

1997

Kunz & Company, dba Kunz Outdoor Advertising  
v. State of Utah, Department of Transportation :  
Brief of Appellee

Utah Court of Appeals

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**COURT OF APPEALS**

**KUNZ & COMPANY, dba KUNZ  
OUTDOOR ADVERTISING, a  
California corporation,**

**Plaintiff/Appellee,**

**VS.**

STATE OF UTAH, UTAH DEPARTMENT  
OF TRANSPORTATION,

**Defendant/Appellant.**

**Case No. 970216-CA**

## Priority No. 15

## BRIEF OF PLAINTIFF/APPELLEE

**Appeal of Judgment from Bench Trial  
on Remand of the Fifth Judicial District Court  
Honorable James L. Shumate**

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- No. 3 Trial Court's Findings of Fact, Conclusions of Law.
- No. 4 Trial Court's Order and Judgment.
- No. 5 Trial Exhibit "1" (Annexation/Zoning Map).
- No. 6 Trial Exhibit "2" (p.29, Signs and p.38, Highway Commercial Zone).
- No. 7 Trial Transcript (condensed copy with Record page number designated at top right side of each page).

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### **JURISDICTION**

The Supreme Court of Utah has original jurisdiction over this Appeal from the Declaratory Judgment of the Fifth District Court under Utah Code Annotated § 78-2-2(3)(j) (Supp. 1996). This Court has jurisdiction resulting from the Supreme Court's pour over of the case to the Court of Appeals under Utah Code Annotated § 78-2-2(4) (Supp. 1996).

### **STANDARD OF REVIEW**

Appellant's Issue No. 1 is a challenge to the adequacy of the Court's Findings of Fact, and reviewed under a clearly erroneous standard. State v. Pena, 869 P.2d 932, 935-36 (Utah 1994).

Appellant's Issue No. 2, if reached at all by this Court, is a question of law or correct application of law, and is reviewable without deference to the District Court's determination. State v. Pena, 869 P.2d 932, 935 (Utah 1994).

Appellant's Issue No. 3, is not a question of law as asserted by Appellant, but actually an issue of fact as to the adequacy of the Court's Findings of Fact, and as such it is reviewed under the clearly erroneous standard. State v. Pena, 869 P.2d 932, 935-36 (Utah 1994).

Appellant's Issue No. 4, is also not a question of law, but an indirect challenge to the adequacy of the Trial Court's Findings of Fact and whether they logically show that the Trial Court's Judgment is within the context of its review of Utah Code Annotated § 27-12-136.3(3) (Supp. 1995) and as such is reviewable under the clearly erroneous standard. State v. Pena, 869 P.2d 932, 935-36 (Utah 1994).

## **DETERMINATIVE STATUTES**

The following authorities are believed by Appellee to be the only statutes relevant and determinative of the issues presented in this Appeal:

Utah Code Ann. § 27-12-136.3(3) (Supp. 1994).

## **STATEMENT OF THE CASE**

### **I. NATURE OF CASE AND DISPOSITION BELOW.**

This is a Declaratory Judgment Action on remand from this Court to the Trial Court for a trial and further evidence on one narrow and specific issue of fact as set forth by this Court:

The Trial Court erred in concluding that Section 27-12-136.3(3) applies only to areas outside incorporated cities and towns. Outdoor advertising is prohibited in any location zoned for the "primary purpose of allowing outdoor advertising." Because Kunz and UDOT have presented conflicting evidence regarding Toquerville's primary purpose behind its zoning of Eveleth's land, we reverse the grant of Summary Judgment and remand for trial on that issue.

Kunz & Company v. State, 913 P.2d 765, 771 (Utah App. 1996).

In its Statement of the Case, UDOT goes to extreme lengths to resurrect issues and facts concerning the original UDOT administrative procedure, and the zoning procedure before the Washington County Commissioners, all of which have been reviewed and resolved by this Court in the original Appeal and are not relevant to this Court's remand to the Trial Court. This Court clearly outlined the scope of review for the Trial Court as follows:

Even so, the Order on Remand is *res judicata* only "as to those issues which were either tried and determined, or upon all issues which the party had a fair opportunity to present and have determined in the other proceeding." (Citations omitted). Kunz is therefore bound by the prior adjudication that Washington

County zoning of Eveleth's land was for the primary purpose of allowing outdoor advertising. However, this action involves a different set of facts, which have not been adjudicated: Whether *Toquerville's* zoning, rather than Washington County's zoning, was for the primary purpose of allowing outdoor advertising. Toquerville's annexation and zoning of Eveleth's land occurred nearly eight (8) months after the State issued its Order on Remand. Accordingly, the Trial Court was correct to the extent that it concluded that the Order on Remand was not binding on this particular issue.

Id. at 769-70.

. . . Inasmuch as Kunz and the State have presented conflicting evidence as to Toquerville's primary purpose behind the zoning of Eveleth's land, we conclude that a genuine issue of material fact exists. We therefore reverse and remand for trial to allow the fact finder to determine the primary purpose for the zoning decision.

Id. at 769.

## **II. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS.**

The following facts relevant to this Court's review of the trial on remand, were established at trial on October 1, 1996, and were not rebutted by UDOT, and clearly show a deliberate, careful planning and zoning process that had nothing to do with accommodating advertising signage, and everything to do with legitimate municipal needs and long range planning goals.

The property in question, owned by Thomas Eveleth is located in the northern most limits of the town of Toquerville on the west side of Interstate 15, and was annexed by the town in 1992. (R. 856; 963-64; Ex. 1) The Petition for annexation was presented by more than half of the property owners involved. (R. 864; 868.) Originally the Eveleth property was split, with a portion of it to be annexed into Toquerville Town and the northern portion

of it to remain in the unincorporated area of Washington County. Eveleth, together with a group of property owners on the east side of I-15, whose property was also split in the proposed annexation, contacted Toquerville authorities and requested that the annexation include all of their properties. Subsequently, Toquerville adjusted the proposed annexation to include those properties. (R. 855:24-25; 856:1-5; 882-83; 884:23-24; 886.)

The annexation was adopted by ordinance October 14, 1992. (R. 963, 964.) Beginning in January 1993, and continuing until November 1993, the Toquerville Town Planning Commission, with the assistance of a Planning Consultant, reviewed Toquerville's existing zoning and land uses, specifically focusing on all commercial property located within the Town and prepared a master plan which included the newly annexed property at Anderson Junction. (R. 893-96; 943.) During the master plan process, monthly meetings were conducted by the Planning Commission open to the public generally and all affected property owners specifically were invited to participate, and several public hearings were held at the Planning Commission and Town Council level. (R. 896; 945.) As part of the master plan process, the Planning Commission and Planning Consultant identified all existing uses on the newly annexed property, and solicited input from all property owners as to their desired uses, and discussed projections for proposed future uses. (R. 897-98.)

Prior to formulating its master plan and recommended zoning, the Planning Commission considered a broad spectrum of issues and factors including, that the majority of the town residents did not want to have commercial zoning and development in the "tree-lined" rural atmosphere of the existing Toquerville main street area. (R. 902:23-903:25; 952:12-19; 977:12-17.) The owners of property located right on the Anderson Junction I-15



Interchange wanted the property designated commercial to accommodate their plans for future commercial development. (R. 870:14-25; 947:13-19.) On the east and north of the interchange, the property owners wanted residential that would allow subdivisions. (R. 867:24- 868:5; 948:21-22.) A majority of town residents expressed general interest in an expanded commercial zone in town for the opportunities of increased commercial activities and revenue because of the limited commercial property existing in town. (R. 947:13-17; 966:5-10.)

Only one other spot had been designated commercial, in the extreme south end of Toquerville. (R.950-52; Ex. 1.) Most residents favored the creation of a commercial zone around the Anderson Junction Interchange because it was away from the traditional main street Toquerville area, because it was near the freeway and could not be seen from town, and because the freeway interchange offered the best potential for commercial opportunity; (R. 948:25-949:6-9; 950-953; 966:15-21.) In addition, the existing zoning designation of Washington County prior to the annexation was considered. (R. 902:3-4; 914:7-11.)

In November 1993, the Planning Commission recommended to the Town Council that the Anderson Junction area that includes the Eveleth property, be zoned Highway Commercial (H-C) as provided in the Toquerville Zoning Ordinance (Ex. 2) on the basis that its location on the I-15 Interchange would generate substantial commercial traffic, and on the further basis that the owners of the property on the intersection desired such a designation to accommodate future commercial development plans, and it provided the best potential tax base benefits without impacting the traditional existing Toquerville down town area. (R. 902-03; 947:13-17; 952:12-953:14.)

While there was discussion of existence of the three Kunz Outdoor Advertising signs on the annexed property, there was never any discussion of the outdoor advertising signs as justification for a Highway Commercial (H-C) zoning designation. (R. 977:18-22.) There was discussion with the Planning Commission and Planning Consultant about the existing signs and how to handle them. The Consultant noted in these discussions that the existing zoning ordinance did not specifically address outdoor advertising and that something needed to be included in an amended ordinance to specifically address location and regulation. (R. 905-906:8.) Some property owners were very concerned and opposed any proliferation of outdoor advertising in the I-15 corridor, while other property owners wanted outdoor signage as part of their future commercial uses. The discussion of outdoor advertising came down to the fact that the current Toquerville zoning ordinance did not address outdoor advertising specifically, and that the ordinance needed to be amended to specifically address location and regulation of outdoor advertising. (R. 911-912.)

Ultimately, after extensive review and analysis the Toquerville Planning Commission recommended that the property on the Anderson Junction I-15 interchange, including the Eveleth property be zoned Highway Commercial (H-C). Approximately a month later on December 14, 1993, after detailed discussion by the Toquerville Town Council of the Planning Commission recommendation, the Town Council adopted the proposed Master Plan and zoning map and designated the Anderson Junction interchange property including the Eveleth property as Highway Commercial (H-C) pursuant to the Toquerville zoning ordinance. (R. 975-976.)

The Toquerville zoning ordinance adopted in 1982 (R. 956-57; 984-84.) provides that advertising signs are a conditional use within the Highway Commercial (H-C) zone in Toquerville Town. (R. 925-26.) In fact, all uses in the Highway Commercial (H-C) zone were designated conditional uses under the Toquerville zoning ordinance applicable at the time of the Town's zoning of the subject property in 1993. (R. 926:1-7; Ex. 2 at 38.) The H-C zone for the Anderson Junction property was adopted pursuant to this ordinance and the zoning ordinance was not amended in any way to accommodate outdoor advertising. (R.935.)

### **SUMMARY OF ARGUMENTS**

The Trial Court did not base its Judgment on the existence of any conditional use permit, but on the fact that outdoor advertising signage is allowed only as a conditional use and not a permitted use under the Toquerville Zoning Ordinance. UDOT mistakenly concludes that the Trial Court relied on the existence of conditional use permits for the signs at issue. The record clearly supports the Court's Findings of Fact, that Toquerville's Zoning Ordinance preexisted the annexation and zoning of the Eveleth property and that the Toquerville Ordinance did not allow outdoor advertising as a permitted use, but only as a conditional use subject to a conditional use review procedure and permit. The evidence shows that the Town intended to substantially limit outdoor advertising signage by use of this conditional use procedure, in response to concerns expressed by citizens in planning hearings that outdoor advertising signage in the I-15 corridor be limited.

UDOT has failed to marshal the evidence from the record and demonstrate the Trial Court's Findings are against the clear weight of the evidence. Therefore, this Court should dismiss UDOT's Appeal.

The Administrative rule R933-2-3(4)(1994), cannot be applied in this case to circumvent the law of the case established by this Court in Kunz & Company v. State, 913 P.2d 765, 768 (Utah App. 1996). UDOT argues for a *post facto* retroactive application of an administrative rule the Utah Department of Transportation adopted that clearly circumvents the express holding of the Trial Court in its Summary Judgment dated December 22, 1994 (R. 600-602) and affirmed in pertinent part by this Court in its opinion,

"while we agree that an area zoned for commercial or industrial use in a city or town need not actually have commercial development on it to satisfy the definition in Section 27-12-136.3(2)(a), we conclude that such property may still be excluded from use for outdoor advertising if the zoning violates Section 27-12-136.3(3)".

Id. at 768. This is the law of the case. This Court remanded the issue of "primary purpose" under Section 27-12-136.3(3) for trial, and clearly declined to construe Section 27-12-136.3(3) to include zones in which the "primary activity" is outdoor advertising.

UDOT has never made a claim or preserved the issue that Section 27-12-136.3(3) is ambiguous in any way or that R933-2-3(4) (1994) applies in this case. Nor did this Court treat Section 27-12-136.3(3) as ambiguous in its express directive to the Trial Court to take evidence as to primary purpose of the Toquerville Town zoning action. Therefore, a UDOT Administrative rule cannot be applied in an attempt to circumvent the clear law of the case as established by the Court of Appeals.

The Trial Court carefully received and considered all relevant evidence as expressly directed by this Court. Id. at 769. The Trial Court received evidence and testimony with regard to the following factors considered by Toquerville Town:

- A. Petition for Annexation.
- B. Land Use/Lack of Commercial Development.
- C. Proposed Land Uses/Compatibility with character of Town.
- D. Washington County Zoning.
- E. Utility Service/Infrastructure.
- F. Signage Issues.
- G. Existing Town Zoning Ordinances and Procedures.

Finally, the Trial Court carefully structured the entire trial, and the Findings of Fact, Conclusions of Law, and Judgment within the context and framework of Utah Code Annotated § 27-12-136.3(3) and according to the parameters established by this Court on remand. The record clearly shows sufficient evidence supporting each of the Trial Court's Findings of Fact, which in turn show the logic followed by the Court in its Findings of Fact and Conclusion of Law which form the basis for the Trial Court's Judgment which should be affirmed by this Court.

## ARGUMENT

**I. THE TRIAL COURT DID NOT BASE ITS JUDGMENT ON THE EXISTENCE OF ANY CONDITIONAL USE PERMIT, BUT ON THE FACT THAT OUTDOOR ADVERTISING SIGNAGE WAS ALLOWED ONLY AS A CONDITIONAL USE, AND NOT A PERMITTED USE UNDER THE TOQUERVILLE ZONING ORDINANCE.**

UDOT has mischaracterized the Trial Court's Finding of Fact Number 10 and sets up a "strawman" in an attempt to avoid its burden of marshalling the evidence which supports the Trial Court's Finding. UDOT argues that the Trial Court's ultimate Judgment was based on the existence of Toquerville conditional use permits for the signs in question, and then argues Kunz "tendered no evidence to show that Toquerville had issued conditional use permits for the signs", thereby avoiding its burden to marshal the evidence. UDOT quotes the following Finding in support of its argument:

10. Due to the fact that the placement of outdoor advertising signs within the Eveleth property after Toquerville annexed and zoned the subject property could only be done by conditional use permit, the Court cannot find that the primary purpose of zoning was to allow outdoor advertising signage.

(Findings of Fact, R. 769)

Nowhere in the Finding quoted or in any other Finding of Fact articulated by the Court, or *in dicta* in the trial transcript, does the Court comment on, make a finding, or otherwise conclude that there is any conditional use permit for the signs. The existence of conditional use permits was never raised and was not the focus of the Court because it is not relevant. A careful reading of the Court's Findings of Fact in sequence clearly puts Finding Number 10 in the correct context:

6. The Court finds from Exhibit "1" and testimony, the Town of Toquerville, is separated into two distinct areas, one south of a high ridge that blocks the view of Anderson Junction from the traditional "main street" area, and one north and west of the high ridge which constitutes the annexed area and includes the Anderson Junction and the I-15 Interchange.

7. Unrebutted testimony was presented without objection that it was the purpose of the Town in establishing its master plan, zoning ordinance, zoning districts, and a zoning map, that commercial zoning be limited to two distinct areas. One, a tiny parcel located at the south end of the Town on State Highway U-17 which leads toward La Verkin, Utah and the other parcel immediately surrounding the Anderson Junction I-15 Interchange in the north end of Toquerville.

8. The Court finds from Exhibit "2", it was the intent of Toquerville Town, because it incorporated its planning and zoning to match up with the existing zoning ordinance, that any signage of the type involved in this litigation be permissible only by conditional use permit. The Town Ordinance so provides, and it was the clear intention of the Town in this annexation to substantially limit outdoor advertising signs by that process.

9. The Court heard evidence and testimony of the intent of the Town from the former Mayor, the former Chairman of the Planning Commission at the time these actions were undertaken, and from the former Town Engineer, while such testimony provides some assistance in the Court's determination of these facts, the most telling evidence of Toquerville's intent with respect to outdoor advertising signs is the Toquerville Zoning Ordinance itself.

10. Due to the fact that the placement of outdoor advertising signs within the Eveleth property after Toquerville annexed and zoned the subject property could only be done by conditional use permit, the Court cannot find that the primary purpose of zoning was to allow outdoor advertising signage.

(Findings of Fact, ¶ 6-10; R. 768-769.)

A review of the record clearly establishes the logic of the Trial Court's findings and thinking. The Court received as Exhibit "1" an engineering map of Toquerville Town which shows the annexed property, and the other zoning districts within the Town. The Court heard testimony of Kim Wallace the Town's Engineer, Kenneth Sizemore the Town's Planning Consultant, Glade Peterson the Planning Commission Chairman at the time of the master planing, and zoning of the subject property, and Charles Wahlquist the Mayor at the time of the annexation and zoning.

The Mayor established that the zoning map, Exhibit "1", was the only zoning map adopted by the Town and even though the Town had the intent to continue to work on zoning generally throughout the Town, Exhibit "1" was the map that existed in December 1993 at the time of the zoning action, and to his knowledge existed as is shown in Exhibit "1" as of the date of Trial. (R. 982-983.)

The Planning Consultant, testified that the black oval drawn in on Exhibit "1" represents a high ridge that separates the traditional rural "down town main street area" from Anderson Junction and the I-15 corridor. (R. 903:3-905:4.) During the course of the zoning and master plan planning public meetings from January 3, 1993 through November of 1993, a strong majority of town residents expressed their desire that they did not want to have commercial development or zoning in the "tree lined rural atmosphere" of the existing Toquerville Town site in the main street area. (R. 902:23-903:25; 952:12-19.) The Planning Commission and residents looked along the corridor of UDOT Highway that travels through Toquerville, and determined that there were not many locations along the corridor that would be appropriate for intensive commercial development. For that reason they



determined that the Anderson Junction area on Exit 27 of I-15 was the most appropriate location for commercial services and zoning. (R. 903:18-25; 905:5-11.) The only other area designated for commercial zoning was a very small parcel located at the extreme south end of Toquerville Town on UDOT Highway which had been approved for commercial zoning years earlier by the Town Council and was affirmed as a commercial zone during the 1993 master plan process. (R. 951:21-952:4; 976:24-977:6.)

The Town Council formally adopted the Toquerville Zoning Ordinance in 1982. (R. 956-957; 983-984.) The Trial Court received the Town Zoning Ordinance in its entirety as Exhibit "2". As part of the master plan process and hearings, the Planning Commission and zoning consultant reviewed the existing Toquerville Zoning Ordinance. (R. 906:9-15.) Specifically, they reviewed page 38 of Exhibit "2" which sets forth the characteristics of Highway Commercial Zone as adopted in 1982. This became the basis for the Planning Commission's designation of the Highway Commercial Zone for the Anderson Junction annexation property. (R. 910:5-911:11.)

Based on the Toquerville Ordinance, outdoor advertising signs are not a permitted use within the Highway Commercial zone, but only a conditional use. (R. 925:23-926:7.) The Planning Consultant testified that there was discussion in the master planning meetings about the outdoor advertising signs existing in the annexed area and how to handle them. Some property owners expressed concern and opposition to any continued proliferation of outdoor advertising in the I-15 corridor. Other owners expressed a desire to have outdoor advertising as part of their commercial uses in the future. The Planner noted in these discussions that the existing Toquerville Zoning Ordinance did not specifically address outdoor advertising

and that the ordinance needed to be amended to specifically address location and regulation of outdoor advertising. (R. 905-906; 911-912.) It was the intent of the Planning Commission to continue revisions of the Zoning Ordinance to address outdoor advertising, but that was never done. (R. 912:12-15; 933:10-14; 935:6-9.)

The Planning Consultant summarized the discussion of the signage issues in the Planning Commissions master plan process as follows:

My recollection of the issue, at the time we went through this process, was that we have a fairly long discussion about the pros and cons of outdoor advertising and the fact that there is a State statute that directs some of the location of signs along the freeways.

I did indicate to the Planning Commission that we needed to look at the State Highway Beautification Act and determine what they could, as a municipality, impose that might be more restrictive than what the State Code allows.

We talked about that fact that outdoor advertising along the I-15 corridor might impede some of the other economic development efforts that were going on at the time in terms of tourism development and that we wanted to retain a more natural looking corridor entering into the St. George basin.

We talked about the fact that the three (3) signs were already erected and that we might have to live with the decisions that allowed those signs to be erected in the first place as prior non-conforming uses prior to the annexation of the property. Those all were talked about in general terms, but again, that was not followed up on and no proposed ordinance amendments were developed or recommended.

(R. 934:8-935:9.)

Viewing the evidence marshalled above in a light most favorable to the Trial Court's determination, the Court's Findings of Fact and Judgment are supported by the clear weight of the evidence. The clearly erroneous standard is highly deferential to the Trial Court's

decisions because the witnesses and parties appear before the Trial Court and the evidence is presented there. Pena, 869 P.2d 936. Thus, the Trial Judge is "considered to be in the best position to assess the credibility of witnesses and to drive a sense of the proceedings as a whole, something an appellate court cannot hope to garner from a cold record." Id. (citing In Re: J. Children, 664 P.2d 1158, 1161 (Utah 1983)).

In applying the clearly erroneous standard, first, the evidence must be viewed in the light most favorable to the Trial Court's determination. State v. Pena, 869 P.2d 932, 935-36 (Utah 1994). Next, the Findings of Fact must show the Court's Judgment or Decree "follows logically from and is supported by, the evidence." Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987); Smith v. Smith, 726 P.2d 423, 426 (Utah 1986). Finally the Findings "should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." Acton, 737 P.2d at 999; Rucker v. Dalton, 598 P.2d 1336, 1338 (Utah 1979). Conversely, UDOT has the burden to first marshal all evidence that supports the Court's Findings, and then demonstrate that the Findings are so lacking in support as to be against the clear weight of evidence. Doelle v. Bradley, 784 P.2d 1176, 1178 (Utah 1989); Sorenson v. Kenecott-Utah Copper Corp., 873 P.2d 1141, 1147 (Utah App. 1994). UDOT has utterly failed in its burden to marshal the evidence herein.

The evidence marshalled above clearly shows that the Findings of Fact, Conclusion of Law, and ultimate Judgment, entered by the Trial Court, follow logically from and are all supported carefully by the evidence set forth in the Record. The Findings are detailed and make reference to subsidiary facts which clearly disclose the steps of the Court's reasoning

and logic to reach its ultimate conclusion, that the Toquerville zoning authorities did not zone the Eveleth property as Highway Commercial for the primary purpose of allowing outdoor advertising. Indeed, there is clear and convincing evidence that the Toquerville Planning Commission, Planning Consultant, and ultimately the Toquerville Town Council, carefully reviewed over an 11 month period, all issues and factors that are appropriate to a comprehensive master plan and zoning consideration, including the public's desire to protect the character of the tree lined Toquerville main street by removing commercial zoning to the Anderson Junction area, before they adopted the Highway Commercial zone.

The evidence clearly supports the conclusion that outdoor advertising of the type at issue in this case was not a permitted use in the Highway Commercial zoning classification under the Toquerville Zoning Ordinance. Not only was it not a permitted use, but even as a conditional use, the Toquerville Zoning Ordinance could not by its terms permit outdoor advertising of the size and scope of the Kunz advertising billboards at issue in this case except as a non-conforming use. That evidence is clearly set forth in Exhibit "2" received and discussed by the Court. Testimony of the Planning Consultant also clearly established that the Planning Commission recognized that the signs were preexisting and probably non-conforming. (R. 934.) Taken in total, the evidence marshalled above is more than sufficient to sustain the Court's Findings of Facts, Conclusions of Law, and Judgment as entered by the Court.

**II. UDOT HAS FAILED TO MARSHAL EVIDENCE THAT SUPPORTS THE TRIAL COURT'S FINDINGS AND JUDGMENT AND THEN DEMONSTRATE THAT THE FINDINGS ARE SO LACKING IN SUPPORT AS TO BE AGAINST THE CLEAR WEIGHT OF THE EVIDENCE.**

As stated above, UDOT's issues Number 1, 3, and 4, are indirect attacks on the adequacy of the Trial Court's Findings of Fact and should be reviewed under a clearly erroneous standard. The Appellate Court should not address UDOT's challenge of the Trial Court's Findings unless UDOT has properly marshalled the evidence. Robb v. Anderton, 863 P.2d 1322, 1328 (Utah App. 1993). In order to successfully challenge the Trial Court's Findings of Fact, the Appellant must marshal evidence in support of Findings and then demonstrate that despite this evidence, the Trial Court's Findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous. Wade v. Stangl, 869 P.2d 9, 12 (Utah App. 1994); West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1313 (Utah App. 1991). When appellants fail to marshal the evidence in support of a challenged Finding, the Utah Supreme Court has declined to consider the attack and the Trial Court's Findings are upheld. Grayson Roper Ltd. Partnership v. Finlinson, 782 P.2d 467, 470 (Utah 1989); Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

In the present case, UDOT has characterized their statement of the issues presented for review Numbers 1, 3, and 4 in such a way as to appear to avoid the requirement of marshalling. Careful review of those issues, however, show that they are issues of fact, challenging the adequacy of the Trial Court's Findings of Fact, reviewable under the clearly erroneous standard, and therefore require marshalling as a prerequisite to review.

However, UDOT fails to marshall the evidence in the record that shows the Trial Court did in fact review those elements as directed by this Court. UDOT merely presents carefully selected facts favorable to its argument rather than properly marshalling any evidence which is insufficient to sustain its burden. Oneida/SLIC v. Oneida Cold Storage & Warehouse, 872 P.2d 1051, 1053 (Utah App. 1994); Robb v. Anderton, 863 P.2d 1322, 1328 (Utah App. 1993). Commercial Union Assocs. v. Clayton, 863 P.2d 29, 36 (Utah App. 1993). Since UDOT has failed to marshall the evidence in support of the Court's Findings applicable to those three issues, this Court should decline review of UDOT's arguments.

**III. THE ADMINISTRATIVE RULE R933-2-3(4) (1994)  
PROMULGATED BY THE UTAH TRANSPORTATION  
COMMISSION, CANNOT BE APPLIED IN THIS CASE  
TO CIRCUMVENT THE LAW OF THE CASE  
ESTABLISHED BY THE COURT OF APPEALS.**

UDOT in its second argument sets forth a two-fold argument in support of its contention that this Court should apply R933-2-3(4.) (1994). First, UDOT contends that the Trial Court based its Judgment on a conditional use permit that does not exist; and then that this Court held in its earlier opinion the Kunz Company signs were unlawful on the basis that Kunz failed to exhaust administrative remedies and therefore this Court now has a "clear slate" to apply R933-2-3(4) (1994). Both contentions are strawman arguments.

Kunz has demonstrated under Argument I above, that the Trial Court did not rely in any way on the existence of the conditional use permit as the basis for either its Findings of Fact or Judgment which are all clearly supported by sufficient evidence in the Record. In addition, to allow this Court's holding regarding Kunz's failure to exhaust remedies as a basis to apply the Administrative Rule as urged by UDOT, would allow UDOT to completely

circumvent the law of the case established by this Court in its remand and in effect allow a *post facto* retroactive application of an administrative rule.

The Tenth Circuit Court of Appeals and the U.S. Supreme Court have held that retroactivity is not favored in the law and that administrative rules will not be construed to have retroactive effect unless their language requires the result. DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377 (10th Cir. 1990); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988). There is no such language or need to require retroactive application of this administrative rule in this case.

UDOT suggests that since the Court of Appeals declared the Kunz signs "illegal" Kunz had no vested rights to the signs at the disputed location as of the date of the Trial on Remand, October 1, 1996; and therefore this Court is free to apply R933-2-3(4) (1994). This on the basis that it is "the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons". Brewster v. Gage, 280 U.S. 327, 336 (1930).

UDOT conveniently ignores three fundamental facts that defeat their argument. First, UDOT has never raised or preserved the issue that Utah Code Annotated § 27-12-136.3(3) is in any way ambiguous. The statute is clear and unambiguous in its language; it states, "commercial or industrial zone does not mean areas zoned for the primary purpose of allowing outdoor advertising." Utah Code Annotated § 27-12-136.3(3) (Supp. 1988). This statute clearly sets forth a narrow issue of fact for consideration by any official charged with this administration, i.e., was the zone created for the primary purpose of allowing outdoor advertising signage.

The second fatal fact is that UDOT has never applied that rule to Kunz in this case as part of the administrative procedure and review, as the Brewster case seems to require. UDOT's administrative holdings have all been based on a conclusion that the zones were created primarily to allow signage.

The third fact fatal to UDOT's argument, is that this Court has already construed U.C.A. § 27-12-136.3(2)(a) and § 27-12-136.3(3) in such a way as to make the language of R933-2-3(4) (1994) contrary to this Court's statement of the law of the case.

In Kunz & Co., v. State, 913 P.2d 765, 768 (Utah App. 1996) this Court held:

While we agree that an area zoned for commercial or industrial use in a city or town need not actually have commercial development on it to satisfy the definition in Section 27-12-136.3(2)(a)...

The Court's holding here allows signs as the only use in a zone under 27-12-136.3(2)(a) so long as zone was not created for the primary purpose of allowing outdoor advertising. This is in direct contradiction to R933-2-3(4) (1994) which states:

(4) "Areas zoned for the primary purpose of outdoor advertising" as used in sub-section 27-12-136.3(3) of the Act is defined to include areas in which the primary activity is outdoor advertising.

(Emphasis added.)

This language would purport to render any area in which the "primary activity" is outdoor advertising unlawful even though this Court has held as a matter of law that an area zoned for commercial or industrial use in a city or town need not actually have commercial



development on it to satisfy the provisions of the Act. In the face of that clear conflict, certainly an administrative rule must give way to the legal holding of the Court of Appeals.

With regard to the factual issue under Section 27-12-136.3(3) as to whether a zoning authority has zoned an area for the "primary purpose allowing outdoor advertising", this Court has construed the scope of the factual inquiry under that statute and specifically set forth factors to consider in its holding:

Furthermore, in determining the primary purpose behind a particular zoning decision, the fact finder can and should consider all relevant evidence, not just the stated purpose of the zoning body or local government. This would include evidence of the actual land use or any evidence that the zoning body merely perpetrated a prior zoning designation.

Kunz, 913 P.2d at 769. (Emphasis added.)

This Court clearly declined to take a narrow position that Section 27-12-136.3(3) is defined to include those areas in which the primary activity is outdoor advertising, rather it correctly construed the statute to require a broader factual inquiry. On the basis that the parameters set forth by this Court as quoted above, conflict with the language of R933-2-3(4) (1994), this Court's holding is the law of this case and supersedes any administrative rule. Therefore this Court should not apply R933-2-3(4.) (1994) to this case.

#### **IV. THE TRIAL COURT CAREFULLY RECEIVED AND REVIEWED ALL RELEVANT EVIDENCE AS DIRECTED BY THE COURT OF APPEALS.**

This Court specifically directed the Trial Court on remand that:

The fact finder can and should consider all relevant evidence, not just the stated purpose of the zoning body or local government... includ[ing] evidence of actual land use or any evidence that the zoning body merely perpetrated a prior zoning

designation. ... We therefore reverse and remand for trial to allow the fact finder to determine the primary purpose.

Kunz, 913 P.2d at 769.

This Court's remand is in effect a mandate to review the Toquerville planning process that began in 1992 with the annexation of the Eveleth property and culminated in December 1993 with adoption by the Town Council of the zoning designation "Highway Commercial" for the Eveleth property. At the outset, it is important to understand the scope of the Trial Court's review as the context in which to view UDOT's claims of error. Before receiving any evidence on October 1, 1996, the Trial Court stated the following:

Alright. Counsel, just so you will get a general understanding of the way that I view the remand from the Court of Appeals, it seems to me as though the Court of Appeals wants the Court to determine the primary purpose.

Now, the way of determining the primary purpose is really interesting to me because if I find that the actions of the zoning authority were based on number of considerations, it may be extremely difficult to discern a primary purpose. . . .

In this matter, we have extremely broad horizons to look at the information that can be brought to the Court that might bear upon a factual finding of whether or not the primary purpose of the zoning authority was to create an area for outdoor advertising in the form of the billboards which have been the subject of this litigation.

Now, because we have such a broad horizon, I think I must broadly use the definitions of Rule 401 et. seq. in the Rules of Evidence to determine what was probative of this issue of purpose and primary purpose in the zoning authorities' activities.

That means I will have to look at what they did, I will have to look at what happened, I will probably have to look at what was proposed, and I will probably have to look at what the body of

zoning authority thought about it, and the only way I may be able to do that is to look at what the individual persons thought about and discussed in reaching this decision.

(R. 841:25-843:13.)

It should be noted that the Trial Court's Statement quoted above, was in response to UDOT's attempt to limit the scope of inquiry and evidence to only the Toquerville Town official written records. It is ironic that UDOT at various times through the trial objected to the introduction of relevant evidence probative of the Town's purpose in its zoning action and now comes before this Court arguing that the Trial Court did not consider those same factors as expressly directed by the Court of Appeals.

UDOT characterizes its Issue Number 3 that "the Trial Court failed to consider the specific factors directed by the Court of Appeals as a question of law in part, to be reviewed without deference to the District Court to again avoid marshalling the evidence. Kunz disagrees with UDOT's characterization. UDOT is challenging the adequacy of the Trial Court's review and Findings. Such a challenge should be reviewed under the clearly erroneous standard.

At the trial on October 1, 1996, the Trial Court received and considered testimony and evidence relevant to and probative of all factors including each of the specific factors directed by this Court, which were considered by the Toquerville Planning Commission, Planning Consultant, and Town Council during the annexation, master plan, and zoning process which formed the basis for the Planning Commission's recommendation to the Town Council, and the Town Council's zoning action in December 1993.

**A. PETITION FOR ANNEXATION.** The Town Engineer, Kim Wallace, testified that the original discussion to annex the subject property was initially proposed by the owners of property right on the Anderson Junction Interchange and southwest of the interchange. Those property owners were interested in municipal services, primarily culinary water services, and desired to be annexed to develop commercial opportunities that might arise from a reservoir that was on the Washington County Water Conservation District drawing board at that time. (The reservoir is designated in blue on Exhibit "1".) (R. 847-49; 866-67.) Additionally, property owners north and east of the Anderson Junction Interchange, were anxious to have their property zoned residential to accommodate current residential development and planned subdivision development that they wanted regulated under Toquerville zoning ordinances. (R. 867-68.) Together, over fifty percent (50%) of the affected property owners in the annexed area petitioned Toquerville to annex their property into the town. (R. 868:14-25.) Mayor Wahlquist testified the Town was interested in annexation to get a handle on expected growth. (R. 967:5-16.)

With regard to the Petition for Annexation, UDOT argues that Toquerville's annexation and zoning of the land was at the request of Eveleth. The record simply does not support that argument. In fact, Exhibit "1" received by the Court and testimony of the Town Engineer, Kim Wallace, conclusively establishes that the original proposed annexation did not include any property north of the Section 27 boundary line which would include the northern portion of the Eveleth property, and certain residential properties north and east of the Anderson Junction Interchange. (R. 856.) Eveleth, and other property owners north and east of the Anderson Junction Interchange, originally had their properties split by the

proposed annexation so that a portion of their properties were to be annexed while a portion of the properties were to remain in the unincorporated Washington County area. All of the property owners, not just Eveleth, contacted Toquerville Town authorities and requested that all of their properties be included in the annexation to prevent the division of their property between the Town and County. (R. 876; 884:13-24; 901.) Before Eveleth ever contacted Toquerville Town authorities, the proposed annexation was under way and to suggest that the annexation was requested by Eveleth, misconstrues the Record and misrepresents the evidence.

**B. ACTUAL LAND USE/LACK OF COMMERCIAL DEVELOPMENT.** The Trial Court took judicial notice of the general layout of the subject property based on the Judge's experience driving through the property on the interstate and stated:

THE COURT: Counsel, why don't we look at it in this fashion, and I do this, counsel, with some hesitation, but there is no way we can get around this Court's familiarity and personal familiarity with the area, and, gentlemen, I would propose that I take judicial notice that the area in which these signs are located, which is north of Exit 27, west of the I-15 freeway, if one were to stand on the I-15 freeway near the area of the signs and look west and northwest, you would see basically sage and pinion foliage extending for some miles uninterrupted by the presence of human activity at all.

As a backdrop to that sage and pinion foliage you have the western face - no take that back - eastern face of the Pine Valley Mountains, which constitute the horizon west and northwest of the area of the signs, and that it is with the exception of the freeway, itself, in that location without any other indication of human activity. That's my recollection.

I believe at this junction, Anderson Junction, even the utility corridors are on the east side of the freeway so you don't even have the power lines or the Mountain Fuel lines to the west as the observer standing on the freeway would face toward the Pine

Valley Mountains. Now, does that describe the property and the location of the signs in the area in which the signs and the area in which the signs are located to your satisfaction, Mr. Finlayson?

MR. FINLAYSON: Your honor, I believe that is accurate, and with this witness, I won't pursue that.

(R. 879-880.)

The Planning Consultant, the Planning Commission Chairman, and the Toquerville Mayor, all testified that there was no commercial activity other than signs on the Eveleth property. (R. 924:1-3; 959:22-23; 979:13-16.) The Court also received as evidence Exhibits 8, 9, 10, 11, 12, 13, and 16, which are photographs of the Eveleth property, showing the outdoor advertising signs, the natural state of the property and the lack of any other commercial development. In addition, in the midst of UDOT's opening statement following the close of Plaintiff's case, the Trial Court interrupted, to point out to counsel, "it doesn't seem to be necessary on the state of this record to establish any point of proof at this point that the signs are the sole evidence of humanity on the subject property." (R. 995:8-12.) At that point, Plaintiff agreed that the signs are the only "development" that is apparent on the Eveleth property. (R. 996:5-12.)

**C. PROPOSED LAND USES/COMPATIBILITY WITH CHARACTER OF TOWN.** As part of the master plan process, the Planning Commission and Planning Consultant identified all existing uses on the newly annexed property, and solicited input from all property owners as to their desired uses, and discussed projections for proposed future uses. (R. 897-98.) The Planning Commission considered input from property owners in the immediate vicinity of the Anderson Junction I-15 Interchange who wanted the property

designated commercial to accommodate their desires and plans for future commercial development. (R. 870, 947-48.) The Planning Commission also considered input from residents favoring the creation of commercial zone around the Anderson Junction Interchange because it was away from the traditional down town Toquerville area, and because it was near the freeway and could not be seen from the Town, and because the freeway interchange offered the best potential for commercial opportunity. (R. 902-03, 948-53, 966.)

**D. PERPETUATING WASHINGTON COUNTY ZONING DESIGNATION.**

It should be noted here that UDOT objected to the inquiry and introduction of any evidence with regard to Washington County zoning designation which was overruled by the Court (R. 81.) and now alleges that the Court did not consider evidence of the prior Washington County zoning. The Planning Consultant, testified that during the Planning Commission meetings from January 1993 through November 1993, one of the factors the Planning Commission looked at was the existing Washington County zoning of the annexed property prior to annexation. (R. 902:3-4; 914:7-11.) Mr. Sizemore pointed out that the Planning Commission did not merely rubber stamp the Washington County zoning designated. (R. 918:21-24.) In addition, the Planning Commission Chairman Glade Peterson testified that while he couldn't recall what the Washington County zoning designation was, he recalled that it did not have any bearing on the Planning Commission's actions as far as zoning. (R. 954:15-21.) In response to cross-examination, Mr. Peterson had this exchange with State's counsel:

Q. So when you adopted the Highway Commercial category for Toquerville and Washington County was the same Highway Commercial, you didn't change the zoning category did you?

A. No, I said we really weren't aware of what Washington County had. We zoned what I had as Exhibit "2" [Toquerville Zoning Ordinance outlining Highway Commercial] and zoned it Highway Commercial.

(R. 960:17-23.)

UDOT offered no evidence at trial and none has been marshalled that shows the Town "merely perpetrated" any zoning designation.

**E. UTILITY SERVICE/INFRASTRUCTURE ISSUES.** The Trial Court received and considered ample evidence regarding the status of utility infrastructure in the annexed area. The Town Engineer testified that the primary issue initially driving the Petition for Annexation was the property owners' desire to have Toquerville extend municipal services into the annexed area. (R. 866-67.) The Engineer also testified that there were no sewer or water services at the Eveleth property. (R. 874-75.) The Planning Commission Chairman testified that the Planning Commission was aware that there were no sewer or water utilities at the Anderson Junction area, but also testified that the Planning Commission discussed the need to extend municipal utilities including water and sewer into the annexed area. (R. 949:14-20.) The Mayor testified that the Town had investigated and pursued the development of several water sources in the annexed area without success until working out an arrangement with the Washington County Water Conservancy District resulting in the installation of a 21" well and a water tank that was under construction at the time of trial that would provide water in the annexed area. (R. 967-72.) The Engineer further testified that in the annexation process, there were detailed discussions at the Town level and preliminary planning, including cost estimates, for the extension of culinary service



and utilities into the annexed area. Utilization of a special improvement district as a means of financing extension of utilities was also discussed. (R. 887.) The clear evidence shows the Town engaged in planning as the first step to actual development of infrastructure.

**F. SIGNAGE ISSUES.** The Planning Consultant testified that there was a general discussion about existing signs in the annexed area and how to handle them. He noted in the discussions that the existing ordinance did not specifically address outdoor advertising and something needed to be included in the ordinance to specifically address location and regulation. (R. 905-906.) The Planner stated that some property owners expressed concern and opposition to any proliferation of outdoor advertising in the I-15 corridor while other owners wanted outdoor signage as part of their commercial use in the future. The discussion came down to a realization that the current ordinance did not adequately address signage and needed to be amended in order to more fully address the issue. (R. 911-912.) The Planning Commission Chairman, testified that based on his memory, and in his opinion signs were not a primary issue in the planning process. (R. 954.)

Mayor Wahlquist testified that while he was aware of the three advertising signs on the Eveleth property, he does not recall that it was brought up in the Town Council discussions. (R. 974:24-975:8.) The Mayor testified that outdoor advertising was not the basis of adopting the Highway Commercial zoning designation. (R. 975; 976:15-22.) Finally, the Mayor testified that he did not recall any discussion of outdoor advertising signs as justification for the Highway Commercial zoning. (R. 977: 18-22.) (See also Planning Consultant's summary of signage discussion. (R. 934: 8-935: 9.)

**G. EXISTING ZONING ORDINANCE AND PROCEDURES.** The Court received Exhibit "2" which is the Toquerville Ordinance Number 1978-1 Ex. 2), the Town zoning ordinance prepared in 1978 but actually adopted in 1982. (R. 956-957; 983-84.) The Mayor testified that the zoning ordinance as it appears as Exhibit "2" was the official zoning ordinance in effect at the time of the master plan and adoption of the zoning map, Exhibit "1". (R. 984.) The Planning Consultant testified that the Highway Commercial zone designation (H-C) which is outlined at page 38 of Exhibit "2", was the basis of the Planning Commission's H-C designation with regard to the Anderson Junction property incorporated into the Master Plan recommended to the Town Council. (R. 910:5-24.) Under the (H-C) Zone Classification, all uses are designated as "conditional uses" subject to conditional use permit. (Exhibit "2" at 38.) The Planning Consultant testified that under the sign regulations contained at page 29 of Exhibit "2", outdoor advertising is a conditional use within the H-C zone designation. (R. 925-26.) Finally, the Planning Consultant testified that the zoning ordinance was not revised or amended in any way to accommodate or allow outdoor advertising during the master plan or zoning procedure. (R. 935.)

It is obvious from the marshalling of the record above, that the Trial Court reviewed the factors specifically outlined by this Court, and all evidence offered that was relative and probative of any and all factors actually considered by the Town authorities in adopting the Highway Commercial zoning designation. The Trial Court simply didn't find UDOT's spin on the evidence credible. It is also obvious from the marshalled record, that the rural community of Toquerville, Utah, with limited resources, engaged in a comprehensive and carefully considered review of a full spectrum of planning and zoning considerations in

master planning the annexed property at Anderson Junction and in adopting a Highway Commercial zoning designation for the Anderson Junction area and did not "merely perpetuate the prior county zoning designation".

The record supports the Trial Court's Findings of Fact and show that the Trial Court's Judgment follows logically from and is supported by the evidence and that subsidiary facts are clearly established in the record and incorporated into the Trial Court's Findings of Fact that demonstrate the Trial Court's Findings and Judgment are based on sufficient evidence and not clearly erroneous. Actin, 737 P.2d at 999; Pena, 869 P.2d at 935-36.

What is conspicuously absent in the record and UDOT's argument is any affirmative evidence whatsoever offered by UDOT which contradicts in any way the evidence marshalled above, or otherwise affirmatively demonstrates that the Court's Findings and Judgment are so lacking as to be against the clear weight of evidence. Nowhere is there any evidence that signage issues were primary considerations driving the zoning decisions, nor was there any evidence shown that demonstrates the zoning ordinance was developed, crafted, or adopted to accommodate signage at all.

**V. THE TRIAL COURT CAREFULLY STRUCTURED THE ENTIRE TRIAL, ITS FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT WITHIN THE CONTEXT AND FRAMEWORK OF UTAH CODE ANNOTATED § 27-12-136.3(3) AND THE PARAMETERS ESTABLISHED BY THE COURT OF APPEALS.**

Contrary to UDOT's argument in Point IV of its Brief, the Trial Court did not disregard at all Utah Code Ann. § 27-12-136.3(3) (Supp. 1994). Indeed even a superficial reading of the Court's Findings of Fact clearly demonstrate a careful and logical analysis and

presentation of the Court's Findings framed in the context of the language of Section 27-12-136.3(3).

UDOT's reference to the Trial Court's parenthetical musing as proof that the Trial Court disregarded Section 27-12-136.3(3) in either the conduct of the trial, or in reaching its Findings, Conclusions, and Judgment ignores entirely the whole structure of the Trial, and the Court's repeated insistence on receiving all relevant and probative evidence bearing on the issue of the Town's purpose in designating the Highway Commercial zone. The Court's parenthetical statement cited by UDOT came at the conclusion of its recitation of the Findings of Fact and Conclusion of Law. The Court's statement in full was:

I observe parenthetically that the legislative use within § 27-12-136.3(3) of the phrase "primary purpose" of allowing outdoor advertising probably does not accomplish the intent - the announced intent of the act or give any kind of reasonable framework within which Courts may determine issues of these kinds.

I would suspect that it would be a rare case if the Court could find evidence that the primary purpose was to build billboards. The evidence here is the primary purpose is to get development away from the old traditional town of Toquerville out against the freeway, isolate the old traditional town from that commercial purpose, and increase the tax base of the town by having a commercial base, but not in their backyard.

(R. 1068:5-20.)

That statement must be put in proper context by comparing it to the statement the Trial Judge made earlier in the trial:

Alright. Counsel just so you will get a general understanding of the way that I view the remand from the Court of Appeals, it seems to me as though the Court of Appeals wants the Court to determine the primary purpose.

Now, the way of determining the primary purpose is really interesting to me because if I find that the actions of the zoning authority were based upon a number of considerations, it may be extremely difficult for the Court to discern a primary purpose.

(R. 844:25-842:10.) (Emphasis added)

The Court's parenthetical statement at the conclusion of his Findings of Fact is nothing more than a follow-up to the statement made at the outset, that ultimately identifying the primary purpose of any legislative action may be difficult to do. Indeed, as the Record marshalled above amply demonstrates, the Toquerville Town officials and Town residents considered multiple issues and factors and were no doubt attempting to achieve multiple purposes. What is most clear from review of the record is that there is no demonstrated evidence whatsoever that accommodating outdoor advertising was ever a motivation or even a subsidiary purpose of the annexation, master plan, or ultimate zoning designation.


### CONCLUSION

The record clearly supports the Trial Court's Findings of Fact and shows that the Trial Court's Judgment follows logically from and is supported by the evidence, and that subsidiary facts are clearly established in the record and incorporated into the Trial Court's Findings that demonstrate the Trial Court's Findings of Fact and Judgment are based on sufficient evidence and are not clearly erroneous. This Court should hold that the Utah Administrative Code § R933-2-3(4) (1994) is not applicable to this case on the basis that it is in clear conflict with this Court's earlier holding and construction of Utah Code Ann. § 27-12-136.3(2) and (3) (Supp. 1994). Finally, UDOT has failed completely in its burden to marshal the evidence and show that the Trial Court's Findings and Judgment are against the

clear weight of the evidence. For these reasons, this Court should uphold and affirm the Trial Court's Judgment in its entirety.

DATED this 18th day of July, 1997.

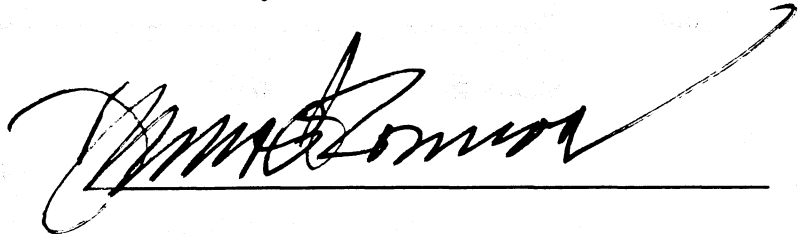
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Attorneys for Appellee

**CERTIFICATE OF SERVICE**

I hereby certify that on the 18th day of July, 1997, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing BRIEF OF PLALINTIFF/APPELLEE, to the following:

Ralph L. Finlayson  
Assistant Attorney General  
160 East 300 South  
P.O. Box 140857  
Salt Lake City, UT 84111-0857



## **ADDENDUM NO. 1**

**27-12-136.1. "Utah Outdoor Advertising Act" — Short title.**

This act shall be known and may be cited as the "Utah Outdoor Advertising Act."

**History:** L. 1967, ch. 51, § 1.

**Meaning of "this act."** — Laws 1967, ch. 51 enacted §§ 27-12-136.1 to 27-12-136.13.

**NOTES TO DECISIONS****ANALYSIS**

**Nonconforming use.**  
Cited.

**Nonconforming use.**

State could not compel removal of outdoor advertising sign on ground that sign violated this act because advertising had established prior nonconforming use and sign in question substantially complied with negotiations be-

tween parties and was constructed without objection by commission, and no procedure for paying just compensation for removal of sign had been pursued by the state. *National Adv. Co. v. Utah State Rd. Comm'n*, 26 Utah 2d 132, 486 P.2d 383 (1971).

Cited in *Utah Dep't of Transp. v. Reagan Outdoor Adv., Inc.*, 751 P.2d 270 (Utah Ct. App. 1988).

**27-12-136.2. Purpose of act.**

The purpose of this act is to provide the statutory basis for the regulation of outdoor advertising consistent with zoning principles and standards and the public policy of this state in providing public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the natural scenic beauty of lands bordering on such highways, and to ensure that information in the specific interest of the traveling public is presented safely and effectively.

The agreement entered into between the governor of the state of Utah and the secretary of transportation of the United States dated January 18, 1968, regarding the size, lighting and spacing of outdoor advertising which may be erected and maintained within areas adjacent to the interstate and primary highway systems which are zoned commercial or industrial or in such other unzoned commercial or industrial areas as defined pursuant to the terms of such agreement is hereby ratified and approved.

**History:** L. 1967, ch. 51, § 2; 1971, ch. 61, § 1.

**Meaning of "this act."** — See note under § 27-12-136.1.

**27-12-136.3. Definitions.**

As used in this chapter:

(1) "Commercial or industrial activities" means those activities generally recognized as commercial or industrial by zoning authorities in this state, except that none of the following are commercial or industrial activities:

- (a) agricultural, forestry, grazing, farming, and related activities, including wayside fresh produce stands;
- (b) transient or temporary activities;
- (c) activities not visible from the main-traveled way;



- (d) activities conducted in a building principally used as a residence; and
  - (e) railroad tracks and minor sidings.
- (2) "Commercial or industrial zone" means only:
- (a) those areas within the boundaries of cities or towns that are used or reserved for business, commerce, or trade, or zoned as a highway service zone, under enabling state legislation or comprehensive local zoning ordinances or regulations;
  - (b) those areas within the boundaries of urbanized counties that are used or reserved for business, commerce, or trade, or zoned as a highway service zone, under enabling state legislation or comprehensive local zoning ordinances or regulations;
  - (c) those areas outside the boundaries of urbanized counties and outside the boundaries of cities and towns that:
    - (i) are used or reserved for business, commerce, or trade, or zoned as a highway service zone, under comprehensive local zoning ordinances or regulations or enabling state legislation; and
    - (ii) are within 8420 feet of an interstate highway exit, off-ramp, or turnoff as measured from the nearest point of the beginning or ending of the pavement widening at the exit from or entrance to the main-traveled way; or
  - (d) those areas outside the boundaries of urbanized counties and outside the boundaries of cities and towns and not within 8420 feet of an interstate highway exit, off-ramp, or turnoff as measured from the nearest point of the beginning or ending of the pavement widening at the exit from or entrance to the main-traveled way that are reserved for business, commerce, or trade under enabling state legislation or comprehensive local zoning ordinances or regulations, and are actually used for commercial or industrial purposes.
- (3) "Commercial or industrial zone" does not mean areas zoned for the primary purpose of allowing outdoor advertising.
- (4) "Comprehensive local zoning ordinances or regulations" means a municipality's comprehensive plan required by Section 10-9-301, the municipal zoning plan authorized by Section 10-9-401, and the county master plan authorized by Sections 17-27-301 and 17-27-401.
- (5) "Department" means the Department of Transportation.
- (6) "Directional signs" means signs containing information about public places owned or operated by federal, state, or local governments or their agencies, publicly or privately owned natural phenomena, historic, cultural, scientific, educational, or religious sites, and areas of natural scenic beauty or naturally suited for outdoor recreation, that the department considers to be in the interest of the traveling public.
- (7) (a) "Erect" means to construct, build, raise, assemble, place, affix, attach, create, paint, draw, or in any other way bring into being.
- (b) "Erect" does not include any activities defined in Subsection (a) if they are performed incident to the change of an advertising message or customary maintenance of a sign.
- (8) "Highway service zone" means a highway service area where the primary use of the land is used or reserved for commercial and roadside services other than outdoor advertising to serve the traveling public.

## **ADDENDUM NO. 2**

awarding the natural father his costs and attorney fees incurred after September 8, 1993. *See Schoney v. Memorial Estates, Inc.*, 863 P.2d 59, 62 (Utah App.1993) (holding no abuse of discretion awarding costs and attorney fees when sanctions were warranted).

### CONCLUSION

We therefore affirm the sanctions imposed by the trial court and award the natural father his costs and attorney fees incurred on appeal. We remand the case to the trial court for a determination of the amount of the award on appeal.

BILLINGS and GREENWOOD, JJ.,  
concur.



**KUNZ & COMPANY dba Kunz Outdoor  
Advertising, a California corporation,  
Plaintiff and Appellee,**

v.

**STATE of Utah, Utah Department  
of Transportation, Defendant  
and Appellant.**

**No. 950186-CA.**

Court of Appeals of Utah.

March 14, 1996.

Outdoor advertising corporation sought order declaring signs on property adjacent to interstate highway to be in compliance with state law and providing injunctive relief. The Fifth District Court, Washington County, James L. Shumate, J., entered summary judgment for corporation. Department of Transportation appealed. The Court of Appeals, Wilkins, J., held that: (1) property reserved for commercial or industrial use in city or town could be excluded from use for outdoor advertising near highway if zoning

violated statute providing that "commercial or industrial zone" does not mean areas zoned for primary purpose of allowing outdoor advertising; (2) fact issues existed as to whether primary purpose behind rezoning of land was to allow outdoor advertising; (3) corporation was bound by order of Department concerning signs; and (4) corporation was required to exhaust administrative remedies with regard to obtaining renewal permits before seeking order in district court providing declaratory and injunctive relief.

Reversed and remanded.

#### 1. Appeal and Error ⇨863

In considering appeal from summary judgment, Court of Appeals reviews trial court's legal conclusions, including its conclusion that material facts are not disputed, for correctness. Rules Civ.Proc., Rule 56(c).

#### 2. Appeal and Error ⇨863

Standard of review of summary judgment allows Court of Appeals to make its own conclusions and does not obligate it to defer to trial court. Rules Civ.Proc., Rule 56(c).

#### 3. Highways ⇨153.5

Area zoned for commercial or industrial use in city or town need not actually have commercial development on it to satisfy highway code's definition of "commercial or industrial zone" as including areas used or reserved for business. U.C.A.1953, 27-12-136.3(2)(a).

#### 4. Highways ⇨153.5

Area zoned for commercial or industrial use in city or town which does not actually have commercial development on it may be excluded from use for outdoor advertising near highway if the zoning violates statute providing that "commercial or industrial zone" does not mean areas zoned for primary purpose of allowing outdoor advertising. U.C.A.1953, 27-12-136.3(3), 27-12-136.4(1)(d).

#### 5. Zoning and Planning ⇨624

In determining primary purpose behind particular zoning decision, fact finder can and should consider all relevant evidence, not just

stated purpose of zoning body or local government; this would include evidence of actual land use or any evidence that zoning body merely perpetuated prior zoning designation.

#### 6. Judgment ⇨181(15.1)

Issues of material fact existed as to whether primary purpose behind rezoning of land to commercial use was to allow outdoor advertising, such that land would be required by statute to be excluded from use for outdoor advertising, precluding summary judgment. U.C.A.1953, 27-12-136.3(3); Rules Civ.Proc., Rule 56(c).

#### 7. Highways ⇨157

Outdoor advertising corporation was bound under doctrine of res judicata by order of Department of Transportation concerning removal of billboards, even though corporation had not been party to proceedings in which order was issued, where corporation was privy to, and subsequent assignee of, corporation which had been party to such proceedings.

#### 8. Judgment ⇨681

Court would not adopt test set forth in Restatement of Judgments (Second), providing various exceptions to applicability of res judicata to successor of property interest when that party is subject of pending litigation to which transferor of interest, rather than successor, is party. Restatement (Second) of Judgments § 44.

#### 9. Judgment ⇨713(2), 720

Res judicata applies only as to those issues which were either tried and determined, or upon all issues which party had fair opportunity to present and have determined in other proceeding.

#### 10. Highways ⇨153.5

Although outdoor advertising corporation was bound under doctrine of res judicata by prior adjudication of Department of Transportation that county's zoning of land was for primary purpose of allowing outdoor advertising, it was not bound by any adjudication as to whether town's zoning was for primary purpose of allowing outdoor advertising, since town's annexation and rezoning

of land occurred nearly eight months after order was issued. U.C.A.1953, 27-12-136.3(3).

#### 11. Highways ⇨153.5, 157

Regardless of whether outdoor advertising signs adjacent to highway were located in valid commercial or industrial zone, they were illegal and subject to removal where sign owner had not obtained valid permits for signs. U.C.A.1953, 27-12-136.4(1)(d), 27-12-136.7(1)(a).

#### 12. Administrative Law and Procedure ⇨662

##### Highways ⇨153.5, 159(2)

Outdoor advertising corporation was required to exhaust administrative remedies with regard to obtaining renewal permits for signs before seeking order in district court declaring signs to be in compliance with state law and providing injunctive relief; statute providing district courts with jurisdiction to review final orders of Department of Transportation resulting from formal and informal adjudicative proceedings did not relieve corporation from exhausting its administrative remedies, order denying permits was not final order under such statute, and order did not result from formal and informal adjudicative proceedings. U.C.A.1953, 27-12-136.9(4)(a).

#### 13. Administrative Law and Procedure ⇨662

##### Highways ⇨153.5

Where outdoor advertising corporation did not exhaust its administrative remedies with regard to sign permits, neither trial court nor Court of Appeals had jurisdiction to reverse, alter, or otherwise circumvent that particular agency action. U.C.A.1953, 63-46b-1(8).

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Appeal from Fifth District, Washington County; The Honorable James L. Shumate, Judge.

Jan Graham and Ralph L. Finlayson, Salt Lake City, for Appellant.

D. Williams Ronnow and John J. Walton, St. George, for Appellee.

OPINION

Before BILLINGS, JACKSON, and  
WILKINS, JJ.

WILKINS, Judge:

The Utah Department of Transportation (UDOT) appeals the district court's grant of summary judgment in favor of Kunz & Company. We reverse and remand.

BACKGROUND

Thomas Eveleth owns real property adjacent to Interstate 15 in Washington County, near the Anderson Junction. In March 1986, Eveleth applied to the county for a zoning change, seeking to change the zoning of his property from "agricultural" to "highway commercial."

Prior to obtaining the zoning change, Eveleth entered into an agreement with Lundgren Outdoor Advertising (Lundgren) whereby Eveleth would lease his property to Lundgren for the purpose of placing and maintaining billboards on the property. In July 1987, Eveleth and Lundgren applied to UDOT for permits to construct three billboards on the property along I-15. Each application certified that "the sign is in full compliance with the [Outdoor Advertising] Act," and that Eveleth's property is zoned "commercial." In fact, the property was still zoned "agricultural" at the time. Nevertheless, UDOT granted the permits, and Lundgren proceeded to erect the three signs later that year.

In March 1988, UDOT notified Lundgren that the property was not zoned "commercial," as was claimed in the permit applications. Lundgren then notified Eveleth of this problem, and Eveleth took further steps to obtain the zoning change.

In August 1989, UDOT held a hearing on the matter to determine the legality of the signs pursuant to the Utah Outdoor Advertising Act (codified at that time at Utah Code Ann. §§ 27-12-136.1 to -136.13 (1989)). UDOT ruled that the three billboards violated sections 27-12-136.4, -136.9, and -136.3(3) because the billboards were located on property that was not zoned "commercial" nor could be deemed such for purposes of out-

door advertising. UDOT revoked the permits and ordered the signs' immediate removal.

Lundgren appealed the UDOT order to this court. However, in December 1989, during pendency of the appeal, Washington County rezoned Eveleth's property as "highway commercial." After UDOT informed this court of the changed circumstances, we remanded the case to UDOT in April 1990.

UDOT conducted further proceedings, which involved only the parties to the appeal, UDOT and Lundgren. Subsequently, in February 1993, UDOT issued a new order ruling that although Eveleth's property was now zoned "commercial," the rezoning was for the "primary purpose" of allowing outdoor advertising, thereby disqualifying the property for that use, pursuant to section 27-12-136.3(3) of the Utah Code.

UDOT sent the Order on Remand, which revoked the permits for the three signs and ordered their removal, to Lundgren and Eveleth. However, ownership of the signs had changed prior to the issuance of UDOT's final order. Two years earlier, in February 1991, Kunz & Company (Kunz) had purchased the billboards from Leonard & Company, a successor to Lundgren.

In September 1993, UDOT sent a letter to Kunz explaining the illegality of the signs and providing a copy of the UDOT Order on Remand. Nevertheless, Kunz did not take any steps to intervene or appeal that order.

Subsequently, in November of that year, the town of Toquerville annexed Eveleth's property and chose to retain the "highway commercial" zoning for the area. However, there is not now, nor has there ever been, any commercial development on the property other than the three billboards.

On January 18, 1994, Kunz applied for renewal permits for the signs. UDOT denied the application, and on February 16, Kunz filed an action for declaratory judgment in district court. Kunz sought a declaration from the trial court that "due to the annexation and rezoning of the subject property, the billboards are now in compliance with applicable state law, specifically . . . the Utah Outdoor Advertising Act, and that re-

removal of the billboards is not warranted thereunder." The parties also agreed to have the trial court determine "the effect [on Kunz] (if any) of the UDOT District Five 'Order on Remand.'" Finally, Kunz sought permanent injunctive relief, enjoining UDOT and the State "from any removal of, or hindrance of Kunz's access to, the billboards."

During the course of the proceedings, UDOT filed a motion for summary judgment, and Kunz filed a cross-motion for summary judgment. In December 1994, the trial court denied UDOT's motion and granted Kunz's cross-motion. Specifically, the trial court held that Kunz is not bound by UDOT's Order on Remand and that the three signs comply with the provisions of the Outdoor Advertising Act. UDOT appeals.

#### ANALYSIS

[1, 2] As is the case whenever we consider an appeal from a summary judgment, we review the trial court's legal conclusions, including its conclusion that the material facts are not disputed, for correctness. *See* Utah R.Civ.P. 56(c) (stating that summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law"). This standard allows us to make our own conclusions and does not obligate us to defer to the trial court. *See State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

##### I. Application of Outdoor Advertising Act

Kunz specifically asked the trial court to declare that "the billboards, as presently situated on [Eveleth's] property, lie within a bona fide commercial zone not created or existing for the primary purpose of outdoor advertising," which would qualify the area for billboards under the Outdoor Advertising Act. *See* Utah Code Ann. § 27-12-136.4(1)(d) (1995). Pursuant to the Declaratory Judgment Act, "[a]ny person . . . affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." *Id.* § 78-33-2 (1992). Thus, the trial court in this case could properly decide the issue. *See id.* § 78-33-1.

The trial court concluded that the current zoning of Eveleth's land met the requirements of the Outdoor Advertising Act and thereby permitted the use of billboards on the property. In reaching this conclusion, the court specifically relied on the fact that Toquerville has zoned the area as "highway commercial." *See id.* § 27-12-136.4(1)(d) (1995) (permitting the use of outdoor advertising in a "commercial or industrial zone"). The court found this designation sufficient to fall within the statutory definition for such a zone as provided in the Outdoor Advertising Act.

Section 27-12-136.3(2)(a) defines "[c]ommercial or industrial zone," in the relevant part, as "those areas within the boundaries of cities or towns that are used or reserved for business, commerce, or trade, or zoned as a highway service zone, under enabling state legislation or comprehensive local zoning ordinances or regulations." *Id.* § 27-12-136.3(2)(a). In addition, a subsequent provision in the Act limits the definitions found in subsection (2) by establishing that "[c]ommercial or industrial zone" does not mean areas zoned for the primary purpose of allowing outdoor advertising." *Id.* § 27-12-136.3(3).

The trial court construed the use of the term "reserved" in subsection (2)(a) to mean that the property does not actually need to have commercial development on it, but that it merely be zoned for that purpose. Thus, the court determined that the current zoning of Eveleth's land satisfied the statute, despite the fact that the three signs represent the only commercial development on the property. The trial court further concluded that the "exclusionary definition" in section 27-12-136.3(3) referred only "to the areas outside incorporated cities and towns."

[3, 4] While we agree that an area zoned for commercial or industrial use in a city or town need not actually have commercial development on it to satisfy the definition in section 27-12-136.3(2)(a), we conclude that such property may still be excluded from use for outdoor advertising if the zoning violates section 27-12-136.3(3). The trial court erred in deciding that this latter provision applied

only to areas outside of incorporated cities and towns.

In enacting section 27-12-136.3(3), the legislature must have contemplated that local zoning bodies might attempt to generate immediate revenue from lands adjacent to highways by rezoning such lands to allow outdoor advertising. However, allowing outdoor advertising in areas without other businesses or highway services in the vicinity would violate essential purposes of the Outdoor Advertising Act—enacted in part to promote the “convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the natural scenic beauty of lands bordering on such highways, and to ensure that information in the specific interest of the traveling public is presented safely and effectively.” *Id.* § 27-12-136.2. Accordingly, if a zoning body designates specific land as “commercial” for the *primary* purpose of allowing outdoor advertising on that land, then section 27-12-136.3(3) prohibits the use of billboards on the land regardless of whether or not the zoning body also intends to “reserve” the land for other commercial use.

[5, 6] Furthermore, in determining the primary purpose behind a particular zoning decision, the fact finder can and should consider all relevant evidence, not just the stated purpose of the zoning body or local government. This would include evidence of actual land use or any evidence that the zoning body merely perpetuated a prior zoning designation. Inasmuch as Kunz and UDOT have presented conflicting evidence as to Toquerville’s primary purpose behind the zoning of Eveleth’s land, we conclude that a genuine issue of material fact exists. We therefore reverse and remand for trial to allow the fact finder to determine the primary purpose for the zoning decision.

## II. Effect of Order on Remand

UDOT argued before the trial court that UDOT’s Final Order on Remand, issued in February 1993, constitutes an enforceable order against Kunz and has res judicata effect on the issues of this case. In light of these arguments, Kunz and UDOT agreed to have the trial court decide what effect, if any, the

Order on Remand has on Kunz and this case. The trial court ruled that because Kunz was not a party to the previous UDOT proceedings and did not receive adequate legal notice of those proceedings, Kunz was not bound by the Order on Remand.

[7] Nevertheless, the trial court failed to recognize the significance of the fact that one of Kunz’s predecessors in interest, Lundgren, was a party to those proceedings. Res judicata applies to the same parties *and to their privies or assignees*. *D’Aston v. Aston*, 844 P.2d 345, 350 (Utah App.1992). As a privy to, and subsequent assignee of, Lundgren’s interests in the billboards, Kunz is bound by the UDOT Order on Remand to the same extent as Lundgren. The trial court erred in ruling otherwise.

[8] Kunz proposes that we adopt the test set forth in the Second Restatement of Judgments, which provides various exceptions to the applicability of res judicata to a successor of a property interest when that property is the subject of a pending litigation to which the transferor of the interest, rather than the successor, is a party. *See* Restatement (Second) of Judgments § 44 (1982). Utah has not adopted the Restatement test, and we decline to do so now.

[9, 10] Even so, the Order on Remand is res judicata only “as to those issues which were either tried and determined, or upon all issues which the party had a fair opportunity to present and have determined in the other proceeding.” *D’Aston*, 844 P.2d at 350 (quoting *Throckmorton v. Throckmorton*, 767 P.2d 121, 123 (Utah App.1988)). Kunz is therefore bound by the prior adjudication that Washington County’s zoning of Eveleth’s land was for the primary purpose of allowing outdoor advertising. However, this action involves a different set of facts, which have not been adjudicated: Whether *Toquerville’s* zoning, rather than Washington County’s zoning, was for the primary purpose of allowing outdoor advertising. Toquerville’s annexation and zoning of Eveleth’s land occurred nearly eight months after UDOT issued its Order on Remand. Accordingly, the trial court was correct to the extent it con-

cluded that the Order on Remand was not binding on this particular issue.

### III. Further Relief Sought by Kunz

As part of its declaratory action, Kunz also sought an order declaring the billboards to be in compliance with state law, declaring them exempt from any removal requirements, and granting permanent injunctive relief to prevent UDOT and the State from removing the signs. Under the Declaratory Judgment Act, a party may seek any further relief that is necessary or proper in light of the declaratory judgment issued by the trial court. Utah Code Ann. § 78-33-8 (1992). Nevertheless, the trial court cannot grant the relief asked for in this case.

[11] Regardless of whether the signs are found to be located in a valid commercial or industrial zone, the signs are still illegal and subject to removal, because Kunz has not obtained valid permits for the signs. *See id.* § 27-12-136.7(1)(a) (1995) ("Outdoor advertising may not be maintained without a current permit."); *id.* § 27-12-136.9(1)(b) ("Outdoor advertising is unlawful when . . . a permit is not obtained as required by this chapter.").

[12] In January 1994, Kunz applied to UDOT for renewal permits for the three billboards. When UDOT denied the applications, Kunz did not exhaust its administrative remedies, but instead filed this declaratory action in district court. Kunz claims that exhaustion of remedies is not required in this case because the state legislature has provided that "[t]he district courts shall have jurisdiction to review by trial de novo all final orders of the Department of Transportation under this section resulting from formal and informal adjudicative proceedings." *Id.* § 27-12-136.9(4)(a).

However, Kunz's argument that section 27-12-136.9 allows Kunz to proceed directly to district court for the relief sought is disingenuous. First, this section does not relieve Kunz from exhausting its administrative remedies. *See id.* § 63-46b-14(2) (1993) ("A party may seek judicial review only after exhausting all administrative remedies available, except" under circumstances not appli-

cable to this case.). Furthermore, the UDOT order denying the permits is not a final order *under this section*, nor is Kunz seeking review of that order in this action. *See id.* § 27-12-136.9(4)(a) (1995). Most importantly, the UDOT order denying the permits is not a final order *resulting from formal and informal adjudicative proceedings* as required under this section. *See id.*

Once UDOT denied Kunz's applications for new permits, Kunz should have requested further agency action, seeking adjudicative proceedings to determine whether the permits should have been granted in light of Toquerville's annexation and rezoning of Eveleth's property. *See* Utah Code Admin.P. R907-1-3(B)(3) (indicating how adjudicative processes may be petitioned for by persons outside UDOT). UDOT's administrative rules specifically provide for adjudicative proceedings pursuant to the Outdoor Advertising Act. *Id.* R907-1-1(A)(2). Such proceedings would commence informally and convert to formal proceedings if necessary. *See id.* R907-1-1(A), -5(F), & -15(B). Indeed, Administrative Rule 907-1-15(B) specifically establishes:

No final order is issued in the informal phase if there is a timely objection and request for hearing made. If such a timely objection and request for hearing is made, the matter is treated as a contested case which is processed as a formal proceeding before the Director. Such right to have the matter be contested and processed "formally" is an available and adequate administrative remedy and should be exercised prior to seeking judicial review.

Nevertheless, Kunz chose not to exhaust its administrative remedies following UDOT's denial of the new permits. Before Kunz could claim on appeal that UDOT erred in denying the permits, UDOT should have had the opportunity to correct the alleged error. *See Mountain Fuel Supply Co. v. Public Serv. Comm'n.*, 861 P.2d 414, 423-24 (Utah 1993) (recognizing that the correction principle underpins the doctrine of exhaustion of administrative remedies); *see also Maverik Country Stores v. Industrial Comm'n.*, 860 P.2d 944, 947 (Utah App.1993) ("The basic purpose underlying the doctrine . . . is to



allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies.” (quoting *Parisi v. Davidson*, 405 U.S. 34, 37, 92 S.Ct. 815, 818, 31 L.Ed.2d 17 (1972))).

[13] Because Kunz did not exhaust its administrative remedies with regard to the sign permits, neither the trial court nor this court has jurisdiction to reverse, alter, or otherwise circumvent that particular agency action. See *Maverik Country Stores*, 860 P.2d at 947–48; see also Utah Code Ann. § 63–46b–1(8) (Supp.1995) (“Nothing in this chapter may be interpreted to provide an independent basis for jurisdiction to review final agency action.”) Accordingly, the trial court cannot order UDOT to grant the permits. Without the permits, the billboards are illegal, and the trial court is without jurisdiction to change the signs’ legal status and grant the further relief requested by Kunz in its declaratory action. See Utah Code Ann. § 78–33–8 (1992) (“Further relief based on a declaratory judgment or decree may be granted when necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief.” (emphasis added)).

### CONCLUSION

The trial court erred in concluding that section 27–12–136.3(3) applies only to areas outside incorporated cities and towns. Outdoor advertising is prohibited in any location zoned for the “primary purpose of allowing outdoor advertising.” Because Kunz and UDOT have presented conflicting evidence regarding Toquerville’s primary purpose behind its zoning of Eveleth’s land, we reverse the grant of summary judgment and remand for a trial on that issue.

The trial court also erred in concluding that the UDOT Order on Remand has no binding effect on Kunz. Nevertheless, res judicata does not bar adjudication of the new issue presented in this action.

Finally, the trial court is without jurisdiction to declare the billboards to be in complete compliance with the Outdoor Advertis-

ing Act because Kunz did not exhaust its administrative remedies following UDOT’s denial of the new sign permits. The trial court cannot exempt the billboards from removal requirements or grant the injunctive relief requested in this action.

Reversed and remanded.

BILLINGS and JACKSON, JJ., concur.



STATE of Utah, In the Interest of E.K., a person under eighteen years of age.

K.K., Appellant,

v.

STATE of Utah, Appellee.

No. 950292–CA.

Court of Appeals of Utah.

March 14, 1996.

Infant was determined to be neglected child by the Third District Juvenile Court, Salt Lake County, Olof A. Johansson, J. Mother appealed. The Court of Appeals, Billings, J., held that: (1) after-born child may be “neglected” based on abuse of siblings; (2) state established prima facie case of neglect based on abuse of siblings; and (3) challenge to state’s use to judicial notice was not preserved for appeal.

Affirmed.

Orme, P.J., concurred in part and concurred only in result in part.

### 1. Infants ⇌ 156

For purposes of statute defining “neglected or abused child” as child who is at risk of being neglected or abused because another child in the same home was neglected or abused, children “in the same home” is not limited to children actually present in

## **ADDENDUM NO. 3**

56 DEC 4 PM 12 47

WASHINGTON COUNTY

BY WJ

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JWH&Mc File No.: 3668.0004

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY

STATE OF UTAH

---

KUNZ & COMPANY dba KUNZ	:	
OUTDOOR ADVERTISING, a California	:	FINDINGS OF FACT AND
Corporation,	:	CONCLUSIONS OF LAW
Plaintiff,	:	
vs.	:	Civil No. 94050322
THE STATE OF UTAH AND THE UTAH	:	
STATE DEPARTMENT OF	:	Judge James L. Shumate
TRANSPORTATION,	:	
Defendant.	:	

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The above-entitled matter came on before the Court on October 1, 1996, for a bench trial pursuant to remand from the Utah Court of Appeals. Plaintiff was represented by counsel D. Williams Ronnow. Defendants were represented by counsel Ralph L. Finlayson. The Court received testimony and evidence regarding the issue on remand, and now enters the following:

**FINDINGS OF FACT**

1. The property in question, owned by Thomas Eveleth, located west of Interstate 15 in the northernmost limits of the town of Toquerville, Washington County, was annexed by the Town in 1992.

2. Beginning in January 1993, Toquerville town undertook the process of master-planning its entire community and enlisted the assistance of the Five County Association of Government's planner, the town engineer, and solicited the input of all property owners.

3. The three signs in question in this lawsuit had been on the Eveleth property since 1987.

4. The only use of the Eveleth property since 1987 has been for outdoor advertising signage.

5. There is no evidence of any utility ever servicing the property - water, power, gas, sanitary sewer or other utilities.

6. The Court finds from Exhibit 1 and testimony, the Town of Toquerville, is separated into two distinct areas, one south of a high ridge that blocks the view of Anderson Junction from the traditional "Main Street" area, and one north and west of the high ridge which constitutes the annexed area and includes Anderson Junction and the I-15 interchange.

7. Unrebutted testimony was presented without objection that it was the purpose of the Town in establishing its master plan, zoning ordinance, zoning districts and its zoning map, that commercial zoning be limited to two distinct areas. One, a tiny parcel located at the south end of the Town on state highway U-17 that leads toward LaVerkin, Utah, and the other parcel immediately surrounding the Anderson Junction I-15 interchange in the north end of Toquerville.

8. The Court finds from Exhibit 2, it was the intent of Toquerville Town, because it incorporated its planning and zoning to match up with the existing zoning ordinance, that any signage of the type involved in this litigation be permissible only by conditional use permit. The

Town ordinance so provides, and it was the clear intention of the Town in this annexation to substantially limit outdoor advertising signs by that process.

9. The Court heard evidence and testimony of the intent of the Town from the former mayor, the former chairman of the planning commission at the time these actions were undertaken, and from the former town engineer, and while such testimony provides some assistance in the Court's determination of these facts, the most telling evidence of Toquerville's intent with respect to outdoor advertising signs is the Toquerville Zoning Ordinance itself.

10. Due to the fact that the placement of outdoor advertising signs within the Eveleth property after Toquerville annexed and zoned the subject property could only be done by conditional use permit, the Court cannot find that the primary purpose of the zoning was to allow outdoor advertising signage.

11. The primary purpose of Toquerville's zoning action, designating the subject property as Highway Commercial, was to keep the commercial development away from the traditional downtown Main Street area of Toquerville and isolate the traditional downtown area from the property zoned commercial near the I-15 Anderson Junction interchange and increase the tax revenue of the town from an expanded commercial base.

### CONCLUSIONS OF LAW

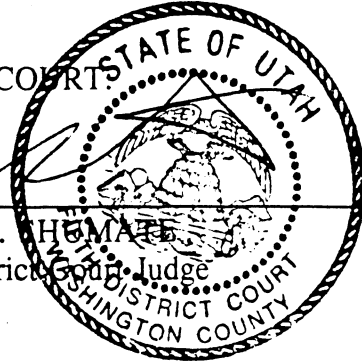
The designation of the Highway Commercial zone at the Anderson Junction I-15 interchange by the Toquerville Town Council on December 14, 1993, was not for the primary purpose of

allowing outdoor advertising, and therefore does not violate UCA § 17-12-136.3(3) (Supp. 1988).

DATED this 3 day of <sup>Dec</sup>~~November~~, 1996.

BY THE COURT:


JAMES L. HUMATEL  
Fifth District Court Judge



CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Findings of Fact and Conclusions of Law on the 19<sup>th</sup> day of November, 1996 to be hand-delivered and delivered via facsimile to the following:

RALPH L. FINLAYSON  
Assistant Attorney General  
JAN GRAHAM  
Attorney General  
Attorneys for Defendant  
160 East 300 South, 5th Floor  
Salt Lake City, UT 84114-0857  
Fax No.: 1-801-366-0352



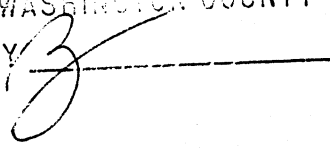
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## **ADDENDUM NO. 4**



FILED  
FIFTH DISTRICT COURT  
'97 JAN 23 PM 1 23

D. Williams Ronnow (USB #4132)  
JONES, WALDO, HOLBROOK & McDONOUGH  
Attorneys for Plaintiff  
249 East Tabernacle, Suite 200  
St. George, Utah 84770  
Telephone: (801) 628-1627  
Fax: (801) 628-5225  
JWH&Mc File No.: 3668.0004

WASHINGTON COUNTY  
BY 

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY

STATE OF UTAH

---

KUNZ & COMPANY dba KUNZ	:	
OUTDOOR ADVERTISING, a California	:	<b>ORDER AND JUDGMENT</b>
Corporation,	:	
Plaintiff,	:	
	:	Civil No. 94050322
vs.	:	
	:	
THE STATE OF UTAH AND THE UTAH	:	Judge James L. Shumate
STATE DEPARTMENT OF	:	
TRANSPORTATION,	:	
	:	
Defendant.	:	

---

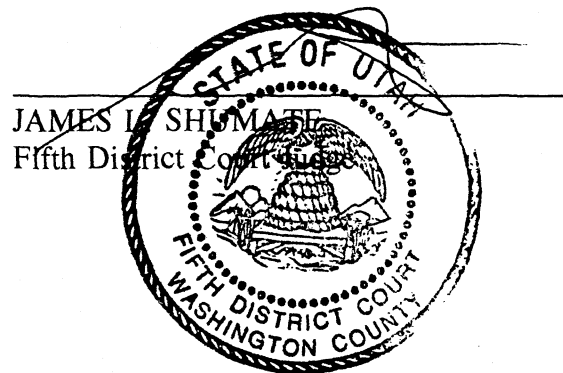
The above-entitled matter came on before the Court on October 1, 1996, for a bench trial pursuant to remand from the Utah Court of Appeals. Plaintiff was represented by counsel D. Williams Ronnow. Defendants were represented by counsel Ralph L. Finlayson.

The Court having received testimony and evidence regarding the issue on remand, and having entered its Findings of Fact and Conclusions of Law on December 4, 1996.

**NOW, WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED, and DECREED** that the designation of the Highway Commercial Zone at Anderson Junction I-15 Interchange by the Toquerville Town Council on December 14, 1993, was not for the primary purpose of allowing outdoor advertising, and therefore does not violate Utah Code Ann. § 17-12-136.3(3) (Supp. 1988)

DATED this 22 day of January, 1997.

BY THE COURT:



JUDGEMENT ENTERED

Date: 1-23-97

Time: 2:46 p.m.

AFFIDAVIT OF SERVICE

STATE OF UTAH                     )  
  : ss.  
COUNTY OF WASHINGTON    )

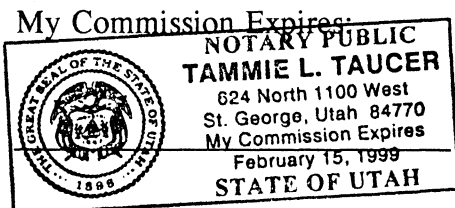
Sharon M. Allhands, being first duly sworn, states that she is an employee of the law firm of Jones, Waldo, Holbrook & McDonough, and that she caused to be served on this 22 day of January, 1997, the foregoing proposed ORDER AND JUDGMENT upon the following by facsimile transmission and by depositing a true and correct copy thereof in the U.S. Mail, first class postage prepaid, addressed as follows:

RALPH L. FINLAYSON  
Assistant Attorney General  
JAN GRAHAM  
Attorney General  
Attorneys for Defendant  
160 East 300 South, 5th Floor  
Salt Lake City, UT 84114-0857  
Fax No.: 1-801-366-0352

Sharon M. Allhands  
Sharon M. Allhands

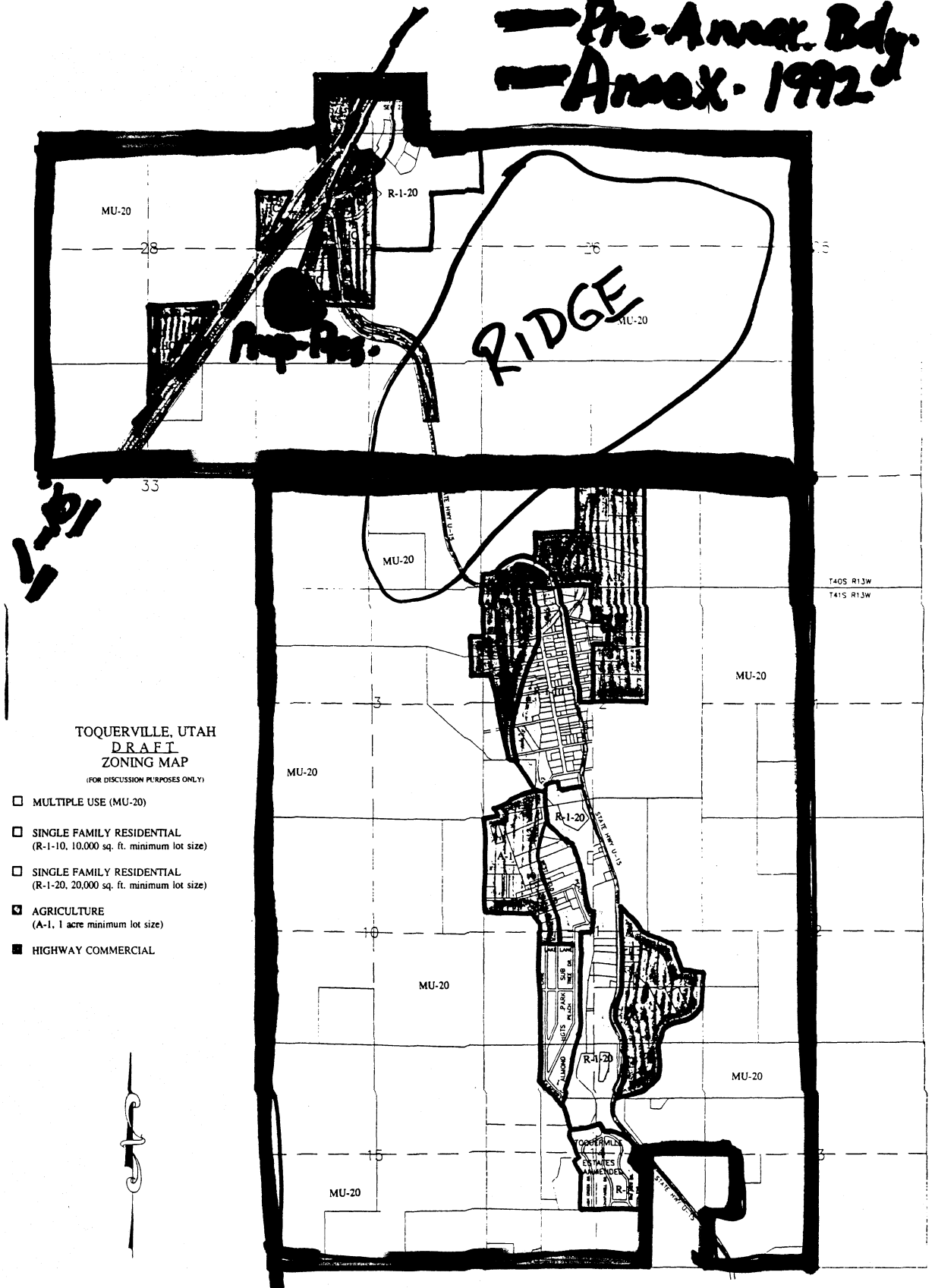
Subscribed and sworn to before me this 22<sup>nd</sup> day of January,  
1997.

Tammie L. Taucer  
Notary Public  
Residing at St. Geo., UT



## **ADDENDUM NO. 5**

== Pre-Annex. Bdy.  
 == Annex. 1992



## **ADDENDUM NO. 6**

## Chapter 12. SIGNS

### 12-1 Signs Allowed

The following described signs shall be allowed as indicated in the accompanying table:

Type of Sign <u>See definitions</u>	Maximum Size in <u>Feet</u>	Maximum Height in <u>Feet</u>	<u>Zone</u>		Illumination <u>Type of</u>
			<u>Permitted Use</u>	<u>Conditional Use</u>	
Advertising	8 x 12	18		HC	Indirect
Business	8 x 20	50	CN	Above 50'	Indirect
Name Plate	1 x 2	8	All Zones		Indirect
Property-- Sale, Lease Rent or Trespass	2 x 3	6	All Zones		None
Public Information	3 x 6	8		All Zones	Indirect
Temporary	8 x 12	16		All Zones	None

\*The distance from the top of the sign to the ground supporting it.

### 12-2 Construction

All signs in commercial zones shall have a surface of noncombustible material; provided, however, that combustible structural trim may be used thereon.

### 12-3 Illumination

All signs, except business signs, shall be illuminated by indirect lighting, the source of which shall not be visible from the street. In no case shall direct rays of light be permitted to penetrate a property in a residential zone or used for residential purposes.

### 12-4 Location of Signs

All signs shall maintain a clear view of intersecting streets as provided in this ordinance, and no sign shall be less than nine (9) feet high over public right-of-way. In any zone requiring a front yard, all ground signs in that zone shall adhere to the front yard requirements.

13-9 Highway Commercial Zone H-C

1. Purpose

To provide commercial areas on major highways for the location of travel service and highway oriented commercial uses.

2. Permitted Uses

All permitted uses subject to conditional use permit.

3. Conditional Uses

- a. Restaurant or drive-in cafe
- b. Motels
- c. Mobile home sales
- d. Overnight camping facilities
- e. Automobile service station, auto accessories
- f. Nursery, sale of plant materials
- g. Roadside stand, sale of agricultural produce and related items
- h. Accessory buildings and uses

4. Height Regulations

No building or structure shall be erected to a height greater than two and one-half (2 1/2) stories or thirty-five (35) feet.

5. Area, Width and Yard Regulations

<u>District</u>	<u>Area</u>	<u>Width</u>	<u>Yards in Feet</u>		
			<u>Front</u>	<u>Side</u>	<u>Rear</u>
H-C	20,000 sq. ft.	20'	20	None, except 10' where side yard abuts a residential zone; 20 feet when abutting a street	None, except 10' where rear yard abuts a residential zone



## **ADDENDUM NO. 7**

R 834 / Page 1

1 IN THE FIFTH JUDICIAL DISTRICT COURT

2 IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

3

4

5 KUNZ & COMPANY, )

6 Plaintiff, )

7 vs. ) Case No.

8 UTAH DEPARTMENT OF TRANSPORTATION, ) 940500322

9 Defendant. )

10

11

12

13 REPORTER'S TRANSCRIPT OF VIDEOTAPE

14 BEFORE THE HONORABLE JAMES L. SHUMATE

15 Tuesday, August 1, 1996

16

17 APPEARANCES:

18 For the Plaintiff: D. Williams Ronnow, Esq.

19 Russell S. Mitchell

20 For UDOT: Ralph L. Finlayson, Esq.

21

22

23

24

25 Reported by: J. Elizabeth Van Fleet, RPR, CSR

R 836 / Page 3

1 ST. GEORGE, WASH. CO., UT., TUES., OCTOBER 1, 1996

2 9:01 a.m.

3 -oOo-

4 P R O C E E D I N G S

5

6 THE COURT: Good morning, ladies and

7 gentlemen, and welcome to the district court. The

8 record will reflect that today is the 1st day of

9 October, 1996. The hour is 9:01 a.m.

10

11 The matter before the Court is the trial

12 on remand from the Court of Appeals. Case is Kunz

13 and Company versus Utah State Department of

14 Transportation, 940500322. For the plaintiff, Mr.

15 D. Williams Ronnow and Mr. Russell Mitchell, and for

16 the defendant, Mr. Ralph Finlayson.

17 Counsel are present, together with their

18 appropriate client representatives, and we are ready

19 to hear the issue of what was the primary purpose of

20 Toquerville Town in zoning the subject property

21 where the signs in this lawsuit are situated when

22 that property was zoned as commercial. Am I right,

23 Mr. Ronnow?

24 MR. RONNOW: That's correct, Your Honor.

25 As I understand, the Court of Appeals on remand,

there's just that single issue.

R 835 / Page 2

I N D E X				
WITNESSES FOR THE PLAINTIFF:		PAGE		
KIMBALL N. WALLACE				
	Direct Examination by Mr. Ronnow		12	
	Cross-Examination by Mr. Finlayson		40	
	Redirect Examination by Mr. Ronnow		50	
KENNETH SIZEMORE				
	Direct Examination by Mr. Ronnow		57	
	Cross-Examination by Mr. Finlayson		87	
	Redirect Examination by Mr. Ronnow		92	
	Recross-Examination by Mr. Finlayson		100	
GLADE PETERSON				
	Direct Examination by Mr. Ronnow		109	
	Cross-Examination by Mr. Finlayson		125	
CHARLES WAHLQUIST				
	Direct Examination by Mr. Ronnow		128	
	Cross-Examination by Mr. Finlayson		145	
	Redirect Examination by Mr. Ronnow		149	
	Recross-Examination by Mr. Finlayson		151	
	Further Redirect Exam by Mr. Ronnow		154	
	Further Recross-Exam by Mr. Finlayson		156	
	Further Redirect Exam by Mr. Ronnow		156	
WITNESS FOR THE DEFENDANT:				
KENNETH SIZEMORE				
	Direct Examination by Mr. Finlayson		100	
SCOTT J. SNOW				
	Direct Examination by Mr. Finlayson		174	
	Voir Dire Examination by Mr. Ronnow		184	
	Direct Exam (Resumed) by Mr. Finlayson		187	
-oOo-				
E X H I B I T S				
PLAINTIFF'S:		REFERRED	OFFERED	ADMITTED
1	Map	16	24	24
2	Zoning Ordinance	73	124	124
3	10-14-92 Minutes	129	130	131
4	12-14-93 Minutes	142	142	142
DEFENDANT'S:				
5	Photograph	174	177	178
6	Photograph	177	178	179
7	Photograph	179	179	179
8	Photograph	170	170	172
9	Photograph	170	170	172
10	Photograph	170	170	172
11	Photograph	193	195	196
12	Photograph	196	196	197
13	Photograph	197	197	197
14	Agreement Utah	202	207	-
15	Lease	195	198	-
16	Photograph	209	210	210

R 837 / Page 4

1 THE COURT: All right. I will hear an

2 opening statement, then, from the plaintiff, if you

3 wish to make one, counsel; however, we have plowed

4 this ground so many times, and I have read both your

5 memorandum, don't feel the need to be overly

6 eloquent or lengthy.

7 MR. RONNOW: Your Honor --

8 MR. FINLAYSON: I have one preliminary

9 matter. (Inaudible) --

10 THE COURT: Mr. Finlayson.

11 MR. FINLAYSON: -- evidence that may be

12 introduced, and I would just like to --

13 THE COURT: Counsel, my bailiff will run

14 things around for you --

15 MR. FINLAYSON: Oh, I'm sorry.

16 THE COURT: -- in order to help you stay

17 in camera, meaning not in chambers, but in the view

18 of the electronic eye. What is this memorandum,

19 counsel?

20 MR. FINLAYSON: I'm not sure what evidence

21 the plaintiff will present, but it may possibly be

22 oral testimony or other documentary evidence that's

23 not part of the official Toquerville record, and

24 since the zoning was a legislative matter, the law

25 is clear that only official records of that

R 838 / Page 5

1 legislative record are admissible. For example,  
2 oral testimony in some member about what the intent  
3 was is not admissible.

4 THE COURT: All right. Which rule of  
5 evidence are you referring to, counsel?

6 MR. FINLAYSON: It's not a rule of  
7 evidence strictly. It's a rule of statutory  
8 construction that is settled in that arena.

9 THE COURT: I see that you have cited  
10 Arizona, New Jersey, Fed. -- (inaudible) --  
11 apparently the northern district of Illinois. Any  
12 Utah statutes or rules or cases on this issue,  
13 counsel?

14 MR. FINLAYSON: I searched quite fully,  
15 and I found no specific Utah authority. I also cite  
16 Sutherland. He refers to 14 states' cases, all of  
17 which support the proposition stated, none of which  
18 go the other way, and I found no reference to any  
19 Utah authority. I have cited this in another --  
20 it's not precedent. I cited it in another case that  
21 went to the Utah Supreme Court, and it --

22 THE COURT: They saw fit not to give us a  
23 ruling on the issue?

24 MR. FINLAYSON: Well, at this -- this  
25 issue didn't even go up because the other side did

R 839 / Page 6

1 not press this issue, but the lower court kept out  
2 an affidavit of --

3 THE COURT: All right. Well, counsel,  
4 what I'm going to do in view of your motion and your  
5 authority and the lack of authority on this matter  
6 is allow you on specific instances for proffered  
7 testimony from Mr. Ronnow to raise that objection,  
8 and you can raise it on one occasion and have a  
9 continuing objection, but because there is no  
10 authority in the State of Utah under the rules of  
11 evidence, I will receive all of the evidence unless  
12 I clearly think it is somehow violative of the rules  
13 of evidence, as I understand them, in order to  
14 preserve a record.

15 We will probably not lose a lot of time in  
16 doing that, and I think it's the best way to  
17 preserve a record. Mr. Ronnow, again, I am not  
18 ruling one way or another on this issue. Is there  
19 anything else you want to say in response to the  
20 concept?

21 MR. RONNOW: I just want to establish a  
22 brief preliminary statement with response, and then  
23 we'll go ahead and deal with it issue by issue, but  
24 since this is the first I have seen this memorandum  
25 and I -- is there a motion that goes with this?

R 840 / Page 7

1 THE COURT: Apparently it's an oral Motion  
2 in Limine, as I understand it.

3 MR. RONNOW: All right. Your Honor, I  
4 would -- I would just say this, as a foundation for  
5 later evidentiary argument, the State continues to  
6 present to the Court circular arguments in an  
7 attempt to limit evidence that -- to just those  
8 categories of evidence that they feel are outlined  
9 by the Court of Appeals or whatever.

10 I would draw the Court's attention to the  
11 Court of Appeal's opinion at 769 in which the Court  
12 states, Furthermore, in determining the primary  
13 purpose behind the particular zoning decision, the  
14 fact finder can and should consider all relevant  
15 evidence, not just the stated purpose of the zoning  
16 body or local government.

17 And the State has made that argument that  
18 the -- as a matter of fact, they go so far as to say  
19 the State -- what they're now claiming is the only  
20 record that should be reviewed, the stated position  
21 of the zoning body are not probative because they're  
22 inherently unreliable, and so we have this circular  
23 argument.

24 Since we are talking about an un -- a  
25 clear -- the statute is narrowly focused by the

R 841 / Page 8

1 Court of Appeals regarding a determination of  
2 primary purpose, primary implying that there may  
3 have been other purposes to be considered, in that  
4 language that I just read, I think it's clear that  
5 in this particular situation, without any  
6 clarification as to limiting that definition and in  
7 light of the Court of Appeals' specific instruction  
8 that the intent is to get to all the intent and  
9 understanding of how the zoning authority reached  
10 its decision and what motivated it, not merely it's  
11 official legislative declaration.

12 THE COURT: Mr. Finlayson, it is your  
13 motion, so I'll give you last say.

14 MR. FINLAYSON: It will be a very short  
15 response. In our trial memorandum, we stated right  
16 at the end that any documentary evidence that is in  
17 the legislative file would not be inadmissible and  
18 that would go to weight.

19 Certainly, the Court of Appeals did not  
20 intend that inadmissible evidence on that issue be  
21 received, and where the law is settled, that certain  
22 kinds of evidence on that issue are not admissible.  
23 They should be limited to the official record, which  
24 is reliable and which we do not object to.

25 THE COURT: All right. Counsel, just so

R 842 / Page 9

1 you'll get a general understanding of the way that I  
 2 view the remand from the Court of Appeals, it seems  
 3 to me as though the Court of Appeals wants the Court  
 4 to determine the primary purpose.  
 5 Now, the way of determining the primary  
 6 purpose is really interesting to me because if I  
 7 find that the actions of the zoning authority were  
 8 based upon a number of considerations, it may be  
 9 extremely difficult for the Court to discern a  
 10 primary purpose.  
 11 I liken the entire issue to a  
 12 determination of -- (inaudible) -- in a criminal  
 13 case. There we have very definite levels of purpose  
 14 behind criminal conduct, no longer intentional  
 15 reckless or criminally negligent under our present  
 16 statute.  
 17 In this matter, we have extremely broad  
 18 horizons to look at the information that can be  
 19 brought to the Court that might bear upon a factual  
 20 finding of whether or not the primary purpose of the  
 21 zoning authority was to create an area for outdoor  
 22 advertising in the form of the billboards, which  
 23 have been the subject of this litigation.  
 24 Now, because we have such a broad horizon,  
 25 I think I must broadly use the definitions of Rule

R 843 / Page 10

1 401 et sequitur in the rules of evidence to  
 2 determine what is probative of this issue of purpose  
 3 and primary purpose in the zoning authorities  
 4 activities.  
 5 That means I'll have to look at what they  
 6 did, I'll have to look at what happened, I'll  
 7 probably have to look at what was proposed, and I'll  
 8 probably have to look at what the body of the zoning  
 9 authority thought about it, and the only way that I  
 10 may be able to do that is to look at what the  
 11 individual persons thought about and discussed in  
 12 reaching this decision.  
 13 Now, perhaps the Court of Appeals did not  
 14 exactly look at the problem they were creating on  
 15 remand with this broad approach, but I can see no  
 16 other way to look at it, but, again, I will apply  
 17 the rules of evidence to any matters objected to,  
 18 and we'll just work at it one issue at a time. Mr.  
 19 Ronnow, an opening statement if you wish.  
 20 MR. RONNOW: Your Honor, I don't think, in  
 21 light of our argument discussion, an opening  
 22 statement is necessary. We're prepared to proceed.  
 23 THE COURT: All right. Mr. Finlayson, do  
 24 you want to make an opening statement or do you want  
 25 to reserve opening statement to a later point?

R 844 / Page 11

1 MR. FINLAYSON: Your Honor, reserve.  
 2 THE COURT: Okay. Then you may call your  
 3 first witness, counsel.  
 4 MR. RONNOW: Plaintiffs call Kim Wallace.  
 5 THE COURT: Mr. Wallace, if you would come  
 6 forward in front of counsel table here and well  
 7 before the bench, face the clerk, raise your right  
 8 hand and be sworn, sir. That's fine right there,  
 9 Mr. Wallace.  
 10 Whereupon,  
 11 KIMBALL WALLACE,  
 12 having been first duly sworn to testify to the  
 13 truth, the whole truth and nothing but the truth,  
 14 was examined and testified as follows:  
 15 THE COURT: Thank you, sir. Please have a  
 16 seat here on the witness stand.  
 17 MR. RONNOW: Your Honor, if I may, we're  
 18 going to need the easel.  
 19 THE COURT: All right. The bailiff or you  
 20 may struggle with it. It does have its  
 21 eccentricities so watch your fingers as it unfolds.  
 22 It's been known to bite.  
 23 MR. RONNOW: Where's the microphone for  
 24 the --  
 25 THE COURT: The microphone you'll probably

R 845 / Page 12

1 end up using is either the one on witness stand,  
 2 counsel, or the one on the jury bar behind you.  
 3 MR. RONNOW: All right.  
 4 THE COURT: And if you understand the  
 5 limitations of our record, counsel, just presume  
 6 that you have got a live reporter here. The cameras  
 7 will not pick that up, nor under the proposed rules  
 8 of appellate procedure would that be part of the  
 9 record. So just act like we've got a live reporter  
 10 working here and all will be well.  
 11 MR. RONNOW: I understand, Your Honor.  
 12 -oOo-  
 13 DIRECT EXAMINATION  
 14 BY MR. RONNOW:  
 15 Q. Would you state your full name, please?  
 16 A. Kimball Nielsen Wallace.  
 17 Q. Where do you reside, Mr. Wallace?  
 18 A. Farmington, Utah.  
 19 Q. How are you currently employed?  
 20 A. I'm a civil engineer working for the State  
 21 of Utah in the Department of Environmental Quality.  
 22 Q. Would you briefly describe your post high  
 23 school education degrees and licensing, please?  
 24 A. I attended Weber State College, and then  
 25 transferred to the University of Utah, graduated

1 with a bachelor of science degree from the  
 2 University of Utah.  
 3 Q. And are you licensed as a civil engineer  
 4 in the State of Utah?  
 5 A. That's right. Four years after college  
 6 taking a professional engineering examination, I  
 7 have been a licensed civil engineer since 1976.  
 8 Q. And in the time frame of approximately  
 9 1992 and '93, where did you reside?  
 10 A. I resided in St. George Utah at that time.  
 11 Q. And how were you employed at that time?  
 12 A. I was the owner of an engineering firm by  
 13 the name of Meridian Engineering.  
 14 Q. And did you -- in that capacity, were you  
 15 retained by Toquerville Town to assist them in an  
 16 annexation project?  
 17 A. Yes, I was. I was acting as the city  
 18 engineer for the Town of Toquerville.  
 19 Q. And could you -- roughly, what was the  
 20 time frame of that annexation project you're  
 21 referring to?  
 22 A. Well, discussions began in 1990 or  
 23 thereabouts with comments from various property  
 24 owners, and then the annexation concluded in the  
 25 latter part of 1992. So for about a two-year period

1 it progressed.  
 2 Q. Would you explain in a little greater  
 3 detail essentially the general chronology of what  
 4 you did as an engineer in assisting and consulting  
 5 with the town relative to the adoption of the master  
 6 plan?  
 7 A. Well, there were a lot of minor things I  
 8 can just comment briefly on at that time. We had a  
 9 number of issues, a lot to do with the water  
 10 system. Property owners up near Anderson Junction  
 11 was desirous of having services provided to them,  
 12 primarily water, and so they looked to the City of  
 13 Toquerville, through an annexation process, whereby  
 14 Toquerville could either extend their water system  
 15 up or create an individual, a separate water system  
 16 up at Anderson Junction with existing wells and  
 17 storage reservoirs. So there were a number of  
 18 issues relative to the water, the culinary water.  
 19 In addition to the culinary water, I was  
 20 also employed during this period of time as a board  
 21 member of the Washington County Water Conservancy  
 22 District, and as such, I was doing a study on the  
 23 three streams that come down into the canyons. And  
 24 we looked at a feasibility at this time of building  
 25 a new dam between the Town of Toquerville and the

1 Town of Leeds. It would be just south of Anderson  
 2 Junction.  
 3 So in the process of looking if a new dam  
 4 were to be built in that area, I got very heavily  
 5 involved in the master planning of the roads and the  
 6 utility lines that would subsequently go in if that  
 7 dam were to be installed, and so that was an  
 8 irrigation project that had to do with hydro power  
 9 as well as irrigation. And that came into play at  
 10 this time.  
 11 There were a couple of other minor  
 12 issues. One, La Verkin was very anxious to annex  
 13 that portion of the -- of Toquerville, which is on  
 14 the intersection of the highway that goes up to Zion  
 15 National Park. That area, which I think Gilbert  
 16 Construction is now developing, was at that time in  
 17 Toquerville, and so there was an interest in La  
 18 Verkin having that land de-annexed from Toquerville  
 19 and annexed into La Verkin.  
 20 Well, if that was to take place, the Town  
 21 of Toquerville was very interested in having some  
 22 commercial property, and so it led the people of  
 23 Toquerville to look at Anderson Junction more  
 24 heavily. If La Verkin were to obtain the land on  
 25 the south end of Toquerville, then Toquerville would

1 look to the north intersection. So that issue was  
 2 in the back of our minds. Nothing had happened  
 3 during that time.  
 4 And then another minor issue was a good  
 5 friend of ours, County Commissioner Scott Hirschi,  
 6 had some problems with some people who were  
 7 littering some property up near Toquerville  
 8 Junction. They, I think, just had a bunch of old  
 9 debris that was on the property, and the county had  
 10 a very difficult time enforcing them to clean that  
 11 up.  
 12 And there was some discussion between  
 13 Scott Hirschi and myself relative to if Toquerville  
 14 annexed that area maybe Toquerville would be more  
 15 successful in requiring those people to clean up  
 16 that eyesore, and so there was some encouragement  
 17 off the record on a minor issue relative to cleaning  
 18 up some property.  
 19 Q. All right. I am going to show you -- I'm  
 20 going to approach the clerk and have this --  
 21 THE COURT: Plaintiff's 1, counsel?  
 22 MR. RONNOW: -- marked. Yes, Plaintiff's  
 23 1.  
 24 THE COURT: All right.  
 25 MR. RONNOW: I'm placing on the easel here

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1 an engineered map. I'm going to ask you, if you  
 2 will, to approach the easel. I'm going to ask you  
 3 some questions about this map.  
 4 MR. FINLAYSON: If I may inquire, is this  
 5 part of the official Toquerville record?  
 6 MR. RONNOW: This is a copy of what  
 7 ultimately became the zoning map which is the  
 8 current Toquerville zoning map. A black and white  
 9 copy of what is a colored map that is sitting here,  
 10 it's on the wall of Toquerville.  
 11 MR. FINLAYSON: I'll make a general  
 12 objection at this time about anything offered that  
 13 may go to annexation, which is a step apart from  
 14 zoning, but it might be linked.  
 15 To the extent that annexation can be  
 16 linked to zoning, if it's evidence outside the  
 17 official legislative record on zoning, I object on  
 18 the basis of my initial document, and I won't  
 19 continually make objections of this type.  
 20 THE COURT: All right. Thank you,  
 21 counsel. You have a continuing objection. The  
 22 Court notes your objection. It is overruled. Mr.  
 23 Ronnow, you may go forward.  
 24 MR. RONNOW: All right.  
 25 Q. Mr. Wallace, if you would approach that

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1 map on the easel, are you generally familiar with  
 2 that map?  
 3 A. Yes, sir.  
 4 Q. Could you identify specifically what that  
 5 is for the Court?  
 6 A. Well, prior to 1990 or '92, this  
 7 rectangular area here less this little nook here was  
 8 Toquerville Town limits.  
 9 Q. All right. For purposes of the record,  
 10 let me first ask you if you just identify it  
 11 generally. Is that -- is that an engineering  
 12 drawing of what ultimately included the new  
 13 annexation in Toquerville Town?  
 14 A. That's correct.  
 15 Q. All right. Now, then, if you would,  
 16 please, take the red marker, and would you just  
 17 generally outline on the town boundaries, the  
 18 portion of that map that was existing prior to the  
 19 annexation as the official Toquerville Town?  
 20 A. This was Toquerville.  
 21 THE COURT: Mr. Wallace, the sides of the  
 22 map, according to -- or the sides of the drawing  
 23 there, according to your red line, north, south --  
 24 I'm sorry -- the east and west boundaries are  
 25 outlined clearly. Is that a -- and I'm too distant

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1 or my eyes are too old to determine the line. Is  
 2 that a section line that denotes the northern  
 3 boundary of the town?  
 4 THE WITNESS: This is right through the  
 5 center of a section. This is the section --  
 6 THE COURT: All right. So it's a line --  
 7 THE WITNESS: (Inaudible.)  
 8 THE COURT: So it's a quarter section  
 9 line?  
 10 THE WITNESS: That's correct.  
 11 THE COURT: All right. And quarter  
 12 section line of which sections, township, and range  
 13 if you have it on there?  
 14 THE WITNESS: This is township 40 south,  
 15 range 13 west is this area right here.  
 16 THE COURT: And it's a quarter section  
 17 line running through which sections?  
 18 THE WITNESS: Section 34, and even this  
 19 close, I can't tell which section this is.  
 20 THE COURT: Well, it would have to be 35.  
 21 THE WITNESS: It's 35.  
 22 THE COURT: 34 and 35. All right. That  
 23 gives us a real solid description. Go ahead, Mr.  
 24 Ronnow.  
 25 ///

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1 MR. RONNOW:  
 2 Q. Mr. Wallace, if you would take that red  
 3 marker, and at the top of the Exhibit 1, would you  
 4 simply write preannexation boundaries, write those  
 5 words, and you can abbreviate.  
 6 All right. Now, then, in your work as  
 7 consul -- a town engineering consultant on this  
 8 master plan, would you now describe, in reference to  
 9 Exhibit 1, that portion of the property around  
 10 Toquerville that was originally prepared and  
 11 proposed as an annexation in 1992, and would you do  
 12 that in green, please.  
 13 And you have labeled that, on the upper  
 14 right-hand corner of Exhibit 1, annexation, 1992,  
 15 indicating the proposed annexation property; is that  
 16 correct?  
 17 A. That is correct.  
 18 Q. Let me ask you to make one more  
 19 identification mark. Taking the blue marker, since  
 20 our map is primarily in black and white --  
 21 THE COURT: So is your judge, counsel.  
 22 MR. RONNOW: Excuse me?  
 23 THE COURT: Since I'm color blind, I'm  
 24 about in black and white, too. Go ahead.  
 25 MR. RONNOW: We're going to do it this

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1 way: I would like you, in the annexed portion,  
2 roughly parallel to the I-15 corridor but alongside  
3 of the I-15 corridor, to make a bold dotted line in  
4 blue so that the judge can clearly see that that  
5 generally indicates the I-15 corridor.

6 THE COURT: All right. And the record  
7 should reflect that this Court is well familiar with  
8 the property having commuted up and down I-15 ever  
9 since about 1968 when that portion of the freeway  
10 was open, and I recognize the area described by Mr.  
11 Wallace on Exhibit 1. Go ahead.

12 MR. RONNOW: Thank you.

13 Q. One last matter with regard to Exhibit 1,  
14 Mr. Wallace. In the course of preparing the  
15 annexation materials, let me first ask you this: As  
16 engineer, did you prepare your own engineered  
17 drawing of the proposed annexation?

18 A. It was a sketch from a U.S.G.S. sheet, so,  
19 yes, it was just a sketch, though not a detailed  
20 drawing like this.

21 Q. And is -- have you reviewed that sketch  
22 that you prepared in preparation for your testimony?

23 A. Yes.

24 Q. Is the green section on Exhibit 1, which  
25 you have identified as the annexed property, 1992,

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1 his additional property to the north of the proposed  
2 annexation be included in the annexation process,  
3 and that information must have been conveyed to me  
4 because I adjusted the boundary of the proposed  
5 annexation to include all of Mr. Eveleth's property  
6 as well as some additional property on the east side  
7 of I-15. And so that was the reason it was changed  
8 was because there was a formal -- an informal  
9 request made.

10 Q. Let me -- let me see if I understand you.  
11 The original proposal that just had the straight  
12 clean rectangular shaped annexation, in fact, would  
13 have divided at least two property owners'  
14 properties so that part would have been within  
15 Toquerville Town and part would have been without  
16 Toquerville Town; is that correct?

17 A. That is correct.

18 Q. And that is the map we now see that has  
19 that rectangular knob on the upper -- on the north  
20 end of the town at the Anderson Junction area, that  
21 knob is to accommodate those property owners and  
22 bring the total of their property within the  
23 boundaries of Toquerville Town; is that correct?

24 A. That's correct.

25 Q. All right. You may be seated, Mr.

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1 does that accurately correspond and reflect your  
2 sketch of the proposed annexation property prepared  
3 in 1992?

4 A. It is. This is the ultimate  
5 configuration. The original sketch, which I have in  
6 my file with me today, shows the original proposed  
7 annexation was a rectangle in this fashion. It did  
8 not include this small parcel of land up on the  
9 northern end of the ultimate annexation, but I have  
10 a copy of the sketch after it had been changed and I  
11 -- you could see where this had been added on to my  
12 sketch indicating the final configuration.

13 Q. In preparation of that final proposed  
14 annexation map, did you become familiar with the  
15 property owned by Mr. Thomas Eveleth in the Anderson  
16 Junction area?

17 A. It was explained to me, and this is just  
18 recently, my memory fails me on my own recall, but  
19 as I met with Charles Adams, the town clerk, two  
20 weeks ago, he indicated to me that when we made the  
21 original proposal that some property owned by Tom  
22 Eveleth was included in the original proposed  
23 annexation.

24 By a phone call Mr. Eveleth talked with  
25 the town clerk, Chester Adams, and requested that

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1 Wallace. Thank you.

2 THE COURT: Counsel, do you offer Exhibit  
3 No. 1?

4 MR. RONNOW: Yes, Your Honor. We would  
5 offer Exhibit No. 1 at this time.

6 THE COURT: All right.

7 MR. RONNOW: We would offer it for two  
8 reasons, both as a official --

9 THE COURT: Demonstrative?

10 MR. RONNOW: Demonstrative of Mr.  
11 Wallace's testimony but also as a copy of the  
12 current zoning map or the zoning map that was  
13 adopted pursuant to the annexation and subsequent  
14 master plan.

15 THE COURT: All right. Subject to your  
16 continuing objection, Mr. Finlayson, any other  
17 objections that you want to make as to Exhibit 1?

18 MR. FINLAYSON: No.

19 THE COURT: All right. 1 is received.  
20 It's in evidence. Go ahead, Mr. Ronnow.

21 (Whereupon, Plaintiff's Exhibit  
22 1 was received into evidence.)

23 MR. RONNOW: Bailiff, if we could just  
24 leave that there, we're going to be referring to  
25 that throughout testimony. Thank you.

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1 Q. Now, Mr. Wallace, for the record, would  
2 you just briefly summarize how an annexation is  
3 initiated?  
4 A. Well, annexations can be initiated by  
5 private property owners requesting annexation of a  
6 city or it can be initiated by a city itself. In  
7 this case the mayor had received a number of phone  
8 calls and conversations from people that were  
9 interested in annexation, and that was probably what  
10 was taking place in the 1990 period.

11 And then we reviewed the process of  
12 annexation, and we were counseled by our attorney,  
13 John Palmer, that there needed to be a petition  
14 signed by a majority of the property owners  
15 representing one-third of the value of that  
16 property.

17 So we went through a series of meetings  
18 requesting input from property owners. We sent out  
19 letters to the individual property owners explaining  
20 the advantages and disadvantages of being within the  
21 city and generally just got their input.

22 Q. Now, Mr. Wallace, in the annexed portion  
23 that you show on Exhibit 1, there are various  
24 geometric designations, triangles and rectangles  
25 that are shaded different colors. Are you familiar

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1 with what those designations represent?

2 A. Not on all of them. I am aware that they  
3 do generally follow property lines of individual  
4 properties, and a lot of that land is government  
5 property. And it looks like when --

6 THE COURT: When you say "government," do  
7 you mean federal government or state lands or is it  
8 a mixture of both?

9 THE WITNESS: I think everything on the  
10 east side is federal. I think that's U.S.  
11 property. And I think it is U.S. property Forest  
12 Service on the west side, too.

13 THE COURT: All right.

14 THE WITNESS: I think it's federal. I  
15 think it's U.S. property.

16 MR. RONNOW: All right.

17 Q. In your -- if I understand your testimony,  
18 then, as part of the annexation process, you  
19 solicited input from the property owners involved in  
20 the annexation; is that correct?

21 A. That's correct. There was some property  
22 right at the junction that was purchased through  
23 some -- I don't know -- went into default or  
24 something, but it was purchased by some real estate  
25 property owners in St. George, and they wanted to

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1 develop that area.

2 They talked specifically about motels,  
3 rest stops, and they were the prime group that was  
4 really pushing this annexation, and their company is  
5 known as -- was at that time as The Property Shoppe,  
6 and they were the ones who were the primary people  
7 really pushing this annexation.

8 Q. And as a result of those discussions and  
9 the feedback that you solicited and received as  
10 engineer, can you tell us why these property owners  
11 wanted to petition for annexation?

12 A. The vast majority of the reasons was to  
13 accommodate a culinary water system, which here for  
14 they did not have. They have private wells on those  
15 homes that are up there, but they have no municipal  
16 water resources. So they looked to Toquerville to  
17 provide them with culinary water.

18 Q. Was there -- in the annexed property, you  
19 made reference just in passing, were there some  
20 residential property owners that were up there  
21 living at the time?

22 A. Yes. Yes, there's a ranch and a number of  
23 homes. I'm guessing now two or three homes at the  
24 time. There might be three or four.

25 THE COURT: Mr. Wallace, again, I'm going

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1 to show my general familiarity with the property,  
2 but also because some of it has been litigated as  
3 well. My recollection, from other litigation as  
4 well as driving around and looking around up in  
5 there, is that the ranch properties, the dwellings  
6 consist in the -- within the annexed area shown on  
7 Exhibit No. 1 within those properties outlined on  
8 the northern end of the exhibit and to the east of  
9 the freeway whereas the property on the west of the  
10 freeway does not contain dwellings. Am I accurate?

11 THE WITNESS: That is correct. All  
12 dwellings are on the east side of I-15, and on the  
13 west side, other than those signs, there was nothing  
14 there except some -- a dirt road, access to the  
15 mountains.

16 THE COURT: All right.

17 MR. RONNOW:

18 Q. Mr. Wallace, you made reference in passing  
19 to your work with water conservancy district with  
20 regard to a reservoir in that general area. Let me  
21 see if I understand this. Was there a plan for a  
22 reservoir on the drawing board, if you will, at the  
23 same time the Toquerville annexation was being  
24 discussed?

25 A. Yes, there was.



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1 Q. Did this reservoir -- can you explain to  
2 us, was it large enough that it would have, had it  
3 gone in -- and I need to lay a little foundation.  
4 Did it ever go in?

5 A. No, it did not.

6 Q. All right. Again, those of us who drive  
7 the road know that it never went in, but we do have  
8 to make the record.

9 Had it gone in, and at the time it was  
10 being discussed in the planning stages, was it large  
11 enough to provide recreation -- water recreation  
12 opportunities?

13 A. Yes, it would have been large enough to  
14 provide recreation.

15 Q. And did that reservoir and the potential  
16 recreation opportunities factor into some of the  
17 feedback from property owners with regard to their  
18 desire to be annexed?

19 A. Yes. Yes, I'm sure if that was a  
20 reservoir, the commercial property would have been  
21 more -- a little more valuable.

22 THE COURT: Mr. Wallace, with reference to  
23 Exhibit No. 1, at the time that this proposal for a  
24 reservoir in this area was considered, where would  
25 the reservoir had covered, if you can just tell me

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1 by section, township, and range so we'll have a --

2 MR. RONNOW: Your Honor, if we may clarify  
3 the record, I'm going to ask Mr. Wallace if he would  
4 take that blue pen again and if he can on Exhibit 1  
5 just draw a rough oval where the reservoir was being  
6 planned.

7 THE COURT: All right. And you have  
8 placed a circular mark east of the freeway in  
9 section what, sir?

10 THE WITNESS: This would be in section 27,  
11 in the southwest quarter of section 27.

12 THE COURT: Thank you, sir.

13 MR. RONNOW:

14 Q. And the southwest quarter of section 27 is  
15 pretty close to the center of the proposed  
16 annexation; is that correct?

17 A. Yes, it is.

18 Q. And that is, just to orient us on the  
19 ground as well as the map, that is west of the state  
20 highway that goes from I-15 into Toquerville. Do  
21 you know what state highway that is by chance?  
22 That's all right if you don't know.

23 A. I don't know. I'm guessing.

24 Q. But essentially it is in between the  
25 interstate, I-15 highway, and the state highway that

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1 goes through Toquerville; is that correct?

2 A. That's correct.

3 Q. Now, again, to clarify the record, did the  
4 town ultimately adopt the annexation pursuant to the  
5 petition of the property owners?

6 A. Yes.

7 Q. And one last time, Exhibit 1, the green  
8 box represents that an -- that property that was  
9 actually and formally annexed by the Town of  
10 Toquerville; is that correct?

11 A. That is correct.

12 Q. Now, during the annexation process when  
13 you solicited feedback and were discussing issues  
14 with property owners, did you ever discuss with  
15 specific property owners that you can recall outdoor  
16 advertising issues in the annexed property?

17 A. I cannot recall any conversation relative  
18 to that, to signs.

19 Q. Do you have -- as part of your work in  
20 preparing this annexation, did you consult with and  
21 discuss these issues with the planning commission as  
22 part of your duties?

23 A. I did meet on a couple of occasions with  
24 the planning commission, and I was in those meetings  
25 with them.

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1 Q. Do you recall any discussion at the  
2 planning commission meetings, either discussion  
3 raised by members of the public or raised by the  
4 planning commissioner, himself, with regard to any  
5 outdoor advertising signs located in the proposed  
6 annexation?

7 A. Counsel, there may well have been  
8 discussion relative to those signs, but my memory is  
9 not such that I can recall any of this -- any of  
10 those discussions concerning an outdoor sign in  
11 those meetings.

12 THE COURT: Pardon me.

13 MR. RONNOW:

14 Q. Now, based on your work as the town  
15 engineer and consultant in this master plan and your  
16 participation in those planning meetings, could you  
17 articulate for the Court what you feel were the  
18 primary purposes that motivated this annexation of  
19 property in Toquerville?

20 MR. FINLAYSON: Although I made a  
21 continuing objection, this is so I clearly directed  
22 to the ultimate issue and --

23 THE COURT: I'm going to sustain your  
24 objection, Mr. Finlayson, on the form of the  
25 question. Frankly, counsel, it would be more useful

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1 to the Court to have this witness' memory probed as  
2 to the items that were discussed either by specifics  
3 or by category of considerations that he can recall  
4 rather than his feelings on the matter, which,  
5 unfortunately, don't help the Court much. Go ahead.  
6 MR. RONNOW:  
7 Q. Based, Mr. Wallace, on your recollection,  
8 those meetings and discussions, both with property  
9 owners and with the planning commission members  
10 and/or other official Toquerville -- Toquerville  
11 Town officials, do you recall the specific issues or  
12 concerns that were raised with regard to objectives  
13 for this annexation?  
14 A. Counsel, the reason we proceeded with the  
15 annexation was to provide services to that area. I  
16 do not have any recollection specifically relating  
17 to those signs. I do not recall any conversations  
18 with property owners, which I did mail out letters  
19 to each of the property owners.  
20 I spoke by phone -- I would -- I would,  
21 again, guess that every property owner that lived  
22 outside this area I contacted them by phone to make  
23 certain that they got our mailing, and so I'm  
24 suspecting I did speak to every property owner on  
25 the phone, but I do not recall, in any of those

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1 conversations, any discussion relative to those  
2 billboard signs.  
3 THE COURT: Mr. Wallace, what were the  
4 issues discussed either in the zoning meetings, the  
5 planning commission meetings, the town council  
6 meetings pertaining to the annexation and/or the  
7 zoning of this property just in broad categories if  
8 you could delineate those?  
9 THE WITNESS: Three key issues were  
10 usually discussed. One is always to do with money,  
11 who pays what taxes in the county versus the city.  
12 Secondly, what services would be available, and who  
13 would pay for those services. And then a third  
14 issue was the key issue was the zoning, the  
15 subsequent zoning which would be enacted by the Town  
16 of Toquerville, and that was probably more  
17 controversial than any of the other three.  
18 And the zoning in the county had -- and I  
19 don't remember the details -- but they had a zoning  
20 such that if a person owned a certain piece of land  
21 they couldn't subdivide it into real small parcels,  
22 nor did their master plan look like there would be  
23 much chance of doing that in the future.  
24 So there was some interest in a number of  
25 property owners that were interested in subdividing

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1 their property into smaller parcels, and so they  
2 were hopeful in the annexation process they would  
3 receive a zoning that would be conducive to allowing  
4 them to better use their property through  
5 subdividing it.  
6 MR. RONNOW: All right.  
7 Q. Now, Mr. Wallace, you have now just  
8 described a residential zoning issue that was  
9 discussed. Earlier you described a commercial  
10 zoning issue. I'm going to ask you was it 51  
11 percent of the property owners was there a consensus  
12 that, A, the property should be annexed by  
13 Toquerville Town?  
14 A. The final -- the final documents, which I  
15 received this morning, I visited with Elwin Prince  
16 at the Washington County Title, it's now called  
17 Terra Title, but Elwin Prince did the research and  
18 he has given me a tabulation that shows 34 property  
19 owners and 18 of them voted in favor of the  
20 annexation, 16 of them voted negative.  
21 And in his certification that he gave to  
22 John Palmer, the city attorney, it showed that 39.6  
23 percent of the assessed value of those who voted for  
24 -- 39.6 percent of the total value, and so it looks  
25 like our 50 percent and our one-third value was just

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1 barely met on this annexation question.  
2 Q. You have talked about discussions during  
3 annexation with property owners about those two  
4 zoning issues. Did you participate in subsequent  
5 discussions during the master plan process that  
6 followed the annexation?  
7 A. To some extent. Ken Sizemore took the  
8 lead during the zoning process, but I was in  
9 attendance at several meetings.  
10 Q. And were those same issues of commercial  
11 and residential zoning designation discussed in  
12 those meetings?  
13 A. Yes. I specifically remember individuals  
14 in our meeting indicating that they had a windmill  
15 apparatus that they had either installed or wanted  
16 to install or wanted to manufacture, that they  
17 requested having zoning conducive to that windmill  
18 structure. I don't remember a lot of the other  
19 details, but I do remember quite a number of people  
20 in those meetings.  
21 THE COURT: I'm intrigued, Mr. Wallace,  
22 when you talk about windmills. There is the  
23 traditional windmill that's used to pump water.  
24 Were we talking about electrical generation  
25 windmills or traditional windmills or do you

1 recall?  
 2 THE WITNESS: Ken Sizemore will probably  
 3 help you more, but, no, this was not a traditional  
 4 windmill. This was a cylindrical windmill that  
 5 produced electricity -- produced electricity for  
 6 their needs anyway, and he wanted to build these to  
 7 sell them throughout the country, and this was his  
 8 prototype. This is where he wanted to manufacture  
 9 them, and he wanted one to be built and used there.  
 10 And I suspect it's there right now.

11 THE COURT: All right, sir. Go ahead,  
 12 counsel.

13 MR. RONNOW:

14 Q. In your participation in master plan in  
 15 process, do you recall the property owners located  
 16 right on the I-15 intersection, the cloverleaf  
 17 intersection or interchange, rather, do you recall  
 18 discussions with those property owners relative to  
 19 how they wanted their property zoned?

20 A. Yes. They specifically had some -- even  
 21 some sketches, they had some plans, and they did  
 22 show their property limits, they showed a proposed  
 23 motel, it was a small motel with a convenient  
 24 store. And we, in our master planning, looked at  
 25 details. There was an existing well up there that

1 we were very interested in as a city in obtaining  
 2 water rights that existed at that well site.

3 We anticipated that if that were to be  
 4 annexed that a special improvement district would be  
 5 created whereby the property owners would be  
 6 assessed sufficient fees to build a storage tank on  
 7 the west side of I-15 up on a knoll, and then that  
 8 would be fed from a well down near the easterly side  
 9 of I-15 and would provide adequate water for this  
 10 commercial development.

11 And then we had another issue with the  
 12 Town of Leeds. There was some controversy about the  
 13 ultimate boundary between the Town of Leeds and the  
 14 Town of Toquerville. So we had representatives of  
 15 the town, either the planning council or the city  
 16 town -- town council of Leeds were in a number of  
 17 our meetings, and we had agreed -- it turned out  
 18 that through the boundary commission -- the county  
 19 boundary commission we did agree to a common  
 20 boundary line that you see now and Leeds had some  
 21 interest in their water system in coming down. And  
 22 we set this water zone to accommodate a common  
 23 boundary between Leeds and Toquerville.

24 Q. Mr. Wallace --

25 THE COURT: Hold on a second, counsel.

1 Just so we're clear, the topography is not shown on  
 2 Exhibit 1, but I'm well familiar with it. The  
 3 western side of the freeway, more specifically the  
 4 northern portion of the annexation on the side west  
 5 of the freeway is probably the highest point in that  
 6 area and would give you the greatest pressure head  
 7 for a water tank storing water at that location. Is  
 8 that accurate, sir?

9 THE WITNESS: That's correct.

10 THE COURT: All right. Go ahead, Mr.  
 11 Ronnow.

12 MR. RONNOW: Just a moment, Your Honor.  
 13 Let me make a note here.

14 Q. With regard -- Mr. Wallace, with regard to  
 15 the common boundary issue with Leeds, and Leeds is  
 16 the community immediately west of Toquerville, along  
 17 the I-15 corridor; isn't that correct?

18 A. That's correct.

19 Q. Now, then, if -- let me understand, the --  
 20 in the county boundary commission, the boundary was  
 21 adjusted in connection with the annexation and  
 22 master plan in process; is that correct?

23 A. It was concurred at that time. I think  
 24 this is what we had always proposed, and the Leeds  
 25 people concurred in that matter at that time.

1 Q. And did that reflect the logistical  
 2 reality of providing water services to those  
 3 properties that would be part of the adjusted  
 4 Toquerville boundary?

5 A. That is correct.

6 Q. So to simplify it, the boundary was  
 7 adjusted so that those property owners of  
 8 Toquerville could deliver water to, as a logistical  
 9 matter, became Toquerville properties and those that  
 10 made more sense for water and service delivery from  
 11 Leeds became Leeds properties; is that right?

12 A. That's a correct statement.

13 Q. Thank you.

14 MR. RONNOW: Your Honor, we have no  
 15 further questions at this time.

16 THE COURT: Mr. Finlayson, you may  
 17 cross-examine.

18 MR. FINLAYSON: Thank you.

19 -oOo-

20 CROSS-EXAMINATION

21 BY MR. FINLAYSON:

22 Q. Is it correct that Toquerville, itself,  
 23 did not plan any commercial development up in the  
 24 area where the signs are?

25 A. When you say "Toquerville, itself," they

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1 have -- Toquerville has no property, and they had no  
 2 involvement in any commercial development. We were  
 3 -- we were interested in obtaining water rights in  
 4 that --

5 THE COURT Mr. Finlayson, I ordinarily  
 6 ask counsel to stand while they're questioning.  
 7 That way when objecting counsel stands up my  
 8 attention is drawn to it, and I can see what the  
 9 problem is. Go ahead, counsel.

10 MR FINLAYSON Thank you, Your Honor, and  
 11 I apologize.

12 THE COURT That's fine.

13 MR FINLAYSON

14 Q At the time of the annexation, there was  
 15 no culinary water or sewer to the area where the  
 16 signs are; is that correct?

17 A That is correct. There were private wells  
 18 for individual homes on the opposite side of the  
 19 highway, but I don't think there were any utilities  
 20 on the west side of I-15.

21 Q All right. When did you leave the  
 22 Toquerville employment or contract relationship?

23 A The last -- the end of December in 1993.

24 Q At that time, was there any culinary water  
 25 or sewer up to that area?

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1 A No, sir.

2 Q Without water and sewer up there,  
 3 commercial development is not feasible; is that  
 4 correct?

5 A That's correct. There would have to be  
 6 utilities available for a commercial development.

7 Q So far as you know, there is not presently  
 8 any culinary water or sewer up to that area?

9 A No, not that I'm aware of.

10 Q Would you show us where on the map these  
 11 signs were?

12 A Well, I -- I can't tell you exactly  
 13 where. I am aware that this triangular piece of  
 14 property contains -- contained the signs, but I  
 15 couldn't show you specifically on the property where  
 16 they're -- where they're located.

17 THE COURT So the record is clear, Mr.  
 18 Wallace, what you're referring to is the triangular  
 19 portion of the property west of I-15 in that small  
 20 rectangle on the northern extent of the annexation  
 21 of 1992. That's correct, sir?

22 THE WITNESS That's correct.

23 THE COURT All right.

24 MR FINLAYSON. If you'll stay there, I'll  
 25 ask another question or two.

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1 Q Which is the property that was included at  
 2 Eveleth's suggestion that would have not been  
 3 included without that suggestion?

4 A Everything north of this section 27 and  
 5 west of I-15 was requested by Tom Eveleth and his  
 6 wife to be included in the annexation process.

7 Q Was there a portion of that that was not  
 8 included in the original plan?

9 A Yes.

10 Q What part of that?

11 A Everything north of section 27 was  
 12 originally not included in the annexation proposal.  
 13 It was subsequent to his phone call, and I have a  
 14 letter from him in my file now that verifies that he  
 15 requested that additional property north of section  
 16 27 west of I-15 be included in the annexation.

17 Q Can you tell where on the map the old 91  
 18 road crosses I-15?

19 A Well, I'm aware the old 91 comes up  
 20 through here where the residential homes now front  
 21 the old 91, and it looks like it crosses it on the  
 22 southerly side probably right near -- it would have  
 23 crossed it right near the southern portion of the  
 24 interchange, Anderson Junction.

25 Q Does that map show where Anderson Junction

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1 is?

2 A It does. I didn't delineate it well here,  
 3 but you can see the expanded right-of-way of I-15,  
 4 and that's the junction right there.

5 THE COURT. Counsel, might we stipulate  
 6 that Anderson Junction is Exit 27 on Interstate 15?

7 MR RONNOW. Yes, Your Honor, we would --  
 8 we would gladly stipulate to that.

9 THE COURT All right. Just so we all  
 10 make sure that no one looking at this record in the  
 11 future is confused. I think that's Exit 27, as I  
 12 recall.

13 MR RONNOW. If we may also, to clarify,  
 14 Your Honor, if I may propose a stipulation that the  
 15 only interchange on I-15 that is shown on Exhibit 1  
 16 within the green annexation property is the Anderson  
 17 Junction.

18 THE COURT. Exit 27?

19 MR RONNOW Exit 27.

20 THE COURT Would you so stipulate, Mr. --

21 MR FINLAYSON. Yes, Your Honor.

22 THE COURT -- Finlayson? All right. The  
 23 record is clear. Go ahead, Mr. Finlayson.

24 MR FINLAYSON. You may be seated if you  
 25 wish.

1 Q. You referred to a business, The Property  
2 Shoppe?

3 A. Yes, sir.

4 Q. Did they want to retain signs up where  
5 Zions --

6 A. I have no -- I have no knowledge of that.

7 Q. Do you recall telling me previously that  
8 they didn't want signs up there?

9 A. No. In our conversation earlier, there  
10 was a gentleman who's interested in developing the  
11 land, which would be in the Leeds portion, it would  
12 be south of the interchange and south of the  
13 annexation, and that gentleman was very adamant  
14 about not having those signs there. And he was a --  
15 he had an option on the property within the Leeds  
16 proposed declaration of annexation, and he made a  
17 specific request that those signs not be there.

18 Q. Do you know why he did not want the signs  
19 there?

20 A. He indicated that as an entrance to his  
21 project, which was a very large proposal, including  
22 golf courses, a destination resort, he thought that  
23 that would be an eyesore and that it should be left  
24 in its natural, pristine condition.

25 Q. All right. Are you aware of the nature of

1 the topography in that area?

2 A. Yes, I am. I've walked that several  
3 times.

4 Q. How would you describe it?

5 MR. RONNOW: I'm going to object as to  
6 ambiguous, the phrase, "that area."

7 THE COURT: Counsel, why don't we look at  
8 it in this fashion, and I do this, counsel, with  
9 some hesitation, but there's no way we can get  
10 around this Court's familiarity and personal  
11 familiarity with the area, and, gentlemen, I would  
12 propose that I take judicial notice that the area in  
13 which these signs are located, which is north of  
14 Exit 27, west of the I-15 freeway, if one were to  
15 stand on the I-15 freeway near the area of the signs  
16 and look west and northwest, you would see basically  
17 sage and pinion foliage extending for some miles  
18 uninterrupted by presence of human activity at all.

19 As a backdrop to that sage and pinion  
20 foliage, you have the western face -- no, take that  
21 back -- eastern face of the Pine Valley Mountains,  
22 which constitute the horizon west and northwest of  
23 the area of the signs, and that it is with the  
24 exception of the freeway, itself, in that location  
25 without any other indication of human activity.

1 That's my recollection.

2 I believe at this junction, Anderson  
3 Junction, even the utility corridors are on the east  
4 side of the freeway so that you don't even have the  
5 power lines or the Mountain Fuel lines to the west  
6 as the observer standing on the freeway would face  
7 towards the Pine Valley Mountains. Now, does that  
8 describe the property and the location of the signs  
9 and the area in which the signs are located to your  
10 satisfaction, Mr. Finlayson?

11 MR. FINLAYSON: Your Honor, I believe that  
12 is accurate, and with this witness, I won't pursue  
13 that.

14 THE COURT: Well, let me give --

15 MR. FINLAYSON: (Inaudible.)

16 THE COURT: Let me give Mr. Ronnow an  
17 opportunity to describe the property and the, if you  
18 will, the vista at that location. Mr. Ronnow,  
19 anything you want to add to that or objections you  
20 would like to make to the Court taking judicial  
21 notice of those observations?

22 MR. RONNOW: Your Honor, the only  
23 objection I would make is that I have no specific  
24 evidence, and I don't think any has been presented,  
25 as to the location and availability of power

1 services on the west end of the freeway. So I think  
2 the Court's judicial notice should be qualified that  
3 there is no evidence, and we believe that there are  
4 no utilities over there.

5 I have no evidence that they exist, nor do  
6 I have any evidence that they are not available, and  
7 the reason I add that caution is that it is not very  
8 far south on the west side of the interstate now  
9 that there are multiple residences with power  
10 utilities available, and I just don't know how far  
11 north they go.

12 THE COURT: And I understand that,  
13 counsel, and I do not intend to, by my taking  
14 judicial notice of the items that I placed on the  
15 record, imply whether there is or is not electrical  
16 service there. What my judicial notice goes to is  
17 the visual appearance, and the visual appearance is  
18 as I have stated without any reference to electrical  
19 service or availability on the west side of the  
20 freeway, and that's well clarified. Anything else,  
21 Mr. Ronnow?

22 MR. RONNOW: No, Your Honor.

23 THE COURT: Mr. Finlayson?

24 MR. RONNOW: One other -- excuse me, there  
25 is one other thing in way of judicial notice. At

2002  
1 summary judgment there was an affidavit submitted  
2 received by the Court by an engineer that  
3 specifically located those signs in a number of  
4 feet. I was just looking for it, but an engineer  
5 that went out there and located those signs on the  
6 west side of the freeway, and that is part of the  
7 Court's original record at summary judgment.

8 THE COURT: Is it, Mr. Finlayson? I  
9 recall --

10 MR. FINLAYSON: It is part of the Court's  
11 original -- it's an affidavit -- actually it's not  
12 admissible in this forum. It's hearsay in a trial.  
13 We will elicit testimony on that issue, and that  
14 will be through Mr. Snow. So I think it premature  
15 to address those distances.

16 MR. RONNOW: Your Honor, in order --  
17 following the Court's lead here to perhaps expedite  
18 this a little bit, plaintiffs are perfectly willing  
19 to stipulate that the three outdoor sign structures  
20 are located in the northwest triangular portion of  
21 Mr. Eveleth's property that appears on Exhibit 1 as  
22 the northwest side of Interstate 15 in the bump on  
23 the annexation at the very top of that annexation  
24 and their exact location, I don't think, is  
25 necessarily too material. They are there. We don't

2003  
1 dispute that.

2 THE COURT: And the only other thing that  
3 we should understand for the purpose of the record  
4 and part of the evidentiary milieu that the Court  
5 will work with, is that on today's date, the 1st of  
6 October, 1996, all that remains of the signs are the  
7 vertical posts. The faces of the signs are removed,  
8 and that today all there are now is the vertical  
9 steel posts that previously supported the face of  
10 those signs, and you can stipulate to that, Mr.  
11 Ronnow?

12 MR. RONNOW: That is correct.

13 THE COURT: And Mr. Finlayson, that is the  
14 fact as you understand it as well?

15 MR. FINLAYSON: Yes, Your Honor.

16 THE COURT: All right. Mr. Finlayson, any  
17 further cross-examination for Mr. Wallace?

18 MR. FINLAYSON: No, Your Honor.

19 THE COURT: All right. Anything more of  
20 this witness, Mr. Ronnow?

21 MR. RONNOW: Yes, Your Honor.

22 -oOo-

23 REDIRECT EXAMINATION

24 BY MR. RONNOW:

25 Q. Mr. Wallace, first of all --

2004  
1 MR. RONNOW: If I may approach the  
2 exhibit, Your Honor.

3 THE COURT: Yes, counsel.

4 MR. RONNOW:

5 Q. Drawing your attention to Exhibit 1, what  
6 we have described as a small rectangular bump, which  
7 is on the top of this drawing, that is the north end  
8 of the Toquerville annexation, there is property  
9 located within that area that is both on the west  
10 side of the interstate and on the east side of the  
11 interstate; is that correct?

12 A. That is correct.

13 Q. And is it your understanding that both  
14 property owners, that is Mr. Eveleth and whoever  
15 owns the property on the east side of the freeway,  
16 requested that their property be included in the  
17 annexation?

18 A. That is correct.

19 Q. And do you recall specifically what their  
20 concern was with the original proposal that lopped a  
21 portion of their property off? Why were they  
22 concerned with that original proposal?

23 A. Mr. Eveleth was to be consistent with his  
24 property already inside the annexation. The people  
25 on the east side I have no recollection. I do, in a

2005  
1 file in front of me, have their names.

2 MR. FINLAYSON: I object as hearsay.

3 THE COURT: Is it hearsay, Mr. Ronnow?

4 MR. RONNOW: Well, Your Honor, he has  
5 already testified as to -- in relationship to why  
6 this was -- why he, as the city engineer, modified  
7 this. I think it's material to what the proposal  
8 and purpose was.

9 THE COURT: Counsel, as far as the  
10 justification for Mr. Wallace's going above the  
11 section line for township 20 -- or section 27, as  
12 shown on Exhibit No. 1, the information is not  
13 hearsay. It is simply foundational to the reason  
14 why Mr. Wallace added the additional rectangle on  
15 top of the annexation proposal.

16 To that extent, the desire expressed by  
17 the property owners, Mr. Eveleth on the west and the  
18 other owner or owners on the east, is not hearsay.  
19 It is not received for the proof of the matter  
20 asserted, specifically, the specific intentions or  
21 desires of those property owners, Mr. Eveleth and  
22 the others, but is received only to indicate the  
23 reason why Mr. Wallace made the change, and with  
24 that modification, you may proceed, Mr. Ronnow.

25 ///

MR. RONNOW:

Q Do you know, Mr. Wallace, whether there are any -- at the time you prepared the proposed annexation whether there were any commercial uses in that northwest portion of the -- this bump we're talking about, the north bump on the -- excuse me -- on the east side of the road, those property owners that requested they be included, were there any commercial uses in there that you were aware of?

A. Not that I was aware of.

Q. And are you aware of how it was ultimately zoned in that area?

A I would -- I am -- right now from my recollection, no. No, I'm not acquainted with how that was ultimately zoned.

Q. All right. Now, Mr. Wallace, drawing your attention to the discussion regarding services, in your earlier testimony you said that one of the primary issues for the annexation was to facilitate the extension of municipal services into the annexed area around Anderson Junction; is that correct?

A. That is correct.

Q. When you say services or utilities, which services and utilities exactly are you referring to?

A. Culinary water.

Q. And at the time of the annexation, I think you testified there was no culinary service up there; is that correct?

A. That's correct. No municipal culinary, just private.

Q. Would you describe to the Court, then -- first, were there discussions specifically as part of the annexation master plan with regard to how and when those utilities might be extended into the annexed area?

A. Yes. There was detailed discussions. From our master plan, we had a cost estimate of several approaches to bringing culinary water into that area, and in our declaration of annexation, it specifically states that this area would be provided services from the city and that those services would be paid for by those people who lived within that area, such that there would not be an unfair tax burden on the existing citizens of Toquerville.

Q. When you say that those citizens would pay for those services, how exactly was that discussed? What -- by what procedural vehicle would they pay for those?

A. There would be a special improvement district, the creation of a special improvement

district whereby the city could assess -- make assessments to those property owners for the cost of the utility.

Q. Now, then, at the time of the annexation in these discussions, do you recall whether there was a discussion of how quickly that those services might be provided?

A. I don't think -- I don't think we had any specific dates. It was anticipated in the near future that it could be proposed, the special improvement district be proposed.

Q. And now in relationship to your career and training as a civil engineer, have you worked on other annexations for other municipalities?

A. Yes. Yes, I have.

Q. And is it fair to characterize this annexation process is perhaps the first step of a long-range planning process for a general?

A. Yes, we have a master declaration of annexation, which includes clear up to Pintura, and each city has those master declaration of annexation within their boundaries. That's the first step. And then the second step is the implementation of annexing portions of that anticipated area.

Q. So at the time the annexation was

discussed and approved, based on all of your feedback from property owners and planning commission members, et cetera, was it the objective to facilitate the water and other utility service to that area from --

MR. FINLAYSON: Object, leading.

THE COURT: It is leading. Rephrase your question, Mr. Ronnow. Sustained.

MR. RONNOW:

Q. With regard to the utility issue, at the time the annexation was finally approved --

MR. RONNOW: Well, I'll withdraw that question. I think he's answered it sufficiently. No further questions, Your Honor.

THE COURT: Mr. Finlayson, anything else of Mr. Ronnow -- or not of Mr. Ronnow -- Mr. Wallace?

MR. FINLAYSON: No, thank you, Your Honor.

THE COURT: All right. Thank you, Mr. Wallace. You may step down. Counsel, may Mr. Wallace be excused or do you want him to hang around?

MR. RONNOW: Your Honor, he may be excused.

THE COURT: All right. Mr. Wallace, you



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1 may go back to work up north if you want, sir.  
 2 THE WITNESS: Thank you, sir.  
 3 THE COURT: Your next witness, counsel.  
 4 MR. RONNOW: Your Honor, plaintiffs call  
 5 Mr. Ken Sizemore.  
 6 THE COURT: Mr. Sizemore, if you'll come  
 7 forward, in front of those tables, raise your hand  
 8 and be sworn.  
 9 Whereupon,  
 10 KENNETH SIZEMORE,  
 11 having been first duly sworn to testify to the  
 12 truth, the whole truth and nothing but the truth,  
 13 was examined and testified as follows:  
 14 THE COURT: Thank you, sir. Please have a  
 15 seat on the witness stand.

-oOo-

## DIRECT EXAMINATION

BY MR. RONNOW:

Q. Would you state your full name, please.

A. I'm Kenneth Lee Sizemore.

Q. Mr. Sizemore, where do you reside?

A. I reside in Santa Clara, Utah.

Q. And how are you currently employed?

A. I'm employed as the deputy director of the  
 25 Five County Association of Governments.

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1 Q. And would you briefly describe your post  
 2 high school degrees, certificates, and licenses, if  
 3 any?

A. Certainly. I hold a bachelor of arts  
 5 degree in political science with a certificate in  
 6 public administration from Utah State University. I  
 7 have substantial postgraduate work but did not  
 8 complete that program because I moved here to  
 9 southern Utah.

That program included economics, public  
 11 administration, and community planning. I've worked  
 12 in community planning since 1977, a number of  
 13 functions, including county planning for Cache  
 14 County, Utah, and in my current function as  
 15 community and economic development director for the  
 16 Five County Association of Governments.

Q. In your capacity as community economic  
 18 development director of the Five County Association  
 19 of Governments, are you called on to consult with  
 20 rural communities with regard to annexation, master  
 21 plan, and land use zoning issues?

A. Constantly, yes, sir.

Q. And were you involved in that capacity  
 24 with the Town of Toquerville in 1992 and '93?

A. Yes, sir.

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1 Q. Would you -- would it be fair, as a --  
 2 without sliding your position, but as a shorthand  
 3 reference to your work, to refer to you as a  
 4 planner --

A. Certainly.

Q. -- in connection with the work you did for  
 7 Toquerville?

A. Definitely.

Q. All right. Now, then, would you describe  
 10 to the Court briefly, as an overview, your  
 11 involvement in either the annexation or the master  
 12 plan and zoning that took place in Toquerville in  
 13 1992 and '93?

A. In late 1992 Mr. Kim Wallace contacted me  
 15 by telephone and indicated to me that Toquerville  
 16 was undertaking an annexation process that would  
 17 include Anderson Junction, that was including a  
 18 substantial amount of property, approximately three  
 19 sections of land, that the community needed some  
 20 assistance in determining the appropriate general  
 21 planning for the land uses in those three sections,  
 22 and, subsequently, the appropriate zoning  
 23 designations for those pieces of property.

I was then asked by Mr. Wallace if I could  
 25 provide that technical assistance to the community.

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1 I indicated that that request should be made to our  
 2 governing board and the approval be given, which is  
 3 the normal process for assigning that kind of work  
 4 in our organization. That request was made in  
 5 December of 1992 subsequent to the annexation having  
 6 taken place. The request for my assistance was made  
 7 subsequent to the annexation.

Q. All right. So you came on board  
 9 officially after the final annexation ordinance was  
 10 adopted?

A. That's correct.

Q. And in relation to your duties, what were  
 13 your marching orders when you came on board with  
 14 Toquerville?

A. My standard process is to schedule a  
 16 meeting with the planning commission of the  
 17 community. I did so, met with the planning  
 18 commission of Toquerville. I believe our first  
 19 meeting was January of 1993.

That particular planning commission meets  
 21 monthly, and during the year of 1993, I visited with  
 22 the planning commission on a monthly basis  
 23 determining the procedure that should be followed in  
 24 allocating land uses for the annexed area.

We quickly determined that the entire



1 community should be looked at and expanded the scope  
2 of my assistance to the community to incl the  
3 entire Town of Toquerville, not just the ne  
4 annexed area. And we reviewed the existing general  
5 plan designations already on record, and I prepared  
6 draft, general plan, and zoning maps for the  
7 community.

8 Q. Now, then, did you participate with the  
9 planning commission in public hearings with regard  
10 to the proposed master plan?

11 A. I recalled that public hearings were  
12 held. I do not recall that I was personally in  
13 attendance at the actual public hearings.

14 Q. Did you attend open planning commission  
15 meetings at which the public attended and provided  
16 any input into the --

17 A. Yes. Over the year we had a number of  
18 meetings where specifically the property owners of  
19 the newly annexed area were invited to come and  
20 discuss with the planning commission their desires  
21 for uses of land in the newly annexed area.

22 Q. Prior to meeting with the planning  
23 commission and beginning this preliminary process of  
24 developing information, were you given any  
25 instructions or directions as to how any specific

1 by discussion with the subject property owners, and  
2 we determined what we would like to see future land  
3 uses to occur over a 20-year time horizon.

4 Q. All right. When you say what we would  
5 like to see over a 20-year time period, can you be  
6 more specific? Who is the we in that statement?

7 A. The planning commission and town council  
8 of Toquerville Town.

9 Q. So then part of the overall master plan  
10 process is to look down the road in advanced  
11 planning as far as 20 years; is that correct?

12 A. Yes.

13 Q. And with regard to that, as a result of  
14 that feedback and work with the planning commission,  
15 can you describe to the Court how your proposal  
16 began to take shape with regard specifically to the  
17 Anderson Junction area?

18 A. Yes. We did have a series of meetings and  
19 invited the Anderson Junction property owners to  
20 come to the meetings and discuss future uses of land  
21 and their intents for uses of land at the Anderson  
22 Junction area. We discussed the capability of  
23 providing services, including culinary water, sewer,  
24 utility, other utilities, such as electricity.

25 We talked about the intents of the

1 property in the annexed area was to be zoned?

2 A. No, sir.

3 Q. And so would you describe in detail, if  
4 you will, the scope of your meetings and how you  
5 solicit information as you developed -- as you  
6 developed the master plan and specifically with  
7 regard to the annexed property?

8 A. We first asked Bush and Gudgell  
9 Engineering to provide a base map. Exhibit 1 here  
10 is the base map prepared by that engineering firm.  
11 I indicated to them that we needed to have a base  
12 with some of the property -- property outlines of  
13 the description and we let --

14 Q. Let me -- excuse me, let me interrupt you  
15 here. When you say the property outline  
16 descriptions, you're talking about private property  
17 parcels?

18 A. Private property parcels. That's correct.

19 Q. So they would be identified on your base  
20 map for purposes of discussion?

21 A. That's correct.

22 Q. Okay. Go on.

23 A. We then went through a process of  
24 determining the current uses of land on the  
25 properties. We determined what were proposed uses

1 property owners, and it was very clear that the  
2 owners of The Property Shoppe that were referred to  
3 earlier, Floyd and Mary Helm, were very interested  
4 in some commercial development at the intersection  
5 itself.

6 We talked about some future development  
7 across the freeway and talked specifically about the  
8 existing well that could be developed to provide the  
9 culinary water.

10 THE COURT: Mr. Sizemore, when you use the  
11 phrase "across the freeway," you mean on the west  
12 side or the east side of the freeway?

13 THE WITNESS: That would be the west side  
14 of the freeway.

15 THE COURT: Thank you, sir. Go ahead,  
16 counsel.

17 MR. RONNOW: We cut you off. Were you  
18 finished with your description.

19 THE COURT: Talking about the well is when  
20 I jumped on your testimony, sir.

21 THE WITNESS: We had a very substantial  
22 discussion over, I believe, a series of three  
23 meetings talking about the potential uses of the  
24 property there.

25 We also talked about the fact that a

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1 substantial amount of that property is in government  
 2 ownership, both federal and state lands, and that we  
 3 would have to include their planning processes into  
 4 the future uses of that land.  
 5 The process ended out with a draft general  
 6 plan and zoning map. The draft zoning map is the  
 7 exhibit here today.  
 8 MR. RONNOW: All right.  
 9 Q. We're going to come back to that in just a  
 10 minute. I want to focus on some of those  
 11 discussions. With regard to water development,  
 12 water service in that area, you said you discussed  
 13 the well and how you would provide.  
 14 Could you give us a little more detail as  
 15 to the proposed solutions or possible solutions to  
 16 the water -- the culinary water issue that you  
 17 discussed during the master plan process?  
 18 A. My recollection is that we relied heavily  
 19 on studies that were underway sponsored by the  
 20 Washington County Water Conservancy District. We  
 21 talked about some potentials for collecting water  
 22 out of some of the streams coming off of the Pine  
 23 Valley Mountains and the fact that there was a well  
 24 in the area that could be improved and that might be  
 25 able to provide substantial amounts of culinary

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1 water.  
 2 Q. As part of those discussions with regard  
 3 to water, did you discuss the insulation and  
 4 location of possible water tanks, reservoirs for  
 5 storage as part of the water system?  
 6 A. Those items were addressed, however, not  
 7 very specifically, and I personally did not get  
 8 involved with specific locations or designs of water  
 9 tanks. I left that area of discussion up to their  
 10 town engineer.  
 11 Q. Without holding you to any specifics, do  
 12 you recall general discussions that were possible  
 13 locations where a water tank might be found?  
 14 A. Yes, the high ground on the west side of  
 15 I-15.  
 16 Q. And can you generally locate where that --  
 17 when you say "high ground on the west side of I-15,"  
 18 our Exhibit 1 does not have topography. Can you  
 19 approach Exhibit 1 and just generally direct the  
 20 Court's attention to where that would be?  
 21 A. I don't know if I can specifically  
 22 pinpoint the location. My recollection is it would  
 23 be somewhere in this location.  
 24 Q. All right. Are you familiar with the  
 25 property in the bump on the north end of the annexed

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1 property?  
 2 A. Yes, I am.  
 3 Q. Is that high ground above the Anderson  
 4 Junction area generally?  
 5 A. It is.  
 6 Q. All right. Thank you. You may return.  
 7 Well, while you're there, I'm going to ask you just  
 8 to specifically closely identify Exhibit 1. Is that  
 9 the -- a copy of the -- well, is that a copy of the  
 10 proposed zoning map that you worked on?  
 11 A. Yes, it is.  
 12 Q. And at what point in the process of master  
 13 planning and zoning did you reach that configuration  
 14 that is shown on Exhibit 1?  
 15 A. This map was prepared in late 1993 after  
 16 revising a series of draft maps that would work with  
 17 the planning commission over the months. I would  
 18 say this was probably November of 1993 that this map  
 19 was prepared.  
 20 Q. While I have you there by Exhibit 1, do  
 21 you recall the issues with regard to the property  
 22 that is located on the extreme north end of the  
 23 annexed property that constitutes that rectangular  
 24 jog into the county area, do you recall discussions  
 25 of that property?

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1 A. I do.  
 2 Q. And would you describe to the Court, based  
 3 on your recollection, why you proposed to include  
 4 that property into the master plan proposal?  
 5 A. The major reason was the fact that  
 6 property owner owned property on both sides of the  
 7 section line here and did not want to have this  
 8 property divided between incorporated Toquerville  
 9 Town and unincorporated Washington County.  
 10 Q. And is that true on both sides of the  
 11 interstate, both the west side property owner and  
 12 the east side property owner?  
 13 A. I do not recall the specific configuration  
 14 of ownership on the east side of I-15. I do recall  
 15 that there were property owners that did have that  
 16 same situation, but there are numerous property  
 17 owners in that area east of I-15.  
 18 Q. All right. So that when you ultimately  
 19 made your proposal for zoning as reflected in  
 20 Exhibit 1, how -- would you describe to the Court  
 21 your proposal for the specific zoning designations  
 22 in the Anderson Junction area?  
 23 A. Yes. The darker shaded areas here are  
 24 proposed highway commercial zoning districts.  
 25 Q. Now, at that time, could you describe what

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1 the -- as a planner, what the basis of your  
2 recommendation for highway commercial was?  
3 A. We looked at the existing zoning of  
4 Washington County prior to the annexation. We  
5 looked at the fact that there is an interchange  
6 there, which would generate substantial commercial  
7 traffic, and we looked at the owners' desires and  
8 future plans for their property as well as the  
9 potential tax base benefits that commercial  
10 development at the interchange would bring to  
11 Toquerville Town.

12 Q. Now, you stated that after you got  
13 involved in the master plan process it expanded  
14 somewhat so that in part you looked at the whole  
15 planning issue for Toquerville Town; is that  
16 correct?

17 A. That's correct.

18 Q. As part of looking at that whole planning  
19 issue, can you explain to the Court the issues that  
20 were being discussed with regard to the location of  
21 commercial properties or commercial zones in  
22 Toquerville generally?

23 A. Toquerville historically has been somewhat  
24 isolated and has been a residentially oriented  
25 community. Their intent during this discussion was

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1 to try and determine where appropriate locations for  
2 future commercial development could occur, and we  
3 looked at their desires as a community and  
4 determined that the Anderson Junction interchange  
5 would be the most appropriate and viable location  
6 for commercial activity.

7 Q. Okay. I'm going to ask you -- I'm going  
8 to pin you down just a little bit. When you say  
9 most appropriate and most viable for the community,  
10 can you give us a little detail as to what led you  
11 to that conclusion?

12 A. The residents of Toquerville were very  
13 concerned about retaining the rural atmosphere and  
14 the shaded tree line street that constitutes the  
15 existing Toquerville Town site. They did not want  
16 to see intensive commercial development occurring in  
17 that area.

18 As they looked along the corridor of the  
19 state highway that goes through Toquerville, they  
20 determined that there were not many locations along  
21 that corridor that would be appropriate for  
22 intensive commercial development. For that reason,  
23 they determined that the interchange was the  
24 appropriate location for highway commercial highway  
25 services.

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1 Q. Now, then, on that map, just while the  
2 Court has taken broad judicial notice, in order to  
3 make the record, isn't there a geological formation,  
4 a hill, a ridge that separates generally that  
5 annexed area from the older traditional Toquerville  
6 Town?

7 A. That is correct, sir. This hill is in  
8 this location.

9 THE COURT: And where you were indicating,  
10 sir, is in a region paralleling the I-15 freeway  
11 approximately -- well, if I can see the section  
12 lines correctly -- approximately a mile to the  
13 southeast of the I-15 freeway. That is the high  
14 ground that separates the Andersonville -- or  
15 Anderson Junction area from Toquerville Town, the  
16 traditional town with only the highway connecting  
17 the two?

18 THE WITNESS: That is correct.

19 THE COURT: All right.

20 MR. RONNOW:

21 Q. Now, Mr. Sizemore, just to clarify our  
22 exhibit, I'm going to ask you to take the -- do we  
23 have a black pen there. If you would just draw --  
24 I'm not holding you to any scale or detail. If you  
25 could just draw an oval in the area which you just

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1 described as that ridge formation that separates  
2 those two portions of Toquerville, and would you  
3 label within that rough oval that you've drawn just  
4 put the word "ridge."

5 So that if I understand your testimony,  
6 then, the -- was it the consensus that you heard  
7 from property owners and community residents that  
8 intensive commercial development was most  
9 appropriate at the Anderson Junction area; is that  
10 correct?

11 A. That is correct.

12 Q. All right. Mr. Sizemore, you can sit  
13 down. Now, you have described a lot of meetings, a  
14 lot of feedback, a lot of discussion here with both  
15 property owners in the master planned area, other  
16 Toquerville property owners, and the planning  
17 commission.

18 In the course of all that discussion,  
19 feedback, were you ever approached by any property  
20 owners with specific -- with discussions  
21 specifically regarding outdoor advertising signs in  
22 the Anderson Junction area?

23 A. The fact that there were three outdoor  
24 advertising structures in the proposed annexation  
25 area was brought up in the discussion. I was

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1 questioned regarding how the town should approach  
2 the issue of outdoor advertising.

3 We did note that the existing zoning  
4 regulations in effect at the time for Toquerville  
5 Town did not address outdoor advertising, and that  
6 something needed to be included in future zoning  
7 ordinance amendments to address the location and  
8 regulation of outdoor advertising.

9 Q. Now, you have made reference to reviewing  
10 Toquerville zoning ordinances. Let me ask you a  
11 question I should have asked -- (inaudible.) As  
12 part of your master plan process, did you, in fact,  
13 go to existing Toquerville zoning ordinances and  
14 review what they had?

15 A. Yes, sir.

16 Q. So that you were, at the time of the  
17 master plan process, familiar with the zoning that  
18 they had adopted?

19 A. That is correct.

20 MR. RONNOW: Your Honor, I'm submitting  
21 for marking as Exhibit 2 a document --

22 THE COURT: And for identification  
23 purposes, counsel, what do you want to call Exhibit  
24 No. 2?

25 MR. RONNOW: Exhibit No. 2 is the

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1 Toquerville zoning ordinance. It's called the  
2 Toquerville General Zoning Ordinance.

3 THE COURT: All right. Of what date,  
4 counsel? Is it dated?

5 MR. RONNOW: Well, we're going to have to  
6 clear that up on testimony, Your Honor.

7 THE COURT: All right. Exhibit No. 2 has  
8 been handed to the witness. Go ahead, counsel.

9 MR. RONNOW: And, Your Honor, for counsel,  
10 if I may just make a proffer, foundation for this  
11 may require two witnesses, but I want to proceed at  
12 this point with Mr. Sizemore.

13 THE COURT: All right.

14 MR. RONNOW:

15 Q. I ask you to review what has been marked  
16 as Exhibit 2 in this matter. Would you take just a  
17 moment and thumb through that, familiarize yourself  
18 with it. Are you familiar with that document?

19 A. Yes, sir, I am.

20 Q. Would you just generally describe what  
21 that document is and how you became familiar with  
22 it?

23 A. It appears to be a copy of the zoning  
24 ordinance in effect during 1993 for the Town of  
25 Toquerville.

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1 Q. And in that period of 1992, '93, did you  
2 review such a document in -- in Toquerville offices?

3 A We keep a copy of all of the currently  
4 adopted ordinances for all the communities in the  
5 five county region in my office, so I have a copy of  
6 this ordinance at my office. I did check with the  
7 town to make sure that there hadn't been any  
8 amendments that I was not aware of.

9 Q. All right. I'm going to draw your  
10 attention to the first page of that document. At  
11 the top of the page it states, Ordinance No. 1978-1?

12 A. Yes, sir.

13 Q. Now, have you reviewed that sufficiently  
14 enough to be able to determine today whether that is  
15 an accurate copy of the zoning -- the Toquerville  
16 zoning ordinance that was, insofar as you know, was  
17 the official adopted Toquerville zoning ordinance in  
18 1993?

19 A. As far as I know, it is.

20 Q. All right.

21 MR. FINLAYSON: May I have that section  
22 number again?

23 MR. RONNOW: On the very top, 1978-1.

24 MR. FINLAYSON: Oh, the whole thing.

25 Okay.

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1 MR. RONNOW:

2 Q. Now, I'm going to draw your attention to  
3 the last page of that document, which is page No.  
4 41. Do you have that on Exhibit 2?

5 A. I do.

6 Q. And there's a line there that states,  
7 Passed by the town council and approved by the mayor  
8 of the Town of Toquerville, 10th day of March, 1982;  
9 is that correct?

10 A. It appears that that's correct, yes.

11 Q. All right.

12 MR. FINLAYSON: I object to this witness  
13 providing a foundation for that. There's no  
14 indication that he made this -- the change or that  
15 he signed the document.

16 THE COURT: Counsel, Mr. Ronnow has  
17 indicated he may require different witnesses in  
18 order to lay foundation. Being that this is  
19 foundational only, I will overrule your objection,  
20 but we may still be a long ways from admission of  
21 this document. Go ahead, Mr. Ronnow.

22 MR. RONNOW: Your Honor, to clarify, for  
23 purposes of this witness, I'm trying to establish  
24 the zoning ordinance that he reviewed as part of his  
25 master plan duties and what he relied on in part in

1 his master plan preparation.

2 THE COURT: I follow you, counsel. That's  
3 basis of my ruling.

4 MR. RONNOW: Okay. Thank you.

5 Q. Now, Mr. Sizemore, I'm going to direct  
6 your attention to page 38 of that zoning document.  
7 Would you read to the Court on page 38 what is that  
8 page entitled?

9 A. The page is entitled, Highway Commercial  
10 Zoning.

11 Q. And the designation is?

12 A. H-C.

13 Q. Was that the commercial designation that  
14 you incorporated into your master plan with regard  
15 to the Anderson Junction property?

16 A. Yes, it is.

17 Q. Now, then, are you familiar with this  
18 particular page of the ordinance, this highway  
19 commercial zone?

20 A. I am.

21 Q. And was that in existence and part of the  
22 zoning records -- zoning ordinance that you reviewed  
23 in preparation of your master plan?

24 A. It was, yes, sir.

25 Q. Now, let me clarify. In relationship to

1 your specific duties, you worked on the master plan  
2 and you prepared maps that go with the master plan,  
3 but did you prepare any amendments to actual text of  
4 zoning ordinances?

5 A. No, sir, I did not.

6 Q. So that when we talk about H-C in the  
7 master plan and the zoning map, which is Exhibit 1,  
8 we're referring to this corresponding Toquerville  
9 ordinance for highway commercial zoned H-C; is that  
10 correct?

11 A. That is correct.

12 Q. All right. Thank you. Now, you also  
13 mentioned that you talked generally about outdoor  
14 advertising. You have been sitting in on these  
15 proceedings. The issue of these signs is no secret  
16 to anybody. Let's cut to the chase.

17 Tell the judge, insofar as you recall, any  
18 of the comments or feedback that you had with regard  
19 to outdoor advertising in this Anderson Junction  
20 area or the annexed area pro or con? What kind of  
21 feedback did you receive?

22 A. There were property owners who attended  
23 the meetings as we prepared these drafts that were  
24 very concerned and opposed to any proliferation of  
25 outdoor advertising along the freeway corridor. One

1 of their major concerns was that the annexation  
2 might provide additional commercial zoning that may  
3 -- might enable the erection of additional outdoor  
4 advertising along the freeway.

5 They were very concerned and expressed a  
6 desire to control the proliferation of outdoor  
7 advertising along the I-15 corridor. Other property  
8 owners indicated that one of their intents was to be  
9 able to allow outdoor advertising as part of the  
10 commercial uses of their property in the future, and  
11 they wanted to have that capability.

12 The discussion came down to the fact that  
13 the current zoning regulations of Toquerville Town  
14 did not address outdoor advertising and amendments  
15 would have to be made to address that issue.

16 Q. Now, you have stated in your earlier  
17 testimony that you made the recommendation in the  
18 zoning map, which is Exhibit 1, for the highway  
19 commercial designation at Anderson Junction because  
20 it was the most appropriate location for such -- for  
21 any economic development in Toquerville Town; is  
22 that correct?

23 A. Any commercial.

24 Q. Commercial development?

25 A. Correct.

1 Q. Now, then, in making that recommendation  
2 as planner, you assimilate all of this data;  
3 correct?

4 A. Yes, sir.

5 Q. That you received input from property  
6 owners, input from the planning commission, et  
7 cetera, and then this map reflects, to a certain  
8 extent, certain conclusions that you have drawn; is  
9 that correct?

10 A. Yes, sir.

11 Q. And is it correct to say that your  
12 conclusions or proposals were based on what you felt  
13 was the majority feeling or consensus at the time?

14 A. As I indicated previously, we went through  
15 a number of innovations of these kinds of draft  
16 maps, and we spent some time over that year's period  
17 of time sketching potential uses of land in the  
18 proposed annexation area. This particular exhibit  
19 is the result of the planning commission's consensus  
20 as to what potential zoning district should be  
21 adopted for the Anderson Junction area.

22 Q. Now, you said in passing that that process  
23 of developing that feedback and information took how  
24 long?

25 A. Again, I believe we began in January of

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1 1993, and this map was produced in November of 1993.  
 2 Q. And during that process --  
 3 A. Monthly.  
 4 Q. And there was a fairly constant flow of  
 5 information and discussion?  
 6 A. Yes, sir.  
 7 Q. Now, you have made reference to, as part  
 8 of the process, looking at what the Washington  
 9 County Commission had zoned that newly annexed  
 10 property; is that correct?  
 11 A. That's correct.  
 12 MR. FINLAYSON: I object to Washington  
 13 County information inasmuch as a matter of law. The  
 14 Court of Appeals has already determined that the  
 15 Washington County zoning was unlawful as for the  
 16 primary purpose of -- (inaudible.)  
 17 MR. RONNOW: Your Honor, may I address  
 18 that before you rule?  
 19 THE COURT: I was not aware that the Court  
 20 of Appeals had ruled on that issue, counsel.  
 21 MR. RONNOW: Your Honor --  
 22 MR. FINLAYSON: In my brief, I quote them,  
 23 and they have a specific sentence that says, We find  
 24 that that is unlawful -- let's see, I'll find the  
 25 page number.

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1 MR. RONNOW: Your Honor, at page -- Your  
 2 Honor, are you looking from the Pacific Digest  
 3 copy?  
 4 THE COURT: Actually, counsel, I have the  
 5 Court of Appeals remitter together with their  
 6 opinion right here. I also have the memoranda  
 7 submitted by both counsel, and I have the -- and I  
 8 have the Utah advanced report copy.  
 9 MR. RONNOW: May I submit to the Court the  
 10 Pacific Digest copy because I think the appropriate  
 11 citation should be to that -- those page numbers.  
 12 THE COURT: Let's use it in that fashion.  
 13 MR. RONNOW: Your Honor, if I may just  
 14 assist Mr. Finlayson. We have nothing to hide  
 15 here. I draw your attention to page 769 is the  
 16 first statement, and the second column towards the  
 17 bottom is the first statement that I think he's  
 18 referring to wherein the Court of Appeals says, Kunz  
 19 is, therefore, bound by the prior adjudication that  
 20 Washington County zoning of Eveleth's land was for  
 21 the primary purpose of outdoor advertising. And we  
 22 don't dispute that holding as it would become the  
 23 law of this case.  
 24 What I am soliciting from Mr. Sizemore,  
 25 however, runs to the left-hand column of page 769 in

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1 which the Court of Appeals specifically suggests  
 2 that relevant evidence would include evidence of  
 3 actual land use or evidence that the zoning body  
 4 merely perpetrated a prior zoning determination.  
 5 They have specifically expressed that as fair game.  
 6 THE COURT: Perpetuated rather than  
 7 perpetrated.  
 8 MR. RONNOW: I'm sorry, Your Honor.  
 9 THE COURT: That's okay.  
 10 MR. RONNOW: I'll get my teeth back in.  
 11 THE COURT: Mr. Finlayson, let's focus on  
 12 your objection. Your objection is that the --  
 13 MR. FINLAYSON: I'm not sure what -- there  
 14 was a reference to the Washington County zoning  
 15 plan, and I wasn't sure where that was going to go,  
 16 but it looks like you are going to rely on the  
 17 Washington County zoning plan, and I wanted to point  
 18 out at that point that the Court of Appeals has  
 19 determined that as a matter of law that Washington  
 20 County zoning is unlawful as providing for the -- as  
 21 being for the primary purpose of allowing outdoor  
 22 advertising, and when considering other issues, we  
 23 can't ignore that the Court made that legal  
 24 determination.  
 25 MR. RONNOW: Your Honor, we are not

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1 submitting in any way, shape, or form. I hesitate  
 2 at this point, counsel, on his speculation. We're  
 3 certainly not submitting Washington County's zoning  
 4 authority as authority for anything. The witness  
 5 said that they looked at that zoning, and the Court  
 6 of Appeals specifically raise the issue of did  
 7 Toquerville perpetuate that zone. That's where I'm  
 8 headed.  
 9 THE COURT: And I understand you,  
 10 counsel. Your caution is well taken, Mr.  
 11 Finlayson. We will tiptoe carefully along this  
 12 path, but at this point, your objection is  
 13 overruled. Let's keep it at mind carefully.  
 14 Rephrase your question again, Mr. Ronnow. Let's  
 15 start back up.  
 16 MR. RONNOW: Your Honor --  
 17 MR. FINLAYSON: One final sentence. The  
 18 Court in its findings of fact said that Toquerville  
 19 -- it didn't use the word perpetuated -- retained  
 20 the Washington County zoning. This Court found, as  
 21 a matter of fact, that Toquerville retained the  
 22 Washington County zoning category and --  
 23 THE COURT: And I understand that,  
 24 counsel, but the concern that I have is to determine  
 25 whether or not the primary purpose behind

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1 Toquerville in retaining this designation as  
2 commercial zoning was to allow outdoor advertising.

3 That is the focus the Court of Appeals has  
4 given me, and that's where I'm going. And in  
5 viewing all the evidence and facts and probative of  
6 that issue, I'm going to overrule your objection.  
7 Mr. Ronnow, again, state your question.

8 MR. FINLAYSON: Thank you, Your Honor.

9 MR. RONNOW:

10 Q. Mr. Sizemore, you made reference to the  
11 fact as one part of the great body of information  
12 that you refer to incorporated in your designs --  
13 (inaudible) -- with regard to master planning was a  
14 review of what the Washington County existing  
15 ordinance provided; is that correct?

16 A. That is correct.

17 Q. My question is this: Did your 11-month  
18 process of reaching this zoning map proposal that is  
19 reflected in Exhibit 1, after 11 months, would you  
20 characterize that as the -- let me rephrase that.

21 Did you ever, as part of your  
22 recommendation, merely seek to rubber stamp what  
23 Washington County had designated that property?

24 A. No, sir.

25 Q. Now, did you ever incorporate into your

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1 recommendation, as a basis for your recommendation,  
2 the notion or proposal that the Anderson Junction  
3 property should be designated H-C for the purpose of  
4 allowing outdoor advertising?

5 A. No, sir.

6 Q. Now, then, Mr. Sizemore, once you had  
7 reached the point of preparing this master plan and  
8 zoning map, you made your recommendation, did you  
9 participate in its final adoption?

10 A. No, sir. After these draft maps were  
11 prepared, they were submitted to the planning  
12 commission to hold the required public hearing that  
13 the planning commission is to hold according to  
14 state law, and then their recommendation goes to the  
15 city council, the town board in this case.

16 I was involved with the planning  
17 commission's deliberations but was not involved past  
18 that point. I did not attend the city council  
19 hearing as I recall.

20 Q. All right. But to clarify, the map we've  
21 been working from as Exhibit 1 appears to you to be  
22 -- or to be a copy of the zoning map that you  
23 prepared for presentation to the planning  
24 commission?

25 A. That is correct.

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1 MR. RONNOW: No further questions at this  
2 time, Your Honor.

3 THE COURT: Counsel, I think it's a good  
4 time to take our mid-morning recess. Let's stand in  
5 recess about 10 minutes. For your housekeeping  
6 concerns, I intend to go in session until 12:30.  
7 Then we would break and pick up again about a  
8 quarter to two, if that helps you align witnesses  
9 and be ready.

10 MR. RONNOW: That will work, Your Honor.

11 THE COURT: All right. Then we'll be in  
12 recess about 10 minutes.

13 (Recess.)

14 THE COURT: We are back in session in Kunz  
15 versus Department of Transportation. Counsel are  
16 present. The witness is on the witness stand, and  
17 Mr. Finlayson, you may cross-examine.

18 MR. FINLAYSON: Thank you.

19 -oOo-

20 CROSS-EXAMINATION

21 BY MR. FINLAYSON:

22 Q. Mr. Sizemore, you referred to maps and  
23 recommendations and also the Toquerville zoning  
24 ordinance. Do any of them say anything about  
25 whether it's appropriate to have signs?

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1 A. No, sir.

2 Q. Did you anticipate that that would be  
3 addressed at a future time?

4 A. Yes, sir.

5 Q. Were you aware of the three large  
6 billboards on the Eveleth property at the time of  
7 this process of the zoning and annexation?

8 A. Yes, sir.

9 Q. In your discussions with the planning  
10 commission, was there any discussion of those  
11 outdoor advertising signs?

12 A. Yes, sir, I recall some discussions.

13 Q. Okay. Were they aware of the natural  
14 beauty of the area where the signs were?

15 MR. RONNOW: Objection, calls for  
16 speculation.

17 MR. FINLAYSON:

18 Q. Did they express awareness of the nature  
19 of that area?

20 A. I don't recall that being part of the  
21 discussion.

22 Q. Did anyone on the commission ever express  
23 a preference for having signs there?

24 A. My memory doesn't serve me in terms of  
25 whether it was an actual planning commissioner or if



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1 it were -- was just an audience participant, but the  
2 discussion of the signs did come up, and the  
3 inappropriateness of outdoor advertising along that  
4 corridor was a topic of discussion.  
5 Q. Did any commissioner ever say, to your  
6 recollection, that he thought that signs were  
7 inappropriate there?  
8 MR. RONNOW: Objection, asked and just  
9 answered.  
10 MR. FINLAYSON: No, it's a different  
11 question.  
12 THE COURT: He focused specifically on a  
13 planning commissioner, counsel. Overruled. Do you  
14 recall any planning commissioner opining on the  
15 appropriateness of the signs?  
16 THE WITNESS: It's been too long. I  
17 cannot recall whether it was a planning commissioner  
18 or a audience participant.  
19 THE COURT: All right.  
20 MR. FINLAYSON: Thank you.  
21 Q. You have testified to your experience and  
22 background in city planning and zoning. As a zoning  
23 consultant, do you have an opinion as to whether it  
24 is appropriate to place signs and replace these  
25 signs before they were removed?

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1 MR. RONNOW: Objection, Your Honor. I  
2 think that is beyond the scope of his testimony on  
3 direct. He's soliciting affirmative expert opinion  
4 from a witness that was -- didn't present that  
5 specific issue.  
6 THE COURT: On scope of cross-examination,  
7 I'll sustain your objection. It is beyond the  
8 scope. Next question, Mr. Finlayson.  
9 MR. FINLAYSON: I would request the  
10 opportunity of making this witness my own for the  
11 purpose of this question either now or later.  
12 Perhaps for the convenience of witnesses, I could  
13 ask that now. I don't know.  
14 THE COURT: Finish up your cross, counsel,  
15 then we'll do that without running Mr. Sizemore back  
16 and forth. We'll address the issue at that point,  
17 at that juncture.  
18 MR. FINLAYSON: Thank you.  
19 Q. When commercial development -- let me --  
20 commercial development would be more naturally  
21 placed first right at the Anderson Junction rather  
22 than further up where the signs were; is that  
23 correct?  
24 A. Yes, sir. That would be a logical  
25 development pattern.

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1 Q. There isn't any commercial development at  
2 this point right at the junction; is that correct?  
3 A. That's correct.  
4 Q. The -- there is a water tank presently on  
5 the west side of I-15 that is south of the road that  
6 crosses there at Anderson Junction; is that correct?  
7 A. That is correct.  
8 Q. And presently there is no water that is  
9 run up to the area where the signs are?  
10 A. I'm not aware of the location of culinary  
11 waterlines on the subject property.  
12 Q. And while you were working on the project,  
13 there was no culinary water that went up there?  
14 A. No, sir.  
15 Q. And there was no sewer that went up there?  
16 A. No, sir.  
17 Q. And so far as you're aware, there is none  
18 today?  
19 A. No, sir.  
20 MR. FINLAYSON: That's all I have on  
21 cross.  
22 THE COURT: All right. Mr. Ronnow,  
23 anything on redirect before I get back to Mr.  
24 Finlayson's request?  
25 MR. RONNOW: Yes, Your Honor.

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1 THE COURT: Go ahead  
2 -oOo-  
3 REDIRECT EXAMINATION  
4 BY MR. RONNOW:  
5 Q. Mr. Sizemore, do you have Exhibit 2, the  
6 zoning ordinance, in front of you there?  
7 A. I do.  
8 Q. Direct your attention to page 29. How is  
9 29 -- page 29 titled?  
10 A. Signs.  
11 Q. That is chapter 12 of the ordinance; is  
12 that correct?  
13 A. Yes, sir.  
14 Q. And can you tell from that ordinance --  
15 direct your attention, first of all, to the  
16 left-hand side of the ordinance, there's a column  
17 apparently defining types -- or indicating types of  
18 signs; is that correct?  
19 A. Yes, sir.  
20 Q. Do you see that first category,  
21 advertising; is that correct?  
22 A. Yes.  
23 Q. Now, using that matrix that appears on  
24 page 29 in the ordinance, can you tell whether  
25 advertising signs are permitted use within the



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1 highway commercial zone?

2 A. My reading of the page would indicate that

3 they are conditional use.

4 Q. All right. And, in fact, if we flip back

5 over to page 38, all uses in the highway commercial

6 are designated conditional; isn't that correct?

7 A. That is correct.

8 Q. Based on your experience as a planner,

9 have you been involved in preparing and assisting

10 communities in developing zoning ordinances

11 specifically?

12 A. Yes, sir.

13 Q. So that you're familiar with the

14 conditional use procedure?

15 A. I am.

16 Q. Generally?

17 A. Yes, sir.

18 Q. And are you familiar with the variance

19 procedure generally?

20 A. I am.

21 Q. So that if under the sign ordinance here

22 we have advertising as a conditional use under H-C

23 coupled with all uses being conditional under the

24 H-C zone, isn't it possible --

25 MR. FINLAYSON: Objection, leading.

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1 THE COURT: That is -- that is the

2 absolute trip wire for a leading question. I see

3 the reason for Mr. Finlayson's objection. It's

4 probably well taken. Rephrase your question. Don't

5 use "isn't it possible," counsel.

6 MR. RONNOW:

7 Q. Under the conditional use concept, that

8 designation in the H-C zoning would allow

9 consideration and review --

10 MR. FINLAYSON: Objection, leading.

11 THE COURT: Let's let him finish it first,

12 counsel.

13 MR. FINLAYSON: He said if it would

14 allow. It's a statement. It's -- nothing that

15 follows could be anything other than leading.

16 THE COURT: Well, depends on where he

17 goes. It may be a long preamble. Go ahead, Mr.

18 Ronnow.

19 MR. RONNOW:

20 Q. Mr. Sizemore, the H-C zone that we've been

21 discussing, zoning ordinance -- in the Toquerville

22 zoning ordinance at page 38 provides all uses are

23 subject to conditional use permit; is that correct?

24 A. That's correct.

25 Q. And as you just testified, under chapter

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1 12 of that ordinance, it appears that advertising is

2 a conditional use under the sign ordinance in

3 highway commercial; correct?

4 MR. FINLAYSON: I object. This is leading

5 or argument, one or the other.

6 THE COURT: Well, counsel, the problem

7 that Mr. Ronnow has is that he has a document here

8 that he has not yet been able to enter into

9 evidence, and he may need to get another witness in

10 order to establish its admissibility.

11 However, in terms of convenience of

12 presenting his case, he has Mr. Sizemore on the

13 stand who has testified as to his familiarity with

14 the ordinance, which I cannot refer to now because

15 it's not in evidence yet.

16 Mr. Ronnow is indeed technically leading

17 the witness. He is technically asking questions

18 that might be argumentative were Exhibit No. 2 in

19 evidence, but it's not in yet.

20 MR. FINLAYSON: I'm not objecting to

21 foundation. I'm even assuming, for purpose of

22 argument, that there's no foundational problem. It

23 still has those effects.

24 THE COURT: Well, I understand, counsel,

25 but the Court has discretion under Rule 611 to

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1 conduct the presentation of evidence in a reasonable

2 fashion and see that it is conducted in a reasonable

3 fashion, and I am going to overrule your objection

4 finding that it's a lot easier to work with Mr.

5 Sizemore while he's here rather than run him back

6 and forth. Mr. Ronnow, start up again.

7 MR. RONNOW:

8 Q. Based on the H-C ordinance, the highway

9 commercial ordinance we've been discussing and

10 provisions therein, and the chapter 12 sign

11 ordinance, Toquerville's zoning ordinance that we're

12 now discussing, can an applicant seek a conditional

13 use permit in highway commercial for an advertising

14 sign?

15 A. Yes, sir.

16 Q. Now, you have testified that you're

17 generally familiar with the variance law and

18 procedures. Let me focus that. Are you familiar

19 with the state law found in the Utah Code with

20 regard to general variance procedure?

21 A. I am.

22 Q. And can an applicant landowner seek a

23 variance from a town, a variance to any provision in

24 the zoning ordinance?

25 A. My understanding of the state law is that

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1 variances are very strictly regulated into three  
 2 specific areas and that variance of a use is not  
 3 allowed according to case law.  
 4 Q. Right, but we have a conditional use  
 5 established here; isn't that correct?  
 6 A. Yes.  
 7 Q. So the applicant may seek a variance as to  
 8 parameters of that use under state law; isn't that  
 9 correct?  
 10 MR. FINLAYSON: Objection, leading.  
 11 MR. RONNOW:  
 12 Q. May an applicant landowner, under the Utah  
 13 state variance procedure, file an application  
 14 seeking a variance as to the limitations of a use  
 15 that is permitted in his zone?  
 16 A. Yes.  
 17 Q. And if he meets all those criteria that  
 18 are outlined in the code in case law, could he  
 19 receive -- or could he expand the limitations if  
 20 appropriate?  
 21 A. I'm not sure I understand the question.  
 22 Q. Well, he may seek a variance under the  
 23 strict application of the statute to a permitted  
 24 use; correct?  
 25 A. I don't interpret the state code that

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1 way. I'm sorry.  
 2 Q. All right. Let me back up again. We have  
 3 a permitted use?  
 4 A. Yes.  
 5 Q. Sign, has to go through a conditional use  
 6 procedure. As a planner, based on your experience  
 7 in understanding of the Utah Code, I'm not asking  
 8 you to comment except generally, may a property  
 9 owner, by the process of variance procedure, seek to  
 10 acquire a variance, a special treatment, so to  
 11 speak, generally, to a permitted use in a given  
 12 zone?  
 13 A. I am not aware of that process being used  
 14 to expand or alter a permitted use.  
 15 Q. Well, for example, if I have -- if I have  
 16 a ordinance that allows me a driveway that's part  
 17 and parcel of my permitted use on that property, but  
 18 it limits my location of that driveway, may I seek a  
 19 variance to -- to allow a special treatment to  
 20 locate that driveway in a place other than would  
 21 normally be required?  
 22 A. Certainly an application for a variance  
 23 can be made.  
 24 Q. That's all I'm asking.  
 25 A. Yes.

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1 Q. All right. So that I may, under the  
 2 ordinance, seek to change the strict application of  
 3 that use in relationship to location?  
 4 A. Certainly.  
 5 Q. As long as it's a permitted use, and I can  
 6 meet the other criteria of a variance, I may make  
 7 application for a variance that would change,  
 8 modify, expand, abate certain restrictions to my  
 9 permitted use; is that correct?  
 10 A. Certainly the application can be made.  
 11 Q. All right. That's all we're asking about  
 12 because anything else would ask you to speculate.  
 13 All right.  
 14 MR. RONNOW: No further questions, Your  
 15 Honor.  
 16 THE COURT: All right. We now have  
 17 established this witness' expertise, I think, for  
 18 your needs, Mr. Finlayson. I'll go along at this  
 19 point and allow you to ask your questions, as though  
 20 he were your own witness, to opine on those issues  
 21 that you previously approached. Do you want to do  
 22 that now, counsel, or do you want to carry up with  
 23 some other things?  
 24 MR. FINLAYSON: I would like to ask one  
 25 question more before proceeding.

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1 THE COURT: All right. Go ahead.  
 2 -oOo-  
 3 RECROSS-EXAMINATION  
 4 BY MR. FINLAYSON:  
 5 Q. That question is regardless of what may be  
 6 in the Toquerville ordinance, was it still your  
 7 intention to have further zoning specifications for  
 8 signs or not to have signs in the newly annexed  
 9 area?  
 10 A. Yes, it was the intent of the planning  
 11 commission to continue revisions of the ordinance to  
 12 address outdoor advertising.  
 13 Q. But those were never done?  
 14 A. They were never done.  
 15 MR. FINLAYSON: Thank you.  
 16 THE COURT: All right. Go ahead, counsel,  
 17 as though Mr. Sizemore were your witness.  
 18 -oOo-  
 19 DIRECT EXAMINATION  
 20 BY MR. FINLAYSON:  
 21 Q. As a zoning consultant, and the expertise  
 22 has been established, do you have an opinion whether  
 23 it is appropriate or desirable to have outdoor  
 24 advertising signs up in the area where those signs  
 25 were before removed?

1 MR. RONNOW: Objection, ambiguous as to  
 2 the term "appropriate and desirable."  
 3 MR. FINLAYSON: On direct he used the term  
 4 "appropriate" in describing what was done, and it's  
 5 only fair to use the same terminology on the cross.  
 6 THE COURT: All right. Your objection is  
 7 overruled, Mr. Ronnow. Do you have an answer, sir?  
 8 THE WITNESS: My recollection of the  
 9 discussion of this issue, at the time we went  
 10 through this process, was that we had a fairly long  
 11 discussion about the pros and cons of outdoor  
 12 advertising and the fact that there is a state  
 13 statute that directs some of the location of signs  
 14 along freeways.  
 15 I did indicate to the planning commission  
 16 that we needed to look at the State Highway  
 17 Beautification Act and determine what they could, as  
 18 a municipality, impose that might be more  
 19 restrictive than what the state code allows.  
 20 We talked about the fact that outdoor  
 21 advertising along the I-15 corridor might impede  
 22 some of the other economic development efforts that  
 23 were going on at the time in terms of tourism  
 24 development and that we wanted to retain a more  
 25 natural looking corridor entering into the St.

1 George basin.  
 2 We talked about the fact that three signs  
 3 were already erected and that we might have to live  
 4 with the decisions that allowed those signs to be  
 5 erected in the first place as prior non-conforming  
 6 uses prior to the annexation of the property. Those  
 7 all were talked about in general terms, but, again,  
 8 that was not followed up on and no proposed  
 9 ordinance amendments were developed or recommended.  
 10 MR. FINLAYSON: Okay.  
 11 Q. I would like to refocus the question a  
 12 little. Assume this is -- I'm asking your own  
 13 opinion as an expert. Assume there is no state law  
 14 one way or the other as to whether signs are lawful  
 15 or unlawful in this location. As a matter of  
 16 planning, and you, as a zoner, is this an  
 17 appropriate area for outdoor advertising?  
 18 MR. RONNOW: Objection, relevance, Your  
 19 Honor. The strict issue before the Court is the  
 20 purpose of the zoning authorities in Toquerville  
 21 Town in designating this H-C designation.  
 22 We are now going far field, creating  
 23 experts, talking about appropriateness which may  
 24 embrace a whole spectrum of issues outside of  
 25 purpose of the zoning authority. Mr. Sizemore is

1 not part of the zoning authority with regard to  
 2 policy.  
 3 THE COURT: Mr. --  
 4 MR. FINLAYSON: I have --  
 5 THE COURT: -- Finlayson, how is his  
 6 opinion on this specific issue probative to what is  
 7 before the Court in this matter?  
 8 MR. FINLAYSON: Yes. The Court of Appeals  
 9 first cited and quoted the policy of the Utah act,  
 10 which is to preserve the beauty of the area and  
 11 protect it for traveling public. It is a very  
 12 critical -- and our first point to emphasize the  
 13 policy of the act, and this goes to whether this  
 14 violates that policy and impairs the beauty of the  
 15 area and the enjoyment to the public. This is a  
 16 very critical and central point to our case. We  
 17 haven't presented it yet.  
 18 THE COURT: Counsel, you have won that  
 19 issue before the Court of Appeals. The Court of  
 20 Appeals has construed the statute contrary to this  
 21 Court's construction of the statute in order to  
 22 narrowly review the one remaining fact issue that  
 23 was not before the Court of Appeals, and that is to  
 24 determine the primary purpose issue of this  
 25 particular zoning.

1 Now, if that is all that's before this  
 2 Court, and I believe it is, why are we talking about  
 3 the overall statute? I thought I had a very narrow  
 4 finding that I needed to focus on and make for the  
 5 Court of Appeals' opinion on remand.  
 6 MR. FINLAYSON: Right at the beginning,  
 7 when you stated the issue and asked Mr. Ronnow if  
 8 that was correct, I did not have a chance to say  
 9 what I believed, and I believe that's part of what  
 10 this Court must consider, but that there is another  
 11 crucial part and that is that that specific  
 12 27-12-136.3 in parens (3) must be read in light of  
 13 the policy of the act and it would be error to  
 14 consider that specific statutory provision without  
 15 giving important credence to the policy of the act  
 16 to present beauty, and I believe the Court stated  
 17 that in its opinion.  
 18 THE COURT: But, counsel, I am looking  
 19 very specifically.  
 20 MR. RONNOW: Your Honor, it's page 6 --  
 21 769, first column with the headnote 5 and 6.  
 22 THE COURT: Well, I've got 771 where it  
 23 says conclusion. It says --  
 24 MR. RONNOW: It's restated there as well.  
 25 THE COURT: The trial court erred in

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1 concluding that the subject section that was  
2 referred to by Mr. Finlayson applies only the areas  
3 outside appropriate cities and towns. Outdoor  
4 advertising is prohibited in any location zoned for  
5 the, quote, "primary purpose of allowing outdoor  
6 advertising," close quote.

7 Because Kunz and UDOT have presented  
8 conflicting evidence providing Toquerville's primary  
9 purpose behind its zoning of Eveleth's land, we  
10 reversed a grant of summary judgment and remand for  
11 a trial on that issue.

12 MR. FINLAYSON: I believe that issue  
13 cannot be addressed without the effect on it of the  
14 purpose of the act, and I would like to read a  
15 passage in the opinion unless the Court --

16 THE COURT: Go ahead, counsel. Tell me  
17 what you're talking about. If I'm missing  
18 something, now is the time to correct it.

19 MR. FINLAYSON: Yes. I have the --  
20 (inaudible) -- report. I don't know where it is  
21 there, but it's the one, two, three, four -- it's  
22 about the seventh paragraph down from the beginning  
23 of the analysis. It's a paragraph that begins, In  
24 enacting section 27-12-136.3.

25 THE COURT: All right. Let me get to you,

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1 then. I have it right here. It's on page 769.

2 MR. RONNOW: That's correct.

3 MR. FINLAYSON: So the Court begins with a  
4 reference to 27-12-136.3, and then says what's  
5 relevant to that section. In enacting this section,  
6 the legislature must have contemplated that local  
7 zoning bodies might attempt to generate immediate  
8 revenue from lands adjacent to highways by rezoning  
9 such lands to allow outdoor advertising, however --  
10 now it links this purpose to this section --  
11 however, allowing outdoor advertising in areas  
12 without other businesses or highway services in the  
13 vicinity would violate essential purposes of the  
14 Outdoor Advertising Act enacted in part to promote  
15 the convenience and enjoyment of public travel, to  
16 protect the public investment in such highways, to  
17 preserve natural scenic beauty of land bordering on  
18 such highways, and to ensure that information in the  
19 specific interest of the traveling public is  
20 presented safely and effectively.

21 The Court took as a starting point for its  
22 consideration of 27-12-136.3 in parens (3) the  
23 policy of the act, and that specific section cannot  
24 be properly understood apart from the policy of the  
25 act, and that is a essential part to our case in

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1 chief and our argument as a whole, and I submit that  
2 it's relevant here.

3 THE COURT: All right, counsel. I  
4 overruled -- or I am going to sustain the objection  
5 on relevance. I basically disagree with your  
6 underlying focus, Mr. Finlayson, and the record  
7 should reflect why so that you have it reserved if  
8 necessary.

9 I have no idea where this lawsuit is  
10 eventually going to end up. The Court of Appeals in  
11 their opinion has indicated substantial issues of  
12 administrative law and administrative procedure  
13 which have not yet been addressed by these parties  
14 to litigation that I have no idea where it's going  
15 to finish.

16 What I do know, what I do have an absolute  
17 certainty of is the remand for the determination of  
18 the single issue for trial, which has been set forth  
19 for the Court in the conclusion of the Court of  
20 Appeals, and that is Toquerville's primary purpose  
21 behind its zoning of the subject property, Mr.  
22 Eveleth's land where these signs are, and that is  
23 what my focus is on.

24 Where that goes once the Court makes the  
25 factual finding that is mandated by the Court of

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1 Appeals is probably beyond the jurisdiction of this  
2 Court if I read the Court of Appeals appropriately,  
3 but that's not what's before me here today. I'm  
4 sustaining the objection. Any further questions of  
5 Mr. Sizemore, Mr. Finlayson?

6 MR. FINLAYSON: No, thank you, Your Honor.

7 THE COURT: Mr. Ronnow, anything more of  
8 this witness?

9 MR. RONNOW: No, Your Honor.

10 THE COURT: Thank you, Mr. Sizemore. You  
11 have endured a great deal. You may step down, sir.  
12 Your next witness, counsel.

13 MR. RONNOW: The plaintiff calls Glade  
14 Peterson.

15 THE COURT: Mr. Peterson, will you come  
16 forward, raise your hand, and be sworn.

17 MR. FINLAYSON: Would it be appropriate  
18 for me to get a proffer on what he would say on that  
19 question?

20 THE COURT: Yes, counsel. If you want to  
21 preserve your record, do that with Mr. Sizemore at  
22 some later point in the litigation, and we'll go  
23 forward with Mr. Peterson right now.

24 ///

25 ///

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1 Whereupon,  
 2 GLADE PETERSON,  
 3 having been first duly sworn to testify to the  
 4 truth, the whole truth and nothing but the truth,  
 5 was examined and testified as follows:  
 6 THE COURT: Thank you, sir. Please have a  
 7 seat here on the witness stand.  
 8 -oOo-  
 9 DIRECT EXAMINATION  
 10 BY MR. RONNOW:  
 11 Q. Would you state your full name, please.  
 12 A. Glade Lynn Peterson.  
 13 Q. Where do you reside, Mr. Peterson?  
 14 A. Toquerville --  
 15 Q. Excuse me.  
 16 A. Toquerville, Utah.  
 17 Q. How are you currently employed?  
 18 A. I'm the postmaster.  
 19 Q. And did you -- did you sit on the plan --  
 20 the Toquerville Planning Commission at any point  
 21 during the master plan and review of the annexed  
 22 property that we've been discussing here this  
 23 morning?  
 24 A. Yes.  
 25 Q. And just generally can you put a time

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1 frame on that?  
 2 A. Approximately most of 1993.  
 3 Q. Were you chairman of the planning  
 4 commission during your tenure?  
 5 A. Yes, I was.  
 6 Q. And as chairman of the planning  
 7 commission, did you participate in the master plan  
 8 and zoning map preparation discussions that have  
 9 been testified to by Mr. Sizemore here this morning?  
 10 A. Yes.  
 11 Q. Now, specifically, draw your attention to  
 12 that period of time in the general preparation. Did  
 13 you meet with Mr. Sizemore as a planning commission?  
 14 A. Yes, we did.  
 15 Q. Would you briefly describe the scope of  
 16 those meetings and discussions?  
 17 A. Well, I came on the zoning and planning  
 18 after the annexation procedure, and Ken Sizemore was  
 19 contacted. He either contacted me or I contacted  
 20 him, I don't remember which, and we set a time  
 21 within our regular scheduled zoning planning  
 22 meetings that he could come and help us do the  
 23 zoning for Anderson Junction.  
 24 And, subsequently, we determined to cover  
 25 all of Toquerville, so we made sure that all of the

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1 details, all of the I's were dotted and T's were  
 2 crossed as far as zoning was concerned.  
 3 Q. And could you describe what your  
 4 understanding at that time frame -- as planning  
 5 commission chairman, your understanding of what the  
 6 planning commission's overall duties were in the  
 7 adoption process of the master plan and zone map?  
 8 A. Basically to -- we had the zoning  
 9 ordinance that existed within the town that we  
 10 worked with. That's all that we had to work with  
 11 that I was aware of, and to get the property owners  
 12 of Anderson Junction involved and see what their  
 13 needs and desires were was, of course, a part of  
 14 it. And to have public input at our meetings from  
 15 them and anyone else who wished to make input, and  
 16 then finally to have our public hearings on what we  
 17 determined out of all of this process.  
 18 Q. Would you briefly describe how you -- how  
 19 the planning commission went about soliciting or  
 20 gathering the feedback from Anderson Junction  
 21 property owners and other residents in Toquerville?  
 22 A. I was not involved in giving out the  
 23 information by phone or letter to those people, but  
 24 I know that that was done, and also we advertised  
 25 our public meetings. And, again, those people were

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1 invited, we had those advertisements, and letters,  
 2 et cetera to come to our public hearing.  
 3 Q. So on the ongoing basis, as you were in  
 4 the discussion stage of this master plan process,  
 5 did you have multiple meetings?  
 6 A. Yes. We basically had them once a month.  
 7 Q. And those were all open meetings?  
 8 A. Those were all open meetings.  
 9 Q. And did the public attend to some degree  
 10 or another?  
 11 A. Yes. Some of them were quite heavily  
 12 attended.  
 13 Q. And in those open meetings, did you allow  
 14 or solicit comments and feedback from the public?  
 15 A. Definitely.  
 16 Q. So that as you came to this -- first, let  
 17 me stop, a foundation question. Let me draw your  
 18 attention to the map that appears on the easel here  
 19 in the courtroom, which has been marked as Exhibit  
 20 1. Are you familiar with that map?  
 21 A. Yes, I am.  
 22 Q. And is that -- I'm going to ask you to  
 23 approach the easel if you would for just a moment so  
 24 you can get a close look at that. Are you also  
 25 familiar with the zoning map that was ultimately

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1 adopted by the town council as a result of the  
2 planning commission's work in this master plan in  
3 process?  
4 A. Yes, I -- yes.  
5 Q. Is it the same map that's being used today  
6 insofar as you know?  
7 A. As far as I know, yes.  
8 Q. And have you seen it anywhere in the town  
9 hall or town records?  
10 A. Yes.  
11 Q. I now draw your attention to Exhibit No.  
12 1. Does Exhibit No. 1 appear to be a copy of that  
13 official zoning map?  
14 A. Yes, it does.  
15 Q. And does Exhibit 1 appear to be an  
16 accurate copy of the map that was ultimately  
17 submitted by the Toquerville Planning Commission to  
18 the town council with a recommendation that they  
19 adopt it as the amended zoning map?  
20 A. Yes.  
21 Q. All right. You can take your seat now.  
22 Thank you. Now, then, with regard to all this  
23 feedback from the public in your public meetings,  
24 and, I assume -- well, did the planning commission  
25 members also discuss and debate openly the master

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1 plan process and recommendation?  
2 A. Yes, we did.  
3 Q. And was Mr. Sizemore, the planner that had  
4 been retained, involved in many of those meetings?  
5 A. Yes, he was.  
6 Q. Did he openly provide feedback to the  
7 planning commission as planner?  
8 A. Yes, he did.  
9 Q. Do you recall from all of that feedback  
10 discussion, meetings, et cetera what the primary  
11 issues were that the planning commission considered  
12 with regard to zoning property at Anderson Junction?  
13 A. The issues that I am aware of and that I  
14 can recall was first we wanted to have a commercial  
15 development around the interchange, Exit 27, for  
16 purposes of helping tax revenue of the Town of  
17 Toquerville. Secondly, we did have input from some  
18 other landowners, specifically to the east, that  
19 wanted a residential zoning.  
20 Q. All right. With regard, first, to the  
21 proposed commercial zoning, based on these many  
22 meetings of the planning commission, did the -- was  
23 there a consensus among the property owners that  
24 that property should be zoned highway commercial at  
25 the Anderson Junction interchange?

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1 A. As near as I can recall, the landowners on  
2 both sides, we did have some input from landowners  
3 on the west side as well as the east side, wanted  
4 that all to be commercial.  
5 Q. Do you recall generally that at some point  
6 in this whole process you received information or  
7 had specific discussions with each of the property  
8 owners on the four corners of that Anderson Junction  
9 interchange?  
10 A. I can't specifically say how many  
11 landowners commented, but we did have quite a few  
12 landowners comment.  
13 Q. And with regard to the residential  
14 designation that is just west of the Anderson  
15 Junction interchange, was it your recollection that  
16 there was a consensus among the property owners that  
17 that be zoned residential?  
18 A. On the west side?  
19 Q. Excuse me. East side of the Anderson  
20 Junction.  
21 A. On the east side, away from the  
22 interchange, they wanted residential.  
23 Q. Now, then, with regard to your planning  
24 commissioners, when you made a recommendation --  
25 well, let me ask you this: Does Exhibit 1

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1 accurately reflect the recommendation that you, as a  
2 planning commission, made to the town council as to  
3 the designation of zoning districts in the Anderson  
4 Junction area?  
5 A. I believe that's an accurate recollection.  
6 Q. Do you recall, was there a consensus on  
7 the planning commission that the property at  
8 Anderson junction be zoned commercial?  
9 A. Definitely a consensus, yes.  
10 Q. And in the course of that, were there any  
11 other issues with regard to that commercial zoning  
12 proposal that you recall being discussed at the  
13 planning commission?  
14 A. Well, of course, the infrastructure was  
15 all discussed, water, sewer, existing water, et  
16 cetera.  
17 Q. And did -- was the planning commission  
18 aware that there was no existing sewer and water  
19 services there at the time?  
20 A. Yes, we were.  
21 Q. And so what was the -- were there  
22 proposals discussed by the planning commission as to  
23 providing those services?  
24 A. There was no specific proposals. There  
25 were general proposals.

1 Q ... right. Was there general discussion  
2 -- that's my next question. Was there general  
3 discussion of the need to provide those services in  
4 connection with the --  
5 A. There definitely was a discussion as to  
6 the need for services there most definitely.  
7 Q. Now, then, could you articulate -- you  
8 said -- let me ask this question: Were there any  
9 other bases which you considered in recommending the  
10 H-C zoning designation for the Anderson Junction  
11 properties?  
12 A. Well, like I said, we wanted some  
13 commercial development, perhaps a truck stop,  
14 motel. There was some mention of those specific  
15 things that some developers were interested in doing  
16 on around the interchange.  
17 Q. Prior to making the recommendation that  
18 the property be zoned highway commercial, did the  
19 planning commission examine and discuss other areas  
20 in the Town of Toquerville that might be zoned  
21 commercial?  
22 A. Only one other spot.  
23 Q. And where was that?  
24 A. Would you like me to show you.  
25 THE COURT: Yes, sir. If you'll go down

1 to the map, Exhibit 1, and indicate where it was  
2 that you were considering. All right. And you are  
3 indicating on the southern end of the town limits  
4 right next to the -- I'll -- (inaudible) -- the term  
5 notch, in the town boundary.  
6 THE WITNESS: Almost to the La Verkin town  
7 boundary.  
8 THE COURT: All right, sir.  
9 THE WITNESS: And the reason being is  
10 because that had been zoned commercial by future  
11 zoning commission.  
12 THE COURT: Future or past.  
13 THE WITNESS: Past, excuse me.  
14 THE COURT: Okay.  
15 THE WITNESS: Past zoning planning  
16 commission, but it had never been followed up on,  
17 which we did follow-up on.  
18 MR. RONNOW:  
19 Q. How did you follow-up on it? What action  
20 did you take?  
21 A. The landowner came in and said, look, I  
22 know -- (inaudible) -- the zoning planning has said  
23 this is all right to be commercial. The town  
24 council has approved us to be commercial, but it was  
25 never formally done and recorded. (Inaudible.) So

1 we followed up on that.  
2 Q. And what official action did you take?  
3 A. We had -- (inaudible) -- and zoned that  
4 commercial also.  
5 Q. So as a result, at the stage you made a  
6 recommendation to the town council, that small dark  
7 zone at the south end of the map on Exhibit 1 and  
8 the Anderson Junction were the only two areas in the  
9 town that were -- that you proposed to be  
10 commercial?  
11 A. That's correct.  
12 Q. All right. As part of your discussions in  
13 the planning commission, did you receive feedback  
14 from individuals regarding the location of any  
15 commercial property along the traditional downtown  
16 Main Street area of Toquerville?  
17 A. No. In fact, the -- it seemed to be the  
18 town would not -- residents did not want any  
19 commercial development -- (inaudible.)  
20 Q. All right. So that by the time you  
21 reached -- you reached your -- the recommendation to  
22 the town council, was there a consensus in the  
23 planning commission that the Anderson Junction be  
24 designated highway commercial?  
25 A. Yes, because we thought that was the ideal

1 situation. It was right in the town proper. It was  
2 around the interchange. We felt -- (inaudible) --  
3 ideal situation.  
4 Q. And in the course of those discussions,  
5 was there any general discussion with regard to the  
6 kind of unique commercial opportunities that may be  
7 presented in connection to an interstate  
8 interchange?  
9 A. Yes, because there's nothing between Cedar  
10 City and Washington along the interchange there.  
11 It's -- (inaudible) -- Highway 17 to go to Zion  
12 National Park, and there were some property owners  
13 that owned -- I don't know if they owned specific or  
14 had options, but they wanted some growth there.  
15 Q. All right. You can take your seat now.  
16 Mr. Peterson, you heard discussion regarding signs,  
17 and I want you to describe for the Court, based on  
18 your own recollection of that whole deliberative  
19 process in developing a master plan and zoning map,  
20 what is your recollection as to discussion of any  
21 outdoor advertising signs in the Anderson Junction  
22 area?  
23 A. Well, I've heard all Mr. Sizemore said,  
24 and I've read a copy of the minutes that mentions  
25 that was discussed just one sentence in there. I



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1 can't recall specifically having much of a  
 2 discussion on the signs. I can't recall it being a  
 3 issue with me at all.  
 4 Q All right. Do you recall ever having --  
 5 ever in your discussions with the planning  
 6 commission issues of signage reaching a level that  
 7 it was a primary or important consideration to the  
 8 planning commission?  
 9 A I'd have to say, no, it wasn't. In my  
 10 opinion, my memory and what I thought, it was not a  
 11 -- it was not an issue.  
 12 Q Now, you heard the planner, Mr. Sizemore,  
 13 talk about the large scope of the process he  
 14 followed including a review of what the preexisting  
 15 zoning designation in Washington County was. As a  
 16 planning commission, do you recall ever discussing  
 17 the prior Washington County zoning designation?  
 18 A I can't really recall even knowing what  
 19 the prior county designation was. It didn't have  
 20 any bearing on what we were doing as far as our  
 21 zoning that I can recall.  
 22 Q Now, then, as planning commission  
 23 chairman, when you started this project, did you  
 24 have any direction from town officials directing you  
 25 how you should specifically zone any of those

**R 955** / Page 122

1 private properties in the newly annexed area?  
 2 A. You're speaking of the town council?  
 3 Q Town council, yes.  
 4 A Very little input from them. They were  
 5 just leaving us to do our planning.  
 6 Q. So as far as you were concerned, as the  
 7 planning commissioner working with the planner, were  
 8 you starting with a clean slate on the master plan?  
 9 A Yes. There -- there really hadn't been  
 10 anything done on the master plan. There had been  
 11 zoning in place, but really nothing on the master  
 12 plan up until this point.  
 13 Q Do you recall any discussions -- strike  
 14 that. Did you -- I'm going to draw your attention  
 15 to ask you to take a look at Plaintiff's Exhibit 2.  
 16 MR RONNOW Bailiff, thank you.  
 17 THE WITNESS Without going through every  
 18 page, this appears to be the zoning ordinances that  
 19 we were using, yes.  
 20 MR RONNOW.  
 21 Q So, then, as planning commission chairman,  
 22 you familiarized yourself with the zoning ordinance  
 23 that was in place during your tenure as chairman?  
 24 A That is correct.  
 25 Q And in place during this master plan in

**R 956** / Page 123

1 process leading up to the recommendation to the town  
 2 council; is that correct?  
 3 A That's correct.  
 4 Q And your testimony is that Exhibit 2  
 5 appears to be that zoning ordinance?  
 6 A Yes.  
 7 Q Did you have any understanding with regard  
 8 to when that was adopted?  
 9 A My understanding was, and all I had to go  
 10 by was the date on the front, 1978, and,  
 11 subsequently, I did go back and find an entry in the  
 12 minutes that indicated that was when it was adopted.  
 13 Q Originally? Now, drawing your attention  
 14 to the last page of Exhibit 2. It has --  
 15 A Last page?  
 16 Q Last page.  
 17 A Okay.  
 18 Q It has date of adoption showing March 10,  
 19 1982. Do you have any recollection of any  
 20 understanding as to the discrepancy between those  
 21 two dates of '82 or '78?  
 22 A. Yes, and I believe that's why I went back  
 23 to the minutes. I believe that they were -- that's  
 24 when it was compiled, and it wasn't really adopted  
 25 until 1982.

**R 957** / Page 124

1 Q. All right. So when you say 19 -- that was  
 2 when it was compiled, you mean the 1978?  
 3 A Right.  
 4 Q. The initial work that went into drafting  
 5 it?  
 6 A Yes.  
 7 Q And so basis of your recollection during  
 8 your tenure as planning commission chairman, this  
 9 ordinance is dated 1982 was the operative zoning  
 10 order in Toquerville?  
 11 A. That is correct.  
 12 Q. And had been apparently since 1982. Is  
 13 that your understanding?  
 14 A. Yes.  
 15 Q And have you reviewed that zoning  
 16 ordinance as part of the official record of  
 17 Toquerville Town?  
 18 A. Yes.  
 19 MR. RONNOW. Your Honor, we would move for  
 20 the admission of Exhibit 2.  
 21 THE COURT. Any objection to No. 2, Mr.  
 22 Finlayson?  
 23 MR FINLAYSON No, Your Honor.  
 24 THE COURT All right. 2 is received.  
 25 ///



R 958 / Page 125

1 (Whereupon, Plaintiff's Exhibit  
2 2 was received into evidence.)  
3 MR. RONNOW.  
4 Q. Finally, Mr. Peterson, in your  
5 deliberations, did you -- in your recommendation to  
6 the town council of this zoning map, which is  
7 Exhibit 1, was it ever the designation of the  
8 highway commercial zone at Anderson Junction, was  
9 that ever prompted or motivated by a desire on your  
10 part to merely accommodate outdoor advertising?  
11 A. No.  
12 Q. Was that ever a factor in your  
13 recommendation to the council?  
14 A. No.  
15 MR. RONNOW: Thank you. No further  
16 questions.  
17 THE COURT: Mr. Finlayson, you may cross.  
18 MR. FINLAYSON: Yes. Thank you.  
19 -oOo-  
20 CROSS-EXAMINATION  
21 BY MR. FINLAYSON:  
22 Q. You referred to a truck stop and motel as  
23 possible commercial development; is that correct?  
24 A. Yes, sir.  
25 Q. Would they more naturally go right down at

R 959 / Page 126

1 the Anderson Junction or up further where the signs  
2 are?  
3 MR. RONNOW: Object, that calls for  
4 speculation and is ambiguous with regard to more  
5 naturally.  
6 THE COURT: Rephrase your question.  
7 Sustained on the form of the question.  
8 MR. FINLAYSON:  
9 Q. You were a member of the zoning  
10 commission?  
11 A. Yes.  
12 Q. And you considered possible uses of land?  
13 A. Yes.  
14 Q. What was likely and not likely in terms of  
15 development of various types; isn't that correct?  
16 A. That's correct.  
17 Q. Would it be more likely that this truck  
18 stop and motel would go right near the intersection  
19 or up where the signs are?  
20 A. More likely, yes, would be more likely to  
21 be at the interchange.  
22 Q. Yet there is nothing even at the  
23 interchange; isn't that correct?  
24 A. That's correct.  
25 Q. There were three signs there, and you were

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1 aware of their existence?  
2 A. Just generally. That was about it.  
3 Q. Did you assume that since they were there  
4 so far as you knew they were legal?  
5 A. Yes.  
6 Q. That was your assumption?  
7 A. That was our assumption.  
8 Q. You never were concerned about any details  
9 or differences between the Washington County zoning  
10 as highway commercial and the Toquerville zoning as  
11 highway commercial, you never concerned yourself  
12 with any differences in details there might be;  
13 isn't that correct?  
14 A. That's correct. I personally really  
15 wasn't aware of what Washington County had zoned  
16 that.  
17 Q. And so when you adopted the highway  
18 commercial category for Toquerville and Washington  
19 County was the same highway commercial, you didn't  
20 change that zoning category, did you?  
21 A. No, I said we really weren't aware of what  
22 Washington County had. We zoned what I had as  
23 Exhibit 2 and zoned it highway commercial.  
24 MR. FINLAYSON: That's all I have, Your  
25 Honor.

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1 THE COURT: Anything more, Mr. Ronnow?  
2 MR. RONNOW: No, Your Honor.  
3 THE COURT: Thank you, Mr. Peterson. You  
4 may step down, and you may be excused, sir. Your  
5 next witness, counsel.  
6 MR. RONNOW: Your Honor, plaintiffs call  
7 Charles Wahlquist.  
8 THE COURT: Mr. Wahlquist, will you come  
9 forward and be sworn.  
10 Whereupon,  
11 CHARLES WAHLQUIST,  
12 having been first duly sworn to testify to the  
13 truth, the whole truth and nothing but the truth,  
14 was examined and testified as follows:  
15 THE COURT: Thank you, sir. Please have a  
16 seat here on the witness stand.  
17 -oOo-  
18 DIRECT EXAMINATION  
19 BY MR. RONNOW:  
20 Q. Would you state your name -- full name,  
21 please.  
22 A. Charles Pack Wahlquist.  
23 Q. And where do you reside?  
24 A. In Toquerville.  
25 Q. And Mr. Wahlquist, are you retired now?

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1 A. Yes.

2 Q. And during the time frame that we've been

3 discussing here this morning, generally through from

4 1992 through 1993, were you the mayor of Toquerville

5 Town when the annexation and master plan in process

6 took place?

7 A. Yes, I was mayor from 1990 to 1995.

8 Q. So, then, you -- did you participate in

9 the discussions and town meetings that had to do

10 with the master plan -- excuse me -- first, with the

11 annexation of the property out near Anderson

12 Junction?

13 A. Yes.

14 Q. And did you participate in discussions

15 with the planner?

16 A. No. I went there first. Actually, I went

17 to city engineer who we retained for and talked to

18 him about annexation. Our original plan is somewhat

19 different than what the Exhibit No. 1, but after his

20 work, why then that's what we ended up with.

21 MR. RONNOW: Your Honor, may I approach

22 the clerk with an exhibit.

23 THE COURT: Certainly, counsel. You'll

24 have to do the leg work until she gets back.

25 MR. RONNOW: That's all right as long as

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1 no one shoots me while I approach the witness.

2 Q. Mr. Wahlquist, I show you what's been

3 marked as Plaintiff's Exhibit 3. Would you review

4 that for a moment, please. Have you had a chance to

5 review that?

6 A. Yes.

7 Q. Are you familiar with that?

8 A. Yes, I wrote the agenda.

9 Q. Now, this is a -- would you describe what

10 that is to the Court, please?

11 A. This is an agenda of our October --

12 October 14, 1992 meeting.

13 Q. When you say "agenda," is -- are these the

14 minutes that are recorded at that meeting?

15 A. This is the minutes as a result of the

16 agenda I had prepared.

17 Q. All right. Drawing your attention to the,

18 oh, just below midway down that first page, the

19 top --

20 THE COURT: Counsel, let me ask if Mr.

21 Finlayson -- Mr. Finlayson, do you have any

22 objection to the Court receiving this exhibit as a

23 copy of the town minutes?

24 MR. FINLAYSON: No, I do not, Your Honor.

25 THE COURT: All right. Then let's just

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1 receive Exhibit No. 3. There's no reason to make

2 the mayor read them to me, counsel. I can read them

3 myself.

4 MR. RONNOW: Thank you, Your Honor.

5 THE COURT: All right. Exhibit 3 is

6 received.

7 (Whereupon, Plaintiff's Exhibit

8 3 was received into evidence.)

9 MR. RONNOW:

10 Q. Now, then, the meeting on October 14,

11 1992, in which the town council adopted the

12 annexation ordinance, is Exhibit 1, a map that

13 accurately reflects the annexation as marked in

14 green that was adopted on that date?

15 A. Yes. That's the final -- final map.

16 Q. All right. Now, then, moving on to the

17 annexation, did you participate in the master plan

18 process and procedure?

19 A. No. We turned that over to the planning

20 and zoning. I did not attend their meetings.

21 Q. Why is that?

22 A. Well, I didn't want to feel that they were

23 intimidated.

24 Q. All right. Did you participate generally

25 in the community in discussions on the street with

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1 regard to a master planning and zoning?

2 A. Well, we had some discussion in our

3 meetings unofficially. We had discussions, like you

4 said, on the street with one of the councilman a

5 time or two.

6 Q. While you didn't participate directly in

7 planning commission meetings, were you generally

8 aware as mayor as this proposed master plan and

9 zoning map began to evolve?

10 A. I knew what it was. They kept me posted.

11 Q. And were you aware of the issues that the

12 planning commission was discussing with regard to

13 zoning designations near Anderson Junction?

14 A. Yes. It may not have been what I was

15 hoping to get, but I was aware of what they were

16 doing.

17 Q. All right. Then did -- based on your own

18 experience during this time frame, did you receive

19 feedback from property owners or residents of

20 Toquerville with regard to the proposed zoning?

21 A. Well, yes. You always receive a lot of

22 phone calls and personal visits from various people

23 pro and con. My first -- the reason we even

24 considered annexation is because of phone calls from

25 people who are interested in developing some

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1 property in that area. It's one of the nicest on  
2 and off ramps between Salt Lake and Las Vegas, and  
3 it's right on Highway 17 going to Grand -- or to  
4 Grand Canyon, then on down to Zion Park.

5 So we were interested in commercial area.  
6 We didn't have any commercial area. We had a store  
7 at one time years ago, a store and service station  
8 and a garage. It was all kind of closed up, but I  
9 felt that we needed to get some additional  
10 financing, additional money coming into the town.

11 Q. And so could you describe, based on your  
12 feedback and discussions with members of the public,  
13 what the issues were with regard to that proposed  
14 commercial zoning in the Anderson Junction area?

15 A. Most of them that were in favor of it.

16 Q. And why were they in favor of it?

17 A. Well, they put it out of town, put the --  
18 (inaudible) -- out next to the freeway.

19 Q. Can you see this area from downtown  
20 Toquerville?

21 A. No.

22 Q. Did you receive some objections?

23 A. Oh, there's always people who are  
24 negative, yes. There's a few objections.

25 Q. All right. What were the -- what were the

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1 other issues, apart from the commercial,  
2 non-commercial debate, what were other issues that  
3 you're aware of with regard to the proposed  
4 annexation and master plan?

5 A. Well, all of the cities in southern Utah  
6 are beginning to grow and expand, just explode, and  
7 I felt that that would eventually happen in  
8 Toquerville and that we ought to have a handle on  
9 some of that growth. And so we were expecting to  
10 annex more property in order to kind of control what  
11 went on.

12 Q. So you in attempting to get a handle on  
13 growth, as you characterize it, does that mean you  
14 were prepared to annex that property first and solve  
15 utility and water issues later?

16 A. Well, that's the only way it could  
17 happen. We couldn't install utilities outside the  
18 city limits, period. State law.

19 Q. And as mayor, were you involved in the  
20 ongoing discussion of water issues in that area?

21 A. Oh, yes. I've always been involved in  
22 water issues.

23 Q. And during that whole process, would you  
24 describe to the Court what the situation was and the  
25 discussion was with regard to water services?

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1 A. Just north of the city up above the little  
2 notch there and on up on the other side, there's an  
3 old oil well up there that was built back 40 years  
4 ago, and I had been given a copy of the drilling  
5 log. And they hit a very good stream of water.  
6 It's deep water, and it was good water. And it was  
7 tested. And I took Lynn Naegle, and we hiked up to  
8 that site.

9 Q. Who is Lynn Naegle, sir?

10 A. He had some property up there just north  
11 of town. His mother had a little farm up there when  
12 he was a boy, and he took up us up and showed us  
13 where this well -- showed me where this well was.  
14 It was in January right after I was taken office,  
15 and so I --

16 Q. That's January of 1990?

17 A. 1990. And we hiked up there, a little  
18 snow on the ground, and it was a long hike, but --  
19 and I filed for well rights on that site with the  
20 State. Working with Kim Wallace as our engineer, we  
21 filed on three sites inside the city limits along  
22 the fall line.

23 Q. When you say "we filed," you're talking  
24 about on behalf of the town?

25 A. On behalf of the town.

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1 Q. All right.

2 A. We filed for well rights on three sites  
3 along the fall line because apparently we also hired  
4 Bryce Montgomery from Salt Lake to do a geological  
5 survey of the feasibility of that well and paid him  
6 a pretty good fee for that. And his fee then went  
7 with our application to the State to that well right  
8 and we have not acted on it.

9 Q. They have not acted on it to date, you  
10 mean?

11 A. No. We hoped that they would, but they  
12 haven't. We still have the filing in the office.

13 Q. All right.

14 A. (Inaudible) -- wants to build a tank up  
15 there, which would have been higher than we are, and  
16 come on down through Anderson Junction and on down  
17 through Toquerville for additional water source for  
18 Toquerville.

19 Q. You talked about building the tank. Where  
20 was the tank located -- to be located?

21 A. Up on the side. We even went to the BLM  
22 because it was just a hundred feet off of Naegle's  
23 property on BLM property to get right-of-way to do  
24 that and submitted application to them.

25 Q. With -- as the application in cooperation

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1 of the State of Utah bogged down, were there other  
2 discussions of other options that you pursued --

3 A. Yes, we started talking with water  
4 conservancy district on springs, these other  
5 springs, this little reservoir that has been  
6 mentioned. Actually, that was the upper site.  
7 There was two other lower sites, better sites than  
8 that one.

9 As they did their surveys, they said those  
10 cannot be used because improper foundation for dams  
11 or lakes be moved up to that one and determined that  
12 was the same situation in that one. It was not  
13 feasible. So those three sites were dropped by the  
14 water conservancy district.

15 Q. All right. Still within -- directing your  
16 attention to water issues, jumping down the road to  
17 even after the annexation and master plan, were  
18 there other options that Toquerville pursued to  
19 develop water out in that area?

20 A. Yes. Over on the little tiny three  
21 cornered piece on -- zoned by the Cottam family and  
22 they had water right for -- a small water right.  
23 They drilled a small well, six-inch well, hit a very  
24 good aquifer, and they came to me and asked if the  
25 city would buy that well from them and use that to

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1 develop the water in Anderson Junction.

2 Q. And how did you respond to that request?

3 A. Their well was not properly drilled for  
4 commercial or for municipal use, so I went to the  
5 conservancy district, which Ron Thompson is their  
6 general manager --

7 Q. The conservancy district, you mean the  
8 Washington County Conservancy District?

9 A. Washington County Conservancy District.  
10 They said, well, let us do it, we can move water  
11 rights. We have water rights. Our big problem was  
12 we did not have any well water rights in the town.

13 Q. So you had a source there, but no paper  
14 right?

15 A. Right. We had a source but no paper  
16 rights and Cottam's rights were too small to justify  
17 us buying that well. They would not do us any good,  
18 but the conservancy district said that there -- they  
19 had some rights that they could move to that well,  
20 and they would drill the well and sell us the water.

21 Q. And did the conservancy district pursue  
22 that option?

23 A. Yes. They have drilled a big well, and I  
24 talked with Alvin on one occasion about putting the  
25 water tank up on his property up near where those

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1 signs are up in the highest point on his property.  
2 Verbally he gave me that permission, but it never  
3 developed after I left office. Conservancy district  
4 couldn't pursue that. They said he reneged on that  
5 agreement, so they put the tank down where the well  
6 is.

7 Q. So based on the best knowledge you have  
8 today, is there a adequate municipal standard well  
9 in that annexed area now?

10 A. Yes. They have drilled a 21-inch well.  
11 It's got a lot of water in it. They have told me  
12 that it's the best aquifer in Washington County.

13 Q. Now, at the time of the master planning  
14 and zoning discussions, did the town council discuss  
15 any options as to how they were going to get  
16 services out there in addition to actually the  
17 source of water, how they were going to pay for and  
18 actually develop --

19 A. That would have to be done by SID. We  
20 thought we could pump water for more present source  
21 up over the hill and down into Anderson Junction.  
22 We figured we'd have to put a small tank, we have  
23 another tank we can just -- that we had stopped  
24 using that we might use that 100,000 gallon tank and  
25 move it up on the hill somewhere.

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1 Q. And so the financing of that at that time  
2 was generally discussed in the context of the  
3 special improvement district?

4 A. Well, that was a discussion that we were  
5 having in city council meeting.

6 Q. Were there other options available that  
7 you were aware of?

8 A. No. The little well that was up there  
9 that's mentioned several times is a private well.  
10 Nearly every home up there is on that little well.  
11 It's inadequate. They're out of water most of the  
12 time or part of the time, and so they were very  
13 anxious to have some city water up there.

14 Q. So apart from the actual water source and  
15 having water to deliver, were there other financing  
16 options that were available to municipalities at the  
17 time to do these kinds of infrastructure?

18 A. Well, if I had told these people who  
19 called about motels and truck stops that they would  
20 have to participate heavily enough up front to  
21 install water -- (inaudible.)

22 Q. You made reference just in passing the  
23 people that have called. Will you explain in detail  
24 what you mean? People that have called about what?

25 A. Commercial properties, such as motels,

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1 truck stop, RV parks. Even Eveleth at one point  
 2 asked for a permit to put an RV park up on his  
 3 property  
 4 Q And that was in connection or in the  
 5 general location of the Anderson Junction property?  
 6 A There was -- right off the interchange  
 7 there's a high nipple there. It's on the BLM land.  
 8 We approached them about putting a tank up there,  
 9 but they were so restrictive now they made it almost  
 10 inhibitive, so we gave that up.  
 11 Q When you talked to these individuals who  
 12 were inquiring regarding possible development, you  
 13 stated that you talked to them about up front  
 14 participation. Is that in the nature of an impact  
 15 fee?  
 16 A Yes.  
 17 Q And what was their response to those  
 18 discussions?  
 19 A They weren't very favorable. They wanted  
 20 us to do it for them, and I said, no, you've got to  
 21 do it for us.  
 22 Q All right. Now, then, prior to the  
 23 planning commission -- or prior to the town  
 24 council's actual adoption of that zoning map, do you  
 25 recall any discussions about the sign issues in

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1 Anderson Junction, outdoor advertising signs?  
 2 A It was never brought up that I recall in  
 3 the city council meeting. I knew they were there.  
 4 Part of the time they were. Part of the time they  
 5 weren't. They were -- they had a auxiliary  
 6 generator up there on a propane tank, and I had been  
 7 told that it was sabotaged, and it could no longer  
 8 light them signs.  
 9 Q Now, then, I'm going to direct your -- ask  
 10 the bailiff if we could have this marked as an  
 11 exhibit.  
 12 THE COURT: We're up to 4, counsel. What  
 13 will 4 be?  
 14 MR RONNOW: The town council minutes of  
 15 December 14, 1993.  
 16 THE COURT: Any objection to the Court  
 17 receiving Exhibit No. 4, Mr. Finlayson?  
 18 MR FINLAYSON: No, Your Honor.  
 19 THE COURT: No. 4, then, is received as  
 20 identified town council meetings.  
 21 (Whereupon, Plaintiff's Exhibit  
 22 4 was received into evidence.)  
 23 MR RONNOW:  
 24 Q Now, then, is it your recollection, mayor,  
 25 that it was on December 14, 1993 that you adopted

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1 the recommendation of the planning commission with  
 2 regard to the master plan and zoning map?  
 3 A Yes, we adopted it.  
 4 Q Now, you have been referring to -- in  
 5 looking at Exhibit 1 that we have out there on the  
 6 easel, is -- is that an accurate depiction and copy  
 7 of the zoning map that was adopted on December 14,  
 8 1993?  
 9 A That's the one we were looking at when we  
 10 adopted it.  
 11 Q And is that the zoning map that, insofar  
 12 as you know, is still being used by Toquerville Town  
 13 today?  
 14 A Yes.  
 15 Q Okay. When you adopted the  
 16 recommendations of the planning commission and the  
 17 map which appears as Exhibit 1, did you ever  
 18 consider, as a reason for adopting that, as a  
 19 purpose for adopting that, to adopt zoning simply to  
 20 allow outdoor advertising?  
 21 A I don't recall that outdoor advertising  
 22 was ever mentioned.  
 23 Q All right. You have heard discussion with  
 24 regard to the commercial issues. Was -- did the  
 25 town council discuss, in their deliberations, during

R 977 / Page 144

1 this process, issues with regard to commercial  
 2 zoning in the older Main Street area of Toquerville?  
 3 A Only down on the south end where it was,  
 4 that one little corner down there by the three-acre  
 5 piece had been zoned. We did adopt that as  
 6 recommended to us by the planning zone.  
 7 Q Based on -- during your time as mayor and  
 8 your -- the information available to you,  
 9 discussions with individuals, et cetera, what was  
 10 the general feeling about commercial development in  
 11 the center of Toquerville Town?  
 12 A Well, nobody wanted -- I shouldn't say  
 13 nobody. Most people didn't want commercial right in  
 14 town. Some people did. I had a few people -- some  
 15 of the old widows said, why don't we have a  
 16 convenient store right here in town. I said, there  
 17 isn't any provision for such in our planning.  
 18 Q Was there anybody that ever discussed in  
 19 the meeting that you attended as the town council  
 20 the outdoor advertising signs and presented them as  
 21 a basis justifying the zoning?  
 22 A No.  
 23 Q All right. I see in reference to Exhibit  
 24 4 it appears that all members of the council present  
 25 voted in the affirmative to adopt this zoning map.

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1 Is that your recollection?

2 A. Yes. We had held a special meeting prior

3 to that, but we discussed it.

4 MR. RONNOW: No further questions, Your

5 Honor.

6 THE COURT: All right. Mr. Finlayson, you

7 may cross-examine Mr. Wahlquist.

8 MR. FINLAYSON: I have a preliminary

9 matter with regard to the most recent exhibit. My

10 copy is not clear.

11 THE COURT: The last page of the Court's

12 copy, counsel, does have a problem. Mr. Ronnow, can

13 you get us one that doesn't have a blank --

14 MR. FINLAYSON: I have a copy of that.

15 May I --

16 THE COURT: Can we simply substitute a

17 second page? If yours is clearer, let's use that.

18 I'm going to get a better copy for the second page

19 of the town council meetings, Exhibit No. 4. All

20 right, counsel, that's done.

21 -oOo-

22 CROSS-EXAMINATION

23 BY MR. FINLAYSON:

24 Q. Mr. Wahlquist, how long have you lived in

25 Toquerville?

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1 A. About 12 years.

2 Q. Have you lived in southern Utah for a

3 longer period of time than that?

4 A. I lived 10 years in Hurricane prior to

5 that and about 10 years in St. George prior to

6 that. When we first moved here, we came to St.

7 George.

8 Q. So that's more than 30 years?

9 A. Yes.

10 Q. Do you have occasion to go by this area

11 called Anderson Junction frequently?

12 A. All the time. Almost every day.

13 Q. Have you ever seen any commercial activity

14 in the area right where the signs are other than the

15 signs?

16 A. No.

17 Q. Has there ever been any culinary water

18 service run up to the area where the signs are?

19 A. No, not to my knowledge.

20 Q. Has there ever been any sewer service run

21 to that area where the signs are?

22 A. No. There's no sewage up there at all.

23 We had talked with the sewer district to get some,

24 but there isn't any present.

25 Q. Without culinary water or sewage,

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1 commercial development in that area cannot

2 reasonably be done; isn't that correct?

3 A. Correct.

4 Q. You referred to a new waterline and a new

5 tank. Is there a new water tank?

6 A. There is. It's built. It is not finished

7 yet. The line is not installed, but will be

8 probably by the first of the year.

9 Q. Okay. Is that tank south -- that tank is

10 south of --

11 A. Can I show you on the map where it is?

12 Q. I first want to get -- it's south of the

13 road that crosses I-15 at Anderson Junction?

14 A. Yes.

15 Q. That new line that's proposed, it will

16 cross under the freeway; isn't that correct?

17 A. Yes.

18 Q. It will go east toward Toquerville?

19 A. Yes.

20 Q. And it will serve Toquerville, La Verkin,

21 Virgin and Leeds?

22 A. Yes.

23 Q. But it will not run water up to the area

24 of the signs?

25 A. No. Toquerville will have to do that on

R 981 / Page 148

1 their own.

2 Q. Okay.

3 MR. FINLAYSON: I would like to have

4 presented to the witness the most recent exhibit.

5 THE COURT: Exhibit 4 we'll hand to Mr.

6 Wahlquist.

7 MR. FINLAYSON:

8 Q. I refer you to the second page --

9 (inaudible.) There's a paragraph toward the middle

10 that says, Council and George Hunter, I just

11 identified the location that I want to address.

12 Council and George Hunter made the motion with the

13 second action by councilman Chris Lundell that we

14 accept the interim -- I'm in the wrong line.

15 Okay, the line above that, the paragraph

16 above that. An ordinance in the town of Toquerville

17 establishing the temporary moratorium from the

18 division of land and adopting an interim zoning

19 path. What is meant by interim?

20 A. Well, until we get an official -- get the

21 map that Mr. Kenmore and the city council or

22 planning and zoning people were working on.

23 Q. Okay. This just represents an interim and

24 not the final?

25 A. Right.

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1 Q Thank you.

2 MR FINLAYSON That's all I have.

3 THE COURT Anything else, Mr. Ronnow?

4 -oOo-

5 REDIRECT EXAMINATION

6 BY MR RONNOW

7 Q Mr. Wahlquist, picking up on counsel's

8 discussion of interim zoning map, has there ever

9 been a zoning map adopted since December, 1992 that

10 amends or changes or alters this zoning map?

11 THE COURT Counsel, I think your date was

12 wrong. It's '93, isn't it? Check your first page

13 on Exhibit 4.

14 MR RONNOW Excuse me, I'm looking at

15 Exhibit 3. Yes, Your Honor, '93.

16 THE WITNESS Not that I'm aware of.

17 MR RONNOW

18 Q So your tenure as mayor, while there may

19 have been a general objective to continue working on

20 this map, in fact, the map that is reflected on

21 Exhibit 1 was adopted and is being used as

22 Toquerville's only zoning map at this time; is that

23 correct?

24 A Unless they changed it after I left as

25 mayor.

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1 Q So that on December 13, 1993 until you

2 left as mayor, Exhibit 1 represents a copy of the

3 zoning map that was the operative zoning map in

4 Toquerville Town?

5 A Yes.

6 Q Is that correct? And let me ask you, I

7 want to go back just briefly to clarify. I draw

8 your attention to what should be in front of you as

9 Exhibit 2, the zoning ordinance.

10 THE COURT I have it, counsel.

11 MR RONNOW I'm sorry, Your Honor.

12 THE COURT Mr. Wahlquist will have it

13 shortly.

14 MR RONNOW

15 Q Can you explain to the Court why there are

16 two dates on that zoning ordinance, 1978 on the

17 front and 1982 as the adopting date on the last

18 page?

19 A Well, they did this, when, 1982? We

20 weren't sure that they had done it to be honest. We

21 didn't have -- at that time we hadn't found the

22 minutes, and so we adopted it again just to make

23 sure it was there.

24 Q All right. And does that represent the

25 zoning ordinance that was --

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1 A We didn't make any changes from what's in

2 here.

3 Q Right.

4 A We adopted it as it is written. Only did

5 that as housekeeping, shall we say.

6 Q And that's the official zoning -- that

7 ordinance that you have in your hand as Exhibit 2

8 was the official zoning ordinance in effect at the

9 time of the master plan and adoption of this map; is

10 that correct?

11 A Uh-huh.

12 Q You have to answer audibly, sir.

13 A Yes.

14 Q Thank you.

15 MR RONNOW No further questions, Your

16 Honor.

17 THE COURT Mr. Finlayson.

18 -oOo-

19 RECROSS-EXAMINATION

20 BY MR FINLAYSON

21 Q Following up this question, do you recall

22 writing affidavits earlier in this action, things

23 that you signed about the facts in this case?

24 MR FINLAYSON There's a -- I have -- if

25 I could have this presented to the witness and ask

R 785 / Page 152

1 him if he -- if this is his signature. It's -- it's

2 an affidavit -- (inaudible.)

3 THE COURT Is that your signature, Mr.

4 Wahlquist?

5 THE WITNESS Yes.

6 THE COURT All right. Go ahead, Mr.

7 Finlayson.

8 MR FINLAYSON May I have the document.

9 Q I'm going to read what is in this document

10 and ask you if it's correct. The annexation of the

11 property by the Town of Toquerville and the town's

12 zoning of the property as commercial made no change

13 in the zoning status of the property inasmuch as the

14 property was zoned highway commercial both before

15 and after Toquerville zoning. Toquerville left the

16 zoning of the Eveleth land the signs are on just as

17 it was when the land was only in the county. Is

18 that correct?

19 A At that time, yes. See, that was part --

20 what's the date on that?

21 Q Oh, it's August 10, 1994. Okay. Also a

22 paragraph 8 is stated, To my knowledge, there is no

23 specific planning of any commercial developer to

24 construct any commercial activity on the property

25 other than the signs. Was that correct as of that

R 986 / Page 153

1 time?  
 2 A. As of that time. There could be no  
 3 commercial property as long as there's no water or  
 4 services up there.  
 5 Q. Okay. Also, Toquerville does not  
 6 presently provide, nor has it provided in the past,  
 7 any services to the property such as power, water,  
 8 or sewer, nor are such services provided to the area  
 9 by anyone else. Is that correct?  
 10 MR. RONNOW: Objection, Your Honor. That  
 11 has all been asked and answered even on his cross.  
 12 THE COURT: Sustained, counsel. That's  
 13 repetitive. We've covered that ground.  
 14 MR. FINLAYSON: I don't think I ever asked  
 15 about power.  
 16 THE COURT: Is there any power up there,  
 17 sir, to your knowledge?  
 18 THE WITNESS: Not on that side of the  
 19 freeway.  
 20 THE COURT: All right. Thank you.  
 21 MR. FINLAYSON:  
 22 Q. Toquerville, itself, does not, itself --  
 23 Toquerville does not, itself, intend to construct  
 24 commercial development on the property.  
 25 MR. RONNOW: Objection, asked and

R 987 / Page 154

1 answered.  
 2 MR. FINLAYSON: I haven't asked this  
 3 witness.  
 4 THE COURT: Not this witness, counsel.  
 5 Overruled.  
 6 THE WITNESS: Read that again.  
 7 MR. FINLAYSON:  
 8 Q. Toquerville does not, itself, intend to  
 9 construct commercial development on the property.  
 10 A. No, we are not going to do it.  
 11 MR. FINLAYSON: That's all I have, Your  
 12 Honor.  
 13 THE COURT: All right. Anything more, Mr.  
 14 Ronnow?  
 15 -oOo-  
 16 FURTHER REDIRECT EXAMINATION  
 17 BY MR. RONNOW:  
 18 Q. Do you have a copy of that affidavit that  
 19 he's reviewing?  
 20 A. No.  
 21 Q. Do you recall when that affidavit was  
 22 prepared, Mr. Wahlquist?  
 23 A. Yes, I remember seeing it.  
 24 Q. Was that prepared by Mr. Finlayson --  
 25 THE COURT: If you know, sir.

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1 MR. RONNOW:  
 2 Q. -- the attorney for Utah State in this  
 3 matter?  
 4 A. Probably.  
 5 Q. All right. Now, then, you testified  
 6 earlier that you were mayor during the whole time of  
 7 the master plan in process and procedure; is that  
 8 right?  
 9 A. Yes.  
 10 Q. Do you recall roughly how long the  
 11 planning commission worked on development of the  
 12 master plan and zoning map?  
 13 A. It was over a period of about a month. I  
 14 don't recall exactly.  
 15 Q. Do you have any reason to dispute earlier  
 16 testimony that basically from January of 1993 until  
 17 November of 1993 the planning commission was working  
 18 on the master plan and zoning map?  
 19 A. It was at least that long. I'd thought it  
 20 was longer than that.  
 21 Q. All right.  
 22 MR. RONNOW: Thank you. No further  
 23 questions.  
 24 THE COURT: Anything more, Mr. Finlayson?  
 25 ///

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1 -oOo-  
 2 FURTHER RECROSS-EXAMINATION  
 3 BY MR. FINLAYSON:  
 4 Q. As the town council, it's the town council  
 5 who makes the final decisions on annexation and  
 6 zoning; isn't that correct?  
 7 A. Yes.  
 8 Q. And not the earlier advisors?  
 9 A. No. They just submitted their  
 10 recommendation to us.  
 11 Q. And it's -- it's you who makes the final  
 12 decision?  
 13 A. Yes.  
 14 MR. FINLAYSON: Thank you.  
 15 THE COURT: Anything more, Mr. Ronnow?  
 16 MR. RONNOW: Yes.  
 17 -oOo-  
 18 FURTHER REDIRECT EXAMINATION  
 19 BY MR. RONNOW:  
 20 Q. Mr. Wahlquist, you had, in this process, a  
 21 planner retained by the town, Mr. Sizemore, from  
 22 Five County Association of Governments; correct?  
 23 A. Yes.  
 24 Q. And as a town council, you approved  
 25 retaining Mr. Sizemore; is that correct?



~~R 990~~ Page 157

1 A. Well, him or the Five Counties. I don't  
2 remember just how we had that arranged, but he was  
3 working with us, yes.

4 Q. And as a town council, did you rely on his  
5 consulting and work with the planning commission in  
6 developing this master plan and zoning map?

7 A. Well, he knew more about that than we did,  
8 so we had to.

9 Q. And did you rely on the planning  
10 commission for that very same purpose, to advise you  
11 in the preparation of the master plan and zoning  
12 map?

13 A. Yes. They did all the leg work, and they  
14 did all the research.

15 Q. And as a town council, have you relied on  
16 -- had you relied on that planning commission for  
17 advice and recommendations to the town council prior  
18 to that?

19 A. Yes.

20 Q. And as mayor, do you recall that -- was it  
21 the council's practice and procedure to listen to  
22 the recommendations of the planning commission?

23 A. Well, we always listened. We didn't  
24 always agree.

25 Q. Exactly. And did you discuss the

~~R 991~~ Page 158

1 recommendations of the planning commission with  
2 regard to this zoning master plan and map that they  
3 prepared?

4 A. Yes.

5 Q. And was there ongoing -- you testified  
6 that there was ongoing discussion in town council --  
7 town council meetings during the process as the map  
8 and plan evolved; isn't that correct?

9 MR. FINLAYSON: It's either argumentative  
10 or leading.

11 THE COURT: Well, he is leading, counsel,  
12 but it's foundational. Overruled.

13 THE WITNESS: Yes.

14 MR. RONNOW:

15 Q. And did the -- did you feel, at the time  
16 that you adopted this zoning map that appears as  
17 Exhibit 1, that the council had carefully reviewed  
18 the recommendations and proposals and all the issues  
19 that were part of them?

20 A. Well, we spent the -- we got the  
21 recommendation in November and spent the next month  
22 going over that. In fact, we had one special  
23 meeting in between: study that proposal. Then in  
24 November or December we did accept it.

25 Q. All right.

~~R 992~~ Page 159

1 MR. RONNOW: No further questions, Your  
2 Honor.

3 THE COURT: Mr. Finlayson, any more?

4 MR. FINLAYSON: No, thank you, Your Honor.

5 THE COURT: All right. Thank you, Mr.

6 Wahlquist. You may step down, sir. You can just  
7 leave those --

8 THE WITNESS: Right here?

9 THE COURT: -- right there on the edge of  
10 that witness stand. We'll collect them from there.  
11 Counsel, I think it's time for our noon recess.

12 Let's go ahead and take our recess, come back into  
13 session at 1:45.

14 (Recess.)

15 THE COURT: We are back in session in Kunz  
16 versus the State of Utah. The counsel for the  
17 respective parties are present. And, Mr. Ronnow, do  
18 you intend to call any further witnesses?

19 MR. RONNOW: No further witnesses, Your  
20 Honor.

21 THE COURT: All right. The plaintiff  
22 having rested, Mr. Finlayson, we'll turn to your  
23 side of the courtroom.

24 MR. FINLAYSON: I wish to make a  
25 statement, Your Honor.

~~R 993~~ Page 160

1 THE COURT: All right, counsel.

2 MR. FINLAYSON: This case is about a  
3 beautiful and scenic area of Utah where billboards  
4 are inappropriate and unlawful, but where plaintiff  
5 seeks to place billboards. There are several  
6 controlling elements of law, and, therefore, several  
7 corresponding clusters of fact that show violation  
8 of those elements of law.

9 The billboards would violate express  
10 purpose of the Utah Outdoor Advertising Act  
11 including its purpose to promote the enjoyment of  
12 public travel and to preserve the natural scenic  
13 beauty of the lands bordering on the highway quoting  
14 from the statute.

15 The evidence will show that the signs  
16 violate this policy which the Court of Appeals cited  
17 and quoted in connection with its construction of  
18 section 27-12-136.3 in parentheses (3), which  
19 provides, Commercial or industrial zone does not  
20 mean area zoned for the primary purpose of allowing  
21 outdoor advertising.

22 On page 30 of the brief we submitted to  
23 the Court of Appeals, we both cited and quoted the  
24 Utah Federal Agreement, and we cited the Federal Act  
25 23 U.S.C., Section 131A, that also have policies

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1 that are very similar to the Utah act to preserve  
 2 natural beauty adjacent to the freeways. The  
 3 evidence will show the signs violate this policy.  
 4 Second, we will show circumstances that  
 5 demonstrate violation of Utah Code Annotated  
 6 27-12-136.3, which I've already quoted. That  
 7 statutory provision is clarified by a Utah rule, and  
 8 I leave it to the Court how to treat that Utah  
 9 rule. It does exist. We are addressing whether  
 10 signs may go there in the future.  
 11 The Court ruled that these signs were  
 12 unlawful, they are not there, they have no vested  
 13 rights. If the signs go back up again, they have to  
 14 comply with all statutory and rule provisions. And  
 15 there is also a rule in existence that provides area  
 16 zoned for the primary purpose of outdoor advertising  
 17 includes areas in which the, quote, primary activity  
 18 is outdoor advertising.  
 19 We will show that there is no other  
 20 activity in this area other than the signs of a  
 21 commercial nature. We will also show the pristine  
 22 nature of the area, and that under the policy of the  
 23 act, it is inappropriate for signs to be here.  
 24 The signs have been in existence for nine  
 25 years, and there has been no commercial development

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1 to support them. For seven years since they were  
 2 first zoned commercial by Washington County, there  
 3 has been no commercial development there. The -- we  
 4 will show facts supporting that. If --  
 5 THE COURT: Counsel, I don't mean to cut  
 6 you short --  
 7 MR. FINLAYSON: Yes.  
 8 THE COURT: -- but it doesn't seem to be  
 9 necessary on the state of this record to establish  
 10 any point of proof at this point that the signs are  
 11 the sole evidence of humanity on the subject  
 12 property. There is testimony that there is no  
 13 water, no sewer.  
 14 The only electrical there at all that I've  
 15 heard from is Mayor Wahlquist who indicated that  
 16 there had been a generator that at one time or  
 17 another may have been sabotaged, but a generator is  
 18 a closed system, not connected to anything else, and  
 19 there's no evidence before the Court that there's  
 20 any power.  
 21 I cannot help but note my own observations  
 22 of the site having driven by it, even having slowed  
 23 as I drove by it to examine it, that there is no  
 24 other presence on this triangular shaped piece of  
 25 property, west of the freeway, shown on Exhibit 1,

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1 except these signs. I think that is just about as  
 2 conclusively proven as we can possibly get. Mr.  
 3 Ronnow, is there any question about that at this  
 4 stage in the record?  
 5 MR. RONNOW: That the signs are the only,  
 6 quote, "development"?  
 7 THE COURT: That's correct, counsel.  
 8 MR. RONNOW: No, Your Honor. There's no  
 9 evidence. I think there was some evidence of an old  
 10 stock reservoir at one point in all of our  
 11 discussions, but as of today, those signs and  
 12 fences, and that's it.  
 13 THE COURT: Well, the fence is the State's  
 14 right-of-way fence that I'm aware of, counsel, and  
 15 so I don't think we need to show any proof on that  
 16 one. Go ahead.  
 17 MR. FINLAYSON: Okay. Thank you, Your  
 18 Honor. I will, therefore, elicit no testimony on  
 19 those issues. However, for the record, I would like  
 20 to submit photos which document it for the record.  
 21 THE COURT: I think we should have photos  
 22 if you have them available, counsel. They will  
 23 assist anyone reviewing the records that this Court  
 24 sees because maybe not all the judges in the Court  
 25 of Appeals have been by it as carefully as I have

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1 MR. FINLAYSON: Yes. Thank you, Your  
 2 Honor. The Court of Appeals directed attention to  
 3 several features of 27-12-136.3 in parens (3), the  
 4 first of which was actual land use. It said, Do not  
 5 consider just stated purposes, but consider actual  
 6 land use.  
 7 MR. RONNOW: Your Honor, I'm going to  
 8 object. I've gone along this far, but this does not  
 9 sound like opening statement as much as closing  
 10 argument. Thus far Mr. -- counsel is just arguing  
 11 the law, and I think that's more appropriate for  
 12 closing.  
 13 THE COURT: Oh, I think not, counsel. I  
 14 think Mr. Finlayson is telling me what his proof is  
 15 going to show in terms of what the land use is, that  
 16 we have just established that the only use of the  
 17 land is the signs. If that's an objection, it's  
 18 overruled. Go ahead, counsel.  
 19 MR. FINLAYSON: And we will submit photo  
 20 evidence to document it, Your Honor. The  
 21 perpetuation of a prior zoning was also mentioned to  
 22 the Court. That is really more of a legal issue,  
 23 and I believe I will address that in closing, not at  
 24 this time.  
 25 Do not, therefore, concentrate on

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1 objective facts rather than subjective statements of  
2 intent, which in this context we submit are less  
3 relevant. I have asked Mr. Sizemore to come back  
4 for a proffer on the question, which I asked earlier  
5 about his opinion.

6 THE COURT: All right, counsel. Mr.  
7 Sizemore, I want you to listen carefully to the  
8 proffer that's going to be offered to the Court by  
9 Mr. Finlayson. If he states it accurately, and if  
10 that would, in fact, be your testimony if called  
11 upon to so testify, I will put that on the record.

12 Again, the Court has ruled that the  
13 opinion of Mr. Sizemore irrelevant and immaterial to  
14 the issues before this matter, but we want to make  
15 sure that the record is clear as to what your  
16 opinion would be so that if I was in error in my  
17 evidentiary ruling it will be preserved for the  
18 Court of Appeals. Before we do that, Mr. Ronnow,  
19 anything further?

20 MR. RONNOW: Yes, Your Honor. I object to  
21 the proffer on the basis the Court has already ruled  
22 it's irrelevant. The problem is with a bench trial  
23 this Court is the trier of fact. To let in a  
24 proffer creates an element of prejudice with regard  
25 to evidence the Court has already ruled is

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1 immaterial.

2 THE COURT: All right, counsel. The Court  
3 of Appeals has always given trial courts at least  
4 the deference and the understanding that we can  
5 separate the weak from the chaff, and if I don't  
6 allow Mr. Finlayson to put his proffer on the  
7 record, the Court of Appeals will never know what  
8 Mr. Sizemore's opinion would have been. So I'm  
9 going to allow him to secure the record in that  
10 fashion. Mr. Finlayson, what is your proffer?

11 MR. FINLAYSON: I proffer that Mr.  
12 Sizemore, as a person qualified by the plaintiff as  
13 a -- an expert in zoning would testify that based on  
14 the standards of zoners taking into account the  
15 nature of the pristine area with its beauty where  
16 the signs are that it would not -- that he would not  
17 recommend that outdoor advertising signs be placed  
18 there, that he would recommend that they not be  
19 placed there.

20 THE COURT: All right. Mr. Sizemore, is  
21 that a fair rendition of what your opinion would be,  
22 sir?

23 MR. SIZEMORE: Yes, Your Honor.

24 THE COURT: All right. Thank you, Mr.  
25 Sizemore. That proffer is on the record over your

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1 objection. Mr. Ronnow, do you wish to cross-examine  
2 Mr. Sizemore on those issues to preserve a record at  
3 this juncture even though the Court is not  
4 considering it as part of the facts that will go  
5 into the final decision in this case?

6 MR. RONNOW: We'll just clarify for the  
7 record. Based on proffer, we continue our objection  
8 that it's irrelevant and immaterial to the specific  
9 issue remanded to the Court for a review.

10 THE COURT: Thank you, counsel, and that  
11 ruling stands. Next, Mr. Finlayson.

12 MR. FINLAYSON: I have a series of  
13 exhibits I will submit through my first witness, Mr.  
14 Snow. I could either present them to the Court and  
15 have them marked or take them one at a time.

16 THE COURT: Counsel, it usually saves us  
17 some time if I just give you a chance to get up to  
18 the clerk, get them all marked with Mr. Ronnow over  
19 your shoulder, and you gentlemen can go through  
20 them, especially the photographs. Why don't I just  
21 take a brief recess while you get that done. Then  
22 we'll come back and take the testimony from your  
23 witness.

24 (Recess.)

25 THE COURT: All right. We are back in

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1 session in Kunz versus UDOT, and the counsel for the  
2 parties are present. We have marked some exhibits.  
3 Counsel, do we have a stipulation as to the entry of  
4 any of these exhibits without the necessity of  
5 anything more than just foundational identification  
6 on the record?

7 MR. RONNOW: Yes, Your Honor. I'm going  
8 to object and seek the Court's clarification, and  
9 just by way of clarification, we had a series of  
10 photographs that show the use of the property  
11 currently, the sign posts and no signs, and then  
12 photos of preexisting sign faces and a photo of the  
13 for sale sign. And I would object to their  
14 relevance in total with regard to the issue before  
15 the Court.

16 Now, insofar as this Court has made  
17 certain -- taken certain notice as a condition of  
18 the property and the Court of Appeals has mentioned  
19 current use, we have a -- (inaudible) -- of evidence  
20 of what the existing use is and isn't. I think  
21 three of these photos that show the sign posts  
22 indicating that there's nothing else on the property  
23 is certainly sufficient, and the rest are not  
24 relevant to the issue regarding purpose --  
25 (inaudible.)

R1002 / Page 169

1 THE COURT: All right. Which exhibits do  
2 you have no objection to in view of the Court's  
3 previous ruling that photographs would be of  
4 assistance to the record?

5 MR. RONNOW: Well, I think, Your Honor,  
6 there are three photographs numbered 8, 9, and 10  
7 that show the three sign posts and apparently show  
8 them essentially looking south, looking pretty much  
9 due west, and looking substantially north of west  
10 which provides a very broad view of the surrounding  
11 property.

12 One of the pictures, Exhibit 8, shows all  
13 three signs in a view south from the freeway, and I  
14 think that clearly describes, together with all the  
15 verbal -- or the sworn testimony and the Court's  
16 judicial notice the situation of the property with  
17 regard to the Court of Appeals' suggestion that  
18 present use might be relevant to the Court's  
19 inquiry.

20 THE COURT: All right, counsel. I note  
21 that those don't seem to have exhibit numbers on  
22 them. They have not been marked yet?

23 MR. RONNOW: These are my copies.

24 THE COURT: Oh, those are your copies.

25 MR. RONNOW: And I have them on the back.

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1 The Court's copies have a little sticker on the  
2 front.

3 THE COURT: So you have no objection to 8,  
4 9, and 10?

5 MR. RONNOW: 8, 9, 10 -- (inaudible) --  
6 first we should have a proffer on the record as to  
7 just foundation. Off the record I was told that Mr.  
8 Snow took these photographs so that even by  
9 stipulation I would like a brief record as to the  
10 direction these photographs represent.

11 THE COURT: Well, counsel, Mr. Finlayson  
12 -- Mr. Bailiff, will you hand me photographs 8, 9,  
13 and 10. Are they the large ones, counsel?

14 MR. FINLAYSON: I would urge admission of  
15 all of them. Each shows a different thing.

16 THE COURT: Well, we'll deal with each  
17 one, and I'll put on the record the foundational  
18 requirements that Mr. Ronnow is urging because,  
19 again, they should be carefully identified on the  
20 record as to their view and the objects depicted in  
21 them. All right.

22 MR. RONNOW: Mr. Snow, if you want to look  
23 at these, you can tell us which direction we're  
24 looking. This is 8, 9.

25 THE COURT: Exhibit No. 8 is a photograph

R1004 / Page 171

1 showing the three empty sign posts in a view west  
2 southwest from the median of interstate 15 -- no --  
3 from the right-of-way fence on interstate 15 across  
4 the frontage road.

5 MR. SNOW: This was taken actually from  
6 the median. The black strip is the southbound --

7 THE COURT: Oh, that's southbound. Okay.  
8 So from the median --

9 MR. SNOW: (Inaudible.)

10 THE COURT: From the median of interstate  
11 15 looking west southwest shows all three of the  
12 sign posts in question and taken by Mr. Snow, and  
13 that's correct, sir?

14 MR. SNOW: Yes.

15 THE COURT: All right. That's record for  
16 No. 8. It's received. No 9 is a photograph of one  
17 of the sign posts.

18 MR. SNOW: This will be the most southerly  
19 one, I think.

20 THE COURT: That's what I was going to  
21 estimate from the other terrain features. Again --

22 MR. SNOW: I took this one probably on the  
23 southbound shoulder directly across from the sign  
24 just slightly to the --

25 THE COURT: Looking across to the sign,

R1005 / Page 172

1 across the frontage road, and, again, more west than  
2 southwest, but a little bit south of west. All  
3 right. That is Exhibit No. 10 -- 9. Exhibit No. 10  
4 is a photograph of the northern most sign post. Is  
5 that correct, Mr. Snow?

6 MR. SNOW: Uh-huh. Yes, it is.

7 THE COURT: All right. That's the way I  
8 identified it from my recollection. Exhibit No. 10  
9 is taken from an area west of the freeway.

10 MR. SNOW: This is sitting on the same --  
11 the southbound shoulder of the freeway again.

12 THE COURT: All right. And looking very  
13 close to northwest --

14 MR. SNOW: Right.

15 THE COURT: -- towards the sign post as  
16 well as the eastern face of the Pine Valley  
17 Mountains, which shows in the background. And  
18 approximately when were these photographs taken, Mr.  
19 Snow?

20 MR. SNOW: June or July. Just after the  
21 heads were removed.

22 THE COURT: Okay. June or July, 1996,  
23 showing the present use of the property, as we have  
24 it today, at that distance and showing those vistas.

25 MR. FINLAYSON: If I may add, I supplied

R1006/ Page 173

1 these three in that each was taken from a slightly  
 2 different location from the freeway, and it's  
 3 relevant where they are taken from because that's  
 4 the view of the traveling public. So the first one  
 5 is in the median, the next one is on the, I think,  
 6 road side on the west side, and the next one is a  
 7 little closer to the signs.  
 8 THE COURT: And it will show -- at least  
 9 Exhibit No. 8 taken from the median would show a  
 10 relatively reasonable view of the traveling public  
 11 in the northbound lanes of the interstate. 9 and 10  
 12 would show more representative of the view of the  
 13 traveling public from the southbound lanes of I-15  
 14 heading southbound.  
 15 Those are received in conjunction as  
 16 illustrative of the Court's previous findings of  
 17 judicial notice as to the character of the area in  
 18 which the signs are located. Let's just go ahead  
 19 with the rest of them then. I'm not going to  
 20 require any more stipulations. You may call your  
 21 witness, Mr. Finlayson.  
 22 (Whereupon, Defendant's Exhibits 8  
 23 through 10 were received into evidence.)  
 24 MR. FINLAYSON: Mr. Snow.  
 25 THE COURT: Mr. Snow, if you will come

R1007/ Page 174

1 forward and be sworn.  
 2 Whereupon,  
 3 SCOTT SNOW,  
 4 having been first duly sworn to testify to the  
 5 truth, the whole truth and nothing but the truth,  
 6 was examined and testified as follows:  
 7 THE COURT: Thank you, sir. Please have a  
 8 seat on the witness stand.  
 9 -oOo-  
 10 DIRECT EXAMINATION  
 11 BY MR. FINLAYSON:  
 12 Q. Mr. Snow, for the record, would you please  
 13 state your name and spell it?  
 14 A. My name is Scott Joseph Snow, S-K-O-T-T,  
 15 J-O-S-E-P-H, S-N-O-W.  
 16 Q. By whom are you employed?  
 17 A. Utah Department of Transportation.  
 18 Q. How long have you been employed by them?  
 19 A. I've been employed there approximately 13  
 20 years.  
 21 Q. What is your present title?  
 22 A. I am the Cedar City District Encroachment  
 23 Permits Officer.  
 24 Q. How long have you had that position?  
 25 A. Six years the first of September.

R1008/ Page 175

1 Q. So that first year would have been when?  
 2 A. September of 1990 I started.  
 3 MR. FINLAYSON: I would like to have the  
 4 first three photos presented to the witness.  
 5 THE COURT: That should be 5, 6 and 7.  
 6 MR. FINLAYSON: Yes.  
 7 MR. RONNOW: There are no duplicates of  
 8 those three; is that correct?  
 9 MR. FINLAYSON: I think I may have some  
 10 somewhere.  
 11 MR. RONNOW: Those indicate -- those are  
 12 your numbers in sequence.  
 13 MR. FINLAYSON:  
 14 Q. You have three photos. As a group what do  
 15 they -- well, let's see, I'll take them one at a  
 16 time. The first one, No. 5, what does it represent?  
 17 A. This is a picture of the southbound sign  
 18 with its little square sign there in front of it.  
 19 The permit officer at that time took it. It says  
 20 the permit number, the sign number, the milepost,  
 21 county, and date it was taken.  
 22 Q. It shows the date the picture was taken?  
 23 A. It shows the date the picture was taken..  
 24 Q. What is that date?  
 25 A. This is 7/1 of '87.

R1009/ Page 176

1 Q. So is it fair to say that the signs were  
 2 of record as of that date?  
 3 A. Yes.  
 4 MR. RONNOW: Objection, foundation.  
 5 MR. FINLAYSON: Sure.  
 6 Q. Who took these pictures?  
 7 A. I think the permit officer at that time  
 8 was Cliff Reece. I'm not sure -- for sure who took  
 9 the picture, but I would assume that it was Cliff  
 10 Reece, the permits officer.  
 11 Q. Are they -- do you have a file in your  
 12 office that has outdoor advertising documentation in  
 13 it?  
 14 A. Yes.  
 15 THE COURT: Are photographs of this nature  
 16 kept in the regular course of business as part of  
 17 the regular record keeping of the Utah Department of  
 18 Transportation -- (inaudible) -- sir?  
 19 THE WITNESS: Yes.  
 20 MR. FINLAYSON:  
 21 Q. Are these three photos in that file that  
 22 is kept in the regular course of business?  
 23 A. Yes.  
 24 Q. Who is the custodian of that file?  
 25 A. I am.

R 1010 / Page 177

1 Q. Why are you and not someone else?

2 A. That's my job as the encroachment permits

3 officer, to keep track of the signs and other

4 encroachments along the road.

5 MR. FINLAYSON: All right. I submit No. 1

6 in evidence.

7 THE COURT: Exhibit No. 5?

8 MR. FINLAYSON: No. 5 and ask it be

9 presented to the Court.

10 THE COURT: Your objections, Mr. Ronnow?

11 MR. RONNOW: Objections to 5, 6, and 7,

12 same objection, they're irrelevant to the issues

13 before the Court. These particular photos, as

14 distinguished from the others, are close-up photos

15 of not just the sign, but right in the middle of the

16 small frame is still another photo providing

17 information as to -- that Mr. Snow just testified

18 to.

19 As to the purpose of the legislative body,

20 they show nothing. As to the use of the land, they

21 show nothing because they're filled with sign. They

22 only show the sign, and pursuant to our discussion

23 earlier this morning, those issues with regard to

24 purpose and violation of purposes of the act,

25 particularly as it runs through aesthetics, have

R 1011 / Page 178

1 already been resolved by the Court of Appeals, and

2 it's not relevant or material to our issues.

3 THE COURT: Thank you, counsel. You may

4 not argue further, Mr. Finlayson. 5, 6, and 7, as

5 identified -- first of all just No. 5, as identified

6 by Mr. Snow, is received. The Court is receiving it

7 as relevant and probative evidence of use of the

8 land and historic use of the land, the date of the

9 photograph being shown in the photograph 1987. 5 is

10 received. No. 6 let's get into next.

11 (Whereupon, Defendant's Exhibit

12 5 was received into evidence.)

13 MR. FINLAYSON:

14 Q. Mr. Snow, what is No. 6?

15 A. No. 6 is a pictures of the middle sign

16 with its -- with the interior sign showing the

17 permit number, the sign number, milepost, and the

18 date the sign was taken.

19 THE COURT: Same --

20 THE WITNESS: Same --

21 THE COURT: -- type of photograph as No.

22 5?

23 THE WITNESS: Exactly.

24 THE COURT: All right. Same objection,

25 Mr. Ronnow?

R 1012 / Page 179

1 MR. RONNOW: Yes, Your Honor.

2 THE COURT: All right. Same ruling. No.

3 6 is received.

4 (Whereupon, Defendant's Exhibit

5 6 was received into evidence.)

6 MR. FINLAYSON:

7 Q. And it's also in your file the same as the

8 first?

9 A. Yes.

10 Q. The next in order, No. 7?

11 A. It is the picture of the north sign with

12 the picture on the inside of the sign -- on the

13 inside showing the same permit number.

14 THE COURT: All right. Your record is

15 preserved, Mr. Ronnow. You have a continuing

16 objection, but No. 7 is received.

17 (Whereupon, Defendant's Exhibit

18 7 was received into evidence.)

19 MR. FINLAYSON:

20 Q. This is also part of your file the same as

21 the first two?

22 A. Yes.

23 Q. Thank you.

24 MR. FINLAYSON: I simply submit these in

25 evidence as evidence of the date as when the signs

R 1013 / Page 180

1 were there and what the signs look like when they

2 are up and the nature of the area.

3 THE COURT: And they are received,

4 counsel, for that foundational purpose.

5 MR. FINLAYSON:

6 Q. Do these photos reflect the circumstances

7 as of today?

8 A. No.

9 Q. In what respect are today's circumstances

10 different?

11 A. What is there now is the posts without the

12 advertising heads on them.

13 MR. FINLAYSON: I'm going to ask that this

14 large photo, which is out of order, No. 17, be put

15 up on the board, and I wonder if it would be more

16 easily viewed if brought somewhat closer.

17 THE COURT: Oh, I think I can see it

18 pretty well from here, counsel. No. 17 is -- turn

19 it another 90 degrees. Yeah, that's it. No. 17

20 appears to be an aerial photograph of the Anderson

21 Junction interchange, Exit No. 27. Any objection to

22 No. 17, Mr. Ronnow?

23 MR. RONNOW: Mine isn't big enough. Yes,

24 Your Honor, foundation objection. This photo was

25 not taken by the witness, and I'd object as to

21014 / Page 181

1 foundation.

2 THE COURT: All right. Let's lay a little  
3 foundation, then, Mr. Finlayson.

4 MR. FINLAYSON:

5 Q. Mr. Snow, have you been --

6 THE COURT: Bailiff.

7 Q. -- down this area --

8 THE COURT: How about large clips?

9 MR. RONNOW: Not large enough, Your  
10 Honor. We tried that size.

11 MR. FINLAYSON: A little tape might do it.

12 MR. RONNOW: You need a -- (inaudible) --  
13 clip.

14 THE COURT: Industrial strength might do  
15 it. I think we're fine, counsel. It seems to be  
16 staying with us as long as no one walks by it  
17 quickly. Go ahead, counsel.

18 MR. FINLAYSON:

19 Q. How long have you lived in the Cedar City,  
20 St. George area?

21 A. 41 years.

22 Q. Have you had occasion to drive up I-15  
23 between St. George and Cedar City past where the  
24 signs are? Have you had occasion to do that?

25 A. Many, many, many times.

21015 / Page 182

1 Q. Since you were -- became a permits  
2 officer, about how frequently do you drive past that  
3 area?

4 A. I usually get to the St. George area at  
5 least once a week and often times more often than  
6 that.

7 Q. Have you on foot gone through this area  
8 and examined where the signs are and various  
9 indications of the ground?

10 A. Yes.

11 Q. Have you, from your own experience,  
12 compared this map to your personal experiences as  
13 you have both driven by and walked the area to  
14 determine whether this aerial map represents the  
15 area near Anderson Junction where the signs are?

16 THE COURT: Counsel, by this area map, you  
17 are referring to Exhibit No. 17, which is, in fact,  
18 an aerial photograph?

19 MR. FINLAYSON: Yes.

20 THE COURT: All right. And your answer,  
21 sir.

22 THE WITNESS: Yes.

23 MR. FINLAYSON:

24 Q. And as of today, I mean, I don't mean this  
25 moment, when did you -- when did you last walk

21016 / Page 183

1 through this area and looked for indications of the  
2 topography?

3 A. Within the last 10 days. Last week  
4 sometime I was down there.

5 Q. Does that accurately reflect your  
6 observations?

7 A. Pretty much. The interchange -- our  
8 freeway interchange has been changed a little bit.  
9 This picture was taken in '79. We've extended the  
10 on ramp -- northbound on ramp somewhat to better  
11 make it a better, safe intersection, but other than  
12 that, it's pretty much exactly the same.

13 MR. FINLAYSON: I submit this document in  
14 evidence.

15 THE COURT: All right. Your objection it  
16 is a photograph, you don't know who took it, you  
17 don't know when it was taken?

18 MR. FINLAYSON: There's a mark on the  
19 back, but --

20 MR. RONNOW: I have a further objection,  
21 Your Honor.

22 THE COURT: Relevance as well, counsel,  
23 based upon your prior objections. What else?

24 MR. RONNOW: Well, it's not relevant in  
25 that Mr. Snow has just testified that the actual

21017 / Page 184

1 present circumstances of the freeway configuration  
2 at the intersection are different today than when  
3 that photograph was taken. This is also an aerial  
4 photograph, not a photograph at the level Mr. Snow  
5 is accustomed to walking the property. May I voir  
6 dire briefly?

7 THE COURT: I'm not going to let it in,  
8 counsel. A 1979 photograph is not particularly  
9 useful when the signs weren't built until 1987, and  
10 what I'm going to do is order that Exhibit No. 17 be  
11 filed with the clerk of the Court to see that if I  
12 am in error it will be part of the record that can  
13 be corrected, and with that in mind, now, counsel,  
14 you may voir dire to cover any other issues that you  
15 may.

16 -oOo-

17 VOIR DIRE EXAMINATION

18 BY MR. RONNOW:

19 Q. Mr. Snow, are you a pilot?

20 A. No.

21 Q. Have you -- in the time frame of 1979,  
22 have you flown over the area immediately above  
23 Anderson Junction that is purportedly depicted in  
24 the aerial photograph on Exhibit 17?

25 A. Numerous times.

R1018 / Page 185

1 Q. And --  
 2 A. Skywest Airlines. I fly -- I fly down  
 3 here, I imagine, once a month right through the  
 4 pass.  
 5 Q. All right. So do I. Rarely do they go  
 6 over Anderson Junction.  
 7 THE COURT: Occasionally, they do,  
 8 counsel. (Inaudible.)  
 9 THE WITNESS: Occasionally they do.  
 10 MR. RONNOW: We would object on the basis  
 11 that it is not probative of the condition of the  
 12 land or accurate as to the condition of the land or  
 13 the intersection during the relevant time frame of  
 14 this lawsuit.  
 15 THE COURT: And your objection is  
 16 sustained, however, 17 is filed with the clerk in  
 17 order to preserve the record. Next question, Mr.  
 18 Finlayson.  
 19 MR. FINLAYSON: If I may just state a  
 20 reason in argument with regard to this photo. It  
 21 shows the nature of the whole area, and the witness  
 22 has testified that he has observed, except for the  
 23 exact configuration of the freeway entrance, that  
 24 the photo represents present facts, and that would  
 25 be my argument for its admission.

R1019 / Page 186

1 THE COURT: All right. Thank you,  
 2 counsel. Your record is made. Let's go on.  
 3 MR. FINLAYSON: I was also prepared to  
 4 have the witness show where on the map exactly where  
 5 these signs are, but if it's not in evidence, I  
 6 can't do that.  
 7 THE COURT: It's not in evidence, counsel,  
 8 but I'll give you that opportunity to preserve the  
 9 proffer if you wish to do so. You're objecting  
 10 still, Mr. Ronnow, based upon the age of the photo,  
 11 the perhaps differences in the landmarks between  
 12 1979 and 1987, though doesn't that go to weight  
 13 rather than admissibility?  
 14 MR. RONNOW: We would -- we would continue  
 15 that objection, Your Honor.  
 16 THE COURT: All right, counsel. Go ahead,  
 17 Mr. Snow, will you go down, and as best you can, on  
 18 the Exhibit No. 17 with a pen, mark the location of  
 19 the three sign posts that are there today if we were  
 20 to drive to that locale.  
 21 MR. RONNOW: I'm going to object to that,  
 22 Your Honor, and the basis is that is not Mr.  
 23 Finlayson's question. We don't have any foundation  
 24 laid as to his ability at this point to locate signs  
 25 as opposed to just being familiar with the general

R1020 / Page 187

1 area.  
 2 THE COURT: All right, counsel.  
 3 MR. RONNOW: We do have -- again, Your  
 4 Honor, we have an affidavit by an engineer in the  
 5 record that has located those signs by metes and  
 6 bounds if you will.  
 7 THE COURT: And, counsel, you have that in  
 8 your record, and the Court of Appeals has already  
 9 seen it, but I'm going to allow this witness, for  
 10 the purpose of this proffer, it doesn't go into the  
 11 record for this decision on today's matter, but I'm  
 12 going to allow Mr. Snow to locate them to the best  
 13 of his ability without any further foundation for  
 14 the purpose of preserving the record. Go ahead, Mr.  
 15 Snow.  
 16 MR. FINLAYSON: I can elicit from the  
 17 witness how he determined those were the proper  
 18 locations.  
 19 THE COURT: Let him mark it first, and  
 20 then you can do that once he's back on the stand,  
 21 counsel.  
 22 -oOo-  
 23 DIRECT EXAMINATION (RESUMED)  
 24 BY MR. FINLAYSON:  
 25 Q. And where is -- well, I'll ask him

R1021 / Page 188

1 questions.  
 2 THE COURT: Okay. Mr. Snow, you can have  
 3 a seat.  
 4 MR. RONNOW: Your Honor, may I -- may I  
 5 just approach the exhibit and see exactly where that  
 6 is.  
 7 THE COURT: Go ahead, counsel.  
 8 THE WITNESS: We need a bigger marker.  
 9 THE COURT: It's lost to the color blind  
 10 judge anyway, so it's not to worry about. And I'm  
 11 not looking at it because it's not part of the  
 12 record.  
 13 MR. FINLAYSON:  
 14 Q. Mr. Snow, would you also mark where the  
 15 road goes across I-15.  
 16 THE COURT: Oh, counsel, that's visible on  
 17 the photograph. Anybody can see where it goes  
 18 across.  
 19 MR. FINLAYSON: Okay. That's fine.  
 20 Q. Can you tell me how you determined just  
 21 where to put the first marker, the one closest to  
 22 the Anderson Junction intersection?  
 23 A. Can I go back down there?  
 24 THE COURT: If you need to, go ahead.  
 25 THE WITNESS: Okay. I just -- it's easier



21022 / Page 189

1 to kind of show you. The scale on this map is 120  
2 to -- 120 feet to one inch.

3 MR. FINLAYSON:

4 Q. How do you know that?

5 A. There is a stamp on the back that came  
6 from the aerial photographic company that says one  
7 inch on this is a scale of 120.

8 THE COURT: All right. Go ahead and show  
9 me how you did that.

10 THE WITNESS: Right here is a ditch. This  
11 ditch, this drainage comes down so this ditch is  
12 still present as of today. Okay. The first sign is  
13 right here. I found this ditch, okay, so I -- and I  
14 know where this is because I can find it on the  
15 ground.

16 I measured -- I have a distance meter in  
17 my pickup that measures accurately as you drive  
18 along. Here I measured to that point where the sign  
19 is, took the scale -- I knew the exact distance,  
20 took the scale and measured it to there, found that  
21 distance.

22 From this point the distance measured --  
23 (inaudible) -- the next sign, scaled it from a point  
24 that I now knew to that point, to this point.

25 THE COURT: All right, sir. We've got it

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1 covered.

2 MR. RONNOW: Your Honor, we would request  
3 that the exhibit be removed now.

4 MR. FINLAYSON: I'm still going to ask him  
5 several questions.

6 THE COURT: If we're still working on it  
7 as part of the proffer, counsel, we'll keep it up  
8 until Mr. Finlayson is done.

9 MR. FINLAYSON:

10 Q. Did you measure distances from one sign to  
11 another and from the sign closest to the junction,  
12 from there to the junction?

13 A. Yes.

14 Q. Do you know what the distances are?

15 MR. RONNOW: Objection, relevance.

16 THE COURT: Overruled. This is not on the  
17 record for the purposes of this trial, counsel.  
18 This continues to be Mr. Finlayson's proffer with  
19 respect to Exhibit 17. Am I correct, counsel?

20 MR. FINLAYSON: Yes.

21 THE COURT: All right. Overruled. Go  
22 ahead.

23 THE WITNESS: Yes.

24 MR. FINLAYSON:

25 Q. What are those distances? Just state them

21024 / Page 191

1 in the most logical fashion.

2 A. From the first -- from the most southerly  
3 sign, to the center of the interchange or to the  
4 center of where the -- where old 91 goes underneath,  
5 the structure is approximately 2,000 feet.

6 Q. By approximately, within how many feet?

7 A. A couple of feet.

8 MR. RONNOW: Which sign? I'm sorry,  
9 counsel.

10 THE WITNESS: The most southerly one. The  
11 one that's closest to the interchange.

12 MR. FINLAYSON:

13 Q. How many feet?

14 MR. RONNOW: Approximately 2,000.

15 THE WITNESS: 2,000.

16 THE COURT: Give or take two.

17 THE WITNESS: A couple feet.

18 MR. FINLAYSON:

19 Q. From that sign to the middle sign, what is  
20 the distance?

21 A. 490 feet.

22 Q. Is there a rule regarding how far --

23 MR. RONNOW: Objection, Your Honor,  
24 relevance. This is not -- this is not part of the  
25 proffer with regard to this exhibit. Mr. Finlayson

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1 is trying to bootstrap to evidence regarding a whole  
2 entirely different section of the Outdoor  
3 Advertising Act.

4 THE COURT: And, counsel, I'm going to  
5 sustain you there with respect to this question  
6 about the rule. Let's find the distance. What's  
7 the distance to the most northerly sign, sir?

8 THE WITNESS: From the second sign to the  
9 most northerly sign is 520 feet.

10 THE COURT: Thank you, sir.

11 MR. FINLAYSON:

12 Q. Were there any differences between your  
13 measurements and the affidavit of Mr. Whitehead that  
14 you -- did you review his --

15 A. Yes, I had -- I had Mr. Whitehead's  
16 information with me, and I found that -- the  
17 distance that he had between the structure -- I  
18 wasn't sure exactly. I just went from what he  
19 said.

20 He said he started in the center of it, so  
21 I started from the center of it. I found the first  
22 structure was actually 200 feet farther away from  
23 the structure, farther to the north than what he  
24 said there was.

25 ///

R1026 / Page 193

1 MR. FINLAYSON:  
2 Q. And in other respects were the --  
3 A. Everything else was running by the -- he  
4 had 490, that's what I found is 490. He had 520,  
5 and that's what I had, 520.  
6 THE COURT: Just the beginning point was  
7 200 feet different?  
8 THE WITNESS: Right.  
9 MR. FINLAYSON: That's all I have on this  
10 exhibit.  
11 THE COURT: All right. Then Mr. Bailiff  
12 if you will take the exhibit down, give it to the  
13 clerk as offered but not received, filed with the  
14 clerk for the purpose of the record.  
15 MR. FINLAYSON: I would ask that the next  
16 six photos be presented to the witness.  
17 THE COURT: That should be 11, 12, 13, 14,  
18 15, and 16.  
19 MR. RONNOW: Excuse me, counsel. I don't  
20 have 14 and 15 as photos. I think there are only  
21 four more photos. 14 and 15 are documents. There's  
22 three large photos, and one small photo left.  
23 MR. FINLAYSON: Okay. Numbers -- the  
24 first three in this series were perhaps given to the  
25 judge. They were 8, 9, and 10.

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1 THE COURT: I have 8, 9, and 10. They're  
2 already received, and they're on the bench.  
3 MR. FINLAYSON: They're received in  
4 evidence?  
5 THE COURT: They are, counsel.  
6 MR. FINLAYSON: Okay. Yes. Would it be  
7 appropriate for me to ask him what they represent or  
8 do you consider on --  
9 THE COURT: We've already got the record  
10 on, and Mr. Snow assisted in that process. And  
11 they're identified and on the record.  
12 MR. FINLAYSON: Then these are 14, 15, and  
13 16.  
14 MR. RONNOW: They're 11, 12, and 13.  
15 THE BAILIFF: 11, 12, and 13.  
16 THE COURT: All right. What does  
17 photograph No. 11 depict, Mr. Snow?  
18 THE WITNESS: No. 11 is the picture of the  
19 center sign post with the generating apparatus box  
20 -- (inaudible) -- signs.  
21 THE COURT: All right. Taken when, sir?  
22 THE WITNESS: This was taken same as the  
23 others. I think June or July of this year.  
24 THE COURT: You took it?  
25 THE WITNESS: I took it.

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1 THE COURT: Does it fairly and accurately  
2 depict the image as you saw it at the time you took  
3 the photograph?  
4 THE COURT: Same as it was this morning  
5 when I drove by.  
6 THE COURT: All right. And what direction  
7 were you facing at the time you took the  
8 photograph?  
9 THE WITNESS: I was standing right on the  
10 frontage road looking pretty well straight west.  
11 THE COURT: All right, sir. Do you offer  
12 Exhibit No. 11, counsel?  
13 MR. FINLAYSON: I do, Your Honor.  
14 THE COURT: Any objections, Mr. Ronnow?  
15 MR. RONNOW: Your Honor, we would object.  
16 It's absolutely redundant of Exhibit 9. It's just  
17 closer, and as such, it's a little bit misleading.  
18 It doesn't add anything to what is going on or not  
19 going on on the property.  
20 THE COURT: All right. Thank you,  
21 counsel. I overrule your objection. No. 11 is  
22 received. I find that 11 does depict the generating  
23 apparatus that was testified to by one of the  
24 plaintiff's witnesses, and Exhibit No. 9 does not  
25 show that. 11 is received. Next question,

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1 counsel.  
2 (Whereupon, Defendant's Exhibit  
3 11 was received into evidence.)  
4 MR. FINLAYSON:  
5 Q. I would ask you about No. 12 and ask you  
6 what it represents?  
7 A. Okay. No. 12 is a picture, this is the  
8 most southerly sign post. This is looking probably  
9 more a little toward the north because I'm getting a  
10 lot of the Pine Valley Mountain in that.  
11 Q. Did you take that at the same time?  
12 A. Same time, yeah.  
13 Q. This is a different picture from the  
14 immediately prior one -- I mean a different sign?  
15 A. Different sign post. This is the one --  
16 the most southerly one.  
17 MR. FINLAYSON: I urge this in evidence.  
18 THE COURT: Same objection, Mr. Ronnow?  
19 MR. RONNOW: Yes, Your Honor.  
20 THE COURT: Duplication?  
21 MR. RONNOW: Yes.  
22 THE COURT: Overruled. The size of the  
23 sign post shown in the photograph is somewhat more  
24 useful to show the immediate area. 12 is received.  
25 ///

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1 (Whereupon, Defendant's Exhibit  
2 12 was received into evidence )  
3 MR FINLAYSON  
4 Q No 13, I ask you what that photo depicts?  
5 A This is of the most northerly sign post  
6 This is, again, looking -- this is looking pretty  
7 well just straight west  
8 Q That's a different sign post from the  
9 prior two?  
10 A Different sign post from the prior two  
11 Q And you took this at the same time you  
12 took --  
13 A Same time, uh-huh  
14 MR FINLAYSON I submit this in evidence  
15 MR RONNOW Same objections, Your Honor.  
16 THE COURT Same objection? Same order  
17 No 13 is received  
18 (Whereupon, Defendant's Exhibit  
19 13 was received into evidence.)  
20 MR FINLAYSON  
21 Q Do those three exhibits reflect the  
22 circumstances presently on the property?  
23 A Yes  
24 Q Does your file include a lease from the  
25 landowner to a sign owner for signs on this

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1 property?  
2 A Yes.  
3 MR RONNOW Objection, relevance.  
4 THE COURT As it goes to use, counsel,  
5 and use is one of the factors that the Court of  
6 Appeals did point out, a lease establishing that a  
7 lease between the property owner and the sign owner,  
8 you're sure it's irrelevant?  
9 MR RONNOW Your Honor, this is not even  
10 a lease between the current sign owner and the  
11 property owner. This is a lease that goes back  
12 years, and there is no dispute but that the signs  
13 are there pursuant to a lease. The issue of use is  
14 that it's a sign on the property under lease. This  
15 document, itself, is irrelevant.  
16 MR FINLAYSON I would like to respond.  
17 THE COURT I don't think you need to,  
18 counsel. I can see its relevance. However, what is  
19 the exhibit number of said lease?  
20 MR FINLAYSON No 14.  
21 THE COURT All right  
22 MR FINLAYSON Wait a minute  
23 MR RONNOW Your Honor, if I may, this  
24 lease is not even between -- has nothing to do with  
25 the parties in this case

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1 THE COURT Is it the Lundgren lease,  
2 counsel?  
3 MR RONNOW Yes  
4 MR FINLAYSON Eveleth is the landowner  
5 then under the lease and presently, so it is  
6 relevant  
7 THE COURT Well, and that's one of the  
8 problems we run into with the Court of Appeals'  
9 decision They have indicated that Lundgrens having  
10 been the predecessor and interest to Kunz that they  
11 are in the chain of title, and you're just basically  
12 saying, why bother, Mr Ronnow, it's really not  
13 before the Court today?  
14 MR RONNOW There are two predecessors in  
15 interest, Your Honor, two back.  
16 MR FINLAYSON (Inaudible) -- landowner,  
17 not the sign owner, and I will show how that's  
18 relevant  
19 THE COURT But, counsel, there is no  
20 issue that Mr. Eveleth is the landowner. Is that  
21 correct, Mr. Ronnow?  
22 MR RONNOW That is correct, and that is  
23 not relevant under the issue before the Court.  
24 THE COURT Then why is it that the lease,  
25 Mr Finlayson, is relevant? If there's no issue

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1 that Eveleth is the landowner, plaintiff stipulates  
2 that that's the fact --  
3 MR FINLAYSON Mr. Eveleth's  
4 participation we will submit is relevant to the  
5 zoning change, and he as a landowner is relevant to  
6 that line of inquiry.  
7 THE COURT Well, counsel, in the  
8 plaintiff's case in chief, un rebutted testimony came  
9 in that Mr. Eveleth was involved in the annexation  
10 process and in the --  
11 MR RONNOW Master planning.  
12 THE COURT -- master planning at least to  
13 the extent that his interests were solicited by  
14 Toquerville Town and that his requests were  
15 accommodated by extending the annexation, and,  
16 thereafter, the zoning map up to encompass all of  
17 Mr. Eveleth's property on the west side of the  
18 freeway, on the northern edge of the town limits.  
19 Now, that's not an issue as I see it. I  
20 don't think you need to offer any proof on that  
21 because everyone agrees that Mr. Eveleth, as a  
22 landowner, was part and parcel to the process of  
23 annexing, and, thereafter, zoning What else do you  
24 want to get into with Mr Eveleth?  
25 MR FINLAYSON I'm willing to accept that

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1 if we stipulate that Mr. Eveleth was the landowner  
2 at the time the signs were first put up, and that he  
3 has continued to be the landowner.

4 THE COURT: And there's no question about  
5 that, to your knowledge, Mr. Ronnow? You have no  
6 factual issue about that whatsoever?

7 MR. RONNOW: Except that it's not  
8 relevant, Your Honor. I have no -- our  
9 understanding in the underlying -- in the case prior  
10 to appeal was that he was and is, has been landowner  
11 at all times relevant to this issue.

12 THE COURT: All right. Then, counsel, it  
13 is conclusively proven that Mr. Eveleth is the owner  
14 of the fee title interest, the underlying real  
15 estate upon which these signs, which are the subject  
16 matter of this litigation, are located.

17 MR. FINLAYSON: I'm willing to withdraw  
18 submission of this.

19 THE COURT: All right. Then we don't need  
20 to worry about Exhibit No. 14.

21 MR. FINLAYSON: Actually, I think I miss  
22 named it. The lease might be 15.

23 MR. RONNOW: 15, Your Honor.

24 THE COURT: All right. 15, then, we don't  
25 need to worry about. You can take Exhibit 15 back

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1 to Mr. Finlayson.

2 MR. FINLAYSON:

3 Q. No. 14 I would have presented to the  
4 witness and ask him what it is.

5 THE COURT: Do you have a copy, Mr.  
6 Ronnow?

7 MR. RONNOW: Yes, Your Honor.

8 THE COURT: Okay. Go ahead, Mr. Scott,  
9 (sic) take a look at No. 14.

10 MR. FINLAYSON:

11 Q. Mr. Snow, what is the title on the top of  
12 this document?

13 A. It is Agreement Utah.

14 Q. Is this -- do you have -- is this part of  
15 your file?

16 A. Yes.

17 Q. And on the back page, what does it show?

18 MR. RONNOW: Objection, Your Honor. Until  
19 it's admitted, I'm going to object to the witness  
20 reviewing or reading from the exhibit, and we are  
21 going to object on relevance. If he wants to  
22 identify exactly what it is, we can proceed from  
23 there.

24 THE COURT: When it says, Agreement Utah,  
25 what is this agreement, sir?

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1 THE WITNESS: This is the agreement --  
2 this is the Utah Federal Agreement for the outdoor  
3 advertising sign.

4 THE COURT: An agreement entered into  
5 between the State of Utah Department of  
6 Transportation of the United States of America  
7 Department of Transportation regarding to the --  
8 regarding the outdoor advertising issues and  
9 agreements between those two entities?

10 THE WITNESS: Right.

11 THE COURT: All right. Your objection as  
12 to relevance, Mr. Ronnow.

13 MR. RONNOW: Your Honor, again, it  
14 couldn't be clearer as to the narrow confines of the  
15 issue on remand here, that is, the purpose of the  
16 Toquerville legislative body enacting their  
17 ordinance. The federal agreements between the State  
18 of Utah and the federal government with regard to  
19 outdoor advertising are simply not relevant to this  
20 procedure or that issue.

21 Insofar as it may have been relevant to  
22 issues have already gone up on appeal, the Court of  
23 Appeals has dealt with that. Insofar as it may have  
24 -- may be relevant in -- somewhere down the road in  
25 that administrative procedure that the Court alluded

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1 to this morning, we're at pure speculation at this  
2 point as to whether it's relevant or not. In  
3 relationship to the primary purpose of adopting a  
4 zone depicted under Exhibit 1 by the Toquerville  
5 Town Council, it simply is not relevant.

6 THE COURT: Mr. Finlayson, why is the  
7 agreement between the State of Utah and the United  
8 States relevant and probative in the issues before  
9 the Court today?

10 MR. FINLAYSON: The Federal State  
11 Agreement purpose was quoted in our brief to the  
12 federal court and it states a policy.

13 THE COURT: Federal court or appellate  
14 court?

15 MR. FINLAYSON: Excuse me, appellate  
16 court.

17 THE COURT: Okay. We've got one too many  
18 judges involved in this mess already, counsel.

19 MR. FINLAYSON: It was once before the  
20 federal court.

21 THE COURT: That's what I was afraid of.

22 MR. FINLAYSON: No, before the -- before  
23 the Court of Appeals, sir. We quoted that it's a  
24 policy statement regardless of what explicitly the  
25 Court of Appeals stated, it is the law that Utah

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1 must comply with that federal standard.  
2 If we were to have a ruling here in  
3 violation of that law, the federal government could  
4 take action, and in any event, regardless of what  
5 action they take, if it is the law, I'm sure the  
6 Court of Appeals would incorporate it. I mean, they  
7 can't envision every conceivable idea that may be  
8 presented. If it's the law, I'm sure they would  
9 countenance this Court's recognizing it.

10 THE COURT: But, counsel, my concern is,  
11 first and foremost, I'm a state trial court judge.  
12 I don't have federal issues over me, and I don't  
13 have -- in front of me, and I don't have federal  
14 jurisdiction over me except in the broadest sense of  
15 the federal constitution.

16 I have no authority to interpret, nor  
17 enforce an agreement to which the United States  
18 government is a party unless they come in and  
19 consent to give me that authority, and I can't  
20 imagine a federal agency doing so. That would have  
21 to be before the federal court in Salt Lake.

22 The fact that it was in your appellate  
23 brief, counsel, may indeed be of use to the  
24 appellate court in determining what the applicable  
25 law of the case might be between vis-a-vis Utah and

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1 the United States, but in the issues that are before  
2 this Court today, as to the primary purpose of  
3 Toquerville Town in enacting their annexation master  
4 planning and zoning of this property, I just still  
5 am puzzled as to why it is that this Court need to  
6 review and/or opine on the Federal State Agreement.

7 MR. FINLAYSON: The section 27-12-136.2 of  
8 the Utah Act specifically incorporates this Federal  
9 State Agreement.

10 THE COURT: And if it does, counsel, if it  
11 incorporates the Federal State Agreement, then it  
12 does just as a matter of law, but do I need this in  
13 evidence to --

14 MR. FINLAYSON: It's more a matter of law  
15 than evidence really.

16 THE COURT: All right.

17 MR. FINLAYSON: I would submit it in that  
18 way if it's incorporated here, but I thought perhaps  
19 I would ensure its consideration if I submitted it  
20 in evidence.

21 THE COURT: Well, Mr. Ronnow, do you think  
22 there is any need for me to look at the Federal  
23 State Agreement in order to find the facts necessary  
24 in this hearing?

25 MR. RONNOW: No, Your Honor, and I would

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1 like to just clarify the record because we're not --  
2 we're going to get into this again as soon as  
3 closing argument begins. Mr. Finlayson read from  
4 the section of the Court of Appeals case this  
5 morning that he's referring to on page 769 of the  
6 Pacific Reporter, that's 913 P.2d, 765 at 769 in  
7 that left-hand column beginning with the paragraph  
8 in enacting section 27-12-136.3, and the Court of  
9 Appeals went through that broad policy statement and  
10 suggested there that there had to be consistency  
11 with that policy.

12 But the counsel for the State stopped  
13 short of the only relevance of that statement when  
14 in the last sentence the Court of Appeals says,  
15 Accordingly, if a zoning body designates specific  
16 land as commercial for the primary purpose of  
17 allowing outdoor advertising on that land, then  
18 section 27-12-136.3 (3) prohibits the use of the  
19 billboards on a land regardless of whether or not  
20 the zoning body also intends to reserve the land for  
21 other commercial use, or, in other words, because of  
22 the policy that they articulated out of the Federal  
23 Act 136.3 (3) was promulgated, and if we run afoul  
24 of that, then we also run afoul of the act.

25 But the issue before the Court is whether

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1 -- if primary purpose of the zoning was to  
2 accommodate signage. This Court is not -- in this  
3 proceeding here today, is it necessary at all for  
4 this Court to get into the federal act with that  
5 language? The Court of Appeals has tied it up all  
6 very neatly.

7 THE COURT: Well, that's the way I see it,  
8 counsel, but in order to preserve this record, what  
9 I'm going to do is I'm going to receive the  
10 agreement, not as an exhibit, but simply filed by  
11 the State to show the details of the Federal State  
12 Agreement, but I agree with you, Mr. Ronnow, I don't  
13 think I need look at it. But it will go into the  
14 file so that anybody else who has a concern over it,  
15 for what possible reason I can't imagine, but it  
16 will be there.

17 MR. RONNOW: All right. Your Honor and if  
18 I may just add one thing to the record. You know,  
19 it's virtually impossible for us to prepare to deal  
20 with this kind of collateral issue --

21 MR. FINLAYSON: I object to this type of  
22 response. I don't --

23 THE COURT: All right. Your objection is  
24 on the record. Go ahead, Mr. Ronnow.

25 MR. RONNOW: -- with this kind of issue

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1 that is so far afield of what the Court of Appeals  
2 directed this Court, but with the Court's ruling, we  
3 understand

4 THE COURT All right Then Exhibit No.  
5 14 is ordered filed in the Court's file, submitted  
6 as authority under the statute, prepared by counsel  
7 for the defense to show the Court what the law is  
8 insofar as it is impacted by the Federal State  
9 Agreement.

10 MR RONNOW Then, Your Honor, is my  
11 objection sustained?

12 THE COURT Your objection is sustained as  
13 to its reception in evidence.

14 MR RONNOW Okay.

15 THE COURT All right. Go ahead, Mr.  
16 Finlayson.

17 MR FINLAYSON Thank you, Your Honor.  
18 The next exhibit is No. 16, which I would ask be  
19 presented to the witness and first shown to counsel  
20 if he does not have a copy.

21 MR RONNOW Maybe not. Okay.

22 MR FINLAYSON

23 Q Mr. Snow, who took this picture?

24 A I did.

25 Q When did you take it?

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1 A I think I took this about last Thursday.

2 Q Does it accurately reflect the  
3 circumstances as of the last time you were on the  
4 property?

5 A Yes.

6 Q When was that?

7 A Last time I was actually on the property  
8 was Thursday. I drove by this morning and the sign  
9 was still there.

10 Q Today you saw that sign?

11 A Yes.

12 Q Okay. What does the sign say?

13 MR RONNOW. Objection. We will object to  
14 the exhibit, but if it is received, it's the best  
15 evidence of what is in it.

16 THE COURT All right. Any objection,  
17 then, to this photograph, counsel?

18 MR RONNOW Yes, Your Honor, again  
19 irrelevant objection.

20 THE COURT Overruled. It shows the  
21 property as it exists last Thursday and today. No.  
22 16 is received.

23 (Whereupon, Defendant's Exhibit  
24 16 was received into evidence.)

25 MR FINLAYSON With the stipulation that

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1 Eveleth is still the owner, I will refrain from  
2 further questioning

3 THE COURT All right, counsel.

4 MR FINLAYSON This is my testimony, Your  
5 Honor, and Mr. Snow is finished with direct.

6 THE COURT All right. You may  
7 cross-examine, counsel, if you need to.

8 MR RONNOW No questions, Your Honor.

9 THE COURT All right. Thank you, Mr.

10 Snow. You may step down. If you will hand those  
11 photographs to the bailiff, that will take care of

12 it. The State having rested, then, counsel, do you  
13 want a few minutes to go through your notes, examine  
14 the record, and prepare for closing arguments?

15 MR RONNOW That will be helpful, Your  
16 Honor.

17 THE COURT All right. Mr. Finlayson,  
18 let's give you the same chance since Mr. Ronnow  
19 wants it. Let's stand in recess until 3:15, and  
20 then we'll come back and hear your closing  
21 arguments.

22 (Recess.)

23 THE COURT We are back in session in Kunz  
24 versus Department of Transportation. Mr. Ronnow,  
25 Mr. Finlayson, and Mr. Scott -- Mr. Scott -- Snow

P 1045 / Page 212

1 are present and, Mr. Ronnow, you may proceed with  
2 your closing argument.

3 MR RONNOW: Your Honor, we have been  
4 doing closing argument all day long to a certain  
5 extent, but as the Court pointed out, there's  
6 clearly a lot left in this lawsuit even after  
7 today. So I want to take a little time with this.

8 Let me start by stating that we are not  
9 here today to litigate the appropriateness of these  
10 signs from any kind of a setting standpoint. While  
11 there may be a time and place for that, that isn't  
12 today.

13 We are not here today to construe  
14 compliance with federal acts, agreements between the  
15 state and federal government, or even state or UDOT  
16 agency administrative procedure. What we are here  
17 to determine, and the only thing that we are here to  
18 determine today is primary purpose for the  
19 Toquerville zoning decision zoning the Eveleth  
20 property at Anderson Junction as highway  
21 commercial.

22 Clearly, as the Court has already pointed  
23 out, at 769 and at 771 of the Kunz versus State  
24 case, that's 913 Pacific 2.d 765, clearly in two  
25 places the Court of Appeals limit it to just that.

R 1046 / Page 213

1 The Court stated, We, therefore, reverse and remand  
2 for trial to allow the fact finder to determine the  
3 primary purpose for the zoning decision.

4 Now, the Court of Appeals, as it is  
5 sometimes want to do, generously supplied us with a  
6 lot of direction about what we might consider, and,  
7 in fact, I submit to you today, Your Honor, that the  
8 Court of Appeals has already ruled on defendant's  
9 Motion in Limine.

10 The Court of Appeals stated at 769 of the  
11 Kunz case that the Court, the fact finder, can and  
12 should consider all relevant evidence. All relevant  
13 evidence. Now, it's important to understand there  
14 that the Court has ruled on that Motion in Limine  
15 because the inquiry at this stage is not the  
16 construction of any statute. That's already been  
17 accomplished in appeal.

18 It isn't the construction of any statute.  
19 It isn't even the validity of the actual zoning  
20 ordinance or map or master plan or annexation that  
21 Toquerville undertook. We're not here to consider  
22 whether or not their action is valid under express  
23 and limited direction of the Court of Appeals. We  
24 are here only to look at the purpose in designating  
25 that property as highway commercial.

R 1047 / Page 214

1 Now, since the Court of Appeals suggested  
2 that it would be appropriate and relevant for the  
3 Court to look at actual land use, that's why we  
4 looked at all those photographs, and the Court of  
5 Appeals also said that it would be appropriate for  
6 the Court to consider whether Toquerville merely  
7 perpetrated county zoning, that under that express  
8 direction the whole Toquerville process of  
9 annexation, master plan, and zoning map adoption are  
10 relevant to this issue.

11 If we are to consider whether Toquerville  
12 merely perpetrated an earlier zoning --

13 THE COURT: Perpetuated.

14 MR. RONNOW: Perpetuated. Excuse me, Your  
15 Honor. -- perpetuated an earlier zoning designation  
16 then we can't -- we can't understand that issue  
17 without looking at what they did.

18 It's important also to note here, Your  
19 Honor, that the policy behind 136.3 (3), and that is  
20 Utah Code Annotated 27-12-136.3 paren (3) for the  
21 record, the policy behind that is really to  
22 preclude, as the Court of Appeals directs us there,  
23 to preclude the haphazard, unreasoned exercise zoning  
24 authority merely to accommodate a outdoor  
25 advertising. All right.

R 1048 / Page 215

1 Clearly this Court of Appeals held that  
2 the -- in recognizing and affirmed this Court with  
3 the Court's conclusion that a legitimate town zoning  
4 body may prospectively designate commercial and  
5 industrial zonings as part of their long-range  
6 planning, and in that situation, signage, outdoor  
7 advertising complies with the act.

8 It is only under the circumstance that  
9 that zoning activity was perpetrated, motivated for  
10 the primary purpose of allowing outdoor advertising  
11 that we run afoul of 136.6.

12 Now, then, the State would have this Court  
13 believe that after the fact result is the only  
14 evidence -- is the only probative evidence of what  
15 the intent and purpose of the zoning authority was  
16 in adopting that ordinance, and that simply isn't  
17 true. That would tip the zoning process on its head  
18 completely.

19 That would run so foul of all the purpose  
20 and policy and objective in the cities and towns  
21 Land Planning Enabling Act as well as the county  
22 Land Planning Enabling Act encouraging these towns  
23 and cities to reach out, and as Mayor Wahlquist  
24 said, try to get ahead of the zoning curve.

25 Certainly, there is no better and vivid

R 1049 / Page 216

1 illustration of that problem than Washington  
2 County. Reactive zoning is the problem. Proactive  
3 zoning is the solution. Proactive zoning is what  
4 the Utah Land Enabling Act is all about.

5 So the Court of Appeals correctly but  
6 quietly affirmed this trial court in saying that the  
7 trial court construed the use of the term "reserved"  
8 to mean that the property does not actually need to  
9 have commercial development on it, but that it  
10 merely be zoned for that purpose.

11 Then the Court goes on and quietly  
12 affirms, the trial court, while we agree that an  
13 area zoned for commercial or industrial use in a  
14 city or town need not actually have commercial  
15 development on it to satisfy the definition, we  
16 conclude that such property may still be excluded  
17 from the use of outdoor advertising if the zoning  
18 violates 136.3.

19 So the fact that there is no commercial  
20 development out there is not evidence that the  
21 designation violated 136.3 (3). It's only evidence  
22 that there is no commercial development out on the  
23 property.

24 We heard from Kim Wallace, the engineer,  
25 with regard to the annexation that technically v. nat



R1050 / Page 217

1 prompted the annexation were the property owners out  
2 there responding to several issues. One was the  
3 opportunity that perhaps this reservoir on the  
4 planning -- on the drawing board represented in  
5 terms of commercial.

6 Generically, with or without the  
7 reservoir, there was interest in zoning that  
8 property commercial both by property owners and  
9 throughout the town, but Mr. Wallace stated that  
10 there were three primary issues or concerns driving,  
11 if you will, that annexation.

12 Once the petition was received and the  
13 town reviewed the petition, the issues were how do  
14 we pay for services, how do we get them out there,  
15 and a lot of discussions about SIDs and other  
16 things. How do we actually handle the logistic of  
17 providing services? A lot of talk about the water  
18 and solutions and what may or may not happen that  
19 way.

20 And then most importantly a lot of talk  
21 about the property owners and they're to have  
22 commercial right near the Anderson Junction  
23 interchange itself, and north, on the east side of  
24 Anderson junction, the residential side.

25 He said -- Mr. Wallace said clearly that

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1 those were the issues that were driving the  
2 consideration and review of this annexation. It was  
3 clear that the amended configuration of the  
4 annexation was to accommodate a request not just by  
5 Mr. Eveleth, but by the property owners on both  
6 sides of the freeway to the effect that -- all of  
7 our property owners, and that's certainly a  
8 reasonable request and part of the ongoing process  
9 in annexation.

10 And I submit to the Court it is exactly  
11 why the state code requires that the first step is  
12 for the town to adopt a statement of policy, a  
13 policy statement, publish it, get it out on the  
14 table so that those kinds of issues can be raised as  
15 they move from the policy statement in an annexation  
16 to the final adoption of the annexation.

17 And the fact that Mr. Eveleth's property  
18 happened to be one of those parcels that was divided  
19 down the middle so that half would be county and  
20 half would be city, again, is not evidence that the  
21 annexation was to accommodate his sign leases.

22 Mr. Sizemore, the planner, his testimony  
23 is remarkable in the context of 136.3 (3) because he  
24 clearly illustrated how deliberate, how careful  
25 every effort was made to involve the public,

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1 11-month time frame in developing this master plan  
2 and zoning map, working on monthly public meetings  
3 with the planning commission, in which the public  
4 was involved and encouraged to participate.

5 This is not a kind of zoning procedure  
6 that is -- that is, you know, a snap judgment to  
7 accommodate signage. He was very frightened that  
8 the signs were an issue out there, and there was --  
9 if there was any evidence or motivation with regard  
10 to the signs, I think it can be safely construed --  
11 the evidence can be safely -- conservatively  
12 construed to say that a lot of people were in  
13 objection to those signs, didn't want to see them,  
14 but the issues, as Mr. Sizemore stated, that drove  
15 the master plan and zoning map were first,  
16 primarily, commercial area.

17 Toquerville has a need. As the mayor  
18 testified, we're on a curve. It's growing. It's  
19 developing. We need to get ahead of that  
20 development. Part of that is the opportunity for a  
21 commercial development, and what that brings to a  
22 growing viable community.

23 Toquerville also has a long history and  
24 unique character of being a very quaint,  
25 agricultural small town. They had a problem, and

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1 all of the witnesses testified that that problem and  
2 issue was what drove the discussion, where do we put  
3 commercial.

4 And all the witnesses testified that  
5 designation of the Anderson Junction location  
6 provided a perfect fit. It was the best opportunity  
7 for a commercial enterprise in connection with an  
8 I-15 cloverleaf interchange. It was removed from  
9 the old, quaint area of Toquerville Town, would not  
10 impinge, interfere, or disrupt that area, and the  
11 property owners all wanted it out there.

12 That's what drove this signing, this  
13 decision. Wahlquist testified with regard to the  
14 water issues that there were problems with water  
15 issues but what is important, from Mr. Wahlquist's  
16 testimony, is the recognition as the mayor and  
17 chairman of the town council that they had a need,  
18 they had a growing community.

19 They had to get ahead of that growth curve  
20 to plan for that growth curve, and, clearly, all the  
21 discussion of the water and how they would  
22 accommodate the water, even the continued work with  
23 the water conservancy district to solve those  
24 problems, is a clear indication the evidence is that  
25 the primary purpose of adopting that commercial zone



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1 throughout was to accommodate the growth of  
2 Toquerville, provide a logical and appropriate place  
3 to develop hopefully commercial enterprises.

4 The fact that it hasn't happened yet, and  
5 I underscore yet, Your Honor, is not evidence that  
6 this zoning was adopted merely to accommodate or  
7 allow for outdoor advertising.

8 THE COURT: Thank you, counsel. Mr.  
9 Finlayson, it's your turn.

10 MR. FINLAYSON: Thank you, Your Honor, and  
11 counsel. The Court of Appeals directed focus to,  
12 quote, "actual land use." The nature of the  
13 property for the signs would be the most objective,  
14 most significant evidence that can be presented in  
15 this case. It shows the purpose served by the  
16 zoning.

17 The Court of Appeals recognized that  
18 statements of intent don't matter to whether signs  
19 actually violate the purpose of the Outdoor  
20 Advertising Act and someone could state a purpose.  
21 We state that we are doing this only for commerce  
22 and not for signs, and then they could zone it that  
23 way and signs forever be the only activity on the  
24 property.

25 And Mr. Ronnow's argument would have it

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1 that those signs were always legal from now until  
2 eternity. That cannot be the standard. You have to  
3 look at the actual land uses or Section 27-12-136.3  
4 in parens (3) is read out of existence, and that was  
5 precisely the point that the Court of Appeals was  
6 concerned about.

7 The fuzziness of the memories of these  
8 people about this long past annexation and zoning  
9 shows that the objective facts should be the focus  
10 of the decision.

11 Further, the Court of Appeals began its  
12 inquiry of section 27-12-136.3 in parens (3) by  
13 quoting the purpose of the Utah Outdoor Advertising  
14 Act. I won't repeat it. I've stated it earlier.

15 The testimony of all of the witnesses  
16 showed there was no commercial activity ever on this  
17 property. Mr. Wahlquist has been in this area for  
18 30 years, and he says -- he stated on his own  
19 observation there has never been any commercial  
20 activity there.

21 Further, specifically addressing other  
22 features of the land use, he testified that there is  
23 no water service, no sewer, no power except for a  
24 generator on a closed system that's now defunct, no  
25 commercial activity at all.

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1 Mr. Wahlquist, a witness for the  
2 plaintiff, further testified that in this state of  
3 things, commercial activity in the area of the signs  
4 is not even feasible. Further, he said that a new  
5 waterline that's going in in that area goes across  
6 the freeway and does not go up to the area of the  
7 signs.

8 I would like to say something about Mr.  
9 Eveleth. Since the focus is the land use, Mr.  
10 Eveleth is really more pertinent to this inquiry  
11 than the sign owners. It was Mr. Eveleth who owned  
12 the land and had the first lease with the first  
13 landowner, and he has been the continuing landowner  
14 from that time to this.

15 It is Mr. Eveleth that constantly said, I  
16 am going to develop this area commercially and put  
17 commercial materials on it. He made six appearances  
18 to Washington County, which is in a certified copy  
19 of the Washington County --

20 MR. RONNOW: Objection, Your Honor.  
21 Counsel is arguing facts that are not in evidence  
22 before the Court for this proceeding.

23 THE COURT: All right, counsel. Your  
24 objection is noted for the record. Go ahead, Mr.  
25 Finlayson.

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1 MR. FINLAYSON: I wish to show the record  
2 of Mr. Eveleth with regard to this property.  
3 Without Mr. Eveleth's involvement, the bump on the  
4 west side of the property that belongs to Eveleth,  
5 that's where all three signs are located, that  
6 portion on the west side of the property would never  
7 have been included in the annexation by the city.

8 Their first proposal excluded that area,  
9 and it's reasonable why it did. It's too far away  
10 from the intersection. Perhaps it was reasonable to  
11 consider that commercial development would occur  
12 right at the intersection, and witnesses testified  
13 that if there was going to be commercial development  
14 that is where it would occur first.

15 There is no commercial development even  
16 there at this time, but way up where the signs are,  
17 2,000 feet away, is not a feasible place for a  
18 commercial development.

19 We should not be surprised that Mr.  
20 Eveleth, the landowner who is receiving income from  
21 the sign leases, is the one who urged inclusion of  
22 his property in this annexation. The city didn't  
23 include it because it was too far away. Only after  
24 Mr. Eveleth interceded did they include his  
25 property.

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1 These signs have been there for more than  
2 nine years. That's the only thing that is there.  
3 If there is any case where 27-12-136.3 would have  
4 relevance, it must have relevance here, otherwise a  
5 person could state an intent to do something  
6 commercially, put signs there in a pristine,  
7 beautiful area, and I submit the pristineness and  
8 the beauty of this area is relevant to consideration  
9 here.

10 A person could put signs in that area and  
11 leave them there forever and violate the policy of  
12 the state act and the federal act and the Federal  
13 State Agreement, but certainly just limiting it to  
14 the Utah act as the Court of Appeals referred to  
15 that would make 27-12-136.3 in parens (3) entirely  
16 useless.

17 Seven years have passed since Toquerville  
18 zoned it commercial and still there's no commercial  
19 development there. We don't object to the county  
20 zoning an area commercial and seeking to develop it  
21 commercially. There is no objection on the part of  
22 the State at all about that.

23 Our objection is that if it's an area that  
24 serves the primary purpose of allowing outdoor  
25 advertising, then it doesn't qualify the area for

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1 signs. This doesn't stop them from doing other  
2 commercial development, and, in fact, if they did  
3 other commercial development there and it was bona  
4 fide and it was in the area of the signs, the State  
5 would not object to the signs.

6 The incongruity is that you have signs  
7 there and only signs in a pristine area without it  
8 even being feasible for a commercial development and  
9 in justifying the signs for the policy of the act is  
10 to preserve the beauty of the pristine area. It is  
11 starkly incongruous. In 27-12-136.3 in parens (3)  
12 renders these signs unlawful.

13 Just -- I guess I have stated something  
14 about intent. The fuzziness of the memories about  
15 what was said, counsel, we urge, focus on the  
16 objective criteria. Mr. Ronnow made several  
17 comments that I would like to respond to.

18 He said that we should consider all  
19 relevant evidence. Now, did the Court of Appeals  
20 mean by that that you accept all evidence that is  
21 relevant regardless of whether it's inadmissible for  
22 any other reason? Of course, it didn't. It meant  
23 accept relevant evidence that also meets other  
24 criteria of admissibility.

25 I submit that it is crystal clear in the

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1 law that statements of intent of a legislative body  
2 that are not part of the legislative record are not  
3 admissible, and that would include almost all of the  
4 evidence submitted by Mr. Ronnow.

5 This rule does not say that you can get no  
6 evidence of legislative intent. It is a rule that  
7 limits legislative intent to the official record,  
8 and again the fuzziness of the memories shows why  
9 that rule became law.

10 We submit that the nature of the area, the  
11 use there, the passage of time, the signs have been  
12 there, and the area has been zoned commercial  
13 without any commercial development, require, in this  
14 instance, a ruling that it's a -- an area that is  
15 unlawful for signs, that area, which is proposed by  
16 plaintiff. We submit they have not borne their  
17 burden of proof. Thank you.

18 THE COURT: Thank you, counsel. Mr.  
19 Ronnow, any rebuttal?

20 MR. RONNOW: Yes, Your Honor. The only  
21 evidence submitted by the State, evidence --  
22 affirmative evidence of the primary purpose of  
23 Toquerville Town zoning authorities in zoning this  
24 property was to allow outdoor advertising, the only  
25 evidence whatsoever is that outdoor advertising is

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1 the only use.

2 It ignores the fact that outdoor  
3 advertising was there before they zoned it, but the  
4 State can only point to and continues to be that  
5 force, that use, and the State would have the Court  
6 believe that use is the only evidence to consider,  
7 and that simply isn't the case.

8 In connection to this brief in Motion in  
9 Limine the case is cited there in -- are all cited  
10 for the same proposition which is totally irrelevant  
11 to our issue today. That is, in construing a  
12 statute, the Court's refused to consider testimony  
13 about intent.

14 We're not here to construe 136.3 (3).  
15 That job has been done. There isn't any dispute as  
16 to what that statute says and how that statute  
17 applies now in light of the Court of Appeals'  
18 direction in law of the case.

19 We are here to determine a factual issue.  
20 Did they create that zone district for the primary  
21 purpose of allowing outdoor advertising? I submit  
22 to the Court that there is no evidence before this  
23 Court at all that there was any purpose, any  
24 motivation at all to create this zone to allow  
25 signage.

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1 The only evidence with regard to signage  
2 is some rather nebulous recognition that there were  
3 those who were opposed to signage out there and are  
4 still opposed to signage out there. There is no  
5 evidence in this record today presented to this  
6 Court showing any primary purpose to accommodate  
7 signage. The State just merely repeatedly refers to  
8 the fact that nothing has been done out there.

9 That isn't even completely accurate. When  
10 the State says that the actual land use shows the  
11 purpose served by the zoning, that's only half the  
12 case when you're talking about planning.

13 The State has no response and no evidence  
14 to the substantial body of evidence that Toquerville  
15 has no viable option for commercial other than out  
16 in that area, that for Toquerville that location in  
17 and around the Anderson Junction, along both the  
18 I-15 interchange and the state road going in to  
19 Toquerville, north of the ridge on Exhibit 1, is not  
20 just an appropriate place for commercial, it makes  
21 the most sense for Toquerville. No evidence to  
22 contradict that whatsoever.

23 All parties involved in the process,  
24 annexation, the engineer, master planning from the  
25 planner, consultant, the planning commission

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1 chairman, and the mayor all agreed on one thing, the  
2 community wanted commercial development and didn't  
3 want it in downtown Toquerville, and the State has  
4 no explanation to the clear and overwhelming  
5 evidence that their purpose was to locate a  
6 commercial zone that made sense both in terms  
7 location and in terms of opportunity.

8 There is no better opportunity for  
9 commercial benefit for Toquerville Town than that  
10 area that they zoned. In relationship to the  
11 argument that the fact there are no services  
12 currently out there, that's not completely accurate  
13 either.

14 The testimony is that the city has worked  
15 -- the town has worked on developing water and  
16 solving the water problem. The testimony is that  
17 they now have that water source problem solved, that  
18 they will be able to pump water out of this  
19 wonderful aquifer under the direction -- under the  
20 auspices of the water conservancy district and serve  
21 those areas.

22 The state misconstrued the testimony. The  
23 mayor said that there is not a plan currently to  
24 pipe water across to the Eveleth property or the  
25 west side, but there isn't any reason why it can't

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1 be. And it is now there available, ready for  
2 development as is the power. All those homes up in  
3 that area have power. UP&L is up there with those  
4 power poles. You can see them. There is power that  
5 can be put in.

6 The issue is when does growth in economic  
7 circumstances motivate development in a growth  
8 area? If the city waits until the growth is already  
9 on them, they lose their opportunity to control and  
10 develop appropriately, reasonably.

11 I submit to the Court that there is not a  
12 bit of evidence showing that this zoning designation  
13 was adopted for any purpose to allow or accommodate  
14 or otherwise deal with those signs at all except by  
15 virtue of the fact that they were already there and  
16 that the primary purpose was to solve that  
17 commercial zoning problem and accommodate commercial  
18 zoning in the most logical place.

19 THE COURT: Thank you, counsel. These are  
20 the Court's factual findings: First of all, the  
21 property in question, the Eveleth property located  
22 west of interstate 15 and consisting of the northern  
23 most limits of the Town of Toquerville, was annexed  
24 by the town in 1992.

25 MR. FINLAYSON: What year?

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1 THE COURT: 1992, counsel, annexed by the  
2 town. Beginning in January of 1993, Toquerville  
3 Town undertook a process of master planning their  
4 entire community enlisting the Association of Five  
5 County Association of Governments and the expertise  
6 offered by that agency using the efforts of the town  
7 engineer and enlisting the input of all property  
8 owners.

9 The Court finds that the signs in question  
10 had been on the subject property since 1987. The  
11 Court finds from Exhibit No. 1 and the testimony  
12 elicited with regard to Exhibit No. 1 that the Town  
13 of Toquerville, within its corporate limits, is  
14 separated into two distinct areas, one south of the  
15 high ridge that blocks view of Anderson Junction  
16 from the town -- the traditional town and one north  
17 and west of the high ridge, which constitutes the  
18 annexed area.

19 It is un rebutted and the testimony stands  
20 unobjected to before this Court that it was the  
21 purpose of the town in establishing its master plan  
22 and zoning ordinance and zoning designations upon  
23 its zoning map that commercial zoning be limited to  
24 two distinct areas. One of them a tiny parcel  
25 located at the south end of the town in the, as I've

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1 described it, notch up against the existing highway  
2 17 that leads towards La Verkin, and the other  
3 portion immediately surrounding the Anderson  
4 Junction.

5 The Court finds from Exhibit No. 2 that it  
6 was the intent of Toquerville Town, because they  
7 incorporated their planning and zoning to match up  
8 with their existing zoning ordinance, that any  
9 signage, of the type which is in question in this  
10 litigation, be permissible only by conditional use  
11 permit.

12 The town ordinance so provides, and it is  
13 the clear intention of the town in this annexation  
14 to substantially limit outdoor advertising signs by  
15 that process.

16 While the Court has heard evidence and  
17 testimony of the intent of the town from the former  
18 mayor, the chairman of the planning commission at  
19 the time that these actions were undertaking, the  
20 former town engineer, and while that has had some  
21 assistance in the Court's determination of these  
22 facts, the most telling intent of the town, with  
23 respect to outdoor advertising signs, is the town's  
24 ordinance, itself.

25 And due to the fact that the placement of

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1 outdoor advertising signs within the Eveleth  
2 property after Toquerville annexed and zoned the  
3 property could only be done by conditional use  
4 permit, the Court cannot find that the primary  
5 purpose of the zoning was to allow outdoor signage.

6 Accordingly, as a conclusion of law, and  
7 because this matter was remanded of the Court on the  
8 conflicting evidence regarding Toquerville's primary  
9 purpose behind its zoning, the Court finds that the  
10 primary purpose of the zoning was something other  
11 than allowing outdoor advertising.

12 However, the Court further finds that the  
13 single and sole use of this property and the only  
14 evidence before this Court of the use of this  
15 property since 1987 has been for outdoor signage.  
16 There is no evidence of the Court -- before the  
17 Court of the availability of any utilities, water,  
18 power, gas, sanitary sewer, or other utilities and  
19 were it incumbent upon the Court to determine what  
20 uses this property had been put to -- and I'm ending  
21 a sentence with a preposition there, which I should  
22 not.

23 But if it were left to the Court to  
24 determine to which use this property had been  
25 placed, the only conclusion that the Court could

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1 come to on the basis of this record is that the only  
2 use that this property has ever had during the times  
3 pertinent 1987 to date has been for the maintenance  
4 of outdoor advertising.

5 I observe parenthetically that the  
6 legislative use within 27-12-136.3 sub 3 of the  
7 phrase primary purpose of allowing outdoor  
8 advertising probably does not accomplish the intent  
9 -- the announced intent of the act or give any kind  
10 of reasonable framework within which courts may  
11 determine issues of these kinds.

12 I would suspect that it would be a rare  
13 case if the Court could find evidence that the  
14 primary purpose was to build billboards. The  
15 evidence here is the primary purpose is to get  
16 development away from the old traditional Town of  
17 Toquerville out against the freeway, isolate the old  
18 traditional town from that commercial purpose, and  
19 increase the tax base of the town by having a  
20 commercial base, but not in their backyard.

21 Mr. Ronnow, do you need any further  
22 findings from the Court at this stage?

23 MR. RONNOW: If I may just clarify, the  
24 Court started into a discussion of 27-12-133.3 (sic)  
25 using the phrase parenthetically and then moved on

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1 to a statement that the Court was finding primary  
2 purpose to locate commercial activity outside of the  
3 old town. Is it the Court's intent that the second  
4 statement, primary purpose was to locate commercial  
5 activity outside of downtown, if you will,  
6 Toquerville, is it the Court's intent that be  
7 included as a finding of fact?

8 THE COURT: That is a finding of fact,  
9 counsel.

10 MR. RONNOW: Thank you, Your Honor.

11 THE COURT: That was their primary purpose  
12 on the basis of the record that I have before me.

13 MR. RONNOW: I think that covers the  
14 issues on remand, Your Honor.

15 THE COURT: All right. Mr. Finlayson,  
16 anything else I can determine as far as a finding of  
17 fact in your side of the litigation?

18 MR. FINLAYSON: I can't think of any at  
19 the moment, Your Honor.

20 THE COURT: All right. Thank you,  
21 counsel. If you will prepare the appropriate --  
22 (inaudible) -- Mr. Ronnow, submit it to Mr.  
23 Finlayson for his response, the Court will sign the  
24 final order.

25 MR. RONNOW: I will, Your Honor. Thank

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1 you.

2 THE COURT: Thank you, gentlemen. The  
3 Court will stand in recess in this matter.

4 (Thereupon, the hearing  
5 was concluded.)

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## 1 CERTIFICATE OF NOTARY

2

3 STATE OF UTAH )

4 ) ss

5 COUNTY OF WASHINGTON )

6

7 I, J. Elizabeth Van Fleet, a duly  
8 commissioned Notary Public, Washington County, State  
9 of Utah, do hereby certify:

10 That I reported stenographically the  
11 foregoing videotape at the time and place  
12 hereinbefore set forth.

13 That thereafter said shorthand notes were  
14 transcribed into typewriting and that the  
15 typewritten transcript of said videotape is a  
16 complete, true and accurate transcription of my said  
17 shorthand notes taken down at said time, to the best  
18 of my ability.

19 IN WITNESS WHEREOF, I have hereunto set my  
20 hand and affixed my official seal of office in the  
21 County of Washington, State of Utah, this day of  
22 , 1997.

23

24

25

J. Elizabeth Van Fleet, RPR, CSR