

2007

Jeffery R. Gittins v. Smithfiled City : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JEFFRY R. GITTINS)	
)	
Plaintiff/Appellant)	
)	
vs.)	Appeal Case No. 200702898-CA
)	
SMITHFIELD CITY)	
)	
Defendant/Appellee)	

BRIEF OF THE APPELLEE

**Appeal from the
First Judicial District Court, Cache County, Utah
Honorable Gordon J. Low**

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STATEMENT OF JURISDICTION

This Court lacks the jurisdiction to consider this appeal because the judgment appealed was not final as required by Rule 3(a) Utah Rules of Appellate Procedure. (See Appellee's Motion for Summary Disposition filed August 1, 2007; denied without prejudice August 28, 2007.)

STATEMENT OF THE ISSUES ON APPEAL

Although the Appellee contests and disputes the Appellant's positions with regard to the issues presented for appeal, Appellee is satisfied with the statement of the three issues of the case referenced in the Appellant's Brief and therefore, pursuant to Rule 24(b)(1) of the Utah Rules of Appellate Procedure, a statement of issues is not included.

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 court 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...

Rule 24(b)(1), Utah Rules of Appellate Procedure provides:

A statement of the issues of the case [shall not be included in the Appellee Brief] unless the Appellee is dissatisfied with the statement of the Appellant.

§ 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 reasonable 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 was adopted.

§ 10-3-506, Utah Code Provides:

A roll call vote shall be taken and recorded for all ordinances, resolutions, and any action which would create a liability against the municipality and in any other case at the request of any member of the governing body by a “yes” or a “no” vote and shall be recorded. Every resolution or ordinance shall be in writing before the vote is taken.

§ 10-3-508, Utah Code Provides:

Any action taken by the governing body shall not be reconsidered or rescinded at any special meeting unless the number of members of the governing body present at the special meeting is equal to or greater than the number of members present at the meeting when the action was approved.

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

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

On March 27, 2007, the trial court entered its Declaratory Judgment on this matter.

This judgment was not a final adjudication of the action. The issue of the amount of

attorney fees was still pending. Appellant prematurely filed an appeal with this court on March 28, 2007; therefore the appeal must fail for lack of jurisdiction. Matters involving an award of attorney fees are not appealable until the amount of attorney fees to be awarded has judicially been determined and ordered. The trial court entered an order and judgment for attorney fees on April 4, 2007.

Appellant originally brought this action (pursuant to Section 10-9a-801, Utah Code), before the First District Court of Cache County for review of the adoption of a re-zone ordinance by Appellee, Smithfield City. The dispute on appeal centers on the legality of the City's adoption of the rezoning ordinance on February 8, 2006. Appellant argues that the ordinance is procedurally illegal because the City did not strictly follow Robert's Rules of Order, which the City had previously adopted as governing the procedure and conduct of the meetings of the City.

Appellee, Smithfield City, asserts that Robert's Rules of Order is irrelevant to this appeal because there was no "reconsideration" involved in the adoption of City Ordinance No. 06-01. Robert's Rules of Order is the designated procedure of City meetings as a matter of convenience, but are not strictly followed both because of the complexity of the Rules and because it is not always convenient or realistic to do so. Nevertheless, to the extent that Robert's Rules of Order apply, the City argues that Appellant was not prejudiced by the City's failure to strictly comply with the Robert's Rules of Order, and the re-zone ordinance, City Ordinance 06-07, was properly and legally adopted.

The parties each filed motions for summary judgment and the City sought a

declaratory judgment. On March 27, 2007, the trial court entered the subject Declaratory Judgment, which Appellant seeks to appeal. The trial court upheld the legality and validity of the re-zone Ordinance, denied Appellant/ Plaintiff's motion for summary judgment, and granted the City's motion for summary judgment and declaratory judgment.

STATEMENT OF FACTS

Appellee submits the following as the material and relevant facts regarding this appeal:

1. Prior to January 25, 2006, an application to re-zone approximately 24.5 acres of land in Smithfield City was duly filed. (City Minutes January 25, 2006.)
2. A City Council meeting was held January 25, 2006. During the January 25, 2006 City Council meeting, a previously-noticed public hearing was held to address the proposed rezone application and the proposed ordinance (Ordinance No. 06-01 and City Minutes, January 25, 2006.)
3. At the conclusion of the public hearing and discussion by the City Council, a motion was made to adopt the re-zone of the entire proposed parcel. However, that motion was amended to reduce the proposed area to be rezoned by approximately one-third. (City Minutes January 25, 2006.)
4. There was no written ordinance before the City Council as described by the amended motion and which contained the legal description for the reduced area which was proposed under the amended motion to be rezoned. (Affidavit Jim Gass, January 19, 2007; City Minutes January 25, 2006.)

5. During the January 25, 2006 City Council meeting, no motion to “reconsider” was made with respect to said rezone action, and the meeting adjourned without such a motion being made. (City Minutes, January 25, 2006.)

6. On the day after said meeting, January 26, 2006, the Smithfield City Manager (Jim Gass) undertook to draft an ordinance which contained the legal description for the reduced area that had been voted on the night before. (Affidavit Jim Gass, January 19, 2007)

7. During the first few days after said meeting, the City Manager was contacted by at least two members of the City Council, at different times, both of whom had questions about exactly where the northern boundary of the area to be rezoned was to be located. There appeared to be different understandings of where the northern line was to be located. (Affidavit Jim Gass, January 19, 2007)

8. Given the apparent confusion related to what the description for the proposed area for rezone should be, legal advice was sought from the City Attorney, the Attorney for the Utah League of Cities and Towns and from the State Real Property Ombudsman. All three advised the City Manager and City Recorder that an ordinance had to be in writing and before members of the City Council before it could be properly adopted (see section 10-3-506, U.C.A.). (Affidavit Jim Gass, January 19, 2007)

9. In accordance with the legal advice received and in an attempt to have an ordinance with a correct description before the City Council at its next regular meeting (which meeting was held on February 8, 2006), four color-coded draft ordinances were prepared, each with different boundary lines for the proposed rezone area. The color-

coded draft ordinances were presented to the City Council at the February 8, 2006, meeting together with the original ordinance (Ordinance 06-01) which would have rezoned the entire area. (Affidavit Jim Gass, January 19, 2007)

10. At the meeting of February 8, 2006, the proposed rezone in question was on the agenda, again discussed, with comments from the audience permitted, and a motion was made, seconded and adopted to rezone the entire original 24.5-acre parcel (Ordinance No. 06-01, City Minutes, February 8, 2006.)

11. Subsequently, the Appellant challenged the adoption of Ordinance No. 06-01. The City's Ordinances provide that Robert's Rules of Order shall govern the procedure and conduct of the meetings of the City. Said Rules of Order require that a "motion for reconsideration" be made and adopted during the same meeting that the item to be reconsidered was first considered. (Robert's Rules pp. 306-313)

12. There was no ordinance in writing which reflected the amended motion at the January 25, 2006 meeting. (Affidavit of Jim Gass, January 19, 2007)

13. The Appellant presented no evidence to the trial court that he was prejudiced by the City's failure to comply with this "reconsideration" requirement of Robert's Rules of Order. (Court Record; Transcript of hearing February 21, 2007, pages 57-64 and 72-88.)

14. On March 10, 2006, Appellant/ Petitioner petitioned the trial court to review the adoption of City Ordinance No. 06-01. Subsequently motions and counter motions for relief were filed. (Court record.)

15. On December 15, 2006, the trial court entered a Memorandum Decision

which, among other things, awarded Defendant/Appellee all of its attorney fees and costs. (Memorandum Decision December 15, 2006.)

16. On or about March 27, 2007, the trial court entered its Declaratory Judgment. (Declaratory Judgment, March 27, 2007.)

17. On or about March 28, 2007, Appellant/ Petitioner filed a Notice of Appeal appealing the Declaratory Judgment entered on March 27, 2007. (Notice of Appeal, March 28, 2007.)

18. On or about April 4, 2007, the trial court entered its Order for Payment of Attorney's Fees and Costs to Appellee/Defendant. (Order, April 4, 2007.)

19. Appellee filed its motion for summary disposition on August 1, 2007, and argued that the appeal was untimely and thus the court lacked jurisdiction. (Motion for Summary Disposition, July 31, 2007)

20. This court issued an order on August 28, 2007, which denied without prejudice the motion for summary disposition. (Order, August 28, 2007.)

SUMMARY OF THE APPELLEE'S ARGUMENT

This court does not have jurisdiction to consider this appeal because the Notice of Appeal was untimely. The well-accepted law in Utah is that a judgment is not final if there is an unadjudicated issue of attorney fees. Appellee was awarded its fees and costs at the trial level, but before the amount of those fees was adjudicated, the Notice of Appeal was filed. No subsequent Notice or Appeal was filed. Thus the appeal is defective and consequently this court lacks jurisdiction to consider this matter.

City Ordinance 06-07 was adopted on February 8, 2006. Such was not a “reconsideration.” Nevertheless, Appellee, Smithfield City had the right and power to reconsider in a subsequent official meeting a decision made in a previous meeting to adopt a re-zone ordinance where the ordinance first proposed for adoption was not in writing and before the City Council. The City’s adoption of Robert’s Rules of Order as the procedural governance of municipal meetings has no bearing on the enactment of Smithfield City Ordinance 06-01, because Ordinance 06-01 was not adopted by reconsideration per se of a previously adopted ordinance. Rather, Ordinance 06-01 was first adopted on February 8, 2006, after further consideration of a proposed amendment to Ordinance 06-01, made during the City Council Meeting on January 25, 2006, which was not in writing. By law every municipal ordinance shall be in writing before a valid vote can be taken to adopt the ordinance. (See Section 10-3-506, Utah Code.) Neither Ordinance 06-01, nor any amended version of it, was adopted on January 25, 2006; thus, no reconsideration of an adopted Ordinance (Ordinance 06-01 or any amendment to Ordinance 06-01) occurred or could have occurred on February 8, 2006.

Even if Robert’s Rules of Order were relevant to the consideration of this appeal, Appellant was not prejudiced by the City’s failure to strictly follow said Rules. Absent demonstrated evidence of actual prejudice to the Appellant, he may not complain that Smithfield City “reconsidered” the adoption of Ordinance 06-01 in violation of Robert’s Rules of Order. The Appellant is not entitled to claim that an ordinance was adopted on January 25, 2006, when the ordinance was not in writing and did not exist at the time of the City meeting. The Appellant was, however, given notice of the next regularly

scheduled City meeting of February 8, 2006. The previously published agenda of the February meeting identified the subject of consideration of Ordinance 06-01. The public was allowed to comment on the agenda item. Draft ordinances intended to conform to the relevant motion made on January 25, 2006 were in writing and available for consideration together with the original Ordinance 06-01. And after due discussion and consideration the original Ordinance 06-01 was adopted. Appellant has failed to demonstrate prejudice.

Smithfield City Ordinance 06-01 is legal and valid. The judgment of the trial court should be upheld.

ARGUMENT

I. APPELLANT HAS NOT APPEALED FROM A FINAL ORDER AND THUS THIS COURT LACKS JURISDICTION

The Utah Supreme Court has held that “in the interest of judicial economy, a trial court must determine the amount of attorney fees awardable to a party before the judgment becomes final for the purposes of an appeal.” *ProMax Development Corp. v. Raile*, 998 P.2d 254, 258 (Utah 2000). The Utah Supreme Court’s reasoning for following such a rule is based on judicial efficiency and is explained as follows:

“It will save the resources of the parties and this court if the issue of attorney fees can be determined in the same appeal in which the merits of the underlying judgment are examined. Otherwise, a second appeal must be taken to challenge the amount of attorney fees awarded subsequent to the judgment on the merits and then examined in light of the judgment on the merits.” *Id.*

In *Sittner v. Schriever*, the trial court granted summary judgment in respondents' favor on March 25, but waited until June 27 to sign a supplemental judgment concerning a stipulated fee award. *Sittner v. Schriever*, 2 P.3d 442, 443 (Utah 2000). The Utah Supreme Court determined the 30 day period to file an appeal began not after the March 25 judgment, as the court of appeals ruled, but after the June 27 judgment when the attorney fees were fixed. *Id.* Only after the attorney fees were fixed was the judgment final and ready for appeal. *Id.* at 446.

In a case very similar to the one at issue, the Utah Court of Appeals dismissed an appeal due to lack of jurisdiction because the attorney fees had not been resolved at the trial court level. *Turville v. J&J Props. L.C.*, 2004 UT App 389 (Utah Ct. App. 2004). In *Turville*, it was determined that the Notice of Appeal filed by Appellant was premature because the trial court judgment, upon which the Appellant based his appeal, did not resolve the issue of attorney fees and, thus, was not final or appealable. *Id.* Appellee's motion for summary dismissal on the basis of lack of jurisdiction was granted and the court of appeals dismissed the appeal. *Id.* Additionally, attorney fees were awarded to Appellee to the extent they were incurred in filing the motion for summary disposition. *Id.*

Declaratory Judgment was entered in the present action on March 27, 2007. This judgment did not address the pending issue of attorney fees and costs. The Order for Payment of Attorney's Fees and Costs to Defendant was entered on April 4, 2007. Plaintiff filed a Notice of Appeal on the Declaratory Judgment on March 28, 2007. The Notice of Appeal was premature. No amended notice of appeal has been filed. No timely

notice of appeal has been filed. No motions as described under Rule 4(b) of the Utah Rules of Appellate Procedure have been filed.

Rule 3 of the Utah Rules of Appellate Procedure allows appellate jurisdiction from all “final orders and judgments” of the district court. Where an appeal is taken as a matter of right from the final decision of the trial court, the notice of appeal must be filed with the clerk of the trial court within 30 days after the entry of the final judgment or order. (See Rule 4(a) Utah Rules of Appellate Procedure. Emphasis added.).

The most recent pronouncement on this issue is the Utah Supreme Court decision in *Beddoes v Giffin*, 158 P.3d 1102. Speaking of the jurisdictional requirement of Rule 3(a) the Supreme Court said:

This “final judgment rule” “prevents a party from prematurely appealing a non-final judgment and thereby preserves scarce judicial resources.”

Then referencing the decision of *ProMax Development Corp v. Raile* the court said:

As we explained in *ProMax*, disputes as to attorney fees must be resolved in order to have final judgment for appeal, but disputes as to court costs need not.

As provided under the aforementioned rules and case law, matters involving an award of attorney fees are not appealable until the amount of attorney fees to be awarded has judicially been determined and ordered. Because the Declaratory Judgment of March 27, 2007 is not a final adjudication of all matters of the case, the Notice of Appeal was untimely and the appeal must be dismissed.

II. CITY ORDINANCE 06-01 IS VALID AND LEGAL

Utah Code Section 10-9a-801 governs the District Court's review of the adoption of City Ordinance 06-01. Section 10-9a-801 (3) (a) through (d) is particularly relevant to the question of the action taken by the Smithfield City Council at its regular meeting held on Wednesday, February 8, 2006. (See City Minutes February 8, 2006.) A review of subsection (3) reveals that "the Court shall: presume that a decision, ordinance, or regulation made under the authority of this Chapter is valid; and determine only whether or not, the decision, ordinance or regulation is arbitrary, capricious or illegal." That subsection goes on to say that "a[n]... ordinance... involving the exercise of legislative discretion is valid if the... ordinance... is reasonably debatable and not illegal." It further states that "a final decision of a land use authority... is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious or illegal." Finally, it states, "a determination of illegality requires a determination that the... ordinance... violates a law, statute or ordinance in effect at the time [that] the decision was made or the ordinance or regulation [which was] adopted."

As required by 10-9a-801(7) the land use authority, Smithfield City, transmitted to the District Court the record of its proceedings, including its Minutes, Findings, Orders, and, if available, a true and correct transcript of its proceedings.

Section 10-9a-801 (8) provides that if there is a record...

"the District Court's review is limited to the record provided by the land use authority,.... The Court may not accept or consider any evidence outside the record of the land use authority unless the evidence was offered to the land use authority or the appeal authority, respectively, and this Court determines that it was improperly excluded. If there is no record, the Court may call witnesses and

take evidence.”

Utah Code Sections 10-3-506 and 10-3-508 are also instructive. As stated previously, subsection 506 provides that before a vote is taken to adopt a municipal ordinance the ordinance must be in writing. Because the amended motion which was approved at the January 25, 2006 Council meeting was to adopt an ordinance which was not in writing and thus not before the Council, it was not legal. And significantly, it would of necessity have had to have been considered again when the ordinance was written. That opportunity came on February 8, 2006. But at that meeting, instead of voting on and adopting one of four proposed draft ordinances which were intended to codify the amended motion made in the previous meeting, the Council elected to adopt the original written ordinance 06-01. This was not a “reconsideration” in the sense of changing an ordinance which had been previously and legally adopted, but rather was a legitimate and authorized continuation of the legislative process of the governing body to adopt, in the first instance, an ordinance. Nevertheless, Section 10-3-508, by implication, allows reconsideration:

“Any action taken by the governing body shall not be reconsidered or rescinded at a special meeting unless the number of members of the governing body present at the special meeting is equal to or greater than the number of members present at the meeting when the action was approved.”

Now admittedly, the subject re-zone ordinance was not reconsidered at a special meeting. It was adopted at a regular and duly noticed meeting for that purpose. But, state law allows reconsideration of ordinances. The flaw in Appellant’s argument is that no

ordinance was adopted in the January 25, 2006, meeting. The subject ordinance was adopted on February 8, 2006.

The case of *Patterson v. Alpine City*, 663 P.2d 95, 96 (Utah 1983) provides legal support for this provision of the law. Referencing section 10-3-506, the Court stated, “the language of the above statute requiring that all resolutions shall be in writing is mandatory”. The case dealt with the imposition of a sewer connection fee which was not established by resolution or ordinance in writing. Thus, the District Court in that case did not err in concluding that the sewer connection fee was not established as required by law and therefore invalid. Section 10-3-506 of the Utah Code, in the last sentence thereof, provided then as it does now, “Every resolution or ordinance shall be in writing before the vote is taken”.

With this requirement in mind, and the record which has been presented to the Court, it is abundantly clear that the only written ordinance before the City Council at the meeting on January 25, 2006, was an ordinance that provided for the rezone to residential of the entire parcel that was proposed for rezoning. After a motion was made to adopt said ordinance, Council member Monson requested an Amendment, which was accepted and voted upon, but there was no written ordinance before the City Council which contained the legal description for the area to be rezoned under the Amended Motion. Several actions are suggested by the Petitioner that might have been done to provide a written ordinance for the City Council to review, before the vote was taken. However, the meeting was held at the City’s Senior Citizen’s Center, where access to a computer and similar items was not available. The fact is that a written ordinance was not before

the members of the City Council before the vote was taken on the January 25, 2006 action. As stated above and in *Patterson*, having the ordinance in writing is mandatory. In that case, the failure to have the resolution in writing caused it to be invalid. The failure to have an ordinance in writing before the City Council before a vote was taken means that the attempt to adopt an ordinance on January 25, 2006, was legally insufficient and failed.

Therefore, the next appropriate step was to make sure that a written ordinance was prepared and before the City Council in order for a vote to be taken. This occurred in a properly noticed meeting on February 8, 2006. Once proper notice has been given and necessary public hearings have been held by both the Planning Commission and the City Council, neither State nor City law requires that an ordinance adopting the proposed rezone be adopted within any set period of time after the last public hearing. It was legal and proper to place this item on the agenda for the next Council meeting, have an ordinance in writing for consideration by the City Council and then seek a vote. The property considered for rezone at the February 8, 2006 meeting was exactly the same as had been considered by the Planning Commission, by the City Council and by the public at two public hearings. The minutes from both meetings and the public hearings clearly indicate that all concerns that had been raised were properly considered and that the same concerns were discussed as a part of considering the ordinances presented at the February 8, 2006 meeting. In fact, the Petitioner was aware of the action to be taken at the February 8, 2006 meeting and called to discuss this with at least the City Manager and requested that the City Manager raise his concerns at said meeting, which the Manager

did. (Affidavit Jim Gass January 19, 2007.) The concerns of the public at the two public hearings and of City officials at the Planning Commission meeting and two City Council meetings were thoroughly raised and discussed. Nothing more could be gained by holding another public hearing and another public hearing was not required. The requirements of Section 10-9a-503 of the Utah Code had been met by holding the two public hearings before a zoning amendment was adopted and the Planning Commission had given its recommendation. The City Code regarding such an amendment Section 17.08.040 SMC, had been complied with.

The action taken at the February 8, 2006 meeting was not a boundary clarification subject to review by the Board of Adjustment/Appeal Authority, nor was it a “formality cure”. It was a proper original action taken in compliance with the requirements of State and Municipal law to rezone real property. It is interesting that the Petitioner is very rigid in stating that Smithfield City must comply with the Robert’s Rules of Order, when the Supreme Court has granted latitude in this regard. At the same time, the Petitioner is fairly lax in what he would apparently require with respect to having an ordinance in writing before a vote is taken, when the Supreme Court has been very definite in saying there is no latitude to be granted on this issue.

III. APPELLANT HAS NOT BEEN PREJUDICED BY THE CITY’S ACTION

The Appellant suggests that if the City can change its action whenever a majority chooses, what will prevent regular abuse of the legislative process? Appellant, however, ignores the reality of the City’s action. No ordinance was legally adopted on January 25,

2006. Indeed, the only relevant ordinance adopted by the City was on February 8, 2006. State law and City regulations clearly provide that an ordinance is adopted only after required notice and then is in writing, passes by a majority vote, and is signed by the authorized officers of the City. The only ordinance which passes these requirements is City Ordinance No. 06-01 adopted February 8, 2006.

The burden of showing prejudice rests properly with the one making such a claim. (See *Springville Citizens for a Better Community v. City of Springville*; see also *Gardner v. Perry City*, referenced in Appellant's Brief, citations omitted.) Moreover, Code Section 10-9a-801(8) (a) precludes taking of evidence if a record of the challenged proceedings is provided, as was the case here. The trial court found that Appellant was not prejudiced by the February 8, 2006 adoption of Ordinance 06-01.

CONCLUSION


Not only does City Ordinance 06-01 enjoy a presumption of validity, it was adopted conclusively by legal and proper means. The requirements for review by the District Court have been met. The validity of the ordinance was upheld. The Appellant prematurely appealed and thus jurisdiction is non existent for this court to consider the matter further.

Appellant respectfully requests this court to dismiss the appeal. Alternatively this court is requested to affirm the ruling of the trial court.

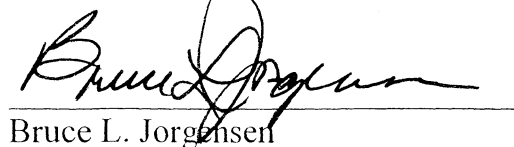
Respectfully submitted this 21st day of December, 2007.

OLSON & HOGGAN P.C.

Attorneys for Appellee,
Smithfield City



James C. Jenkins



Bruce L. Jorgensen

CERTIFICATE OF SERVICE

On December 21, 2007, I cause two copies of the foregoing Brief of Appellee to be delivered by regular mail postage prepaid to the following:

Chris Daines
Chris Daines Law
135 North Main, Suite 108
Logan, Utah 84321

