

1997

Kunz and Company, dba Kunz Outdoor Advertising v. State of Utah and Utah Department of Transportation : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH 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 DEFENDANT/APPELLANT

Appeal from Bench Trial Judgment of the
Fifth Judicial District Court
Honorable James L. Shumate, Judge

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

VS .

Defendant/Appellant.

Priority No. 15

JURISDICTION

1

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in basing its judgment on a supposed fact irrelevant to whether the area was zoned for the purpose of allowing outdoor advertising and which, in any event, does not exist.

2. Whether, in view of the district court's clearly erroneous finding, this Court should declare the area Kunz proposes for signs ineligible for signs on the basis of law in effect at the time of the trial upon the second remand.

3. Whether the district court erred in failing to consider specific factors the Court of Appeals directed it to consider, and other relevant factors, in determining whether the property is zoned for the primary purpose of allowing outdoor advertising.

4. Whether the district court erred in disregarding as unworkable Utah Code Ann. § 27-12-136.3(3) (1995) after the Court of Appeals had identified that subsection as controlling and directed the trial court to follow it.

STANDARD OF REVIEW

Issue No. 1 is a question of adequacy of the trial court's

findings, reversible for clear error. Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987) (findings must show that court's judgment follows logically from and is supported by evidence). (R. 769.)

Issue No. 2 is a question of law or correct application of law, and is reviewable without deference to the district court's determination. United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 885 (Utah 1993). (R. 705-16.)

Issue No. 3 is, as to factors the Court of Appeals specifically directed the District Court to consider, a question of law and is reviewable without deference to the district court. Slattery v. Covey & Co., Inc., 909 P.2d 925 (Utah App. 1995). (R. 861, 874, 875, 878, 924, 978, 981, 985, 986, 987.) As to other relevant factors, the issue is one of adequacy of the trial court's factual findings, which are reversible where clearly erroneous. Acton v. Deliran, 737 P.2d at 999. (R. 1043, 855-56, 876, 882-83, 902, 947.)

Issue No. 4 is a question of law or correct application of law and is reviewable for correctness. Slattery v. Covey & Co., Inc., 909 P.2d at 925; United Park City Mines Co. v. Greater Park

City Co., 870 P.2d at 885.

DETERMINATIVE STATUTES

The following authorities are believed by Appellant to be determinative of certain issues presented in this appeal and are supplied in Addendum A:

Utah Code Ann. § 27-12-136.2(1995)

Utah Code Ann. § 27-12-136.3(3)(1995)

Utah-Federal Agreement (incorporated by reference in
Utah Code Ann. § 27-12-136.2)

Utah Administrative Code, R933-2-1(1994)

Utah Administrative Code, R933-2-3(4)(1994)

STATEMENT OF THE CASE

I. NATURE OF CASE AND DISPOSITION BELOW

This is a declaratory judgment action on remand concerning pristine and scenic land adjacent to 1-15 in the town of Toquerville, Washington County, Utah. The fundamental question is whether it is unlawful to place outdoor advertising billboards on this land.¹ The background for this case is essentially

¹Addendum B hereto consists of copies of four photographs that were UDOT's Exhibits 8, 11, 12, and 13. The photographs

provided in the Utah Court of Appeal's recitation in its decision on the prior appeal reported in Kunz & Co. v. State of Utah, 913 P.2d 765 (Utah App. 1996) (attached hereto as Addendum C for reference). Included in the Court of Appeal's introductory statement is the following: "[I]n November of [1993], 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." Id. at 767.

Three large billboards had been erected on the property prior to the Toquerville annexation by a predecessor sign company to Kunz. (R. 198, 593-94, 645.) The Court of Appeals held the signs "illegal and subject to removal because Kunz [had] not obtained valid permits for the signs." Id. at 770. Still, the appellate court remanded a second time to the Fifth District Court, to determine whether, in view of the stated purpose of the

show the view of the area of the signs from the eastern lane of the divided highway of I-15 looking west with the sign posts visible (Exhibit 8) and a closer view of the area of each of the three sign posts. (Exhibits 11, 12, and 13).

Utah Outdoor Advertising Act to preserve "natural scenic beauty of the lands bordering on the highways," the land was "zoned for the primary purpose of allowing outdoor advertising" as prohibited by the Act, and for that reason ineligible as a location for billboards. Utah Code Ann. §§ 27-12-136.2 and 27-12-136.3(3) (1995).

The district court ruled the land was not "zoned for the primary purpose of allowing outdoor advertising," basing its decision on the existence of conditional use permits for the signs. (R. 769 -- Fifth District Court Findings of Fact, Addendum C, ¶¶ 9 and 10.) There was, however, no evidence of the issuance of any conditional use permit for any of the signs.

The Court of Appeals had specifically directed the district court to consider "evidence of actual land use or any evidence that the zoning body merely perpetuated a prior zoning designation." Id. at 769. And the district court did find that the "only use of the . . . property since [erection of the signs] in 1987 has been for outdoor advertising signage." (R. 768 -- Fifth District Court Findings of Fact, Addendum D, ¶¶ 3 and 4).

However, the court disregarded that finding as irrelevant to its resolution of the case. Further, the district court entered no finding at all on perpetuation of the prior zoning designation, despite the existence of evidence thereon. The district court then entered a declaratory judgment that the area was not zoned for the primary purpose of allowing outdoor advertising and hence signs in that area would not be unlawful.

II. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

The factual background of the case prior to the district court bench trial on October 1, 1996 is provided by the Utah Court of Appeals in Kunz & Company v. State of Utah, 913 P.2d 765. Consistent therewith, and supplementing with material based on the trial and subsequent court-issued documents, this further factual statement is provided.

Until the sign faces were removed under Court order in 1996, the outdoor advertising signs now owned by Appellee Kunz stood for over eight years on land adjacent to I-15 in Washington County. Kunz & Co. v. State of Utah, 913 P.2d 765. There has never been any commercial activity on the land other than the

signs. (R. 768 -- Fifth District Court Findings of Fact, Addendum D, ¶¶ 3 and 4; R. 861 ll 11-15, R. 874 ll 14-25 and R. 875 ll 1-22, R. 878 l 25 and R. 879 l 22, R. 923 ll 18-25 and R. 924 ll 1-19, R. 978 ll 24-25 through R. 981 l 1, R. 985 ll 21-25, R. 986 ll 1-25, and R. 987 ll 1-10.) The issue at the trial on remand was whether Utah Code Ann. § 27-12-136.3(3) and related law barred re-erection of billboards on that land.

Tracking the zoning and annexation of the land, in 1989, Washington County changed the zoning from "agricultural" to "highway commercial" at the urging of the landowner (Eveleth). (R. 198-199, 222-245, 253, 592, 594.) Later, the Toquerville Town Council annexed the land in question and perpetuated the same "highway commercial" zoning classification of the property that it had while its status was part of the unincorporated area of the county. (R. 595; Kunz & Co. v. State of Utah, 913 P.2d at 767; R. 985 ll 9-21, R. 989 ll 4-13, R. 990 ll 20-24.) As noted, it was also at the request of Eveleth, the owner of the land on which the signs stood and would stand, and who was the lessor of the land to the sign company, that the land was annexed by

Toquerville. (R. 855 ll 24-25 and R. 856 ll 1-9, R. 876 ll 1-25 and R. 877 ll 1-12, R. 882 ll 16-25 and R. 883 l 1.)

On August 7, 1989, the Utah Department of Transportation, District Five held a sign hearing regarding the three signs pursuant to UDOT's notice of violation. (R. 247-251, 594.) UDOT entered an order dated August 25, 1989 ruling the three signs unlawful. The then sign owner (Lundgren) appealed the UDOT order. (R. 199, 594.) It was during the pendency of the Appeal that the zoning of the property in question was changed to "highway commercial" by Washington County, and upon being informed of this fact by UDOT, the Utah Court of Appeals remanded to the agency for consideration of the rezoning and its effect, if any. (R. 199, 200, 253, 594.)

On February 25, 1993, UDOT entered its "Order on Remand Revoking Permits and for Removal of Signs." On January 18, 1994, Kunz made application for renewal permits for the signs, which application UDOT denied. (R. 595.) On February 16, 1994, Kunz filed an action in the Fifth District Court for a declaratory judgment regarding its alleged right to sign permits. (R. 595.)

Kunz did not, however, seek a UDOT administrative hearing. Kunz and UDOT filed cross motions for summary judgment, the District Court granting Kunz's motion for summary judgment and denying the motion of UDOT. (R. 600-02.) UDOT appealed.

On March 14, 1996, the Utah Court of Appeals reversed and remanded, holding that the signs were "illegal" (913 P.2d at 770), but directing the trial court to conduct inquiry into the purpose of the zoning in light of the essential purposes of the Utah Outdoor Advertising Act, including inquiry regarding "evidence of actual land use." (Id. at 769.)

On October 1, 1996, the Fifth District Court conducted a bench trial pursuant to the remand, after which it entered judgment in favor of Appellee Kunz. (Addendum E.) The trial proceeding and court-issued documents established the following facts:

1. The district court based its decision on the existence of Toquerville conditional use permits for the signs, the court stating as follows:

Due to the fact that placement of outdoor advertising signs within the Eveleth 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.

(R. 769.) However, no evidence was submitted that conditional use permits were obtained. In fact, the Toquerville ordinance limited "highway commercial" signs under the conditional use permit process to a maximum size of eight feet by twelve feet (Plaintiff's Exhibit 2), and each of the proposed Kunz signs is 14 feet by 48 feet. (R. 664-66)

2. The land adjacent to the highway on which Kunz wishes to place the three billboards is natural and scenic, has never had any commercial use, other than the signs, and has no utilities to service commercial usage. This is shown by photos admitted in evidence. (Defendant's Exhibits 5-13) and comment thereon at R. 1003-04, 1027-28.) It is also evidenced by unrebutted testimony, of which the following is typical: "Q: At the time of the annexation, there was no culinary water or sewer to the area where the signs are; is that correct? A: That is correct." (R. 874 ll 14-16; see also R. 924 ll 1-19); "Q: Without water and sewer up there, commercial development is not feasible; is that

correct? A: That's correct. There would have to be utilities available for a commercial development." (R. 875 11 2-5.))

It was stipulated that the following description of the land given by the court was accurate:

[I]f 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 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 constitutes 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.

(R. 879 11 14-25.)

After testifying that he had lived in the area for more than 30 years and had gone by the area "all the time. Almost daily"

(R. 979 1 12), former Toquerville Mayor Charles Wahlquist responded to questions as follows:

Q. Have you ever seen any commercial activity in the area right where the signs are other than the signs?

A. No.

Q. Has there ever been any culinary water service run up to the area where the signs are?

A. No, not to my knowledge.

Q. Has there ever been any sewer service run to that

area where the signs are?

A. No. There's no sewage up there at all. We had talked with the sewer district to get some, but there isn't any present.

Q. Without culinary water or sewage, commercial development in that area cannot reasonably be done; isn't that correct?

A. Correct.

Also, the distance from the closest of the three signs to the intersection with I-15 is approximately 2000 feet. (R. 1024 ll 2-5.) If any commercial development were to occur in the area, it would first be placed right at the intersection (R. 923 ll 19-25, R. 924 ll 1-3, R. 959 ll 9-24), and no commercial development has occurred even there. (Id.)

3. The district court ruled inadmissible as irrelevant, proffered testimony of Toquerville's own zoning expert, that "based on the standards of zoners[,] taking into account the nature of the pristine area with its beauty where the signs are [,] . . . he would not recommend that outdoor advertising signs be placed there, that he would recommend that they not be placed there." (R. 999 ll 13-19.)² The trial court did, however,

²The testimony was offered to show that signs at this location would violate the stated purpose of the act to promote

receive without objection testimony that the zoning expert and his colleagues "wanted to retain a more natural looking corridor entering into the St. George basin" (R. 934 ll 24-25, R. 935 l 1), but assumed since the three signs were already erected "that we might have to live with" them. (R. 935 ll 3-4.) And it did receive without objection testimony from one of Kunz's witnesses that a gentleman interested in developing the land in the general area "was very adamant about not having those signs there" because "he thought that would be an eyesore and that it should be left in its natural pristine condition." (R. 878 ll 13-14, 22-24.)

4. Toquerville's first interest in the annexing and zoning of the land was "tax revenue of the Town of Toquerville." (R. 947, ll 13-17. See also R. 967, ll 9-11 (of three issues, number "[o]ne is always to do with money, who pays what taxes in the

the "enjoyment of public travel, to protect the public investment in such highways, [and] to preserve the natural scenic beauty of lands bordering on [the] highways" (Utah Code Ann. § 27-12-136.2), in light of which § 27-12-136.3(3) must be read, under the decision of the Utah Court of Appeals.

county versus the city"); R. 902 ll 8-11 (referring to "the potential tax base benefits that commercial development at the interchange would bring to the Toquerville Town".) The only commercial activity on the property annexed at the request of Eveleth, the lessor of the land to the sign company, that has ever existed to pay taxes to Toquerville is billboards Kunz now seeks to reerect.

5. The district court disregarded as unworkable the Code section the Utah Court of Appeals had identified as controlling and directed the District Court to follow. The district court stated as follows:

I observe parenthetically that the legislative use within 27-12-136.3 sub 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.

(R. 1068 ll 1-5.)

Thereupon the district court granted declaratory judgment in favor of Kunz. (Addendum E -- Order.)

SUMMARY OF ARGUMENTS

The trial court erroneously based its judgment on a supposed fact irrelevant to whether the area is zoned for the primary purpose of allowing outdoor advertising and which, in any event, does not exist. Though the district court relied on the supposed issuance of Toquerville conditional use permits for the signs, no evidence of the issuance of conditional use permits was submitted, and the Toquerville ordinance limits signs to a size far smaller than Kunz's proposed billboards.

The signs Kunz proposes to erect would be unlawful because they cannot meet current requirements for valid permits, including compliance with State and federal statutes, UDOT rules and the Toquerville ordinance limiting signs to 8 feet by 12 feet.

The Utah Court of Appeals directed the district court to consider certain specific factors and other evidence as to whether the billboards would be in an area "zoned for the primary purpose of allowing outdoor advertising." These factors included "actual land use" and whether the zoning body perpetuated the prior zoning designation of Washington County that the Court of

Appeals had ruled failed to justify the area for billboards under Utah Code Ann. § 27-12-136.3(3). The district court, however, failed to consider any such factors, disregarding the overwhelming evidence that the land was natural, beautiful and scenic without any commercial incidents absent the signs and rendering no finding on any other such evidence.

The lower court went so far as to describe the controlling section of law the Court of Appeals had discussed and directed the lower court to apply, as essentially unworkable. The district court's errors require this Court to vacate the lower court judgment and hold that the area in question is ineligible for outdoor advertising signs.

ARGUMENT

- I. THE DISTRICT COURT ERRED IN BASING ITS JUDGMENT ON A SUPPOSED FACT IRRELEVANT TO WHETHER THE AREA WAS ZONED FOR THE PRIMARY PURPOSE OF ALLOWING OUTDOOR ADVERTISING AND WHICH, IN ANY EVENT, DOES NOT EXIST**

As noted above, the district court found as follows:

Due to the fact that placement of outdoor advertising signs within the Eveleth 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.

(R. 769.)

This supposed fact, however, has nothing to do with the question whether the area was zoned for the primary purpose of allowing outdoor advertising. Further, Kunz tendered no evidence to show that Toquerville had issued conditional use permits for the signs. Indeed, the Toquerville ordinance limits "highway commercial" signs under the conditional use permit process to a maximum size of 8 feet by 12 feet (Plaintiff's Exhibit 2), and each of the proposed Kunz signs is 14 feet by 48 feet. (R. 664-66.)

Thus, the trial court's judgment is fatally flawed on the ground that the court's findings do not show that the court's judgment follows logically from and is supported by evidence. See Acton v. Deliran, 737 P.2d at 999. The district court judgment is erroneous and should be reversed.

II. SINCE THE SIGNS WERE DECLARED "ILLEGAL" BY THE COURT OF APPEALS FOR HAVING NO VALID PERMITS AND SINCE THE DISTRICT COURT JUDGMENT BASED ON CONDITIONAL USE PERMITS IS ERRONEOUS, THIS COURT SHOULD FINALLY DECLARE THE AREA PROPOSED FOR THE SIGNS AS INELIGIBLE FOR SIGNS ON THE BASIS OF LAW IN EFFECT AT THE TIME OF THE TRIAL UPON SECOND REMAND

The Utah Court of Appeals declared the signs on the land in issue "illegal and subject to removal" because Kunz had not obtained valid permits for the signs. Kunz & Co. v. State of Utah, 913 at 770. That decision was not appealed. Pursuant to that decision, and after Kunz's motion for injunctive relief to prevent removal of the signs was denied by the District Court (R. 615-68.), the sign faces were removed.³

Since after the Court of Appeals declared the signs "illegal" Kunz had no vested rights to signs at the disputed location, Kunz would thereafter have to comply with all existing statutes and rules to qualify the three proposed signs for UDOT sign permits. Also, the district court's declaratory judgment on the second remand based on the supposed existence of Toquerville

³Though UDOT could have required removal of the entire sign structures, as a courtesy to Kunz, UDOT allowed Kunz to remove the sign faces only, until final resolution.

conditional use permits was erroneous inasmuch as no evidence was submitted to show that conditional use permits even existed.

Thus, this court can write on a clean slate and finally end this odyssey without further remand by declaring the area unlawful for signs on the basis of a clarifying rule in effect at the time of, and urged at, the trial. (R. 708-09.)

That rule is R933-2-3(4)(1994) of the Utah Administrative Code. The rule clarifies the definition in Utah Code Ann. § 27-12-136.3(3) (1995) that was otherwise considered ambiguous, in the following language:

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

"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) (upholding a challenged federal regulation). See also Utah Code Ann. § 27-12-136.6(1995) (granting to UDOT the power to make rules). Thus, the area in question is unlawful for signs

inasmuch as it is undisputed that the area is one "in which the primary [only] activity is outdoor advertising." Utah Administrative Code R933-2-3(4) (1994).

III. THE DISTRICT COURT ERRED IN FAILING TO CONSIDER SPECIFIC FACTORS THE COURT OF APPEALS DIRECTED IT TO CONSIDER AND OTHER RELEVANT FACTORS IN DETERMINING WHETHER THE PROPERTY IS ZONED FOR THE PRIMARY PURPOSE OF ALLOWING OUTDOOR ADVERTISING

The district court's failure to follow this Court's instruction to consider certain factors violates the legal principle of law of the case. The principle is stated in Slattery v. Covey & Co. Inc., 909 P.2d 925, 928 (Utah App. 1995), as follows:

[A]ny definitive ruling by an appellate court becomes the "law of the case, and the trial court is bound to follow it, even though it considers the ruling erroneous." [Street v. Fourth Judicial District Court, 113 Utah 60, 191 P.2d 153, 158 (1948).] The Utah Supreme Court has recently reaffirmed this principle. In Thurston v. Box Elder County, 892 P.2d 1034 (Utah 1995), the court stated that "pronouncements of an appellate court on legal issues . . . become the law of the case and must be followed in subsequent proceedings . . . the lower court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." Id. at 1037-38 (citations omitted). . . .

The relevant factors the lower court failed to consider will

be discussed individually.

A. Failure to Consider Actual Land Use, i.e., No Commercial Incidents and the Natural, Scenic Beauty of the Lands Bordering the Highway (Absent the Signs)

If this Court considers it necessary to go beyond the district court's error coupled with R933-2-3(4) as a basis on which to determine the area is ineligible for signs, the Court should reverse based on the district court's failure to consider factors the Utah Court of Appeals directed it to consider. The Court of Appeals recognized the limitations of subjective statements of intent as to whether or not, under subsection 27-12-136.3(3), an area was zoned for the primary purpose of allowing outdoor advertising. It therefore directed the district court to consider "not just the stated purpose of the zoning or local government," but all "relevant evidence" including "evidence of actual land use or any evidence that the zoning body merely perpetuated a prior zoning designation." Kunz & Co. v. State of Utah, 913 P.2d 769.

Thus, the first and most important objective element the Court of Appeals directed the district court to consider was

"actual land use." Id. The reason for focusing on actual land use, as stated by the appellate court, is that the Act explicitly states its purpose to include preservation of "the natural scenic beauty of lands bordering on [the] highways," and therefore "allowing outdoor advertising in areas without other businesses or highway services in the vicinity would violate essential purposes of the . . . Act." Id. The Court of Appeals quotation of the Act's statement of purpose as a background against which it read section 27-12-136.3(3) is consistent with settled law that "[i]n order to give a statute its true meaning and significance it should be considered in the light of its background and the purpose sought to be accomplished"

Snyder v. Clune, 15 Utah 2d 254, 255, 390 P.2d 915, 916 (1964).⁴

⁴These purposes are consistent with Utah Rule, the Utah-Federal Agreement (incorporated by reference in Utah Code Ann. § 27-12-136.2 and included in Appendix A and the record at R. 741-751), and the Federal Highway Beautification Act. In Rule R933-2-1 of the Utah Administrative Code it is provided that "[N]othing in these rules shall be construed to permit outdoor advertising that would disqualify the State for Federal participation of funds under the Federal Standards applicable." The Federal Standards include the Utah-Federal Agreement, "the purpose of [which] is to promote the reasonable, orderly, and effective display of outdoor advertising while remaining

It cannot be determined whether those purposes are being violated without considering whether the area has a natural, scenic and beautiful character to preserve. "Actual land use," therefore, includes use as a natural, scenic, beautiful setting for the highway.

"Actual land use" includes the presence or absence of commercial usage, such as commercial buildings and services such as water, sewer and electricity. A solely pristine and scenic use militates against the lawfulness of the area for billboards, given the policy of the Act, whereas substantial incidents of

consistent with the national policy to protect the public investment in interstate and primary highways, to promote the safety and recreational value of public travel and to preserve natural beauty . . ." Utah-Federal Agreement (emphasis added). Under the Utah-Federal Agreement, Utah agreed "to implement and carry out the provisions of Section 131 of Title 23, United States Code, and the national policy in order to remain eligible to receive the full amount of all federal highway funds" 23 U.S.C. § 131(b) (1994) directs the withholding of a state's funds when the state is not in compliance. The Federal Highway Administration (FHWA), through its Utah right-of-way officer, stated in his affidavit that since the three proposed signs at Anderson Junction violate the Federal policy governing outdoor advertising, he has advised the Utah Department of Transportation that unless these three signs at Anderson Junction are removed, he will recommend to the FHWA withholding of a portion of Utah's Federal Highway Funds. (R. 571-573.)

non-billboard commercial usage would militate in favor of the lawfulness of the area for billboards, showing that the primary purpose served by the zoning was not allowing outdoor advertising.

The appellate court was not directing the district court to engage in the purely academic exercise of looking at "actual land use" and then, after finding that use to be solely natural and scenic without any commercial incidents, to dismiss the finding as irrelevant to its resolution of the case. Nor was the appellate court directing the district court to refuse even to consider the "natural scenic beauty of the land[] bordering on the highway[]." Yet this is precisely what the district court on remand did.

Evidence was replete and uncontradicted that the area of the signs was natural, scenic and beautiful, with no commercial incidents, and therefore subject to preservation under the policy of the Act. This evidence is marshaled above in the Statement of Facts in its subparts 2 and 3. Yet the trial court failed to conform its judgment to the logical conclusion to which that

evidence pointed. This failure in disregard of the direction of the Utah Court of Appeals is error.

B. Failure to Consider Perpetuation of Zoning for Signs

The Court of Appeals directed consideration of "any evidence that the zoning body merely perpetuated a prior zoning designation," 913 P.2d at 769, as a factor bearing on whether, in reality, the area was "zoned for the primary purpose of allowing outdoor advertising." Utah Code Ann. § 27-12-136.3(3). The Washington County zoning as "commercial" had been determined by the UDOT Order on Remand to be for the primary purpose of allowing outdoor advertising, thereby rendering the area of the signs unlawful for signs. (R. 461-64.) And the Court of Appeals held that Kunz was bound by that UDOT Order on the ground of res judicata. 913 P.2d at 769. The Court of Appeals therefore reasonably determined that to perpetuate the zoning designation already held to render the area unlawful for signs would also perpetuate the unlawfulness of the area for signs.

Moreover, evidence that Toquerville perpetuated the prior Washington County zoning designation was adduced, but the

district court made no finding based on it. This was error.

Planners indicated they considered several factors before the annexation and zoning. Kenneth Sizemore, a witness for Kunz, stated that they looked at "existing zoning of Washington County," "owner's desires" and "tax base benefits that commercial development at the interchange would bring to Toquerville town." (R. 902.) The second two of these three considerations are treated below and support the conclusion the property was zoned for the primary purpose of allowing outdoor advertising. The first is relevant here, however, and shows the focus of the planners on the prior zoning.

That focus of the preliminary advisors is subsumed by the testimony of Mayor Walquist, a member of the town council that actually voted -- thereby taking the legislative action that placed the town's annexation and zoning into law. The following dialogue underscores the supremacy of the Town Council's vote over the musings of preliminary advisors.

Q. As the town council, it's the town council who makes the final decisions on annexation and zoning; isn't that correct?

A. Yes.

Q. And not the earlier advisors?

A. No. They just submitted their recommendation to us.

Q. And it's -- it's you who makes the final decision?

A. Yes.

(R. 989.) Further, the Mayor acknowledged that the statements he had made by affidavit were correct that Toquerville left the zoning of the Eveleth land the signs were on just as it was in the county. His testimony is as follows:

THE COURT: Is that your signature, Mr. Wahlquist?

THE WITNESS: Yes.

THE COURT: All right. Go ahead, Mr. Finlayson.

MR. FINLAYSON: May I have the document.

Q. I'm going to read what is in this document and ask you if it's correct. The annexation of the property by the Town of Toquerville and the town's zoning of the property as commercial made no change in the zoning status of the property inasmuch as the property was zoned highway commercial both before and after the Toquerville zoning. Toquerville left the zoning of the Eveleth land the signs are on just as it was when the land was only in the county. Is that correct?

A. At that time, yes. See, that was part -- what's the date on that?

Q. Oh, it's August 10, 1994.

(R. 985.)

That Toquerville merely perpetuated the prior Washington County zoning designation is the law of the case. The district

court found in earlier proceedings that "Toquerville retain[ed] the same zoning category the property had held when in the unincorporated area of Washington County."⁵ Kunz did not object to that finding of fact when the district court entertained counsel's argument on the proposed findings, except as to relevancy on the ground that the district court's ruling against res judicata made the statement irrelevant. Although the Court of Appeals reversed the district court's ruling on res judicata, the factual accuracy of the statement remained unassailed. (R. 789-90.)

Further, the Court of Appeals likewise stated as a fact that in "November of [1993] the town of Toquerville annexed Eveleth's property and chose to retain the "highway commercial" zoning for the area." 913 P.2d at 767. This perpetuation of the Washington County zoning action that the Court of Appeals held as a matter of law "was for the primary purpose of allowing outdoor advertising," 913 P.2d at 769, requires a conclusion that the

⁵Fifth District Court's findings in earlier proceedings, R. 595, 618, 619, 625.

signs are likewise unlawful under Toquerville's zoning. The district court's failure to follow the direction of the Court of Appeals to consider Toquerville's perpetuation of the prior zoning designation of Washington County was error.

C. Failure to Consider Toquerville's Annexation and Zoning of Land at the Request of the Person on Whose Land the Signs Stood and Would Stand

The owner of the land on which the signs would stand -- the lessor of the land to Kunz -- has an obvious financial interest in a zoning category that would accommodate signs. Thomas Eveleth is, and at all times relevant has been, the owner of that land. (R. 1043.) Then, we discover through one of Kunz's own witnesses, the land was annexed and zoned by Toquerville at the request of none other than Thomas Eveleth and that the land would not have been annexed and zoned by Toquerville without the request of Mr. Eveleth. The following testimony was given:

By a phone call Mr. Eveleth talked with the town clerk, Chester Adams, and requested that his additional property to the north of the proposed annexation be included in the annexation process, and that information must have been conveyed to me because I adjusted the boundary of the proposed annexation to include all of Mr. Eveleth's property as well as some additional property on the east side of I-15. And so

that was the reason it was changed was because there was a formal -- an informal request made.

(R. 855-56.)

Also:

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

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

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

A. Yes.

Q. What part of that?

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

(R. 876.)

There is no question that the land annexed at the Eveleths' request is the land the signs were and would be on:

MR. RONNOW: Your Honor, in order -- following the Court's lead here to perhaps expedite this a little bit, plaintiffs are perfectly willing to stipulate that the three outdoor sign structures are located in the northwest triangular portion of Mr. Eveleth's property that appears on Exhibit 1 as the northwest side of Interstate 15 in the bump on the annexation at the very top of that annexation and their exact location, I

don't think, is necessarily too material. They are there. We don't dispute that.

(R. 882-83.)

That Eveleth's request was a sine qua non without which the land would not have been taken and zoned by Toquerville, is consistent with Mr. Sizemore's indication that one of three factors the planners considered was "the owners' desires." This evidence linking the signs to the annexation and zoning, through Mr. Eveleth, supports the conclusion that the zoning was for the "primary purpose of allowing outdoor advertising." The trial court's failure to enter any finding regarding it -- an indication the court declined to consider it -- was error.

D. Failure to Consider Tax Revenues From Signs

In addition to the perpetuation of the zoning of the land by Washington County that was unlawful for signs under the UDOT remand order and Kunz & Co. v. State of Utah, 913 P.2d at 769, and the owner's desires, the third factor Mr. Sizemore said he considered was "potential tax base benefits." (R. 902. See also, R. 947 ("helping tax revenue of the Town of Toquerville").) As stated by the Court of Appeals: "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." 913 P.2d at 769. Thus, rezoning to commercial coupled with no commercial activity except for signs is significant circumstantial evidence of violation of section 27-12-136.3(3). 913 P.2d at 769.

Here, no commercial activity has ever been conducted on the land except for the signs, and, without culinary water or sewer and being at least 2000 feet from the intersection, the area of the signs does not have any reasonable prospect of commercial activity in the foreseeable future. Therefore, the only commercial activity on the land that met or could meet the object of the planners to "help[] tax revenue of the Town of Toquerville" (R. 947), is the signs. This circumstance supports the conclusion that the "primary purpose of [the zoning is] allowing outdoor advertising."

IV. THE DISTRICT COURT ERRED IN DISREGARDING AS UNWORKABLE UTAH CODE ANN. § 27-12-136.3(3) AFTER THE COURT OF APPEALS HAD IDENTIFIED THAT SECTION AS CONTROLLING AND DIRECTED THE DISTRICT COURT TO FOLLOW IT

The Court of Appeals identified subsection 27-12-136.3(3) as controlling in connection with its discussion of the policy of the Utah Outdoor Advertising Act to preserve natural beauty of the lands adjacent to the highways. Further, the Court of Appeals directed the district court to consider certain objective factors that bear on whether an area is zoned for the primary purpose of allowing outdoor advertising in light of the Legislature's recognition that objective circumstances are likely to be more probative than subjective statements of intent of a zoning body. It was the duty of the district court to understand the Court of Appeals' decision and apply it. It was a violation of that duty, however creative or well-intentioned, for the district court to disregard the letter and spirit of the Court of Appeal's decision and embark on a journey of its own, as the above argument discloses it did. See Slattery v. Covey, 909 P.2d at 928 (quoting Thurston v. Box Elder County, 892 P.2d at 1037-38) (requiring the lower court to "implement both the letter and

the spirit of the [appellate] court's mandate").

The district court's disregard of the controlling law is graphically illustrated by the following statement of the court in its oral presentation of findings of fact and conclusions of law:

I observe parenthetically that the legislative use within 27-12-136.3 sub 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.

(R. 1068.) The district court's disregard was error and this Court should itself apply the law to the facts that were fully elucidated at trial and established the area as zoned for the primary purpose of allowing outdoor advertising.


CONCLUSION

The declaratory judgment of the district court should be vacated, and this Court should finally resolve this case by its own declaratory decision. The area is unlawful for signs under statutes and rules incorporating federal policy and under Utah

Code Ann. § 27-12-136.3(3) (1995) as construed by the Utah Court of Appeals. The evidence established that the area is "zoned for the primary purpose of allowing outdoor advertising." Thus, the general prohibition of Utah Code Ann. § 27-12-136.4(1) (1995) renders the area unlawful for signs. This Court should so declare.

DATED this 16th day of May, 1997.

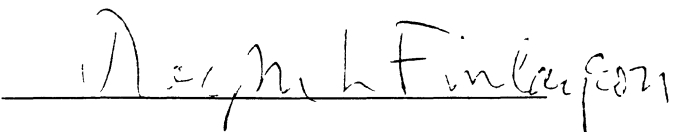
JAN GRAHAM
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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing, Appellant's Brief, postage prepaid, to the following, this 16th day of May, 1997:

D. WILLIAMS RONNOW
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ADDENDUM A

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.

R933. Preconstruction, Right of Way Acquisition.

- R933-1. Right of Way Acquisition.
- R933-2. Control of Outdoor Advertising Signs.
- R933-3. Relocation or Modification of Existing Authorized Access Openings or Granting New Access Openings on Limited Access Highways.

R933-1. Right of Way Acquisition.

- R933-1-1. Right of Way Acquisition Incorporation of Federal Publication.

R933-1-1. Right of Way Acquisition Incorporation of Federal Publication.

The State of Utah incorporates by reference 49 CFR 24 as amended in the Federal Register, March 2, 1989, as its administrative rules on the acquisition of rights of way.

References: 27-12-89 through 103.
History: 13864, AMD, 01/14/93.

R933-2. Control of Outdoor Advertising Signs.

- R933-2-1. Purpose.
- R933-2-2. Federal Regulations.
- R933-2-3. Definitions.
- R933-2-4. Permits.
- R933-2-5. Sign Changes, Repairs, and Maintenance.
- R933-2-6. Commercial and Industrial Usage: Limitations in Zoned or Unzoned Areas.
- R933-2-7. Spacing For Permitted Signs.
- R933-2-8. Removal of Illegal Signs.
- R933-2-9. Termination of Non-Conforming Use Status.
- R933-2-10. Conforming Sign Becoming Nonconforming — Removal.
- R933-2-11. On-Premise Signs — Illegal Status — Removal.
- R933-2-12. Directional Signs.
- R933-2-13. Official Signs.
- R933-2-14. Department Hearings.
- R933-2-15. Prosecution for Violation of Act or Rules.
- R933-2-16. Saving Clause.
- R933-2-17. Effective Date.

R933-2-1. Purpose.

The purpose of these rules is to implement the Utah Outdoor Advertising Act. Nothing in these rules shall be construed to permit outdoor advertising that would disqualify the State for Federal participation of funds under the Federal standards applicable. The Transportation Commission and the Utah Department of Transportation shall, through designated personnel, control outdoor advertising on interstate and primary highway systems.

R933-2-2. Federal Regulations.

The federal regulations governing outdoor advertising contained in 23 CFR section 750.101 through section 750.713 (April 1, 1994) are adopted and incorporated by this reference.

R933-2-3. Definitions.

All references in these Rules to Sections 27-12-136.1 through 27-12-136.13, are to those sections of the Utah Code known as the Utah Outdoor Advertising Act. In addition to the definitions in Section 27-12-136.3, the following definitions are supplied:

(1) "Abandoned Sign" means any controlled sign, the sign facing of which has been partially obliterated, has been painted out, has remained blank or has obsolete advertising matter for a continuous period of twelve (12) months or more.

(2) "Act" means the Utah Outdoor Advertising Act.

(3) "Advertising" means any message, whether in words, symbols, pictures or any combination thereof, painted or otherwise applied to the face of an outdoor advertising structure, which message is designed, intended, or used to advertise or inform, and which message is visible from any place on the main travel-way of the interstate or primary highway system.

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

(5) "Commercial or industrial zone" as defined in Subsection 27-12-136.3(2)(d) of the Act is further defined to mean, with regard to those areas outside the boundaries of urbanized counties and outside the boundaries of cities and towns referred to in that subsection, such areas not within 8420 feet of an interstate highway exit-ramp or entrance-ramp 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, including the land along both sides of a controlled highway for 600 feet immediately abutting the area of use, measurements under this subsection being made from the outer edge of regularly used buildings, parking lots, gate-houses, entrance gates, or storage or processing areas.

(6) "Conforming Sign" means an off-premise sign maintained in a location that conforms to the size, lighting, spacing, zoning and usage requirements as provided by law and these rules.

(7) "Controlled Sign" means any off-premise sign that is designed, intended, or used to advertise or inform any part of the advertising or informative contents of which is visible from any place on the main traveled way of any interstate or federal-aid primary highway in this State.

(8) "Destroyed Sign" means a sign damaged by natural elements wherein the costs of re-erection exceeds 30 percent of the depreciated value of the sign as established by departmental appraisal methods.

(9) "Freeway" means a divided highway for through traffic with full control access.

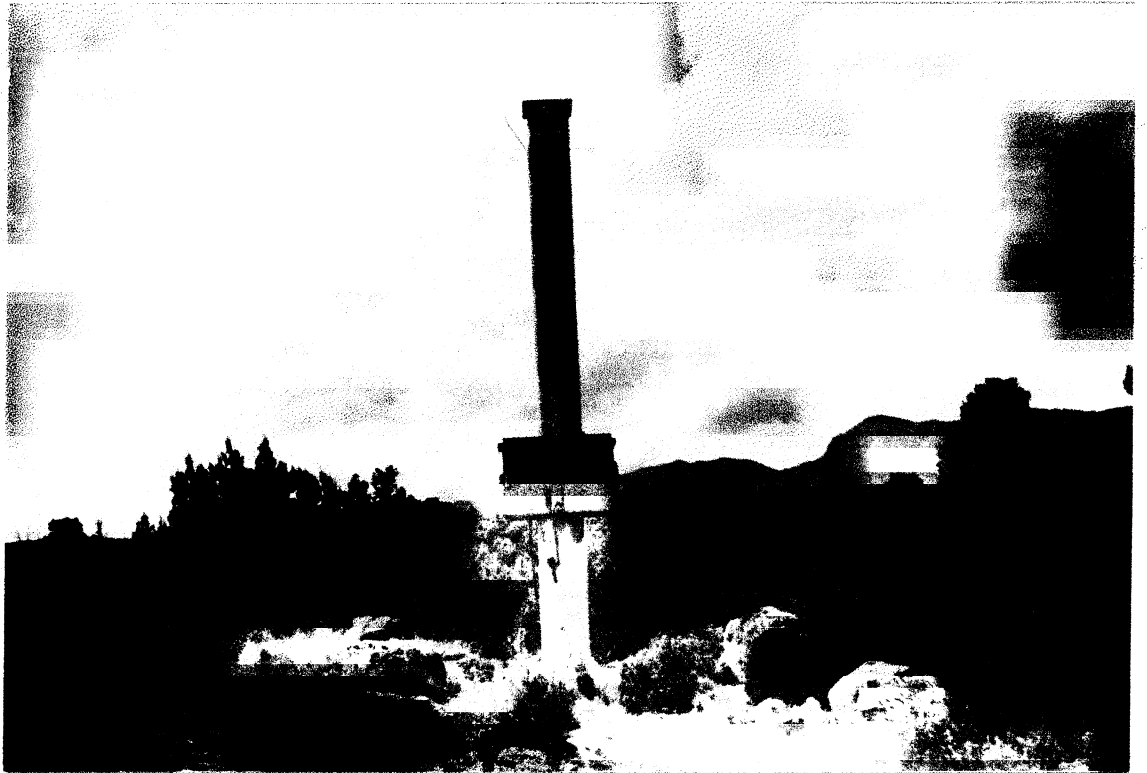
(10) "Grandfather Status" refers to any off-premise controlled sign erected in zoned or unzoned

ADDENDUM B

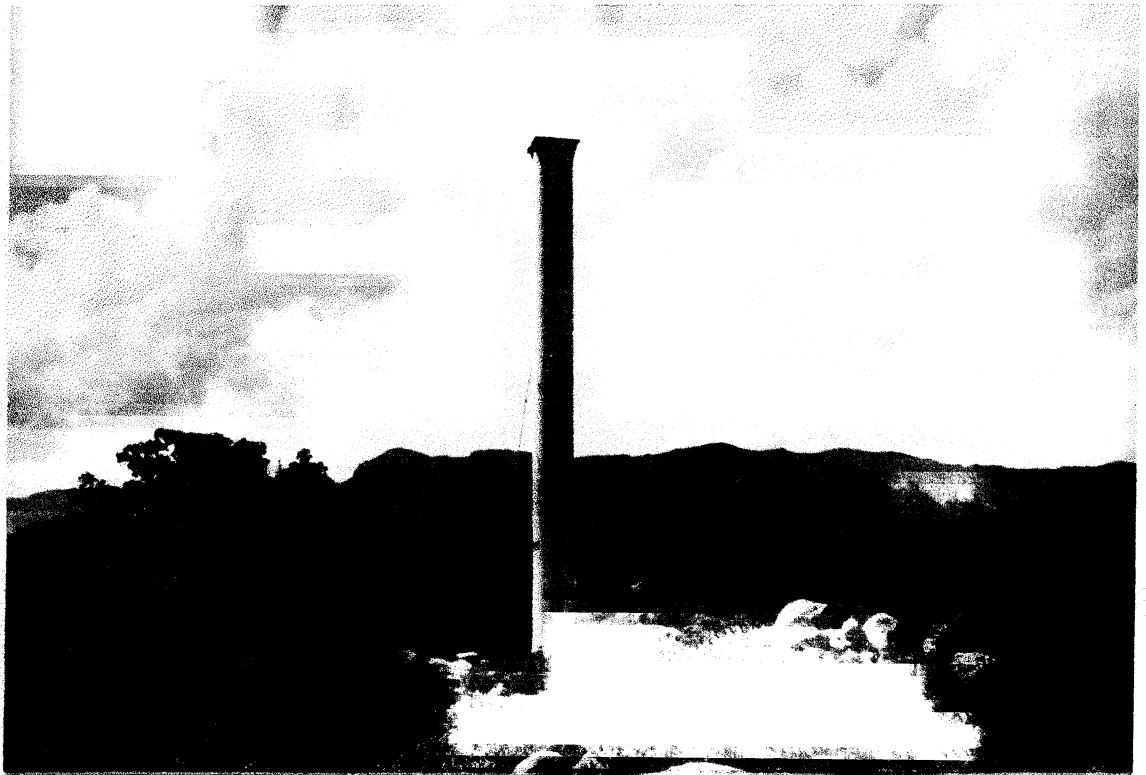
DEFENDANT'S EXHIBIT 8



DEFENDANT'S EXHIBIT 11



DEFENDANT'S EXHIBIT 12



DEFENDANT'S EXHIBIT 13



ADDENDUM C

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).

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 \approx 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 D

FIFTH JUDICIAL DISTRICT COURT
96 DEC 4 PM 12 47

WASHINGTON COUNTY

BY

D. Williams Ronnow (USB #4132)
JONES, WALDO, HOLBROOK & McDONOUGH
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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.	:	

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

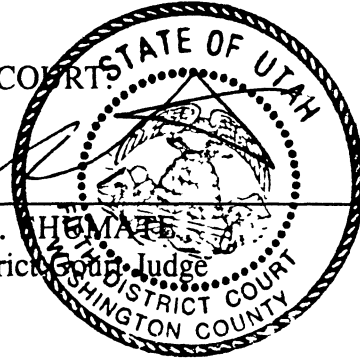
The designation of the Highway Commercial zone at the Anderson Junction I-15 interchange by the Toquerville Town Council on December 14, 1993, was not for the primary purpose of

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

DATED this 3 day of ^{Dec}~~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 19th 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



ADDENDUM E

FILED
FIFTH DISTRICT COURT
'97 JAN 23 PM 1 23

D. Williams Ronnow (USB #4132)
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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	:	ORDER AND JUDGMENT
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.

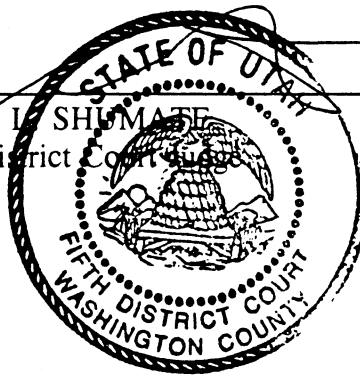
The Court having received testimony and evidence regarding the issue on remand, and having entered its Findings of Fact and Conclusions of Law on December 4, 1996.

**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:

JAMES L. SHUMATE
Fifth District Court Judge



JUDGEMENT ENTERED

Date: 1-23-97

Time: 2:46 p.m.

STATE OF UTAH)
) ss.
COUNTY OF WASHINGTON)

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Notary Public
Residing at St. Geo., VT

