

1996

Jane Harper, Richard D. Harper, Frank Cattlelan,
Richard Richins, The Hill Trust v. Summit County,
Summit County Commission, Summit County
Planning Commission, Utelite Corporation : Reply
Brief

Utah Court of Appeals

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Jeffrey W. Appel, James L. Warlaumont, Benjamin T. Wilson; Appel & Warlaumont.

Jody K. Burnett; Williams & Hunt; Eric C. Olson; Wan Cott, Bagley, Cornwall & McCarthy;
attorneys for appellants.

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**UTAH COURT OF APPEALS
BRIEF**

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CKET NO. 960486-CA

IN THE UTAH COURT OF APPEALS

JANE HARPER, RICHARD D. HARPER,
FRANK CATTELAN, RICHARD RICHINS,
and THE DICKER HILL TRUST,

Plaintiffs, Appellees,
and Cross-Appellants

v.

SUMMIT COUNTY, a body politic, the
SUMMIT COUNTY COMMISSION, and the
SUMMIT COUNTY PLANNING COMMISSION,
and UTELITE CORPORATION,

Defendants, Appellants
and Cross-Appellees.

APPELLEES' REPLY BRIEF

Case No. 960486-CA

APPEAL FROM A DECISION OF THE
THIRD JUDICIAL DISTRICT COURT, SUMMIT COUNTY

Judge Frank Noel

Oral Argument Priority Classification No. 15

JEFFREY W. APPEL (3630)
JAMES L. WARLAUMONT (3386)
BENJAMIN T. WILSON (5823)
APPEL & WARLAUMONT, L.C.
**Attorneys for Plaintiffs/
Appellees and Cross-
Appellants**
1100 Boston Building
Salt Lake City, UT 84145
Telephone: (801) 532-1252

Jody K. Burnett (A0499)
WILLIAMS & HUNT
**Attorneys for Summit County
Defendants/Appellants**
257 East 200 South, Suite 500
P. O. Box 45678
Salt Lake City, UT 84145
Telephone: (801) 521-5678

Eric C. Olson (A4108)
**VAN COTT, BAGLEY, CORNWALL &
McCARTHY**
**Attorneys for Defendant/
Appellant Utelite Corporation**
50 South Main Street, Ste. 1600
P.O. Box 45340
Salt Lake City, UT 84145
Telephone: (801) 532-3333

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Jody K. Burnett (A0499)
WILLIAMS & HUNT
Attorneys for Summit County
Defendants/Appellants
257 East 200 South, Suite 500
P. O. Box 45678
Salt Lake City, UT 84145
Telephone: (801) 521-5678

Eric C. Olson (A4108)
VAN COTT, BAGLEY, CORNWALL &
MCCARTHY
Attorneys for Defendant/
Appellant Utelite Corporation
50 South Main Street, Ste. 1600
P.O. Box 45340
Salt Lake City, UT 84145
Telephone: (801) 532-3333

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The Appellees, Jane Harper, Richard D. Harper, Frank Cattelan, Richard Richins and the Dicker Hill Trust (hereinafter referred to collectively as "Appellees"), each Plaintiffs below, submit this Reply Brief.

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT AS A MATTER OF LAW IN ORDERING REMOVAL OF THE UTELITE FACILITY

Appellants Summit County and Utelite argue that the Utelite facility is an "accessory to a non-conforming use" in an attempt to overturn summary judgment for two reasons: (1) to avoid the undisputed facts demonstrating that the County Planning Commission illegally allowed the Utelite aggregate loading facility as a "permitted use" in a rural residential zone¹; and (2) to create a fact dispute as to whether the loading facility is an "accessory use" to a non-conforming use. This argument is nothing more than post hoc justification for the improper siting of the Utelite facility.

The record is clear. The County Planning Commission classified the facility as a "permitted use." The first time that it was suggested that the facility was an "accessory to a non-conforming use" occurred after the facility had been built, and it was by the Assistant County Attorney. This "after-the-fact"

¹ The Development Code explicitly lists the uses allowed in a rural residential zone, and a commercial loading facility is not included. Development Code § 12.20; see Appellee's Opening Brief at 22.

classification had nothing to do with the decision allowing Utelite to locate its facility.

Moreover, the classification was wrong. There cannot be an "accessory to a nonconforming use." The Summit County Development Code² does not authorize or even mention uses accessory to nonconforming uses and cannot be interpreted to allow a nonconforming use to be expanded as an accessory. Specifically, the Development Code states:

The nonconforming use of land, existing at the time this Code became effective, may be continued, provided that no such nonconforming use of land shall in any way be expanded or extended either on the same or adjoining property, and provided that if such nonconforming use of land, or any portion thereof, is abandoned or changed for a period of one (1) year or more, any future use of such land shall be in conformity with the provisions of this Code.

Development Code § 3.7 (emphasis added). Even if Appellants claim that the Railroad is a nonconforming use, the Code expressly prohibits the expansion that Appellants advocate.

Furthermore, the common law of zoning does not authorize the expansion of a nonconforming use by claiming it is an accessory.³ The Idaho Supreme Court, for example, in County of Ada v. Schemm, 529 P.2d 1268 (Idaho 1974), applied a zoning law nearly identical to Summit County's to hold that one could not maintain a new

² Although Appellants never cite to it in their brief, Appellees implore the Court to carefully review Chapter 3 of the Development Code. See Addendum A. 3 to Appellees' Opening Brief.

³ Appellants have been unable to identify a Utah case examining zoning provisions like those in this case.

building as an "accessory" to an existing nonconforming structure.⁴

Schemm at 1270. The Schemm Court stated:

even if appellants' argument that the structure is an accessory use be accepted (respondent-County argues vehemently to the contrary) nevertheless such accessory use to a nonconforming use is not authorized and is prohibited by the zoning ordinance. Such interpretation comports with the general concept of zoning policy that nonconforming uses should not be allowed to expand and eventually should be eliminated.

Schemm at 1270 (citing O'Connor v. City of Moscow, 202 P.2d 401 (Idaho 1949); Cole-Collister Fire Protection Dist. v. City of Boise, 468 P.2d 290 (1970); 1 R.M. Anderson, American Law of Zoning, § 6.07). It is a basic concept that:

[b]ecause non-conforming uses and structures, so long as they exist, prevent full realization of the zoning plan, the spirit of zoning is, and has been, to restrict, rather than increase, such non-conformities and to eliminate such uses as speedily as possible.

2 A. Rathkopf, The Law of Zoning and Planning, 62-1 (3d Ed.).⁵

⁴ The definitions for "nonconforming use" and "accessory" in the ordinance at issue in the Schemm case are similar to those in the Summit County Development Code. According to the Schemm ordinance, a nonconforming use is:

A building, structure or premises legally existing and/or used at the time of adoption of this Ordinance, or any amendment thereto, and which does not conform with the use regulations of the district in which located.

Ada County Zoning Ordinance § 2.086 as quoted in Schemm at 1269. Compare with Summit County Development Code §§ 1-6(51), (52). An accessory use is defined as:

A use or structure subordinate to the principal use on the same lot and serving a purpose customarily incidental to the use or the principal building.

Ada County Zoning Ordinance § 2.002 as quoted in Schemm at 1269. Compare with Summit County Development Code § 1-6(63).

⁵ Further, the addition of new facilities would most likely be regarded as an extension of use if the nonconforming use is thereby rendered more incompatible with permitted uses, if the volume or

Appellants stretch to avoid Summit County's Development Code and these well-accepted principles arguing that the loading facility could be located at any point along the railroad right-of-way because "the entire tract is generally regarded as within the exemption of an existing nonconforming use, although the entire tract is not so used at the time of the passage or effective date of the zoning ordinance."⁶ Appellants' Reply Brief at 4. This statement directly contradicts section 3.7 of the Development Code, which provides that "no such nonconforming use of land shall in any way be expanded or extended either on the same or adjoining property." Development Code § 3.7 (emphasis added).

Appellants also attempt to circumvent the Development Code in their argument regarding the necessity of a building permit. They assert that a fact issue existed due to an affidavit, prepared by the County Attorney, from a building inspector that claimed the loading "apparatus" originally installed was an "accessory

intensity of use is increased, or if the nature of the use is substantially changed. 83 Am Jur 2d Zoning and Planning § 664 (citing Paramount Rock Co. v. County of San Diego, 4 Cal. Rptr. 317 (where a rock crusher was installed at a nonconforming sand pit); County of San Diego v. McClurken, 234 P.2d 972 (where storage tanks were replaced with tanks double the size); State v. Perry, 178 A.2d 279 (where a use was changed from an ice-cream company to a cold storage facility)).

⁶ Appellants cite Gibbons & Reed v. North Salt Lake City, 431 P.2d 559, 564 (Utah 1967). However, Gibbons did not address a zoning ordinance like the one in this case. Further, the Gibbons case is clearly distinguishable because it involved a narrow exception to the nonconforming use of extracting gravel -- a "diminishing asset." This narrow doctrine has never been applied to a case like this one.

building," and as such was exempt from building permit requirements. Under the Development Code, the Utelite facility would be considered a "structure" requiring a building permit. Development Code §§ 1.6(61) and 1.9. Factually, the County recognized that it was necessary for Utelite to secure a permit by belatedly requiring it to obtain a building permit. R. at 97; 356; 2879.

II. THE SUMMIT COUNTY DEVELOPMENT CODE AND UTAH LAW SUPPORT REMOVAL OF THE UTELITE FACILITY

Appellants also erroneously claim that Appellees provided no legal basis for the remedy of removal. Appellees specifically cited sections of the Development Code, Utah statutory law and case law, all authorizing order of removal. Appellees' Brief at 22-24; Development Code § 1.16; U.C.A. § 17-27-23; Utah County v. Baxter, 635 P.2d 61, 65 (Utah 1981) (holding that a zoning violation is tantamount to irreparable harm).⁷ As a matter of law, a use not

⁷ In an attempt to discount the applicability of U.C.A. § 17-27-23, Appellants comment that this section was repealed in 1992. Reply Brief of Appellants at 15. This comment is of no worth because (1) this section existed during the relevant period involved in this case, and (2) the 1992 amendments contain a provision with similar language. The current "Enforcement" section 17-27-1002 states that:

(1)(a) A county, county attorney, or any owner of real estate within the county in which violations of this chapter or ordinances enacted under the authority of this chapter occur or are about to occur may, in addition to other remedies provided by law, institute:

- (i) injunctions, mandamus, abatement, or any other appropriate actions; or
- (ii) proceedings to prevent, enjoin, abate, or remove the unlawful building, use, or act.

permitted in a specific zone is illegal and a court is fully authorized to order its removal. See U.C.A. §§ 17-27-23 (1987); 17-27-1002(1)(b) (1992); Development Code 1.16.

Appellants' suggestion that it would be inequitable to remove an "expensive" facility cannot override this legal principle. The only justification for recognizing nonconforming structures at all is to protect a landowner's then existing investments in the property -- not expansions made after enactment of the restrictive ordinance.⁸

(b) A county need only establish the violation to obtain the injunction.

(2)(a) The county may enforce the ordinance by withholding building permits.

(b) it is unlawful to erect, construct, reconstruct, alter, or change the use of any building or other structure within a county without approval of a building permit.

(c) The county may not issue a building permit unless the plans of and for the proposed erection, construction, reconstruction, alteration, or use fully conform to all regulations then in effect.

U.C.A. § 17-27-1002 (1992) (emphasis added).

⁸ See City and County of Denver v. Board of Adjustment, 505 P.2d 44, 47 (Colo. Ct. App. 1972) (precluding construction of new nonconforming structures following the destruction of prior nonconforming structures); Clackamas County v. Portland City Temple, 511 P.2d 412 (Or.Ct.App. 1973) (affirming an injunction restraining defendants from using a portion of property zoned single family residential agricultural as an airport where the improvements were made after the enactment of the ordinance); Service Oil Co. v. Rhodus, 500 P.2d 807 (Colo. 1972) (holding that an owner of a service station that was destroyed by fire had abandoned the nonconforming use of the property since the owner made no attempt to obtain a permit to rebuild until after the abandonment period set forth in ordinance); see also 2 A. Rathkopf, The Law of Zoning and Planning, 61-1 stating:

This principle is even more clear under the facts of this case. Here, not only was there a zoning ordinance, but Judge Wilkinson ordered the facility be removed before most of the expenses were incurred. Summit County sought an interlocutory appeal and lost. Utelite was on notice that the facility could be removed and deliberately took the risk that it would be when it incurred further expenses.

Finally, Appellants erroneously claim there must be a "specific" finding that the facility is not a "accessory use to the railroad's non-conforming use." There is no such requirement under Utah law. See Utah R.Civ.P. 52(a); Mountain States, Etc. v. Atkin, Wright & Miles, 681 P.2d 1258 (Utah 1984) (stating that "[f]indings of fact are unnecessary to support the granting of summary judgment").⁹

III. SUMMIT COUNTY VIOLATED THE OPEN MEETINGS ACT BY NOT GIVING APPELLEES NOTICE

Appellants convolute a straight forward violation of the Open and Public Meetings Act by arguing that the County's decision not

[T]he constitutional protection afforded the owner of property on which a nonconforming use exists, exists only in order to permit the continuance of the use to the extent necessary to safeguard the investment of the property owner.
Rathkopf at 61-1.

⁹ The Defendants cannot, and do not, state that Judge Wilkinson did not consider their argument. They made the same claim as the basis for their Opposition to the Plaintiffs' Motion for Summary Judgment and as the basis for their Motion to Dismiss. R. 161-179. Judge Wilkinson was not convinced, as is reflected in the Conclusions of Law, that the County did not meet the provisions of its Development Code.

to comply with the Act was "administrative" because it was made by a County staff member who simply chose to "confirm" it with the planning commission. This argument ignores the undisputed facts as proven by Utelite's own sworn responses to interrogatories. Utelite's answers establish that the decision finding this use to be "permitted" was made at a planning commission meeting with no notice to the public. See Utelite's Response to Plaintiffs' First Set of Interrogatories No. 27, Addendum A. 1 to Appellees' Opening Brief.

Furthermore, there is no "administrative" exception to notice under the Open and Public Meetings Act. The terms of the statute and its announced public policy indicate actions taken by public bodies must be done in open with notice:

In enacting this chapter, the Legislature finds and declares that the state, its agencies and political subdivisions, exists to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

Utah Code Ann. § 52-4-2 (1977). Notice is a threshold procedural requirement for any action taken by the Planning Commission and there was no notice that the County Planning Commission would be making the decision to allow Utelite to locate its facility in Echo on property zoned rural-residential. R. 97, 129; Addendum A. 11, 12 of Appellees' Opening Brief.

Appellants' suggestion that complying with the Act would impose an "immense burden, if not near paralysis" on governmental

operations is without any evidentiary support.¹⁰ An equally persuasive argument is that true paralysis will occur if a public body in Utah must determine whether the decision it will make is "administrative" or "legislative" before it gives notice of its meetings.¹¹ There are no standards or guidelines to follow, and the difficulty in making such a determination would be immense. It was never the intent of the Act to force this decision on the public body. Instead, the avowed intent of the Act is that there must be notice to assure action and deliberations are taken and conducted openly. Utah Code Ann. § 52-4-2.

Finally, Appellants argue that the construction and operation of the facility itself was sufficient notice of a violation of the Open and Public Meetings Act to cause the running of a 90-day limitations period. However, as Appellants admit, the essentials of the Act are notice and minutes of meetings. When those are not

¹⁰ The consequences of complying with the Open and Public Meetings Act are not an "absurdity" as the Appellants would like this Court to think. It is the examples presented by the Appellants that are absurd. A closer analogy to the facts in this case would be that the homeowner in Appellants' example wished to construct a commercial loading facility in a subdivision zoned residential that had a railroad track running through it. Surely the Act intended that the planning commission would comply with its mandates in such a situation.

¹¹ Defendants' argument is not in line with the mandates of the Open and Public Meetings Act. The Act applies to any "public body" not specifically exempted and defines the term "public body" to mean "any administrative, advisory, executive, or legislative body of the state or its political subdivisions." Utah Code Ann. § 52-4-2(2). Thus, the Act does not distinguish between bodies that are performing an administrative or a legislative function.

provided, the essentials are hidden and the time limitations cannot begin.

IV. BY VIOLATING THE OPEN MEETINGS ACT AND ITS DEVELOPMENT CODE, SUMMIT COUNTY DEPRIVED APPELLEES OF DUE PROCESS

Appellants argue that the Appellees have failed to establish (1) what process was due, and (2) how Appellees were deprived of this process. However, the Appellees cited to the Development Code and the Open Meetings Act, which both require notice. The Act further requires that minutes of meetings be kept. See Development Code § 6.3; U.C.A. §§ 52-4-6 and 52-4-7. There is also no distinction regarding notice requirements between "legislative" and "administrative" determinations.¹² The mandates of the Development Code and Utah law establish, on their face, "what process is due," and Appellees showed their rights had been violated.

Appellees established how they were deprived of this process through the undisputed facts. The facts in evidence showed that the agenda for the December 13, 1988 meeting of the Planning Commission provided no notice to the public that there would be a discussion concerning the proposed relocation and construction of the Utelite facility. R. 97; 129, see Addendum A. 11, 12 of Appellees' Opening Brief. Also, the minutes of the meeting were devoid of any reference to the Utelite facility. R. 124-127, Addendum A. 12 of Appellees' Opening Brief.

¹² Section 52-4-6(2) requires that "each public body shall give not less than 24 hours' public notice of the agenda, date, time and place of each of its meetings. (emphasis added).

This evidence clearly established violations of law. Judge Wilkinson carefully considered this evidence and ruled that the actions of Summit County violated its Development Code and the Utah Open Meetings Act, and that these "acts and omissions have harmed Plaintiffs without providing them due process of law." R. 282-3. Thus, the trial court's finding was correct as a matter of law.

V. APPELLEES ARE ENTITLED TO ATTORNEY'S FEES UNDER 42 U.S.C. § 1988

As a matter of law, the trial court erred in not awarding attorney's fees under 42 U.S.C. §§ 1983 and 1988. In Lorenc v. Call, 789 P.2d 46 (Utah Ct. App. 1990), the Utah Court of Appeals stated that "whether Plaintiff's complaint states a claim for relief under section 1983 is a question of law." Lorenc at 49 (citations omitted). The Court quoted that:

[t]o state a claim for relief under section 1983, a complainant need allege only (1) that some person deprived complainant of a right, privilege or immunity secured by the federal constitution; and (2) that such person acted under color of state law.

Id. at 49-50 (citations omitted). Because the Plaintiff in Lorenc alleged a due process claim at the trial level, which she further developed on appeal, the Court concluded that she had stated a constitutional claim for relief under section 1983. Id. at 50. Although the Court did not reach the constitutional claim, the Court stated:

The United States Supreme Court has consistently held that a Plaintiff is generally entitled to an award of attorney fees under section 1988 if the Plaintiff prevails on a statutory, non-civil-rights claim which is

pendant to a substantial constitutional claim and which arises from a "common nucleus of operative fact.

Id. (citations omitted). The United States Supreme Court has reasoned that "[s]uch a fee award 'furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues.'" Maher v. Gagne, 448 U.S. 122, 135, 100 S.Ct. 2570, 2577, 65 L.Ed.2d 653 (1980).

Despite Appellants' argument, it is clear that the Appellees did allege a violation of due process claim in their original Complaint, in their Amended Complaint, and in their Second Amended Complaint. Appellees have further developed their constitutional claims in this appeal. In addition, Appellees prevailed on the pendent statutory Open and Public Meetings Act claim arising from the "common nucleus of operative fact" that they were deprived of notice. Therefore, as recognized by this Court in Lorenc and the United States Supreme Court, Appellees are entitled to attorneys fees under 42 U.S.C. sections 1983 and 1988.

VI. THE UNION PACIFIC RAILROAD WAS NOT A NECESSARY AND INDISPENSABLE PARTY TO THIS LITIGATION

The trial court was correct in ruling that the Union Pacific Railroad ("Railroad") was not a necessary and indispensable party. Appellants fail to analyze Rule 19(a) or cite to a single case that does so. Under Rule 19(a) an absent entity is "necessary" and shall be joined only where:

(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

U.R.C.P. 19(a) (emphasis added). The trial court's determination must not be disturbed unless there is an abuse of discretion. Seftel v. Capital City Bank, 767 P.2d 941 (Utah Ct. App. 1989), aff'd. sub nom., Landes v. Capital City Bank, 795 P.2d 1127 (Utah 1990).

Judge Wilkinson did not abuse his discretion. Appellees' Prayer for Relief requested that the Utelite facility be removed for violating zoning requirements under the Summit County Development Code. Complete relief, removal of the facility, could be obtained without the Railroad and Appellants have never said otherwise.

On the other hand, Appellants recognizing that complete relief would be afforded, challenged the trial court's decision by asserting that "the Railroad has a direct interest in the outcome of the litigation." Appellants' Reply at 13. This blanket argument ignores Rule 19(a)(2). Rule 19(a)(2) is conjunctive. The entity must "claim an interest" and be so situated that disposition of the action in its absence would impede its ability to protect that interest. U.R.C.P. 19(a)(2)(i). At no time has the Railroad "claimed an interest" as required by Rule 19(a)(2). Its refusal to

do so is a factor upon which the trial court could rely in determining that it was not an indispensable party. See Moore's § 19.07[2.-1] at pp. 19-104 - 19-105 (citing United States v. Sabine Shell, Inc., 674 F.2d 480 (5th Cir. 1982) (holding that failure to join property owners did not require reversal where they had not attempted to intervene) [other citations omitted])).

VII. THE TRIAL COURT'S ORDER PROHIBITING ALL DISCOVERY FROM SUMMIT COUNTY WAS AN ABUSE OF DISCRETION.

The trial court abused its discretion in prohibiting further discovery against Summit County.¹³ Under Rule 26(b) of the Utah Rules of Civil Procedure, any party is entitled to obtain discovery from any other party regarding any matter in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any persons having knowledge of any discoverable matter.

In their Brief, Appellants argue that the discovery sought by Appellees against Summit County involved the very same factual and legal issues covered in the Partial Summary Judgment. However, the fact that Partial Summary Judgment was entered against Summit County requiring it to move the facility did not mean it lacked

¹³ After Appellees filed their Second Amended Complaint, the trial court entered a blanket protective order prohibiting all discovery against Summit County. R. at 775.

relevant and discoverable information to remaining claims against it and Utelite.¹⁴

For instance, Appellees had pending attorney's fees claims which were in dispute against Summit County and had newly discovered information learned through informal discovery that Summit County was taking action to abandon the roadway upon which Utelite was located in violation of the law. The trial court's order prohibited the formal discovery necessary to pursue that issue.

Appellees also had pending claims against Utelite, the owner and operator of the facility, for nuisance, trespass, and negligence. As a defense to these claims, before and during trial, Utelite argued that its conduct in building and operating the facility was reasonable because, among other things, Summit County approved the facility and properly issued building permits. Utelite's Answers to Interrogatories; R. 2840 and 2845. By prohibiting discovery, Appellees could not prepare for these defenses.¹⁵

¹⁴ Summit County possessed relevant information regarding the identity of witnesses and documents to be used at trial, its involvement in the location and operation of the facility, and the representatives of Summit County who Utelite would call as witnesses. Furthermore, Summit County continued to participate in the depositions of Appellees.

¹⁵ See Plaintiffs' Memorandum in Opposition to Summit County's Motion for a Protective Order and Request for Oral Argument for Plaintiffs' argument on the relationship of each Request to the pending claims. R. at 725-31.

VIII. THE CONDUCT ALLEGED IN APPELLEES' NUISANCE CLAIM WAS SUBJECT TO STATUTORY PROHIBITION UNDER THE SUMMIT COUNTY DEVELOPMENT CODE AND UTAH LAW

Appellants continue to claim that the trial court erred when it found that the conduct engaged in by Utelite was not subject to a specific statutory prohibition. The trial court did not make this decision lightly. It carefully examined the conduct, the Summit County Development Code and the cases upon which Utelite relies. As set forth in Appellees' Opening Brief, loading rock aggregate is a prohibited use under the Summit County Development Code §§ 12.7 and 12.20. These sections are specifically incorporated into Utah law. Utah Code §§ 17-27-7, 8 and 23.¹⁶ A violation like this is punishable as a criminal violation under the Development Code and the Utah Code. Thus, the argument that the conduct is not prohibited by the law is erroneous. Because it was prohibited, and still is, the facility is a nuisance per se. Turnbaugh v. Anderson, 793 P.2d 939, 943 (Utah 1990); Branch v. Western Petroleum, Inc., 657 P.2d 267, 276 (Utah 1982).

¹⁶ Appellants note parenthetically that § 17-27-8 and 23 were repealed in 1992. A careful examination indicates that the entire zoning code was repealed and replaced in 1992. However, the replacement laws include Code sections that have provisions similar to §§ 17-27-7, -8, and -23 that were in full force when the facility was built. See e.g. Utah Code Ann. §§ 17-27-302, 305, 1002.

IX. THE TRIAL COURT COMMITTED ERROR IN PROHIBITING APPELLEES FROM FILING AN AMENDED COMPLAINT TO CONFORM TO THE EVIDENCE AND NOT PERMITTING EVIDENCE REGARDING ACCESS AND THE PUBLIC ROAD

The trial court erred when it prohibited the Appellees from filing an amended complaint to conform to the evidence. Appellants incorrectly argue that a trial court has complete discretion in determining whether to allow amendment of a pleading, and that this Court should not reverse the trial court's decision absent an abuse of discretion. Appellants' Joint Reply at 16. Further, Appellants attempt to paint the picture that the amendment would cause great delay and result in substantial prejudice. This analysis is flawed.

Rule 15 of the Utah Rules of Civil Procedure is liberally applied. The Rule permits amendments "by leave of court" which "shall be freely given when justice so requires." U.R.C.P. 15(a). The Rule allows "amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment." U.R.C.P. 15(b) (emphasis added).¹⁷

In Lewis v. Moultrie, 627 P.2d 94 (Utah 1981), the Utah Supreme Court had occasion to analyze the liberal policy in Utah regarding amendment. The Court stated:

¹⁷ Rule 54(c)(1) furthers the liberal amendment mandates of Rule 15 by providing that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." U.R.C.P. 54(c)(1). See Cheney v. Rucker, 381 P.2d 86, 91 (Utah 1963).

Ordinarily the allowance of an amendment by leave of court is a matter which lies within the sound discretion of the trial court. This discretion, however, is to be exercised in the furtherance of justice. The rule in this state has always been to allow amendments freely where justice requires, and especially is this true before trial.

Lewis at 98 (allowing amendment where made before trial, the opposing party had adequate opportunity to meet the additional issue raised, and neither party was placed in a position of any greater advantage or disadvantage) (quoting Gillman v. Hansen, 486 P.2d 1045 (Utah 1971) (emphasis added)). According to the Lewis Court:

A prime consideration in determining whether an amendment should be permitted is the adequacy of an opportunity for the opposing party to meet the newly raised matter.

Lewis at 98. Further, according to Utah law, the stage of the proceedings in which Plaintiffs seek leave to amend is not the critical factor in determining whether leave should be granted. As clearly reasoned by the Utah Supreme Court:

Some tempest has been raised about the court allowing the Plaintiff to make tardy amendments to the pleadings. In doing so, he [the trial judge] wisely and properly stated: "The pleadings are never more important than the cause that is before the court There can be no prejudice in this case because we'll give ample time for any answer" This is in harmony with what we regard as the correct policy: of recognizing the desirability of the pleadings setting forth definitely framed issues, but also of permitting amendment where the interest of justice so requires, and the adverse party is given a fair opportunity to meet it.

Id. (quoting Thomas J. Peck & Sons, Inc. v. Lee Rock Products, Inc., 515 P.2d 446 (Utah 1973)).

Appellees sought leave to amend before a certificate of readiness for trial was filed by any party and no pre-trial conference or trial dates had been set. Amendment was required in order to plead their claim that Summit County was improperly abandoning the road and to add a new claim that the facility encroached upon a public road.¹⁸ The motion came at the time the Court had ordered for the conclusion of discovery -- a time that is customary for such motions to be filed. Appellants had ample notice of these claims and adequate opportunity to meet these issues.¹⁹ In fact, two months after the motion was filed, Utelite itself supplemented its responses to discovery to name additional witnesses which led to several witnesses being identified and deposed.

In derogation of Utah law, the trial court would not permit amendment. The court attempted to justify its decision by

¹⁸ In informal discovery Mr. Richins and his counsel learned for the first time that the road was a class "B" road for which Summit County had accepted public monies for maintenance. R. 659, 690-91, 805. Legal research showed that there was a "sister" claim to nuisance known as encroachment on a public road. They also learned, two weeks before the end of the discovery period, that the Summit County Commission was taking steps to abandon the road without following statutory procedures. R. 690-91, 806.

¹⁹ After appeal to the Supreme Court was denied, Appellees filed a Second Amended Complaint to allege that the placement of the facility caused a nuisance. Utelite immediately served written discovery, and both Utelite and Summit County deposed the Plaintiffs. When asked about the basis for Mr. Richins and the Dicker Hill Trust nuisance claims, Mr. Richins testified that the facility blocked access to the property because it was built on a public road that served as the primary access to his home. R. 836-38, 639-43, 688.

insisting that "the Plaintiffs can obtain the additional relief they seek by filing a new civil action in this court." R. 1028-29. This statement by the trial court defied logic. The parties were before the Court.²⁰ The discovery had been done and the proposed claims arose out of a core of facts. See Wells v. Wells, 272 P.2d 167, 170 (Utah 1954) (holding that amendments conforming to the evidence should be liberally allowed and that limitations thereon should be determined by whether the matters involved can be handled in one trial).

Further, the trial court committed error by refusing to allow Mr. Richins to present evidence regarding access to his property. Appellants argue that there was not a specific allegation that placed access or the public road in issue. However, in their Second Amended Verified Complaint, Appellees alleged that Utelite was liable for the inconvenience, annoyance, discomfort, and other nuisance resulting from their placement of the facility. R. 312. In discovery, the access question was the focus of written discovery and depositions. R. 832, 836-38. Among other things, the proposed amendment was designed to more particularly describe how the lack of access was a nuisance. Thus, if there was any doubt about the pleading, notice was certainly imparted as to the

²⁰ As stated above, removal of the facility, did not depend on the Railroad. The issues did not present a title question. Even if they did, Utelite could have easily presented any evidence it had to show it was justified in placing its facility where it did. Nothing would have prohibited it from doing so if the amendment was allowed. See argument VI. above.

claim, it was amply discovered, and amendment would have simply amplified it.

Finally, the Appellants claim that the Appellees did not "proffer" the evidence they would have offered and that without the evidence this Court cannot determine whether the exclusion of the evidence offered affected the trial. Ashton v. Ashton, 733 P.2d 147 (Utah 1987); Onyeabor v. Pro Roofing, Inc., 787 P.2d 525 (Utah Ct. App. 1990). The law in Utah is quite clear. If a trial court is afforded an opportunity to rule on the issue, it is preserved. Onyeabor, 787 P.2d 525. Under this standard, the issue was certainly preserved when the trial court denied the motion to amend. See Handy v. Handy, 776 P.2d 917, 924 (Utah Ct. App. 1989) (quoting State v. One 1979 Pontiac Trans Am., 771 P.2d. 682, 684 (Utah Ct. App. 1989)).

The trial court abused its discretion by denying the Motion to Amend and refusing to allow Appellees to plead and present evidence regarding access. The Appellees should be entitled to present these claims should this case be reversed because they are important to damages and further equitable relief.

X. THE TRIAL COURT COMMITTED ERROR IN ALLOWING THE JURY TO VIEW THE FACILITY IN OPERATION.

Appellants' seek to justify the trial court's decision allowing the jury to see a staged operation of the facility by arguing that Appellees were seeking future damages. Indeed, the trial court indicated that the basis for its ruling was that it

would be "probative on the issue of current damages . . . [and] present lost property values." R. at 2664-65.

In direct contrast to this, however, the trial court only permitted a claim for past damages when the case went to the jury. R. 1988-90. The trial court also advised the jury that there was an order to remove the facility. R. 1985-86. Thus, the court's rationale for allowing the jury view because the Appellees were seeking more than "past damages" was completely undercut when the court restricted damages to the date of trial and told the jury that the facility would be removed.

Moreover, the Appellants' argument that the trial court told the jury that the view would only depict how the facility operated on the day of the view underscores the problem of allowing the jury to view the facility at all. As noted in Appellees' Opening Brief, the jury saw a make-believe demonstration and did not witness Utelite's typical operating conditions²¹. Utelite had moved just one car into place for loading, and did not clean the car by banging it and opening the doors. All of the debris typically surrounding the facility had been cleaned up. Because the view was

²¹ In their brief the Appellants claim Utelite "offered evidence from various witnesses that the condition observed at the Facility on September 14, 1995 was typical." One of these "witnesses," Wilda Peterson, a waitress at the Kozy Kafe, was not even present the day of the jury view. R. at 2927. Another could not recall if he had ever seen the facility operate. R. at 2797. Robert Swenson did not even know whether the facility was operating when he had seen it. R. at 2956. Finally, Brett Atkinson, a Utelite truck driver, said that generally all four drivers were not there to help each other get through the operation. R. at 2921.

not representative, it should not have been permitted. See State v. Cabututan, 861 P.2d 408 (Utah 1993) (upholding a trial court's denial of a motion to view a crime scene where it was unlikely that the site would be in the same condition as it was three months earlier); see also State ex rel. Road Commission, 449 P.2d 114 (Utah 1969) (finding an abuse of discretion where, in a takings case involving property valuation, the jury was permitted to view certain structures a considerable time after the taking and changes had occurred as to render the view of no assistance to the jury).

XI. THE TRIAL COURT'S DETERMINATION THAT THE FACILITY IS NOT PRESENTLY A NUISANCE IS CLEAR ERROR

In their Brief, Appellants do not address the primary problem with the trial court's belated determination that the Utelite facility, at the time of trial, was not a nuisance. As a result of erroneous evidentiary rulings Appellees were unable to, among other things, demonstrate that the facility constitutes an ongoing nuisance that adversely affects the Appellees' use or enjoyment of their property. Additionally, since the trial was on "damages," Appellees could not introduce evidence on the way the facility was located to support further equitable relief.

Contrary to the Appellants' arguments, Appellees have set forth specific and detailed facts demonstrating the facility was a nuisance at the time of trial. Appellees' Opening Brief, Statement of Facts pages 15-20. Appellees also filed timely objections to the Findings and Conclusions prepared by Utelite's counsel. R. 2198-2211. The record clearly shows that these findings of fact

were contradicted by substantial evidence. Attached hereto as Exhibit "A" are the specific Findings of Fact and the substantial evidence, with record citations, showing that the Findings are clearly erroneous.

XII. A NEW TRIAL FOR ALL DAMAGES MUST OCCUR IN THE EVENT OF REVERSAL

The primary relief sought by Appellees was, and continues to be, to have the facility removed. Affirming the order of removal will finally end this case. Should this Court reverse, however, the issue of all damages suffered by the Appellees flowing from the placement and operation of the facility must be presented to a jury that has all of Appellees' claims and all of the facts before it.

Any other result will support a jury verdict that was unfairly based upon two erroneous instructions. First, that damages could only be for past harms. Second, that the facility would be removed. There can be no doubt the jury's verdict was impacted by these instructions.

Appellants mistakenly claim that Appellees had the full opportunity to present evidence of damages and Utelite's conduct that meriting punitive damages. The history of this case belies such a claim. As set out above, Appellees were not allowed to engage in key discovery or to put all of their claims and evidence before the jury. Should there be a reversal, the jury must have every claim with all supporting evidence before it.

CONCLUSION

The only way that Summit County's zoning ordinances are effective is if they are enforced. In this case that requires an affirmance of the order of removal. Appellees request the Court of Appeals affirm the trial court's order requiring Summit County to remove the Utelite facility so that the Summit County Development Code and the Utah Open and Public Meetings Act are honored and this case ends.

RESPECTFULLY submitted this 23rd day of April, 1997.

APPEL & WARLAUMONT

By James L. Warlaumont
James L. Warlaumont
Attorneys for Plaintiffs/Appellees
Jane Harper, Richard D. Harper
Frank Cattelan, Richard Richins,
and The Dicker Hill Trust

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd of April, 1997, a copy of the foregoing Brief of Appellee's was mailed to the following:

Counsel for Defendants/Appellants, Summit County, et al.

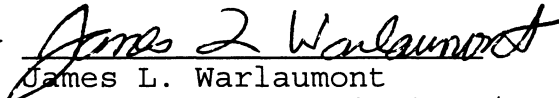
Jody K. Burnett
WILLIAMS & HUNT
257 East 200 South, Suite 500
Salt Lake City, Utah 84145

Counsel for Utelite Corporation

Eric C. Olson
Van Cott, Bagley, Cornwall & McCarthy
50 South Main Street, Suite 1600
P.O. Box 45340
Salt Lake City, Utah 84145

APPEL & WARLAUMONT

By



James L. Warlaumont
Attorneys for Plaintiffs/Appellees
Jane Harper, Richard D. Harper
Frank Cattelan, Richard Richins,
and The Dicker Hill Trust

EXHIBIT A

At the time Utelite filed its proposed Findings of Fact and Conclusions of Law: Re Equitable Relief, the Plaintiffs objected. Since a record had not been prepared, they could not provide specific record citations. This Exhibit follows the objections with record citations.

FACT 1: The Defendant Utelite Corporation ("Utelite") operates a loading facility (the "Facility") adjacent to the Union Pacific railroad tracks at Echo, Utah.

CONTRADICTIONARY EVIDENCE: The statement that the facility is "adjacent" to the Union Pacific railroad track is misleading and incomplete. The uncontested facts, as demonstrated by the evidence, show: (1) Utelite located its facility in an area zoned as Rural Residential 2 (R. at 2383-84); (2) Utelite located its facility above the culinary water line that serves the residents of Echo, Utah, which impedes access to the line (R. 2569-70); (3) Utelite located its facility on the road that Richard and Ruth Richins traditionally used which causes inconvenience (R. 2642, 2672); and (4) Utelite located its facility on and then moved the Echo Ditch that serves agricultural users without permission (R. 2679-80).

FACT 2: The Plaintiffs own property in the vicinity of the Facility. The Union Pacific railroad tracks that run through Echo, Utah lie between the Facility and the property owned by Jane Harper, Richard D. Harper and Frank Cattelan. Trains go through Echo, Utah on these tracks in excess of fifteen to twenty times per

day.

CONTRADICTION EVIDENCE: The term "in the vicinity" is vague and ambiguous. The Plaintiffs Jane and Richard Harper own property that is directly across from the facility. (R. 2387). Plaintiff Frank Cattelan owns property that is contiguous to the Harpers. (R. 2556). The Dicker Hill Trust owns property that is close to the Utelite facility and that has been primarily served by the road upon which Utelite built its facility. (R. 2650-55; 2668; 2690).

FACT 3: At the Facility on a weekly basis, Utelite loads an average of six and one-half railroad cars with its kiln dried aggregate products.

CONTRADICTION EVIDENCE: This Finding is vague, misleading and does not accurately reflect the admitted evidence. The admitted evidence indicated that Utelite would load on some days and not others and there was no way for the Plaintiffs to know when loading would occur. (R. 2402). The evidence further showed there were days when Utelite would load all day and into the evening. (R. 2402). A log, admitted as Exhibits 19 and 20 at trial, documents Utelite's loading from the time the trucks began to arrive to the time they leave and the number of cars loaded. This log indicates that, on average, more than six and one-half rail cars were loaded per week. (R. 2588-89).

FACT 4: Semi-trucks transport the aggregate product to the Facility for loading. It takes four trucks approximately forty minutes to load a single railroad car.

CONTRADICTORY EVIDENCE: The Finding is misleading and does not accurately reflect the admitted evidence. In particular, the statement that "it takes four trucks approximately forty minutes to load a single rail car" implies a rail car is loaded in forty minutes. The evidence was that the loading occurs as trucks come to the facility. At times only one truck will be used to load a rail car. This means the loading of one rail car will occur over several hours. (Exhibits 19 and 20 at trial). In addition, the procedure for loading takes time. Truck drivers must move rail cars into place. At times, the rail cars sit at the site while partially loaded. (R. 2383).

FACT 5: The Utelite Facility currently operates, with occasional exceptions, on weekdays during daylight hours.

CONTRADICTORY EVIDENCE: "Occasional exceptions" is not defined and the evidence showed that Utelite had just before trial loaded as late as 10:00 p.m. (R. 2595; 2858; Exhibits 19 and 20 at trial).

FACT 6: To deal with dust from the loading operations, Utelite has taken the following steps:

- a. Construction of a metal enclosure at the Facility.
- b. Installation of a bag house and duct work at the Facility.
- c. Paving of the access road to the Facility.
- d. Installation of curtains and an electric door at the Facility.
- e. Watering down aggregate at the Utelite plant.
- f. Installation of a hood and metal coverings over the conveyor belt and drop areas at the Facility.

- g. Response to resident complaints called in to the Utelite plant including termination of loading on windy days.

CONTRADICTORY EVIDENCE: Steps taken by Utelite to control aggregate should not be the basis for denying equitable relief unless their continued implementation, maintenance and/or existence actually preclude Utelite aggregate from migrating to Plaintiffs' properties so that Plaintiffs' health is not harmed, the Plaintiffs are not inconvenienced and the Plaintiffs can peacefully enjoy their property. Most of the witnesses testified that dust still migrates and continues to cause health symptoms like wheezing, coughing and running eyes. The migrating aggregate also causes inconvenience. (R. 2387-94; 2586; 2654; 2690-91; 2695-97). Recent pictures were admitted showing Utelite aggregate in the bedroom of Mr. and Mrs. Harper's son as a result of it blowing from the facility. (R. 2394; Exhibit 14 at trial). Samples collected from the windows of the Harper home showed Utelite aggregate on the windows. (R. 2772; Exhibits 78, 79, 80, 84, and 85 at trial). This migration of lightweight aggregate occurred up to the date of trial. (R. 2395-98; 2654; 2579-86).¹

The substantial evidence does not support the following lettered paragraphs:

Subparagraph 6 (a). The term "metal enclosure" is misleading. Utelite constructed a chain link fence that does not "enclose" the facility to prohibit dust, and is much lower than the conveyor from

¹ The Jury did not find that general damages had stopped because of the Utelite changes. The Jury was instructed that it could not award damages past the day of trial and that the court had ordered the facility to be removed. There is nothing in the Jury verdict that the annoyance, inconvenience, health hazards and degraded enjoyment of property have ended.

which aggregate migrates. (R. 2855-56; 2500). Aggregate is left on the road and railroad tracks. (R. 2501; 2579; 2742-45; 2906; 2948). This aggregate migrates to Plaintiffs' properties. (R. 2579-86; 2654). The chain link fence does not "enclose" this aggregate at all or the aggregate that comes from the conveyor. (R. 2500). Additionally, the fence is frequently left open and must be open at the time Utelite loads its aggregate. (R. 2500; 2745).

Subparagraph 6 (b). The "baghouse" only collects dust from the conveyor system, not the entire facility. The blowing aggregate occurs during dumping and when aggregate is left on the roadway and facility, even when Utelite is not loading. (See Subparagraph (a), supra).

Subparagraph 6 (c). Utelite leaves deposits of its aggregate on the paved road which migrates to Plaintiffs' property on windy days. (See Subparagraph (a), supra). Thus, the paving of the road does not preclude blowing aggregate. (Id.) Utelite violates its air quality permit by leaving aggregate. (R. 2729-30). Utelite only cleaned up the aggregate from the road and rail tracks just before the trial. (R. 2674-76; 2906).

Subparagraph 6 (d). The curtains "installed" on the facility have been ripped and torn for a number of years and did not prohibit blowing aggregate. (R. 2504; 2905). The "electric door" at the facility is "sometimes" used and is open for extended periods. (R. 2504; 2744-45).

Subparagraph 6 (e). There was no evidence of the degree that aggregate is watered down at the Utelite plant or the frequency that this is done. The migration of the aggregate demonstrates

that this "watering" down does not work. (R. 2501; Subparagraph (a), supra).

Subparagraph 6 (f). The installation of the hood and metal coverings has not stopped the migration of dust. (See Subparagraph (a), supra).

Subparagraph 6 (g). In opening argument, counsel for Utelite claimed there was one instance where truckers were advised by Kip Bigelow through electronic communications to shut down. (Argument of Eric Olson). Mr. Bigelow's testimony indicated there was no way to communicate to the truckers while on location. (R. 3010). Plaintiff Richard Harper testified that Utelite only quit on one occasion after it had finished loading. (R. 2531). The only other evidence that Utelite quit loading was one instance that occurred shortly before trial when Richard Harper complained to the persons loading. (R. 2530-31; 2922).

The claim that Utelite quit loading was rebutted by Utelite's own employees and agents. Utelite does not know when the wind is blowing in Echo. (R. 2871; 2739). In fact, the Utelite aggregate does blow on windy days. (R. 2501; 2579-86; 2653-54; 2675-77).

FACT 7: To deal with noise problems from the operation of the Facility, Utelite has taken the following steps:

- a. Installation of a muffler on the bag house.
- b. Instruction to truckers not to bang railroad cars in connection with loading.

CONTRADICTORY EVIDENCE: Steps taken by Utelite to deal with noise cannot be the basis for denying equitable relief unless they work and are continually implemented. The evidence showed that the

Utelite facility is still noisy because the moving of railroad cars causes squeaking and banging, because the opening of the lids on the railroad cars causes banging, because persons loading Utelite bang on rail cars to clean and open them despite instructions from Utelite, because the engine noise from semi-trucks can be heard at the Harpers' home, because the engine noise from the baghouse (even with muffler) is still loud enough to be an annoyance, and because the railroad engines at night generate noise when they bring railroad cars to the facility and remove railroad cars. (R. 2406-17).

Subparagraph 7 (a). The evidence showed that the installation of a muffler on the bag house reduced the noise but it still precludes the Plaintiffs from the peaceful enjoyment of their property, particularly on days when the wind blows toward the Harpers. Plaintiffs Harpers cannot hear in their yard under certain conditions, and cannot play with their children in their yard. (R. 2386-2417; Exhibit 12 at trial).

Subparagraph 7 (b). The evidence showed that despite instructions from Utelite, the truckers continue to bang on the cars to load and clean them. (R. 2505; 2740; 2925).

FACT 8: To deal with other annoyances, Utelite has:

- a. Removed outdoor lighting at the Facility.
- b. Terminated night loading.
- c. Instructed truck drivers to yield to other vehicles seeking access to the frontage road on the far side of Interstate 84 through the road at the Facility.

CONTRADICTORY EVIDENCE: Steps taken by Utelite to deal with other annoyances cannot be the basis for denying equitable relief if the

conditions causing the nuisance continue. Plaintiffs specifically object to the lettered portions of paragraph 8 as follows:

Subparagraph 8 (b). The evidence showed continued to load in the evenings up to 9:00 p.m. (R. 2595; 2858; Exhibits 19 and 20 at trial).

Subparagraph 8 (c). There was evidence introduced to support that Utelite has instructed drivers to so yield.

FACT 9: As a result of the actions taken by Utelite, confirmed by the Court's visit to the Facility while in operation and the Court's and third-party's review of videos, tapes and photographs of the Facility in operation, the Facility at present (a) is not injurious to the Plaintiffs, (b) does not adversely affect the Plaintiff's use and enjoyment of their property, and (c) does not cause any property damage to the Plaintiffs.

CONTRADICTORY EVIDENCE: The evidence showed that the facility continues to cause injuries and inconvenience and lessens the enjoyment of Plaintiffs' property in the following ways:

a. Jane Harper and her children have and continue to suffer from breathing problems caused by the aggregate (R. 2386-2417);

b. Jane Harper and Richard Harper's house is still affected by migrating dust. They must clean more often, the dust gets into their children's bedrooms and on their home's windows (R. 2386-2417; Exhibits 12, 13, 14 at trial);

c. Jane and Richard Harper cannot eat vegetables from their garden without taking precautionary measures because of the aggregate that migrates to their vegetable garden (R.

2386-2417);

d. Jane Harper cannot sleep in the day because of noise generated from the Utelite facility (R. 2386-2417; Exhibit 12 at trial);

e. Richard and Jane Harper are awakened at night because of noise caused by the railroad moving rail cars used to transport the Utelite aggregate (R. 2386-2417);

f. Frank Cattelan has and continues to suffer from breathing problems caused by the aggregate;

g. Frank Cattelan's cafe and house are still affected by migrating dust. He must clean more often as a result of the aggregate (R. 2586);

h. Ruth and Richard Richins must now cross a very dangerous rail crossing and cannot move some farm equipment on the road they have traditionally used (R. 2653; 2689); and

i. Richard Richins must now clean an irrigation ditch that was moved by Utelite without permission (R. 2687-88).