

2007

Jeffrey R. Gittins v. Smithfiled City : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JEFFRY R. GITTINS,
Appellant

Appellate Case No. 20070289-CA

vs.

SMITHFIELD CITY,
Appellee

REPLY BRIEF OF APPELLANT

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

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IN THE UTAH COURT OF APPEALS

JEFFRY R. GITTINS,
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vs.

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REPLY BRIEF OF APPELLANT

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT

The Appellant (“Gittins”) posits that the declaratory judgment signed March 27, 2007 (“the Declaratory Judgment”) is final within the meaning of Rule 3(a), Utah Rules of Appellate Procedure, notwithstanding *ProMax Development Corp. v. Raile*, 998 P.2d 254 (Utah 2000). Appellee (“the City”) responded with three new citations, all referring back to the *ProMax* decision. Rather than supporting the City’s view that the Declaratory Judgment was incomplete due to a preliminary attorney’s fee award, these three cases illustrate why the Declaratory Judgment is not robbed of finality by virtue of the trial court’s unaccepted *sua sponte* invitation to the City to file an attorney’s fee affidavit.

The Utah Supreme Court in *Sittner v. Schriever*, 2000 UT 45, 2 P.3d 442, reversed the dismissal of an appeal from “the entire judgment, including the Summary Judgment entered March 25, 1997.” *Id.* at ¶ 11. The notice of appeal was filed some eight months after the March 25th judgment,¹ but within 30 days of entry of “a new supplemental judgment awarding attorneys fees” which “fixed the amount of attorney fees to be awarded.” *Id.*

The core of the *Sittner* opinion was the following holding

We . . . hold that under *ProMax*, Sittner’s appeal is not precluded by his failure to file a notice of appeal within thirty days of the March 25 judgment because that judgment – which failed to fix the amount of attorney fees to be awarded – was not final for purposes of appeal.

Id. at ¶ 19. Important, therefore, in the *Sittner* decision, was the unfinished nature of the March 25th judgment. In its earlier description of that judgment, the Supreme Court emphasized that the incomplete state of the attorney’s fee award was obvious from the face of the judgment.

On March 25, 1997, the trial court granted summary judgment . . . [T]he court dismissed Sittner’s complaint and ordered Sittner to pay defendants’ costs and reasonable attorney fees. The court expressly reserved the amount of attorney fees for later determination.

Id., at ¶ 4.

¹ The City incorrectly implies that Sittner’s notice of appeal was filed timely after a June 27th judgment fixing the amount of attorney’s fees. Although the trial court extended the deadline to file an appeal, Sittner did not file within the extension, but instead moved for relief under Rule 60(b), Utah Rules of Civil Procedure, and waited until after disposition of that motion to file the notice of appeal. *Sittner*, at ¶¶ 8, 10-11.

The overtly partial quality of the judgment in *Sittner* is a feature not shared by the Declaratory Judgment in this case. When Gittins filed the notice of appeal, there was nothing in the Declaratory Judgment indicative of an unsettled question.

In *Beddoes v. Giffin*, 2007 UT 35, 158 P.3d 1102, the Utah Supreme Court affirmed this Court's dismissal of an appeal as untimely. The trial court entered an order dismissing the complaint on September 22, 2005, apparently with no allusion to unresolved issues. *Id.* at ¶ 2. A week later, the plaintiff, Beddoes, moved for an award of costs. *Id.* The court's order denying the motion followed in November. *Id.* Beddoes filed a notice of appeal in December. *Id.*

The ruling in *Beddoes* focused on the materiality of the trailing decision – the question was whether the matter yet to be resolved could influence the main decision.

Only material matters that affect the substance and character of a judgment must be resolved before a judgment is final. Court costs and other matters clerical in nature are not material and do not need to be resolved for a judgment to be final for the purposes of an appeal.

Id. at ¶ 12. The Court emphasized that materiality was a principle and distinction it recognized in *ProMax*.

We refused [in *ProMax*] to dismiss the plaintiff's appeal as untimely. Finding that both amendments were "amendments in a 'material matter,'" we recognized that they were materially different from the amendment made in *Neilson v. Gurley* [888 P.2d 130 (Utah Ct. App. 1994)], where the modification or amendment was to recite that the prevailing party was entitled to court costs."

Beddoes at ¶ 9.

In the case at bar, the trial court's impromptu decision that the City could be awarded its fees is not connected to the Declaratory Judgment in any way. The City's motion (to dismiss) was overruled concurrently with the court's pronouncement that attorney's fees were appropriate in conjunction with that motion. Doubtless, the City would have still been entitled to garner this early fee award even if the trial court had granted Gittins' motion for summary judgment. As in *Beddoes*, the trial court's offer of a fee award regarding the motion to dismiss is not a "material matter that affects the character and substance of" the Declaratory Judgment, and therefore does "not need to be resolved for [the Declaratory Judgment] to be final for the purposes of an appeal." *See Id.* at ¶ 12.

This Court's unpublished memorandum decision in *Turville v. J & J Properties, L.C.*, 2004 UT App 389U, 2004 WL 2404688, dealt with an appellee's request for sanctions under Rules 33 and 34 of the Utah Rules of Appellate Procedure. The appeal was being summarily dismissed because the order from which the appeal was taken "did not resolve the issue of attorney's fees." *Id.* at para. 3.²

There is insufficient information to compare the Declaratory Judgment with the judgment addressed in the *Turville* memorandum decision. However, this Court's award of some attorney's fees for the motion for summary disposition serves as a reminder that the bases for fee awards may vary, along with their association to the case and ultimate judgment. Rule 37, Utah Rules of Civil

² The appellant in that case conceded that the appeal was premature. *Id.* at para. 2.

Procedure provides for fee awards as sanctions for failure to make or cooperate in discovery. These awards are resolvable without reference to who ultimately prevails in the action. Fee awards under Rule 16, like the one offered to the City³, are similarly self-contained. Ordinarily, awards made at this stage of the proceeding are concluded and dealt with before or in the main judgment.⁴

Principal judgments are also unaffected by fee awards under Rule 11.

“Indeed, by their very nature, rule 11 sanctions are a collateral issue and do not address the merits of the party’s cause of action.” *Barton v. Utah Transit Authority*, 872 P.2d 1036, 1040 (Utah 1994). These kinds of awards stand in contrast with fee awards to a prevailing party pursuant to a contract or under a statute. The question whether and how much to award in fees in these cases, is axiomatically tied up in the merits of a judgment.

The three cases cited by the City as support for its rigid interpretation of *ProMax*, demonstrate instead that care must be taken to square the circumstances of the case at hand with the principles undergirding *ProMax* and its progeny. Some facets of this case, regarding finality, are anomalous. Yet it will still be helpful for this Court to confirm and discuss the factors present here that show the Declaratory Judgment to be final, consistent with the *ProMax* line of cases.

³ In providing for the fee award, Judge Low did not cite a rule. Rule 16(d) is the one that best fits the situation.

⁴ It is arguable that unresolved preliminary awards are merged into a judgment that is silent as to their disposition, or that the beneficiary of an award implicitly waives the award, especially if their counsel prepares the judgment. Those arguments are not directly before the Court at this time.

II. THE CITY'S FEBRUARY 8TH LAND USE DECISION WAS ILLEGAL

Gittins demonstrated that the City's decision of February 8, 2006 was illegal. See Brief of Appellant, Point II, Pp. 8-10, 14-28. The City responded with a wide-ranging variety of un-subdivided arguments. See Brief of Appellee, Point II, Pp. 8, 12-16. The thread the City would have this Court follow begins on January 26th, when the City Manager testified that he began grappling with two interwoven conundra: How does one draft (for the ordinance) an adequate legal description of a rezone boundary where the Council was (according to the City Manager) vague or ambiguous in its decision of the previous night?; and, How does one remedy the absence, when the vote was taken on January 25th, of a written draft ordinance conforming to the amended rezone? The City claims the best its Manager could do was to prepare four drafts, alternative to the original, and present all five to the Council at its next meeting. In this construction, the City cuts through the Gordian knot(s) by simply deciding on the rezone boundary for the (legitimate) first time on February 8th. The City baldly asserts that "no ordinance was adopted in the January 25, 2006 meeting." Brief of Appellee, Pp. 13-14. Under this theory, there was no prior action impeding the (later) decision.

The threshold problem with the City's argument is that it seeks to ignore what occurred on January 25th, when the City Council deliberated, exercised its legislative discretion, and made a land use decision, and did so after all of the preliminary notices and public hearings which Utah statutes and Smithfield City ordinances require.

A. On January 25th the City Council Made a Land Use Decision

Notwithstanding the City Manager's "discovery"⁵ of the statutory advance draft mandate, the Council made its decision on the rezone application on January 25th. The City's interpretation of *Patterson v. Alpine City*, 663 P.2d 95 (Utah 1983) goes farther than the holding. Patterson paid a sewer connection fee of \$1,500, under protest, in December of 1979. The Utah Supreme Court ruled that § 10-3-506, Utah Code "requiring that all resolutions *shall* be in writing is mandatory." *Id.* at 96. The decision's focus was not on the question of *when* the writing was in play because, as the Alpine City admitted, the sewer-fee resolution was never put in writing. On October 26, 2007, the Utah Supreme Court decided *Bissland v. Bankhead*, 2007 UT 86, 171 P.3d 430. In that case, Providence City voted on an annexation ordinance on October 24, 2006. The ordinance included language that "[t]he city council recognized . . . was flawed." *Id.* at ¶ 2.

At the meeting, the city attorney proposed the change in language necessary to cure the contradiction. The city council passed the ordinance despite the flaw, with the understanding that the city attorney would remedy the defect . . .

Id. The petitioners argued that their time to submit a referendum on the ordinance did not commence on October 24th. This argument was rejected:

⁵ One possible reason why the City's Manager, with 23 years of experience, would be surprised by this requirement is alluded to in an exchange between the City's staff and Gittins in the days preceding the January 25th meeting. Gittins expressed concern that amendments should be in writing before a vote is taken. Their response was that the requirement had been removed by "the new LUDMA laws." F. 50.

Because the annexation ordinance completed the deliberative process required of the Providence City Council on October 24, this was the date of the ordinance's passage. Petitioners have not indicated nor have we discovered any evidence that the city council somehow failed to comply with or circumvented any of these requirements. Thus, we hold that passage occurred when three of the five members of the city council voted for the annexation ordinance and not when the law was posted or signed on November 15.

Id at ¶ 11. A legislative decision is made and an ordinance is passed when the council says “aye.” Draft revisions, signing, and posting may come later, possibly delaying the *effectiveness* of the ordinance. See §§ 10-3-705, 711, Utah Code.

Smithfield City's deliberative process on the rezone application was completed on January 25th, concluding with a vote. That rezone was passed. As was the case with Providence City, the draft before the Smithfield City Council was not conformed to the motion. But that mismatch did not erase the decision as a concluding exercise of legislative discretion.

B. New Notice and Public Hearings Were Required After January 25th

Assuming instead that, as the City claims, the January 25th decision was a nullity, then on January 26th the property was still zoned exactly as it was before the application for rezone was ever filed. The City could not skip forward to a rezone and skip past the notices and public hearings that are essential not only to sound decision-making, but to the safeguarding of property rights, and as such required by law. Utah case law leaves no doubt that notice and opportunity to be heard, in the zoning context, are essential. See *Citizen's Awareness Now v. Marakis*, 873 P.2d 1117, 1123 (Utah 1994) (“Voters are statutorily granted the

right to be notified of changes and developments in their community's zoning laws."); *Call v. City of West Jordan*, 727 P.2d 180, 183 (Utah 1986) ("Notice, to be effective, must alert the public to the nature and scope of the ordinance that is finally adopted. . . . Failure to follow the statutory requirements in enacting the ordinance renders it invalid.").

The City's view is that due process niceties can be satisfied in this case by piggy-backing the February 8th decision on to the January 25th pre-vote procedures. Pursuing this angle, the City urges that: (1) the situation from one meeting to the next was unchanged; (2) the concerns raised in the public hearings were also addressed on February 8th; (3) the public was properly notified of the February 8th meeting; and (4) the agenda items, and property in question were identical (along with the subtle suggestion that even though there was no public hearing on February 8th, public input would have been allowed⁶). The first two assertions are incorrect: (1) The situation had changed between meetings. For example, Council Member Wood came to a new understanding of agreements between the landowners and a developer, F. 99, and Council Member Monson had received numerous calls. See February 8th minutes, p. 11, Addendum C to Brief of Appellee. (2) There were concerns raised in the January 25th hearing that were not addressed at the February 8th meeting. Compare comments of Carlene Umpley, Jeff Barnes, and Scott Poulsen at Pp. 4-5 of January 25th minutes,

⁶ "The public was allowed to comment on the [February 8th] agenda item." Brief of Appellee, p. 9. To put it gently, this statement is without support in the record.

Addendum B to Brief of Appellee, with February 8th minutes, Pp. 10-12. More to the point, all of the City's assertions about the "sameness" between January 25th and February 8th are irrelevant. The City's position that it can cobble together due process for the February 8th hearing from the planning commission hearing, the 15-day notice, and the public hearing held January 25th is at once self-contradicting (the City maintains the January 25th process was a shambles) and contrary to fundamental principles of law which appellate courts in Utah have yet to apply in the narrow context of the City's due process carryover argument.

In *Anderson v. Judd*, 158 Colo. 46, 404 P.2d 553 (1965) (*en banc*) the municipality (Denver) held a public hearing on a zoning change, and decided against it on August 5, 1968. At its regular meeting held two weeks later, the council reconsidered, reversed itself and adopted the rezone ordinance. *Id.* at 554. The rezone ordinance was challenged for not having been preceded by fresh notice and public hearing as required by Denver's charter and zoning ordinances.⁷ After extensive analysis, the Supreme Court of Colorado ruled against the rezone.

⁷ This rezone ordinance was passed through a two step process of approving a motion to reconsider, followed by approval of the ordinance upon reconsideration. This, despite the fact that a motion to reconsider was rejected at the earlier meeting/hearing after the ordinance was initially disapproved. The Supreme Court of Colorado determined that the city had power to reconsider in these circumstances:

The law is clear that a municipal legislative body may reconsider its actions and rescind an ordinance that has been previously enacted, or enact an ordinance that has previously been defeated, at any time before the rights of third parties have become vested, where there is no statutory, charter, or other prohibition, as in this case.

Sufficient or proper notice required by charter or ordinance, cannot be regarded as unsubstantial or innocuous. Right of notice to, and opportunity for, hearing by affected property owners is entirely too fundamental to require discussion. The intent of the charter and ordinance is crystal clear and a lack of compliance therewith dictates reversal of this case.

Id. at 558. The Supreme Court of Colorado did not find itself alone among jurisdictions ruling that a second decision cannot borrow due process from the public hearings and notice leading up to the earlier round. That Court looked to Massachusetts and happened on a case where, apparently, the City of Springfield tried to persuade the court there that its rules were not so inflexible as to prevent a reconsideration; but that argument was bypassed due to the due process issue.

“ . . . when the May 11 meeting dissolved, the proposed ordinance was no longer pending before the common council because it had been defeated. Under usual parliamentary procedure, it would have been too late to move for reconsideration after the May 11 meeting had adjourned.

“ . . . We need not consider whether valid rules could embody a custom thus permitting recurrent presentations of a zoning change after unfavorable action. [. . .] . . .

“ . . . *In respect of zoning changes, it is obviously desirable that members of the public shall be able to ascertain the legislative status of a proposed change at all times, and to rely on unfavorable action, final in accordance with applicable rules, as a complete defeat of the proposal.*” (Emphasis supplied.)

Id. at 557, (quoting *Kitty v. City of Springfield*, 343 Mass. 321, 178 N.E.2d 580 (1961)). New York courts reached the same conclusion.

⁷(Cont'd.) *Id.* at 557. As argued in the Brief of Appellant, Point II(B), Pp. 17-21, a prohibition against subsequent reconsideration exists in Smithfield City's case. That reconsideration was allowed under Denver's ordinances makes it easier to separate the *Anderson* analyses of due process and “reconsideration” issues.

... “The meeting of July 15th, called after notice of public hearing, was closed after a defeat of the resolution and was not adjourned to a further date or to the call of the chair. Therefore the town board had spent its authority in that connection and under the notice of public hearing, and in no event could reconsider or take any further action without a new notice of public hearing being had.”

Id. at 557 (quoting *Rabasco v. Town of Greenburgh*, 285 App. Div. 895, 137 N.Y.S.2d 802, *aff'd* 309 N.Y. 735, 128 N.E.2d 425) (1955)).

The City’s efforts to stretch its February 8th decision around the fundamental requirements of due process, and its own ordinance mandating fifteen days⁸ advance notice of a public hearing, yield odd argumentative side-effects, not the least of which is the City becoming the challenger of its own actions. Taking his cue from the City’s previous stances, Gittins has already batted down several attempts by the City to rationalize the February 8th action. See Brief of Appellant, Point II, Pp. 14-28. The City’s Brief throws some new curveballs, however, that should be dealt with.

C. The February 8th Land Use Decision Was a Reconsideration

The City takes the stand, for the first time,⁹ that the adoption of the zoning ordinance on February 8, 2006 was not a “reconsideration.” Brief of Appellee, Pp.

⁸ It is not a surprise that minimum notice for Smithfield City and Denver City was fifteen days. Only fourteen days passed from the regular meeting of January 25th to the regular meeting of February 8th, making it impossible for the City to comply with its own rezone ordinance, even if notice had been sent on January 26th.

⁹ The City argued/acknowledged below that there was no motion to reconsider in the January 25th meeting, but did not claim the action of February 8th was not a reconsideration. See Brief of Appellee, Addendum E (“Tr.”), p. 49, Ll. 22-25.

8, 13. This position is directly contrary to the record before the trial court and this Court.

The City Manager wrote to Gittins less than a month after and said, referring to the February 8th decision, “As a result, the matter was brought back to the city council for reconsideration.” R. 186, Addendum to Brief of Appellant, p. 2. This was no slip of the keyboard. A few sentences later the manager provided (incorrect) justification for the reconsideration. “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 . . .” *Id.* Reconsideration was more than just a label the City Manager placed on the action of February 8th; it was the substance of what occurred there. The January 25th and February 8th decisions together, with the latter unmistakably and explicitly constituting a re-do of the former. There are numerous allusions to the substance of this connection. *See*, e.g., the City’s “Chronology”, F. 71¹⁰. The contemporaneous minutes of the February 8th meeting make clear that the City Council was aware that they were redoing the earlier decision. “Council Member Watkins asked if the previous motion was gone. Yes.” F. 97. The City saw fit to insert explanatory italicized notes into the minutes of both meetings, expressly cross-referencing the two. F.

¹⁰ “F.” as used herein refers to a numbered statement from facts submitted to the trial court in Gittins’ summary judgment memorandum, which is reproduced as Addendum 1 to the Brief of Appellant. None of the facts in that statement were put in contest by the City.

67, 70, 95.¹¹ The City’s denial that the land use decision of February 8th was a reconsideration is without any evidentiary support in the extensive record. If the City had produced contradictory evidence, a genuine issue would have been raised, which might have precluded summary judgment. By whatever label, the City, on February 8th reconsidered (considered again) the January 25th decision.

D. The February 8th Land Use Decision Was Not a Continuance

The City advances the novel argument that the Council’s action on February 8th “was a legitimate and authorized continuation of the legislative process of the governing body to adopt, in the first instance, an ordinance.” Brief of Appellee, p. 13; see also p. 8. Again, there is no evidentiary (or other) support for this idea in the record.

It was undisputed below that the January 25th meeting adjourned at 10:40 p.m. that night, F. 69, that there was no continuance, or tabling, or assignment, or reservation of any kind that occurred regarding the rezone at that meeting, *See* Addendum B to the Brief of Appellant, and that when the meeting closed there were no lingering questions, uncertainties, or assignments expressed about the boundary or anything else having to do with the rezone. F. 63-64. It is instructive that the Council knew how to continue a matter to a later time. At 9:22 on January 25th the Council held a public hearing on the “Annexation of Stafford Property,” and deferred the matter to the next meeting: “No vote was taken. This will be

¹¹ Addenda B and C to the Brief of Appellee contain the full text of the minutes of the two meetings. The parenthetical notes appear on pages 8 and 10, respectively.

considered at the February 8, 2006 meeting.” Addendum B to Brief of Appellee, p. 8. There having been no continuance of the rezone during the January 25th public meeting, the City’s claim of “a legitimate and authorized continuation of the legislative process of the governing body” begs the questions, Authorized by who? and Authorized when? Only the legislative body can authorize the continuation of the legislative process, especially where the City’s official minutes reflect termination of the process. If the continuation were “authorized” by the Council, such authorization must occur after the public meeting, and in violation of Utah’s Open Meetings Act, §§10-3-601, 52-4-101, et seq., Utah Code, in which event the continuation would not have been “legitimate.”

E. § 10-3-508, Utah Code, Does Not Authorize Reconsideration

The City maintains that § 10-3-508, Utah Code, should be read to implicitly authorize Utah municipalities to reconsider ordinances in certain circumstances. The statute instead prohibits reconsideration in limited, specific circumstances.

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.

Id. Under the City’s sweeping interpretation, any reconsideration not prohibited by this section is authorized.

A straightforward reading of the statute negates the City’s argument. The statute does not state that it is the exclusive circumstance under which reconsideration may be prohibited. It does not say that reconsiderations are ever

allowed in regular meetings – it would be at least as easy and just as incorrect to infer from the statute that reconsiderations are never allowed elsewhere than at a special meeting as it is to accept that any reconsideration at a special meeting are universally allowed. It is untenable to assume from this language that any reconsideration at a regular meeting is prohibited if fewer council members are present than attended the first meeting; yet this interpretation does not strain the statute’s meaning nearly so far as does the City’s backlighting of the statute’s restrictive silhouette. The maxim *expressio unius est exclusion alterius* does not have the potential to invest § 10-3-508 with the City’s hoped-for meaning, because the iteration of one statutory prohibition against reconsideration does not imply legislative intent to either exclude all other prohibitions or to authorize all reconsiderations not covered by the statutory restriction. *See, e.g., Duke v. Graham*, 2007 UT 31, ¶¶ 15-17, 158 P.3d 540, 544-45. Whatever else § 10-3-508 means, it cannot be understood license to the City to abrogate its own ordinances.

F. The February 8th Action Was the City’s Attempt to Solve a Non-Problem

During proceedings for summary judgment, the City argued that boundary uncertainties and the lack of a written draft on January 25th necessitated and justified the City’s February 8th revisiting of the rezone. Anticipating a renewal of both these arguments,¹² Gittins dealt with them in Points II(C) and (D),

¹² The City’s reconsideration was addressed by Gittins in Points II(A) and (B), Pp. 15-21 in the Brief of Appellant. The City’s only new note on this point – regarding “latitude,” – p. 16 of the Brief of Appellee, simply has no basis.

respectively, Pp. 21-28, Brief of Appellant. In furtherance of its pretension that the February 8th decision was a first-time action cleared of any January 25th encumbrances, the City has thrown overboard the excuses it offered for the February 8th decision.¹³ “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.’” Brief of Appellee, p. 16.

Gittins’ arguments discredited the City’s claim that there was a necessity for the February 8th action, and explained why, even were action needed, the course followed by the City was illegal. Until the Brief of Appellee, the City alleged its February 8th action was to clarify the rezone boundary and to correct the written-draft omission by means of a remedial reconsideration. If successful, the City’s latest re-characterization of the bases for its February 8th procedure would tend to push this Court toward the corner the City continues to urge, namely: There was no way other than a reconsideration (version 1) or continuance (version 2) for the City to solve the intractable twin problems of boundary uncertainty and lack of written ordinance drafts.

Rather than coping with Gittins’ reasoning why there were no real problems, and addressing the alternative legal ways Gittins showed the perceived difficulties could have been avoided or solved, the City offers up the solitary fact that “the meeting [on January 25th] was held at the City’s Senior Citizen’s Center,

¹³The City also nixed its “reconsideration” argument, but elsewhere in Appellee’s Brief. See Point II(A) above.

where access to a computer and similar items was not available.” Brief of Appellee, p. 14. The City had pens, and a previously-marked map showing where the boundary of the downsized rezone. F. 63. The City has not explained why it didn’t substitute the map for the ordinance, or why the map has not been produced. Detailed legal descriptions were not needed; the January 25th motion was sufficiently clear. The City’s premise that the precision of a legal description was essential is debunked by its own ordinances empowering the Board of Adjustments/Appeal Authority to clarify uncertain boundaries and providing it rules of boundary construction to guide it in that process. See F. 11, 14-15, 17, Zoning Ordinances of Smithfield §§ 17.04.050, 17.20.030-040, 17.44.040.

Following the City’s most recent statements about what the February 8th decision *was not*, the destination is a dead end. According to the City, the February 8th action: *was not* a “reconsideration;” *was not* a “boundary clarification;” and *was not* a “formality cure.” This leaves as the only remaining possibility an invisible “continuance” which is demonstrated above to be nonexistent and not viable.

G. The City Did Not Wait Indefinitely to Adopt a Rezone

The City claims the authority to wait indefinitely to resolve a pending zoning application.

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.

Brief of Appellee, p. 15. This assertion points to another reason why the February 8th action was illegal. From the City's earlier perspective, the City has power to reconsider a rezone either during the same meeting where the motion was originally made "or in a subsequent meeting." See p. 2, Addendum 2 to Brief of Appellant. The City denies that the passage of time in between the last public hearing and the reconsideration meeting makes any difference, no matter how "subsequent" that meeting turns out to be. From the City's most recent perspective, an undetectable continuance motion has the potential to delay a vote on a rezone application for an indefinitely lengthy time. Indefinite "continuances" and indefinite "reconsiderations," are alike in their potential for mischief, delay, and uncertainty. The City is essentially saying it holds a procedural blank check, cashable on one day's notice. Aside from notions of fair play and due process, the citizens had a right to expect the City to adhere to its own published rules setting limits. Judge Low's query, Tr. p. 46, Ll. 6-12, is apropos in the time context:

Why do you think the city can adopt the Robert's Rules of Order and then disregard them, where at least constructively citizens of that city, and in fact anybody else, would be operating on reliance on those rules? They can rely on the city council to follow its own rules. When it doesn't why can't they be relieved of any action by the city if they appeal within the appropriate time?

An indefinite delay did not happen in this case. The Council voted on the same day as it held the public hearing, January 25, 2006. As that meeting ended, there was no continuance or deferral. It was unimaginable that the Council would later pass a different rezone without following the rezone process.

III. PREJUDICE, BY ANY DEFINITION, WAS SHOWN

In Point III of the Brief of Appellant, Pp. 28-32, Gittins discussed the “prejudice” requirement articulated in *Springville Citizens for a Better Community v. City of Springville*, 1999 UT 25, ¶ 31, 979 P.2d 332, 338. Gittins showed that there was evidence, four layers thick, that if the illegalities were removed, there would have been a different outcome. Brief of Appellant, Pp. 28-32. This focus was consistent with this Court’s interpretation of the prejudice issue:

Following *Springville Citizens*, we require Gardner to establish on remand that the City Council’s decision would have been different if it had followed its ordinance.

Gardner v. Perry City, 2000 UT App 1, ¶ 20, 994 P.2d 811, 815-16. The City ignores the question whether the City’s decision would have been different if the procedure followed were legal. Instead, the City generally avers that the trial court found no prejudice because none was shown. See Point III, Brief of Appellee, Pp. 16-17.¹⁴ The City calls for “demonstrated evidence of actual prejudice to the Appellant” and sees none, asserting that Gittins was given notice of the February 8th meeting, where the City claims the “public was allowed to comment on the agenda item.” Brief of Appellee, Pp. 8-9. The parties’ arguments pass by each other, apparently due to divergent understandings of “prejudice.” At

¹⁴The City’s Statement of Facts ¶ 13 has a similarly sweeping assertion, citing 25 pages of argument from the hearing transcript. Brief of Appellee, p. 6. This statement, like many of the others and the first three-fourths of the City’s Statement of the Case, belongs in the Argument. At the hearing, Gittins’ counsel responded to the Court’s repeated insistence that there was no prejudice by pointing to the evidences of prejudice discussed in the Brief of Appellee. See Addendum E to the Brief of Appellant, Pp. 25-30, 55-64, 72-87. (“Tr.”)

the hearing on summary judgment motions, the trial court explained its understanding of prejudice.

MR. DAINES: Do we want to go to the prejudice or shouldn't we deal with the illegality first?

THE COURT: Well, if it's not illegal, there's no prejudice. If there's no prejudice, you have no standing. So take either one. They dovetail together.

Tr. p. 24, Ll. 21-25. This straightforward view is consistent with the trial court's abbreviated ruling: "The Plaintiff was not prejudiced by the City's action."

It is understandable that a trial court would resist addressing the prejudice issue before finding illegality in a municipality's procedure. If the city's actions are legal, it makes no sense to move on to the prejudice question. Bifurcation of the illegality and prejudice issues would enable the trial court, parties, and witnesses to see the prejudice issue through an established hypothetical window.¹⁵ As presaged in the courtroom exchange, Judge Low's ultimate determination of legality led him to conclude there could be no prejudice. From the trial court's perspective, once illegality was ruled out, any attempt to examine evidence of prejudice would have been a useless expenditure of judicial resources.

In addition to chaining the prejudice issue to the illegality issue, the trial court equated prejudice with standing. The City follows the same path when it argues about whether Gittins attended hearings or was given notice. The City's

¹⁵The procedural stance of the two reported cases on prejudice illustrates that bifurcation suits these issues. In both cases the trial court ruled the action was legal, the trial court was reversed, and the case was remanded so the trial court could move on to deal with the prejudice issue.

phrase “actual prejudice to the Appellant” reflects the trial court’s insistence on a showing of near-tangible harm to Gittins. The trial court confused the prejudice requirement with the standing requirement in §10-9a-801(2)(a), Utah Code, that a challenger be “any person adversely affected” by a municipal land use decision.

THE COURT: What exactly is the prejudice suffered by your client?

...

MR. DAINES: The prejudice is that it wouldn’t have been rezoned. To get back to –

THE COURT: I’m not clarifying myself very well here. Let’s assume that the 25 acres is rezoned. Even had he been to all the meetings –

MR. DAINES: When?

THE COURT: Had he been to the 18th meeting and the 25th and on the 25th the rezone occurred. All 25 some acres had been rezoned then. Mr. Gass could have drafted this thing and it was all done and signed the next week by the mayor and recorded. Let’s assume that happened. What is the prejudice to your client?

MR. DAINES: None. But that’s not what happened.

THE COURT: I’m not talking about any theoretical or even actual compliance with the code. I want to know how the rezone adversely affects your client.

MR. DAINES: He has a dairy nearby.

THE COURT: Okay.

MR. DAINES: And it’s throughout the record what the prejudice is to him.

THE COURT: Tell me what it is. Tell me how he is adversely affected if in fact this property is zoned into residential. I know he doesn’t want it, but is there some actual prejudice occurring here, and if so what is it?

MR. DAINES: I thought we were beyond the question of adverse affect.

THE COURT: I'm asking the question. What actually happens to him if this rezone is in fact – let's assume this. Let's assume – I asked you the question before and you avoided it. If I decide this case in favor of the city, how is he adversely affected? I don't want to know anything about the city didn't comply, what actually happened to him? Does he lose money, does his farm shut down? What happens?

MR. DAINES: The answer is in the facts.

THE COURT: Just tell me.

MR. DAINES: I honestly didn't come prepared to argue about his standing. That was conceded by the city.

THE COURT: I'm not interested in standing. I'm interested in what it is he doesn't like about this thing. I want to know how he's personally prejudiced by this action. He doesn't want to have houses next to his? Does it take his view away?

Tr. p. 73, l. 12 through p. 75, l. 11. Counsel's exposition of facts from the record in exchanges with Judge Low consumed 30 pages of transcript. Evidences of prejudice as defined in *Sprinville Citizens* (the outcome would have been different through a legal process) and of adverse effect to Gittins as demanded by the trial court (economic harm) were provided and argued. The City never contested Gittins' standing and never disputed the facts supporting Gittins' one-line claim on standing: "Petitioner was adversely affected. F. 44-45, 50, 73, 96, 109-10, 117, 137, 160, 162, 165."¹⁶ The City never offered evidence to show that Gittins would

¹⁶R. 452. The City invokes § 10-9a-801(8)(a), Utah Code, to exclude evidence of prejudice outside the City's record. The City did not so object below, and in any event, 161 of 165 established facts were from the City's record.

not experience loss or hardship from the re-rezone. The only testimony the City supplied the Court grazing the *Springville Citizens* standard, was a chorus of council members vaguely announcing the non-effect of Roberts Rules of Order.¹⁷

The only way to reconcile this state of the record with the trial court's declaratory judgment, is to accept Judge Low's explanation.¹⁸ If there is no illegality, there is no prejudice, and if there is no prejudice, there is no standing. But Gittins was adversely affected. The City's actions were illegal. And Gittins, by any measure, suffered prejudice as a result.

CONCLUSION

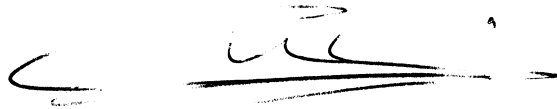
For these reasons, and for the reasons expressed in his earlier brief, the Appellant, Jeffry R. Gittins, respectfully asks this Court to reverse the judgment of the district court and remand with instructions to enter a declaratory judgment that the City Council's decision and rezone ordinance of February 8th is illegal and void, and to proceed further as described in the conclusion of the Brief of Appellant.

¹⁷See Brief of Appellant, Pp. 31-32. None of the City's 9 affidavits were in the record it supplied to the Court. However, Gittins did not object on that basis.

¹⁸Though the trial court's reasoning involved an erroneous misinterpretation of *Springville Citizens*, it is easy to appreciate the misapprehension. § 10-9a-801(3)(a)(ii), Utah Code, mandates exclusive judicial focus on "whether or not the decision, ordinance, or regulation is arbitrary, capricious, or illegal." Judge Low was mindful of this. Tr., p. 3, Ll. 5-7. "Prejudice," would be outside the court's scope of inquiry, unless it were another way of saying "adversely affected," the standing qualification expressed earlier in the same statute. (These observations are not to argue that the *Springville Citizens* prejudice requirement should be scrapped or disregarded.)

RESPECTFULLY SUBMITTED January 23, 2008.

CHRIS DAINES LAW




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CERTIFICATE OF SERVICE

On January 23, 2008, I hand-delivered two copies of the foregoing Reply

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