommendation, which shall be returned to the Smithfield city council for its consideration within thirty (30) days. Failure of the planning commission to submit its recommendation within the prescribed time shall be deemed approval by such commission of the proposed change or amendments. The Smithfield city council may overrule the planning commission’s recommendations by a majority vote of its members.

14. § 17.20.030, ZOS, titled “**Duties and Power of Board**,” provides in part as follows (**Tab 37**):

The board of adjustment shall hear and decide:

- A. Appeals where it is alleged that there is error in any order, requirement, decision or refusal made by an administrative official or agency based on or made in the enforcement of the zoning ordinance.
- E. Interpret the zoning map.

15. § 17.20.040, ZOS, titled “**Appeals**,” provides in part as follows (Tab 38):

- A. The applicant or any other person or entity adversely affected by a decision administering or interpreting a zoning ordinance may appeal that decision applying the zoning ordinance by alleging that there is error in any order, requirement, decision, or determination made by an official in the administration or interpretation of the zoning ordinance. . . .
- C. The person or entity making the appeal has the burden of proving that an error has been made.
- D. Only zoning decisions applying to the zoning ordinance may be appealed to the board of adjustment. A person may not appeal and the board of adjustment may not consider, any zoning ordinance amendments. Appeals may not be used to waive or modify the terms or requirements of the zoning ordinance.
- E. The chairperson shall call for a meeting of the board of adjustment within a reasonable time from the date the appeal is received. Written notice of the date set for hearing the appeal shall be mailed to the applicant at least seven (7) days before the appeal hearing date. After hearing the appeal, the board of adjustment may reverse, or affirm, wholly or partly, or may modify the order, requirement, decision or determination as ought to be made.

16. § 17.44.020, ZOS, titled “**Boundaries of Zones**,” provides as follows (Tab 39):

The boundaries of each of the said zones are established as described in this title or shown on the map entitled “Zoning Map of Smithfield, Utah”, which map is attached to the ordinance codified in this title and found on file in the office of the city recorder and all boundaries, notations and other data shown thereon are made by this reference as much a part of this title as if fully described and detailed herein.

17. § 17.44.040, ZOS, titled “**Rules for Locating Boundaries**,” provides in part as follows (Tab 40):

Where uncertainty exists as to the boundary of any zone, the following rules shall apply:

- A. Wherever the zone boundary is indicated as being approximately upon the centerline of a street, alley or block, or along a property line, then, unless otherwise definitely indicated on the map, the centerline of such street, alley

or block or such property line, shall be construed to be the boundary of such zone. . . .

- C. Where the application of the rules in this section does not clarify the zone boundary location, the board of adjustment shall interpret the map.

Robert's Rules of Order

18. Each rule of Robert's Rules of Order ("RR") quoted below was a rule from "the most current edition of 'Robert's Rules of Order,'" namely Robert's Rules of Order Newly Revised, 10th Edition, in effect on February 8, 2006. Petitioner requests that the Court take judicial notice of each of these rule pursuant to Rule 201, Utah Rules of Evidence. Copies of the rules, taken from the book listing authors Henry M. Robert III, William J. Evans, Daniel H. Honemann, and Thomas J. Balch, published by Da Capo Press, Copyright 2000. A copy of the full book is delivered herewith to the Court. It is assumed that Smithfield City has a copy available for use or verification by their counsel. The rules quoted below are found at Tabs 41-48. The Exhibit Table of Contents notes which copies are excerpts. Brackets denote pages and lines from the book.

19. § 1, RR, titled "**The Deliberative Assembly**" provides in part as follows (Tab 41, p. 3):

The term *meeting* is also distinguished from *session*, according to definitions stated in 8. A session may be loosely described as a single complete course of an assembly's engagement in the conduct of business, and may consist of one or more meetings. [2, l. 3-7]

20. § 2, RR, titled "**Rules of an Assembly or Organization**" provides in part as follows (Tab 42, Pp. 1-2):

An organized society requires certain rules to establish its basic structure and manner of operation. In addition, a need for formally adopted rules of procedure arises in any assembly, principally because there may be disagreement or a lack of understanding as to

what is parliamentary law regarding points that can affect the outcome of substantive issues. [9, l. 35 – 10, l. 4].

When a society or an assembly has adopted a particularly parliamentary manual – such as this book – as its authority, the rules contained in that manual are binding upon it in all cases where they are not inconsistent with the bylaws (or constitution) or any special rules of order of the body, or any provision of local, state, or national law applying to the particular type of organization. [16, l. 8-14]

21. § 3, RR, titled “**Basic Provisions and Procedures**” provides in part as follows (Tab 43, Pp. 8-10):

Business is brought before an assembly by the *motion* of a member. [26, l. 14-15]

A motion is a formal proposal by a member, in a meeting, that the assembly take certain action. [26, l. 19-20]

After the presentation of the report of an officer, a board, or a committee, one or more motions to carry out recommendations contained in the report may be introduced. [27, l. 9-12]

Business may come up automatically at a certain time, without a motion *at that time*, if the motion by which it was introduced has previously been postponed (14) or made a special order (41). In such cases, the business is announced at the proper time by the chair. [28, l. 2-8]

22. § 4, RR, titled “**The Handling of Motions**” provides in part as follows (Tab 44, Pp. 1, 10):

The three steps by which a motion is normally brought before the assembly are as follows:

- 1) A member *makes* the motion. (The words *move* and *offer* also refer to this step. A person is said to “make a motion,” but he uses the word “move” when he does so. He is also said “to move” a particular proposal, as in “to move a postponement.”)
- 2) Another member *seconds* the motion.
- 3) The chair *states the question on the motion*. (The step of stating the question on the motion should not be confused with *putting the question*, which takes place later and means putting the motion to a vote.)

Neither the making nor the seconding of a motion places it before the assembly; only the chair can do that, by the third step (stating the question). When the chair has stated the question,

the motion is *pending*, that is, “on the floor.” It is then open to debate (if it is a main motion or one of several other *debatable* parliamentary motions, which are described in later chapters). If the assembly decides to do what a motion proposes, it *adopts* the motion, or the motion is *carried*; if the assembly expressly decides against doing what the motion proposes, the motion is *lost*, or *rejected*.

[31, l. 11-34]

Once a main motion has been brought before the assembly through the three steps described above, there are three further basic steps by which the motion is considered in the ordinary and simplest case (unless it is adopted by *unanimous consent*, as explained on pp. 51-53). These normal steps are as follows:

- 1) Members *debate* the motion (unless no member claims the floor for that purpose).
- 2) The chair *puts the question* (that is, puts it to a vote).
- 3) The chair *announces the result* of the vote.

[40, l. 21-31]

23. § 5, RR, titled “**Meeting, Session, Recess, Adjournment**” provides in part as follows

(Tab 45, Pp. 1, 3-4):

A *meeting* of an assembly is a single official gathering of its members in one room or area to transact business for a length of time during which there is no cessation of proceedings and the members do no separate, unless for a short *recess*, as defined below. [79, l. 17-21]

An *adjournment* (that is, the act of the assembly’s adjourning) terminates a meeting; it may also end the session. [81, l. 3-5]

In a permanent society whose bylaws provide for regular weekly, monthly, or quarterly meetings that go through an established order of business in a single afternoon or evening, each “meeting” of this kind normally completes a separate session – unless the assembly at such a meeting schedules an *adjourned meeting* as explained on pages 90-91. This rule is the common parliamentary law and holds except where a special rule in the bylaws provides otherwise. Although any society has the right to define, in its bylaws, what shall constitute a session of the organization, it is usually unwise in ordinary societies to adopt a rule making regular sessions last over a long period of time. Such a rule would make it possible for the hands of the organization to be tied during that time, since the same question cannot be brought up again during the same session after it is too late to reconsider (37) a vote that has finally disposed of a motion without adopting it (that is, a vote that has rejected or indefinitely postponed it or has sustained an objection to its consideration; see 11, 26). [81, l. 29 – 82, l. 14].

24. § 9, RR, titled “**Particular Types of Business Meetings**” provides in part as follows

(Tab 46, p. 1):

The term *regular meeting* (or *stated meeting*) refers to the periodic business meeting of a permanent society, local branch, or board, held at weekly, monthly, quarterly, or similar intervals, for which the day (as, “the first Tuesday of each month”) should be prescribed by the bylaws and the hour should be fixed by a standing rules of the society.....Each regular meeting normally completes a separate session, as explained on pages 81-82 (see *Adjourned Meeting*, pp. 90-91 below, however). [87, l. 17-22, 27-29]

25. § 33, RR, titled “**Requests and Inquiries**” provides in part as follows (Tab 47, p. 1):

In connection with business in a meeting, members may wish to obtain information or to do or have something done that requires permission of the assembly. Any member can make the following types of inquiry or request: (a) *Parliamentary Inquiry*; (b) *Point of Information*; (c) *For Permission (or leave) to Withdraw or Modify a Motion*; (d) *To Read Papers*; and (e) *For Any Other Privilege*. [280, l. 19-25]

26. § 37, RR, titled “**Reconsider**” provides in part as follows (Tab 48, Pp 1-3, 6, 10):

Reconsider – a motion of American origin – enables a majority in an assembly, within a limited time and without notice, to bring back for further consideration a motion which has already been voted on. The purpose of reconsidering a vote is to permit correction of hasty, ill-advised, or erroneous action, or to take into account added information or a changed situation that has developed since the taking of the vote.

To provide both usefulness and protection against abuse, the motion to *Reconsider* has the following *unique characteristics*:

a) It can be made only by a member who voted with the prevailing side.
[304, l. 18-32]

b) The making of this motion is subject to time limits, as follows: In a session of one day – such as an ordinary meeting of a club or a one-day convention – the motion to *Reconsider* can be made only on the same day the vote to be reconsidered was taken . . .
[305, l. 26-30]

The motion to *Reconsider*: . . . [306, l. 24]

4. Must be seconded at the time it is made. [309, l. 1]

The effect of the adoption of the motion to *Reconsider* is immediately to place before the assembly again the question on which the votes is to be reconsidered – in the exact position it occupied the moment before it was voted on originally [313, l. 26-30].

Filing of Petition for Review

27. This action was commenced when Jeffry R. Gittins (“Petitioner”) filed a Petition for Review with the Court on March 10, 2006. .*See* the Court’s own record.

The Application for Rezone

28. The abbreviations and acronyms listed below are used to signify the following meanings:

“Board/AA” means the Smithfield City Board of Adjustment / Appeal Authority;

“Chair” means the Chairperson of the Board/AA, Robert Buckley

“Compass” means Compass Point Homes;

“Council” means the Smithfield City Council;

“City” means Smithfield City;

“Manager” means the Manager (unelected position) of the City, James P. Gass;

“Mayor” means the Mayor (elected position) of the City, Chad E. Downs;

“Council Member” means a member of the Council (elected position),
Brent Buttars, Deon G. Hunsaker, Kris Monson, Dennis Watkins, and Dee Wood;

“NNHC” means Neighborhood Nonprofit Housing Corp.;

“P&Z” means the Smithfield City Planning and Zoning Commission;

“Staff” means and includes unelected City employees and officers.

29. On December 5, 2005, the Developers applied to the City ("the Application") for a rezone of 25.5 acres from R-A-1, A-5, and A-10 to R-1-12, which would allow homes on 12,000 sq.-ft. lots. Tab 1.

30. The Application included legal descriptions on the parcels involved, including 08-079-0018 and 08-079-0019 ("Parcel 18" and "Parcel 19"). Tab 1, p. 3.

31. The concept and subdivision sketches that accompanied the Application included sketches for property lines outside the proposed development ("Park Place"), including Parcels 18 and 19, and listed "Lundberg, Johnson & Johnson [sic], Inc." and "Mickelson Investments, LLC," respectively, as owners of the two parcels. Tab 1, Pp. 5-6.

32. The boundary between Parcels 18 and 19 (the "M/LJJ" boundary), as shown on the sketches, meets the western edge of Park Place just north of the northwest corner of Park Place lot 7. Tab 1, Pp. 5-6.

33. The plats from the Cache County Recorder's office that include Parcels 18 and 19 are 08-079, pages 1, 2, and 3. Tab 16, Pp. 23-24; Tab 21, Pp. 1-3.

34. Tab 21, page 4 is an approximation of what the portions of the plats that include Parcels 18 and 19 would look like if pages 2 and 3 were reduced to the scale of page 1, and placed to overlap and intersect page one so that all three pages are on one page, and then the area where Parcels 18 and 19 are located were enlarged.

35. Tab 21, page 5 is an approximation of what the sketch of Park Place that was included in the Application would look like if it were reduced to a scale approximately the same as the scale of Tab 21, page 4.

36. Tab 21, page 6 is a copy of Tab 21 page 5 and Tab 21, page 6, combined.

37. Tab 22, page 1 is a transparent copy of Tab 21, page 5.

38. Tab 22, page 2 is a copy of Tab 21, page 4.

39. Tab 23 is a copy of Tab 21, page 6, with the M/LJJ property boundary, as shown on Tab 21-6, highlighted in pink.

40. The Application included a legal description of the boundary of the proposed subdivision, reciting that it contained “32.3 acres more or less.” Tab 1, p. 7.

41. The Application included a legal description of the boundary of the proposed rezone, reciting that it contained “25.5 acres more or less.” Tab 1, p. 7.

42. The legal description for the rezone boundary has 14 “calls” (each “call” being a distance combined with a direction) from the point of beginning and back. Tab 1, p. 7.

Proceedings of the Smithfield Planning & Zoning Commission

43. P&Z held a public hearing on the Application on January 18, 2006. Tab 2, Pp. 1-4; Tab 3, Pp. 1-14.

44. Petitioner’s letter to P&Z incorporated into its minutes as Exhibit “B,” includes the following statement (Tab 2, p. 7):

There is no doubt in my mind, that a development of the size and proximity being proposed would have an adverse effect on our dairy business. I know from experience that the sights, smells and sounds of a dairy (despite promises and claims that people are fully aware) are not compatible with subdivisions. I also know that, more often than not, those proposing developments of this nature, have no intention of living here themselves; but rather make the impact on the community and move on.

45. During the public hearing an agent Compass had the following exchange with Council Member Monson, who was attending the hearing (Tab 3, p. 5):

Kevin Allen: When is the right time? – I would like to know.

Monson: Well maybe when all the cows dry up, I don't know. Where are these dairies supposed to go, where are the animals supposed to go?

Kevin Allen: There are no dairies where this development is taking place.

Monson: Yes there is – Jeff Giftin's [Gittins'].

Kevin Allen: Next to it, but not on the property.

Monson: He also has been using that property for many years.

Kevin Allen: And therein lies the problem. It's not Jeff Gittins' property. It's my family's property I'm Kevin Allen from Compass Point Homes Mickelson Investments. We've owned that property for 20 years. It's not Jeff Gittins' property. It's not your property.

Monson: Understand that.

Kevin Allen: But yet she wants to force us to keep it open so that he can rent it for next to nothing.

46. P&Z voted to recommend denial of the Application by a 4 to 2 margin. Tab 2, p. 4.

Proceedings of the Smithfield City Council – January 25

47. An agenda was posted on January 20, 2006 providing "Public Notice . . . that the Smithfield City Council will meet in a regular scheduled meeting . . . on Wednesday, January 25, 2006," beginning at 6:30 p.m. Tab 4.

48. Item 5 on the agenda included: "Public Hearing to begin at 7:00 p.m. to receive public comment for consideration of Ordinance 06-01, 'A request [of the Developers] . . . to rezone property . . .'" Tab 4.

49. According to a statement of Council Member Monson to the Board/AA, Council Member Monson met with the Manager and the Mayor on January 24th and "put a mark [on a

“big map” the Manager had] where I thought the line [proposed adjusted northern boundary of rezone] should be just a small mark . . .” Tab 20, p. 12.

50. The following occurred on the evening of January 24th, according to a statement of Petitioner to the Board/AA (Tab 20, p. 9):

I went before then, having been on the city council and said, to two different staff members, “I’m trying to get a hold of Mayor Downs the night before,” and as Chad knows I was leaving town and his phone was very hot and busy the night before. But the question I asked the two staff members separately was “Don’t they have to have it in writing before them?” “No, under the new LUDMA laws they can approve an and all parts of it.” I said, “It’s my understanding that we need to have this in writing.” “No, no, that doesn’t have to happen – they can pass any amendment, part of it or whatever under the new LUDMA laws. . . . [T]hat’s what I was told so I went away feeling somewhat satisfied that should there be some sort of amendment or whatever, they could handle it.

51. A draft of Ordinance No. 06-01, was prepared by January 25th. Tab 5.

52. The draft ordinance’s legal description recited “Containing 24.5 acres.”¹ Tab 5.

53. The legal description had 8 “calls”² from the point of beginning and back. Tab 5.

54. According to the minutes, “[t]he Smithfield City Council met in a regular scheduled meeting . . . on Wednesday, January 25, 200[6]” with a quorum. Tab 6, p. 1.

55. According to the minutes, item 5 on the agenda at the January 25th meeting was still in the identical language as in the previously posted agenda. Tab 6, p.2.

56. According to the minutes, the public hearing on the rezone request was held at the meeting, and closed at 7:40 p.m. Tab 6, p.6.

¹ The one-acre discrepancy between the Application and the Draft is apparently due to one acre on the southern part of the requested rezone already having been located in the R-1-12 zone, making it’s inclusion in the Draft redundant.

² The six-call discrepancy between the Application and the Draft is due in part to the one-acre discrepancy noted above, and partly due to a cleaning up of legal descriptions which produced other deminimus variations between the Application and the Draft. But for all practical purposes, the Draft included the Developers’ entire request.

57. According to the minutes, a discussion ensued in which each of the five Council Members participated. Tab 6, Pp. 6-8.

58. According to the minutes, during the discussion, Council Member Buttars said at the conclusion of his remarks: "There needs to be a compromise." Tab 6, p.7.

59. According to the minutes (Tab 6, p. 7), next, Kevin Allen (of Compass)

Discussed the use of the lots to the north along with the southern lots to make the Non-profit program affordable. Mr. Allen's company will help with the roads and other infrastructure. This makes the development possible.

60. According to the minutes, next, Kim Datwyler (of NNHC) said "The Non-profit plan is for three to five years." Tab 6, p. 7.

61. According to the minutes, after the discussion, the following motion was made: "Council Member Wood moved to approve Ordinance 06-01 as presented, seconded by Council Member Watkins." Tab 6, p. 8.

62. According to the minutes, after the motion, the following occurred (Tab 6, p. 8):

Question on the motion:

Council Member Monson asked that a modification be considered. Move the line south. Then Ms. Monson would like to re-open the General Plan and put the balance of that area back in the agricultural zone.

The northern line of the re-zone request be moved south to the point directly in line with the south boundary of the Lundberg, Johnson, Jacobson property on the west side of what would be 600 West. This would eliminate four rows of proposed houses.

Council Member Hunsaker asked about just one egress from the development.

Council Member Wood and Council Member Watkins agreed to the modification.

63. The following also occurred during the discussion, as later related by Council Member Monson to the Board/AA (Tab 20, Pp. 12-13):

Isn't it Kris Monson? Mr. Daines, you know you said there was considerable confusion over the lines were to be drawn. I don't know the procedure.

Board member Toolson: Kris, what I'd like to do is ask that night of the Smithfield City Council when it was voted 5-0, correct, was at the time confusion among the council?

Council member Kris Monson: There was some confusion so Jim stood up and showed us a big map which he had. The day before I met with he and the mayor and put a mark where I thought the line should be just a small mark and so when there was confusion he stood up and held up the map, I pointed that mark out exactly where it was. But we were also given small maps in front of each of us, the two people off the side of me said "Where is that on this little map?" I wasn't exactly sure, but I did say "I'm fine with the property boundary." There was a definite property boundary drawn on the small map. I did say "That's fine with me and that's where I'll propose that we do it is along that property boundary." So I did say on that map the property boundary that had been marked on the map.

Board member Toolson: There were multiple maps, just different variation in size?

Monson: it was just a small map and it was just a little bit different than the great big map that we had.

Toolson: Nothing deviated in maps?

Monson: They weren't exact – the big map and the small maps weren't exact as far as the markings. So could that be where some of the confusion could have arose from?

C. Daines: Possibly I didn't say there was confusion – I wasn't there that night.

Toolson: Neither was I.

C. Daines: Jim Gass is the one in his chronology that says there was confusion.

Toolson: Right – I know Kris was there and I just wanted her opinion. Thank you.

C. Daines: It was either the north line of the Mickelson property or the south line of the Lundberg-Jacobson-Johnson property.

Kris: That was the line.

64. According to testimony of an eye-witness, after the discussion ended, the Manager “asked the Council if anyone had any questions. No one responded that they had a question.” Tab 49, p. 2.

65. According to the Manager in a March 3rd letter to Petitioner (the “March 3rd Letter”), there was “confusion on the part of the council as to what the modification was.” Tab 12, p. 2.

66. According to the minutes, the following vote was taken after the discussion (Tab 6, p. 8):

Voted yea: Buttars, Hunsaker, Monson, Watkins, Wood
Voted nay:

67. According to a parenthetical note in the minutes of the February 8th Council meeting (Tab 9, p. 10).

At the last City Council Meeting [January 25th] an amendment to the motion to approve this request as presented was made and agreed on. However the proper language of the motion was not in writing. . .

68. According to the minutes, after a presentation by the Fire Chief, the meeting adjourned at 8:59 p.m. and reconvened 23 minutes later. Tab 6, Pp. 8-9.

69. According to the minutes, at the conclusion of all business, the following occurred: “Motion: Council Member Monson moved to adjourn, seconded by Council Member Wood, Unanimously approved. Adjourned at 10:40 pm.” Tab 6, p. 11.

Between Council Meetings

70. According to a parenthetical in the minutes of the January 25th, meeting, the following occurred on the morning of January 26th (Tab 6, p. 8)

On Thursday, morning a called was placed to David Church, Legal Council for the Utah League of Cities and Towns by Jim Gass and Dean Clegg asking for clarification as to

the correct way to handle the modified ordinance.. The mayor did not sign the Ordinance Wednesday night due to the proposed changes not being in writing. Mr. Church explained that the Council must have the final written ordinance in front of them to pass any ordinance. Therefore the modification must be made and presented to the Council in final form before a to vote is taken to pass or deny the ordinance."

71. According a document titled "Chronology" prepared by Staff (the "Chronology"), the following occurred on January 26th (Tab 15, p. 2):

Considerable confusion surfaced over where the line was to be drawn between the area approved for rezone and that to remain unchanged. Conversation was held with Dave Church, legal counsel for the Utah League and City and Towns, Bruce Jorgensen, City Attorney, and Craig Call the State's Ombudsman. The city was informed the action taken by the city council was not proper because the motion represented an area different from that which appeared on the prepared rezone ordinance before the council. Where a properly worded ordinance amendment had not been prepared, signed by the mayor, or posted it was not valid and considered null and void. It was therefore necessary to reconsider the ordinance with the area to be rezoned being properly described.

72. According to a memo dated April 18th from the Manager to P&Z ("the April 18th Memo"), in between the Council meetings of January 25th and February 8th, the following occurred (Tab 25, p. 2):

Prior to the final vote on the rezone [February 8th], the city consulted with the city attorney, Bruce Jorgensen, and the attorney for the Utah League of Cities and Towns, Dave Church as guidance and direction was sought on the matter. Because of their assurances we feel confident the rezone will be upheld by both the board of adjustments and the district court. However, nothing is assured and anything can happen.

Petitioner moves for supplementation of the record to include this entire memorandum, since page one is already a part of the record, and the contents of page two are referred to by reference in other parts of the record.³

³ This page of the two-page memo was not included in the copy of the record Petitioner received, though the first page of the memo was in the "Subdivision" (green) folder. This copy of page two comes from Petitioner's counsel's files. It was obtained at a P&Z meeting on April 19th and forwarded to the City's counsel the next day under cover of a letter (Tab 17). The April 20th cover letter was found in the "Appeals" (yellow) folder, but not with the enclosure.

73. An article in the Herald Journal was published on January 27th stating among other things (Tab 50, Pp. 6-7):

The council voted unanimously to rezone the revised portion of land, which omits the Lundberg, Johnson and Johnson land.

Datwyler [of NNHC] doesn't think the final vote was clear, though. . . . Where the line was drawn is still questionable and city staff were unable Thursday to determine exactly where it is.

"They didn't give us a chance to say that was half of our lots," Datwyleer said. "Maybe the outcome would have been different."

74. An agenda was posted on February 6th providing "Public Notice . . .that the Smithfield City Council will meet in a regular scheduled meeting . . . on Wednesday, February 8, 2006," beginning at 6:30 p.m. Tab 7.

75. Item 10 on the agenda stated in its entirety (Tab 7, p. 1):

Consideration of Ordinance 06-01 "A request from Neighborhood Nonprofit Housing Corporation to re-zone property located from approximately 600 West 200 North from A-10 (Agricultural 10-acre), A-5 (Agricultural 5-acre), RA-1 (Residential Agricultural, 1-acre) to R-1-12 (Single Family Residential, 12,000 square foot)"
(Public hearing held January 25, 2006)

76. Four unsigned drafts of Ordinance No. 06-01 each dated February 8th are in the record of the rezone proceedings. Tab 8.

77. The draft titled "ORDINANCE NO. 06-01 Blue" has a legal description, followed by "Containing 7.46 acres." Tab 8, p. 2.

78. This "Blue" draft has 8 "calls" starting with "North 4.03 chains." Tab 8, p. 1 [misabeled "8-2"].

79. The draft titled "ORDINANCE NO. 06-01 Green" has a legal description, followed by "Containing 8.86 acres." Tab 8, p. 2.

80. This “Green” draft has 8 “calls” starting with “North 5.13 chains.” Tab 8, p. 2 [mislabeled “8-3”].

81. The draft titled “ORDINANCE NO. 06-01 Purple” has a legal description, followed by “Containing 11.41 acres.” Tab 8, p. 2.

82. This “Purple” draft has 8 “calls” starting with “North 7.13 chains.” Tab 8, p. 3 [mislabeled “8-1”].

83. The draft titled “ORDINANCE NO. 06-01 Red” has a legal description, followed by “Containing 15.51 acres.” Tab 8, p. 2.

84. This “Red” draft has 8 “calls” starting with “North 10.35 chains.” Tab 8, p. 3 [mislabeled “8-1”].

85. Tab 24 is an approximation of what the northern portion of the sketch of Park Place that was included in the Application would look like if lines following the northern boundaries of the four draft ordinances were drawn roughly according to the legal descriptions, and highlighted in the colors, corresponding to the colors listed in the respective titles.

Proceedings of the Smithfield City Council – February 8

86. “The Smithfield City Council met in a regular scheduled meeting . . . on Wednesday, February 8, 200[6]” with a quorum. Tab 9, p. 1.

87. Item 10 on the agenda at the February 8th meeting was still in the identical language as in the previously posted agenda. Tab 9, p.2.

88. After dealing with the previous nine items on the agenda, the Council proceeded with the item of business described as “Consideration of Ordinance 06-01 “A request from

Neighborhood Nonprofit Housing Corporation to re-zone property . . . (Public hearing held January 25, 2006).” Tab 9, p.10.

89. According to the March 3rd Letter, “the matter [of the rezone request] was brought back to the city council for reconsideration.” Tab 12, p. 2.

90. According to a note in the Chronology “[t]he matter before the city council was exactly the same as it was in the previous city council meeting when public comment was taken.” Tab 15, p. 2.

91. According to the Chronology, “The city council again reviewed the request of Neighborhood Nonprofit to rezone 25 acres.” Tab 15, p. 2.

92. According to the minutes, “City Manager Jim Gass presented four copies of what members of the Council felt was the northern boundary line that had been agreed on in the last meeting.” Tab 9, p. 10.

93. According to the March 3rd Letter: “At that meeting several versions of the ordinance was presented, each with a colored map depicting the boundary as described within the body of the associated ordinance.” Tab 12, p. 2.

94. According to the Chronology (Tab 15, p. 2):

The council was given an ordinance reflecting the total 25 acres as originally requested along with three other options each of which described a variation of the area We wanted to be sure very variation was represented so when the vote was taken the council would have before them an ordinance which properly described the area being rezoned

95. According to a parenthetical note in the minutes, “[t]he corrected language of the amended Ordinance has been made and is present again for consideration.” Tab 10, p. 15.

96. According to the minutes, the proximity of the “Gittins’ Dairy” to the proposed rezone was mentioned. Tab 9, p. 10.

97. According to the minutes, after some discussion “Council Member Watkins asked if the previous motion was gone. Yes.” Tab 9, p. 11.

98. According to the minutes, Council Member Monson made several comments regarding opposition to the rezone request, then “stated that when she made her amendment to the motion last week it was to have included all the land not in the rezone would be put back in an agricultural zone.” Tab 9, p. 11.

99. According to the minutes, After further discussion, Council Member Wood “stated he accepted the amended motion last week because he understood that the Non Profit Housing had release all of the Lundberg, Johnson, Jacobsen property being considered.” Tab 9, p. 11.

100. According to the minutes, after more comments from Council Member Wood, the following occurred (Tab 9, p. 11):

Motion: Council Member Wood moved to approve Ordinance 06-01 as requested,
seconded by Council Member Watkins

101. According to the minutes, following the motion and second, the following occurred (Tab 9, p. 11):

Question on the motion: Council Member Monson moved to amend the motion to end the re-zone at the “blue line”.

Council Member Wood was asked if he would amend his motion. Mr. Wood asked for a vote on the original motion:

Voted yea: Buttars, Hunsaker, Watkins, Wood
Voted nay: Monson

102. According to the March 3rd Letter, “the city council made the decision to approve the request as originally submitted.” Tab 12, p. 2.

103. According to the Chronology, “[t]he city council voted four to one to approve a rezone of the original 25 acres as requested by Neighborhood Nonprofit.” Tab 15, p. 2.

104. In the minutes, an incorporated document immediately follows the vote, titled “ORDINANCE NO. 06-01 Requested.” Tab 9, p. 12.

105. The ordinance incorporated into the minutes is identical to the draft prepared for the January 25th meeting, with four exceptions, namely the incorporated ordinance: (a) adds “Requested” to the title; (b) is dated “8th day of February” instead of “25th day of January; (c) has conformed signatures; and (d) does not have “voting:” and “Posting Date” at the end. Compare Tab 9, p. 12 with Tab 5.

106. According to the minutes, following a recess and short adjournment, the meeting was adjourned for the day at 10:20, p.m. Tab 9, Pp. 12, 15.

Between January 25th Council meeting and First Administrative Appeal

107. The ordinance incorporated in the minutes is identical to the document copied in Tab 10, p. 2 (“Signed Ordinance 06-01”) except that the latter: (a) has actual rather than conformed signatures; (b) has a City seal; and (c) says “Voting:” and “Posting Date:” at the end.

108. Signed Ordinance 06-01 was apparently posted on February 8th. Tab 10, p.1.

109. An article in the Herald Journal was published on February 10th stating among other things (Tab 50, P.p. 8-9):

The council voted two weeks ago to rezone only part of the land, excluding what would be about 20 lots in the planned-for 80-plus-lot subdivision. After confusion over where that rezone line lay and because necessary paperwork was not available to be

signed after the January meeting, the council was legally allowed to discuss and vote on the issue again.

“We’re very pleased,” said Kim Datwyler [of NNHC] . . .

. . .

Kevin Allen [of Compass] said he anticipated once the councilmembers “understood the ramifications of the drawing line” from two weeks ago, the vote would change.

110. According to the testimony of Petitioner (Tab 50, Pp. 2-3):

Petitioner met with the Mayor “with concerns as to how the initial rezone on January 25th magically made its way back onto the agenda on February 8th (as a consideration; not as a reconsideration) and the procedures (or lack of) that had been used to get it there. I also expressed concern that the public had been sent home from the January 25th meeting with the distinct impression that legislative action had passed the rezone unanimously (5-0) after being modified to exclude some of the northern acreage that lies closest to my dairy. Furthermore, I expressed concern that the council had conducted public business outside of public meetings. I could find no other explanation as to why a majority of the council would do a flip-flop and vote 4-1 to approve the original request in its entirety on February 8th. This happened with little or no discussion in public on the matter prior to the re-rezone vote. Where did the discussion that changed four minds take place? Who was involved? When, specifically, did it take place? Where was the public awareness and involvement? Why should I be hurt because staff had not prepared the paperwork? Some possible answers to these questions were suggested as I read the Herald Journal newspaper articles from January 27, 2006 and February 10, 2006.

While the Mayor was gracious to hear my concerns, he said that he could not do anything about it and he did not believe that the council would revisit the re-rezone question. On March 1, 2006, I received a letter from Mayor Downs stating the same.

First Administrative Appeal

111. On March 1st, Petitioner delivered a handwritten document to the City, stating: “I respectfully request an audience with the Smithfield City Board of Adjustments to appeal a Rezoning, made Feb. 8, 2006 by the Smithfield City Council.” Tab 11.

112. According to the Chronology, on March 1, 2006 “A handwritten appeal was submitted by” Petitioner. Tab 15, p. 2.

113. On the morning of March 3rd Petitioner visited the City’s office with questions regarding the appeal. Tab 12, p. 1.

114. Later on March 3rd, the Manager wrote Petitioner the March 3rd Letter. Tab 12.

115. According to a fax cover page dated April 11th by the Manager (the “April 11th Fax”), at the time the March 3rd Letter was written, the Manager “wasn’t aware that [Petitioner] had actually made a handwritten request.” Tab 15, p. 1.

116. According to the April 11th Fax, as of the time the March 3rd Letter was written, the Manager “was only told that [Petitioner] was asking questions concerning the possibility of an appeal” Tab 15, p. 1.

117. According to the April 11th Fax, the March 3rd Letter “was written not with the intent of denying [Petitioner’s] appeal . . .” but rather because the Manager (Tab 15, p. 1)

wanted to give him [Petitioner] the benefit of my [the Manager’s] understanding of the law with regards to appeals of a legislative decision. We have been friends for over 20 years and if I can save him \$75 dollars I was going to try to do it.

118. According to the April 11th Fax “[i]t had never been [the Manager’s] intention” to give Petitioner “the impression that he wasn’t entitled to pursue an appeal.” Tab 15, p. 1.

119. According to the April 11th Fax, the March 3rd Letter “of course was not a decision.” Tab 15, p. 1.

120. In the March 3rd Letter, the Manager states the following as its purpose (Tab 12, p. 1):

I became aware this morning that you visited the city office this morning with questions regarding the process to follow in making an appeal of a land use decision. In particular, it was my understanding that you were under the impression that your appeal was to the Board of Adjustments. In addressing your inquiry I've elected to present information to you in written form to allow you to refer to it as necessary.

121. In the second paragraph of the March 3rd Letter, the Manager discusses the “role of the Board of Adjustments and how it functions within Smithfield City,” and concludes that “[i]n Smithfield’s case we have elected to retain the membership of the board of adjustments and now refer to them as the appeal authority functioning under the mandates of LUDMA.” (the Municipal Land Use Development and Management Act, §§ 10-9a-101, et seq., UCA). Tab 12, p. 1.

122. In the third paragraph of the March 3rd Letter, the Manager discusses “current law” regarding administrative appeals, and concludes that “[d]ecisions made by the city council, or legislative body, are legislative decisions and cannot be heard by the appeal authority.” Tab 12, p. 1.

123. In the fourth paragraph of the March 3rd Letter, the Manager discusses procedural requirements that must occur “[b]efore the legislative body or city council can make a decision on an amendment to the land use ordinance” and concludes (Tab 12, p. 2):

The city council is then required to hold a public meeting and notice the meeting at least 24 hours before the meeting on city’s website. In the case of the request by Neighborhood Nonprofit the city council took an extra step and held an unrequired public hearing that was noticed 15 days before the hearing.

124. In the fifth paragraph of the March 3rd Letter, the Manager states: “Immediately following the public hearing [on January 25th] the city council was in a position to make a decision on the request or to defer the decision to another meeting.” Tab 12, p. 2.

125. In the fifth paragraph of the March 3rd Letter, the Manager states that “the ordinance [decided on by the Council on January 25th] did not become effective because the proper modified ordinance was not before the city council nor was it signed by the mayor or posted by the city recorder due to confusion on the part of the council as to what the modification was.” Tab 12, p. 2.

126. In the fifth paragraph of the March 3rd Letter, the Manager states (Tab 12, p. 2):

It is not uncommon or unlawful for a city council to reconsider a previous decision either in the meeting when the initial decision is made or in a subsequent meeting provided if it is done in a subsequent meeting that the meeting is open to the public and properly noticed as a public meeting.

Second Administrative Appeal

127. On March 17th, Petitioner filed an appeal of the March 3rd Letter with the Board/AA. Tab 13.

128. In the March 17th letter from Petitioner’s counsel (the “March 17th Letter”) incorporated into the appeal, Petitioner “challenges Smithfield City staff’s decision administering or interpreting Smithfield City’s land use ordinances as reflected in that letter.” Tab 13, p. 3.

129. In the March 17th Letter, Petitioner “alleges that there is error in that letter, and in Smithfield City staff’s decision to not process and treat [Petitioner’s] handwritten letter dated March 1, 2006 . . . as an administrative appeal,” thereby “preventing the earlier appeal and denying access to” the Board/AA. Tab 13, p. 3.

130. In the March 17th Letter, Petitioner alleges (Tab 13, p. 3):

In making the decision, Smithfield City staff have overlooked or misinterpreted several Smithfield City Zoning Ordinances, including Section 17.080.040 providing for a public

hearing before the City Council on a rezone request, and providing for fifteen (15) days' notice of such hearings, and Sections 17.04.050 and 17.44.040, providing rules for the determination, location, and clarification of zoning district boundaries, including involvement of the planning department and and/or Board of Adjustments.

131. In the March 17th Letter, Petitioner requested that upon the granting of the later appeal, the first appeal would be reinstated and scheduled for hearing before the Board/AA. Tab 13, p. 3.

Between Appeals and Hearing

132. In a letter dated April 11th (the "April 11th Letter"), Petitioner's counsel inquired of Staff (serving as clerk to the Board/AA) seeking clarification of the procedure for hearing the two appeals, and suggesting that the hearings on both be held on the same day, but with the second appeal (seeking reinstatement) being heard first and the first (handwritten) appeal being heard immediately thereafter, depending on the earlier outcome. Tab 14.

133. In the April 11th Letter, Petitioner's counsel stated that the first appeal would be supplemented if the Board/AA were to hear both appeals in the same session. Tab 14.

134. In the April 11th Letter, Petitioner's counsel stated: "I expect that you are providing copies of our materials to Smithfield City management, and that if they submit something to the Board, we will be provided copies as well." Tab 14.

135. The Chronology was attached to the April 11th Fax. Tab 15.

136. In the April 11th Fax, the Manager explained that the Chair "had asked the mayor for some information and the purpose for the appeal. Your letters have also been forward to him." Tab 15, p. 1.

137. In the April 11th Fax, the Manager stated: "When I discovered that [Petitioner] had actually made a written request, I called him and apologized if I had given him the impression that he wasn't entitled to pursue an appeal." Tab 15, p. 1.

138. In the Chronology, Staff included the following note with reference to the agenda for the February 8th Council meeting (Tab 15, p. 2):

Note: A public hearing was not required because there was no change in the request. The matter before the city council was exactly the same as it was in the previous city council meeting when public comment was taken. There was no change in the request and no new application.

139. In the Chronology, Staff states (Tab 15, p. 3):

It is unclear what the appeal is. The letter from Jeff Gittins' attorney, Chris Daines, said he was appealing the letter by Jim Gass, see attached. The letter gave explanations but no decisions. A decision was not requested and a decision was not given so it's difficult to understand how a nondecision can be appealed. Without better explanation, it is assumed the appeal is either the process the city followed or the decision given by the city council.

140. In the Chronology, Staff states (Tab 15, p. 3):

Section 17.20.040 of the City Code and section 10-9a-707 of the Utah Code does not allow for an appeal of a zoning ordinance amendment. This leads us to believe the appeal deals with the process. If the appeal is whether proper notice was given for the public hearing then the appeal would have been required to have been made within 20 day following the public hearing. See section 10-90-209 attached. With this in mind the last day to request an appeal would have been February 24, 2006 or thirty days following the public hearing. No other public hearing was required because there was no change in the request. It was the same request.

141. In the April 18th Memo, the Manager states (Tab 25, p. 2):

As this development continues through the approval process we must understand that it could possibly be derailed.

If the rezone is overturned it can only be on a procedural matter. The court will never second guess the decision of the city as to whether or not the rezone was a wise decision. In the event the board of adjustments or district court were to rule in favor of Mr. Gittins, the city would only be required to go through the rezone process again

making sure any errors identified by the court were not made a second time, a matter of 30 to 45 days. The eventual outcome of the rezone would likely be the same regardless of the success or failure of the appeal.

142. In a letter from Petitioner's counsel to counsel for the City dated April 20th, reference was made to the above-quoted passage from the April 18th Memo, with the following statement (Tab 17, p. 1):

With regard to the last paragraph of the memo: We have asserted that the first rezone was granted, there having been no challenge to that rezone timely filed. If we prevail, the next round would necessarily be a request to rezone the northern acreage excluded from the first rezone. This would be a new request, one the Council had never voted on before, to be considered on its own merits. The fact that they voted in favor of the whole rezone on February 8th should not enter in because the Court in that scenario would have invalidated that action. The fact that Neighborhood Non-Profit had lost money should not enter in because they would have been proceeding at their own risk.

143. Petitioner supplemented the first appeal with a letter from counsel to the Board/AA dated April 20th with enclosures (the "April 20th Supplementation). Tab 16.

144. In the April 20th Supplementation, Petitioner asked that the Board/AA to "overturn the decision of the Smithfield City Council on February 8, 2006 because in taking the action on February 8th, the Council misinterpreted sections 17.04.050(D), 17.08.040 and 17.44.040(C)," ZOS. Tab 16, p. 1.

145. In the April 20th Supplementation, Petitioner claimed (Tab 16, p. 1):

On February 8, 2006 the Council voted to rezone approximately 24.5 acres to R-1-12. But on January 25th, two weeks earlier, the Council had already voted to rezone part of the original request (approximately two-thirds). The Council could not decide on a second rezone without going through the procedures in 17.08.040, namely, having a public hearing, with 15 days advance notice.

146. In the April 20th Supplementation, Petitioner claimed (Tab 16, p. 1):

If there was any uncertainty in the boundary of the first rezone, it was not the province of the City Council to clarify the boundary or to interpret the boundary. Those

functions are either the planning department, subject to appeal to you, under Section 17.04.050(D), or your job directly under Section 17.44.040.

147. In the April 20th Supplementation, Petitioner claimed (Tab 16, p. 1):

We believe that the boundary was sufficiently described in the minutes of the January 25th hearing so as to be clear. Even if the boundary was not clear, there is no way that the Council (or anyone, for that matter) could have interpreted the “adjusted” boundary to include all of the 24.5 acres.

148. In the April 20th Supplementation, Petitioner supplied the Board/AA with copies of minutes from the Council meetings (Tab 16, Pp. 3-21), copies of the sketch of Park Place from the Application (Tab 16, p. 22), copies of the plat maps covering the original request (Tab 16, Pp. 23-25), and copies of the three ordinances cited (Tab 16, Pp. 26-28). Tab 16, p. 1.

149. On April 26th at 3:41 p.m. Staff sent an email to David Church, stating the following (Tab 18):

I am responding to a request made by Bob Buckley, Chairman of the Smithfield City Board of Adjustments, with whom you had a conversation today that I contact you to have you tell me the same thing that you told Jim, Mayor Downs and myself two months ago.. He indicated that you suggested that a letter be written to the parties involved in a meeting set for Thursday, April 27, regarding an appeal of a rezone done by the City Council in February. Thank You for getting thru to him that this is not the type of an appeal that can be heard to the BOA. What would you recommend be included in a letter. Would it not be better at this late date to just allow the meeting to happen and inform all concerned when they get together. I feel the appealing parties are going to scream foul. Thank you.

150. At 3:49 p.m. on April 26th, David Church sent a reply to the Staff's earlier email, stating the following (Tab 18):

I agree that a letter may be a little late. He indicated to me that he was going to allow the hearing at least begin then have the Board rule that the matter was beyond their jurisdiction under both the state code and the City ordinances. I would recommend a simple statement in writing that since this is not an appeal from and interpretation applying the zoning ordinance or a variance the Board of Adjustment does not have the power to render a ruling on the matter.

151. Neither of the emails sent on April 26th were copied or forwarded to Petitioner (until Petitioner's counsel received a copy of the record on July 12th). Tab 18.

152. On April 27th the Manager wrote a letter to the Chair ("the April 27th Letter"), and stated (Tab 19):

It has been the opinion of the city that the above referenced appeal scheduled to come before the Board of Adjustments this evening represent a matter outside the board's jurisdiction to hear. This opinion is based on language contained in the Smithfield city Code and the Utah Code Annotated, as amended.

The Smithfield Code, Section 17.20.040 which addresses the jurisdiction of the Board of Adjustments, clearly states the board's actions are limited to matters affected by a decision administering or interpreting a zoning ordinance. The Utah Code also clearly states appeals must be limited to decisions applying the land use ordinance. There is a clear distinction between an administrative action and a legislative action.

If Mr. Gittins feels the city council erred in their legislative process, his appeal is to District Court not the Board of Adjustments.

153. The April 27th Letter was not copied or forwarded to Petitioner (until Petitioner's counsel received a copy of the record on July 12th). Tab 19.

Administrative Appeal Hearing

154. The Board/AA held a hearing on April 27th (the "Appeals Hearing"), at which Petitioner, Petitioner's counsel, the City's counsel, and others were in attendance. Tab 20.

155. At the beginning of the Appeals Hearing, at the invitation of the Chair, counsel for each of the parties (Petitioner and the City) gave a summary of the respective positions regarding jurisdiction of the Board/AA to hear the appeal. Tab 20, Pp. 1-2.

156. The Chair read the April 27th Letter out loud. Tab 20, p. 3. ~

157. After some discussion, the Chair stated (Tab 20, Pp. 6-7): ~

Buckley: The sad part about the board here is that Mr. Gittins has legal representation from you, the city has representation from Mr. Jorgensen, but where do we go for legal interpretation or representation? There are a bunch of lay people here who have various jobs and odd jobs in the community. Its hard for us because of no legal training to sit down and say "Well, this is correct or that's correct or not, because we're just a bunch of lay citizen. I've had a lot of sleepless nights over this trying to figure out what would be right, or what would be wrong in this situation, so I had somebody tell me the League of Cities and Towns has a representation there that you could contact as a board. I didn't know that until yesterday, so I contacted Mr. David Church who is an attorney for the League of Cities and Towns. Mr. Church was familiar with the situation here, I guess Dean Clegg and Mr. Gass have talked to him concerning what the protocol and procedures were, and everything that took place. I said "Quite frankly I'm at a loss, I don't know if we can hear this or not." He said, "it's my professional opinion that the board does not have the authority to hear this." So he said "I would suggest to you that you do not hear this." I called Dean Clegg, he suggested also that I send a letter out to all parties concerned stating that based upon advise of council that we did not have the authority to hear this and the meeting tonight would be cancelled. I called Dean Clegg and I said, "Dean, you need to contact David Church to make sure I heard what I heard so you can hear it too." Dean was unable to get ahold of him, but they received a reply on an e-mail from him. It was too late to post it on the wall here for 24-hour notice and to notify you people, that this meeting was not going to be held because we were advised by council that this meeting exceeded our authority to act on that. So Dean Clegg, I'm just saying it like I heard it, Dean Clegg said "As a courtesy to the parties concerned and the request of the Mayor that we hold this meeting tonight besides have Mr. Toolson and Dave Buys sworn in on the board as replacements, so based upon the advise of counsel from the League of Cities and Towns, I would entertain a motion that we do not hear this and send it on to district court where there is also been a suit filed at the present time.

158. The following discussion regarding the issue of the Board relying on legal advice from David Church (Tab 20, Pp. 7-8)⁴:

Daines: May I, before you take a vote mention one thing. I live here and I know what struggles you go through, but I think it would be a mistake to rely the advise of David Church in this particular issue. The reason why is because they called David Church on the 26th of January. He's the very attorney on whose advise they decided they would go forward on February 8. He's part and parcel of the decision about what process to take that we're appealing about. It's kind of like taking his say so – it puts him in an awkward position and the board in an awkward position to take advise from the very person who

⁴ Where the name appears in brackets, it was assumed from the context and content of the statements that the transition from one speaker to the next was not noted in the transcript.

apparently had something to do with the city following the procedure that we claim is invalid. So it's a problem.

159. Board Member Miles commented that "[i]t sounds like we're not in position to judge one way or another . . . I would almost like to make a motion that we table this until after the hearing in district court and then if we need to readdress this issue." Tab 20, p. 8.

160. Petitioner was allowed to make a statement to the Board/AA, including the following (Tab 20, p. 9):

I've waited nearly two months and made two appeals. There's some confusion over that and I want to clarify just a little bit when I made to first appeal it wasn't my intent to appeal to Jim Gass. Jim is kind of trying to second guess on what basis I'm appealing. I wanted to come before you. I wanted to be heard by fellow lay citizens. So when I received Jim's letter the only thing I could take from it was my appeal was being denied. He claims he's trying to help me out and I felt like he's telling me I'm wasting my time and don't bother. So that's why I made the second appeal. That's why I'm here.

161. After Petitioner's statement and the City's response, the following exchange took place regarding the prospect of tabling the appeal (Tab 20, Pp. 10-11):

Daines: We would consent to a tabling of this appeal, and I think there's some wisdom in letting the court take its process and holding off on your judgment until you have something for [from] the court. In a sense I think if you did what I asked you to do it would only be important if the court rules in our favor. So, in a sense it would be an extra step that you might take unnecessarily if you made a decision now. So I think, I've talked with Jeff Gittins about it, and I think the suggestion made by David [Miles] is a good suggestion as a way to handle this. I just want this kind of as an amendment of our appeal or whatever, but I really think that's a good way procedurally to handle it.

[Buckley]: Does the city have a position on that?

Jorgensen: I think the fact that it ends up in district court, I agree with Chris on that. If the court agrees that the city acted properly you won't see it again. If the court disagrees with the city and says that you did not act properly then the judge is in a position to say one of two things at least. One would be the ordinance is void, got to start over, or it should have been heard by the board of adjustments, so go back and have it heard whether it's tabled or whether you make a motion to deny it, if the court orders it back to you, it will come back.

[Buckley]: It will come back even if you make a motion to deny it?

[Jorgensen]: If you make a motion to deny it and then the court hears it, in my opinion and says there were issues that the board should have heard, the court has the authority to send it back to you and say "These are the issues that you should hear and make a decision on."

[Buckley]: If we make a motion to approve it, then what?

[Jorgensen]: To approve the appeal?

[Buckley]: Yes.

[Jorgensen]: Then it would be, it's already in court so it is going to be heard by the district court.

[Daines]: [W]hether it's approved or disapproved the truth is that if you make a decision now, Jeff Gittins, would have really no choice but to appeal your decision [to the] district court. And have those two appeals kind of merge into one another. If you voted to approve his appeal now, I don't want to speak for the city or give them advise, but I would not be surprised if they appealed your decision to the district court. And then those two would merge together. I would suggest that David's motion to table it or to put a stay on it or whatever preserves both our rights before you.

162. Petitioner stated. "I really feel strongly that in the welfare of the citizens of Smithfield we need to review this thing and make sure proper procedure is taking place." Tab 20, p. 11.

163. The Chair stated (Tab 20, p. 12):

[Buckley:] You know as I think about it where we don't have a legal counsel and I just got back from Albuquerque Tuesday night. About this package I think I've done a lot of work reading among the League of Cities. If we table it, the judge refers it back to that judge who has given us the authority, then we know we have the authority to deal on this. To table it to me right now sounds like a good idea. Dave, that sounds good – I don't know if we have the authority or not. We have two different opinions and I want to do the right thing, but I would feel more comfortable if a judge told me it was the right thing.

164. Just before adjournment of the Appeals Hearing, the following occurred (“Tab 20, Pp. 13-14):

Board member Miles: Well, I don’t think we can just turn them away and say we can’t hear anything. I would like to make a motion that we table this until they have pursued it in district court and then if they so choose to come back to see us, we would entertain it again.

Buckley: Could I have a second on that?

[?:] I second that.

Buckley: Okay, all in favor by voice vote. Aye – five times. Thank you so much. Okay, it’s tabled until we hear back from district court.

Petitioner’s Affidavit

165. On November 15th Petitioner provided, with other testimony, the following in the form of an affidavit (Tab 50, Pp. 1-2, ¶¶ 2-4):

The Gittins family came to Smithfield in 1864. My wife, Lynda, and I moved our dairy operation out of a residential area in Smithfield to an agricultural zone in 1990. The move called for a huge financial commitment from us. Our farm and dairy represent 30 years of labor, investment and family efforts. Our current dairy is located at approximately 300 North (Saddleback Rd.) and 600 West.

We know from experience that housing in close proximity to our dairy and our farming operation restricts our ability to manage, upgrade, improve, and/or expand our business.

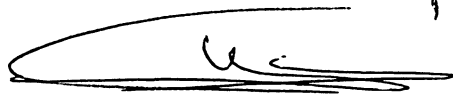
It concerns me that before any homes have even been built, the planning commission has been told, while discussing the possibility of fencing the development, “In this case, the Gittins dairy would be considered the nuisance.”

End of Statement of Facts

The foregoing is the Statement of Material Facts submitted as part of the Petitioner’s Memorandum in Support of Motion for Summary Judgment. The argument part of the Memorandum, incorporating this statement, will be submitted as a separate document.

DATED November 20, 2006.

CHRIS DAINES LAW

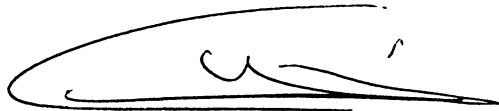


Chris Daines
Attorney for Plaintiff

CERTIFICATE OF SERVICE

On November 20th, 2006, I hand-delivered a copy of the foregoing to:

Bruce L. Jorgensen
Olson & Hoggan, P.C.
88 West Center Street
Logan, Utah 84321



Chris Daines
Attorney for Petitioner

Tab 2

SMITHFIELD CITY CORPORATION

69 North Main Street - P.O. Box 96
Smithfield, Utah 84335
Phone (435) 563-6226
FAX (435) 563-6228

OFFICIALS

CHAD E. DOWNS
MAYOR
O. DEAN CLEGG
RECORDER
JANE LINDLEY
TREASURER
JAMES P. GASS, P.E.
CITY MANAGER
TERRY K. MOORE
COURT JUSTICE

COUNCILMEMBERS

BRENT C. BUTTARS
DEON G. HUNSAKER
KRIS MONSON
DENNIS WATKINS
WILLIAM "DEE" WOOD

March 3, 2006

Jeff Gittins
152 West 200 South
Smithfield, UT 84335

Dear Jeff:

I became aware that you visited the city office this morning with questions regarding the process to follow in making an appeal of a land use decision. In particular, it was my understanding that you were under the impression that your appeal was to the Board of Adjustments. In addressing your inquiry I've elected to present information to you in written form to allow you to refer to it as necessary.

There are a number of issues that need to be discussed in connection with your inquiry. First and foremost is an understanding of the role of the Board of Adjustments and how it functions within Smithfield City. The Municipal Land Use Development and Management Act (LUDMA) was overhauled by the state legislature last year. As a result of that legislation the traditional board of adjustments that we were all familiar with no longer exists. Instead the new law has required cities to establish an appeal authority to address many of the issues the board of adjustments had responsibilities for in the past. This is not to say that the board of adjustments in the various cities had been abolished but the new law gives cities the ability to appoint an appeal authority without the make up and membership requirements of the old board of adjustments. In fact, the new law allows cities to replace the board of adjustment with a one person appeal authority. In Smithfield's case we have elected to retain the membership of the board of adjustments and now refer to them as the appeal authority functioning under the mandates of LUDMA.

Under current law, the appeal authority may hear "appeals from decisions applying the land use ordinances". In other words they may hear administrative appeals. An administrative appeal is one that challenges the "land use authority's decision administering or interpreting a land use ordinance by alleging that there is error in any order, requirement, decision, or determination made by the land use authority in the administration or interpretation of the land use ordinance". A land use authority is defined as "a person, board, commission, agency, or other body designated by the local legislative body to act upon a land use application". As such, ~~the only matters the appeal authority, or in Smithfield's case the board of adjustments, can hear are decisions made by the planning commission, the city staff, or other designated land use personnel. As described in section 10-9a-707 UCA, "Only those decisions in which a land use authority has applied a land use ordinance to a particular application, person, or parcel may be appealed to an appeal authority".~~ Decisions made by the city council, or the legislative body, are legislative decisions and cannot be heard by the appeal authority.

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Before the legislative body or city council can make a decision on an amendment to the land use ordinance there are certain procedures that must be followed. Sections 10-9a-502 and 10-9a-503, UCA clear define that process and I've enclosed copies of those sections for your review. In brief, the planning commission must provide notice and hold a public hearing before making a recommendation to the city council on the request. Notice of that public hearing must be published in the local newspaper and on the city's website at least ten days before the hearing. The city council is then required to hold a public meeting and notice the meeting at least 24 hours before the meeting on city's website. In the case of the request by Neighborhood Nonprofit the city council took an extra step and held an unrequired public hearing that was noticed 15 day before the hearing.

Immediately following the public hearing the city council was in a position to make a decision on the request or to defer the decision to another meeting. As you know, there was a motion made that night to approve the request with modification. However, the ordinance did not become effective because the proper modified ordinance was not before the city council nor was it signed by the mayor or posted by the city recorder due to confusion on the part of the council as to what the modification was. As a result, the matter was brought back to the city council for reconsideration. At that meeting several versions of the ordinance was presented, each with a colored map depicting the boundary as described within the body of the associated ordinance. With this information before them, the city council made the decision to approve the request as originally submitted. It is not uncommon or unlawful for a city council to reconsider a previous decision either in the meeting when the initial decision is made or in a subsequent meeting provided if it is done in a subsequent meeting that the meeting is open to the public and properly noticed as a public meeting..

There are avenues available for individuals to challenge an amendment to a zoning map which is a legislative decision. Under Section 10-9a-209 an individual or group can challenge whether proper notice was given for the public hearing. This challenge must be given within 30 days following the meeting or action for which notice was given. In this case, the notice was given for a public hearing so it would have been necessary to file that challenge within 30 days following the public hearing held by either the planning commission or the city council. Where the city council's hearing was held on January 25, 2006 the challenge would have been required by February 24, 2006. If there is the belief the city council violated state law in their procedures in finalizing their decision, the appeal must be in district court because it is a legislative decision and not an administrative decision. This challenge or appeal must be within 30 days of the decision which was made on February 8, 2006. Remember, the courts will only look at whether or not the city council followed proper procedure not whether or not the decision was a smart or sound decision.

I've tried to provide you with copies of the state law regulating zoning matters. Other sections can be accessed on the state's website at [www.le.state ut us](http://www.le.state.ut.us). What I've given you is my best understanding of the law. I'd be more than happy to sit down and assist you through this process in any way I can.

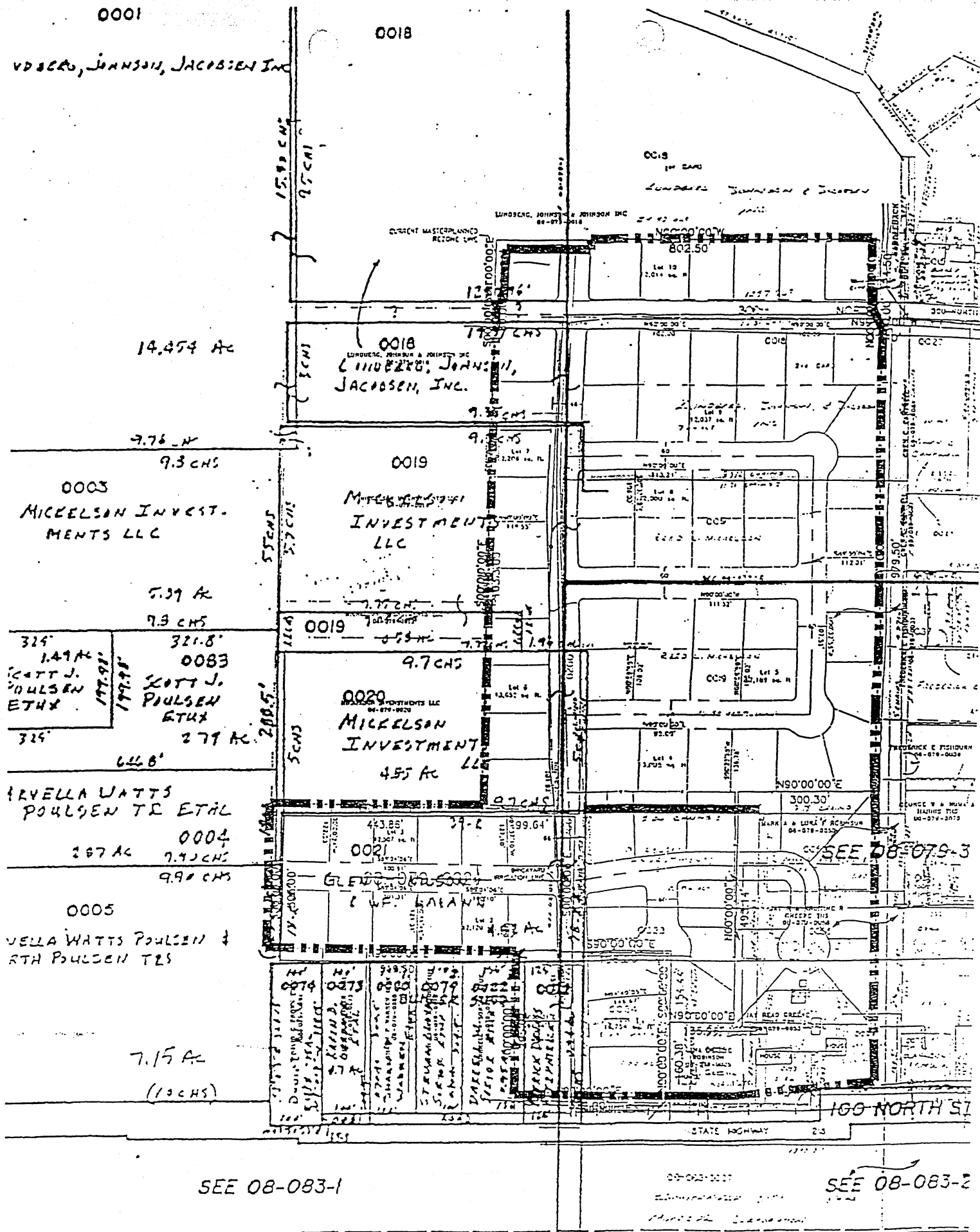
Sincerely
SMITHFIELD CITY CORPORATION

James P. Gass
City Manager

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Tab 3

VDSER, JOHNSON, JACOBSEN INC



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Tab 4

**In the First Judicial District Court
In and for Cache County, State of Utah**

JEFFRY R. GITTENS,

Plaintiff(s),

MEMORANDUM DECISION

vs.

Case Number: 060100558 AA

SMITHFIELD CITY,

Defendant(s).

JUDGE: GORDON J. LOW

THE ABOVE MATTER was before the Court for Oral Argument on the 21st day of February, 2007. Both parties were present and represented by their respective counsel. Cross-motions for summary judgment were filed. The action is one for declaratory judgment relative to the validity of the zoning ordinance in question, and to which the Petitioner filed his challenge to the Council's decision of January 25th and February 8th of 2006.

The issue before this Court has been addressed by counsel for both sides with the memoranda filed and affidavits in support. In large fashion, the ordinance and action by the City Council is to be given deference by this Court unless it is shown to be arbitrary and capricious or illegal.

The gravamen of the Plaintiff's argument is that Smithfield City failed to comply with the *Roberts Rules of Order*, which it has adopted as its rules of governance, and that failure to do so makes its actions illegal. The City has argued that the rules are not to be considered elevated to the level of ordinance, and that strict compliance with them does not affect the legality of the City's actions. No material issues of fact are in dispute, though minor issues and construction, or

interpretation of actions taken or things said, may be considered differently.

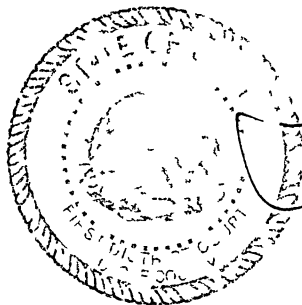
The Plaintiff was not prejudiced by the City's action. The City's use of the *Roberts Rules of Order* is to facilitate the order of its meetings and are not in themselves ordinances. The zoning ordinance requirements were met, notice was provided as required and Plaintiff had notice of each of the meetings addressing the issues, including January 18th, Planning and Zoning, and the January 25th and February 18th City Council. The actions by the City Council have not been shown to be either arbitrary, capricious, or illegal.

In review of the entire matter, this Court finds that the action by the City was not inappropriate, that the re-zone ordinance is valid, and that summary judgment by way of declaratory judgment is therefore granted in favor of Smithfield City.

Counsel for Smithfield City is directed to prepare a formal Order and Summary Judgment in conformance herewith.

Dated this 26 day of February, 2007.

BY THE COURT



Gordon J. Low, District Court Judge
First District Court

2007-02-23/GJL/ts

Memorandum Decision
Case# 060100558
Gutten vs Smithfield City
Page 2 of 2

Tab 5

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Attorneys for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

JEFFRY R. GITTINS,

Plaintiff/Petitioner,

vs.

SMITHFIELD CITY,

Defendant/Respondent.

DECLARATORY JUDGMENT

Case No. 060100558AA

Judge Gordon J. Low

This matter is before the Court by reason of the Plaintiff's Petition for Review of a Land Use Decision made by the Defendant, which Petition for Review was filed pursuant to the authority granted in Section 10-9a-801, Utah Code Annotated, 1953, as amended. Appropriate pleadings were filed by each party including cross-motions for Summary Judgment, but this Court has treated this action as one for Declaratory Judgment relative to the validity of the Zoning Ordinance in question; and as to which, the Plaintiff filed his challenge to the Defendant's City Council's decisions of February 8, 2006. After both parties had filed all appropriate Briefs, Affidavits Exhibits, and all other documents, Oral Argument was set and held before the Court on the 21st day of February, 2007. Both parties were present and were represented by their respective counsel. Both parties had the opportunity to present their respective arguments supporting their positions and answer all questions

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ENT'D MAR 27 2007



posed to them by the Court, after which the Court took the matter under advisement, before rendering its decision. In large fashion, the Ordinance in question and action by the City Council is to be given deference by this Court and is to be presumed valid by this Court, unless it is shown that said Ordinance is arbitrary, capricious, or illegal.

The gravamen of the Plaintiff's argument is that Smithfield City failed to comply with the Robert's Rules of Order, which the Defendant had adopted as its rules of governance, and that failure to do so made its actions illegal. The City has argued that the rules are not to be considered elevated to the level of Ordinance, and that strict compliance with them does not effect the legality of the City's actions. There are no material issues of fact which are in dispute, but minor issues and construction or interpretation of actions taken or things said, may be considered differently.

The Plaintiff was not prejudiced by the City's action. The City's use of the Roberts Rules of Order is to facilitate the order of its meetings and are not in themselves Ordinances. The Zoning Ordinance requirements that were necessary to validly adopt the Ordinance rezoning the property at issue in this action, were met, public notice was provided as required and the Plaintiff had notice of each of the meetings addressing the issues including the January 18, 2006, meeting and Public Hearing of the Planning and Zoning Commission of the City, and the Plaintiff also had notice of the January 25, 2006, City Council Meeting and Public Hearing and the February 8, 2006, City Council Meeting. The Court finds that the actions by the City Council have not been shown to be either arbitrary, capricious, or illegal. After reviewing the various pleadings, Affidavits, Exhibits, the applicable laws and the record of Defendant's proceedings which were supplied to this Court, as required, pursuant to said Section 10-9a-801, Subsections (7) and (8), this Court finds that the action by the City/Defendant, was not inappropriate, that the Re-zone Ordinance is valid, and that Summary Judgment by way of Declaratory Judgment should be granted in favor of the Defendant, Smithfield City.

THEREFORE, having reviewed the record supplied by the Defendant, together with all pleadings, Affidavits, Exhibits and other documents provided by both parties, having heard the Oral Argument, and having reviewed the applicable law, and good cause appearing, it is hereby ORDERED, ADJUDGED AND DECREED, as follows:

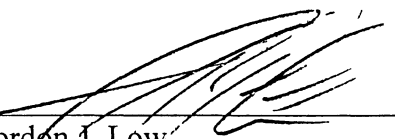
1. The Plaintiff's Motion for Summary Judgment by way of Declaratory Judgment is denied.

2. The action by the Defendant, in adopting the Ordinance re-zoning the real property at issue in this action, was not inappropriate, the re-zone Ordinance is valid, and Summary Judgment by way of Declaratory Judgment is hereby granted in favor of the Defendant, Smithfield City.

DATED this 27 day of March, 2007.

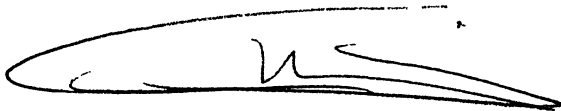
BY THE COURT




Gordon J. Low
District Court Judge

APPROVED AS TO FORM:

CHRIS DAINES LAW



Chris Daines
Attorney for Jeffry R. Gittins