

1997

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

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 970216-CA

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

REPLY BRIEF OF DEFENDANT/APPELLANT

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

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY REGARDING STANDARD OF REVIEW	1
REPLY TO APPELLANT'S STATEMENT OF THE CASE	2
REPLY TO CERTAIN ASSERTIONS IN KUNZ'S SUMMARY OF ARGUMENTS	9
ARGUMENT	11
I. THE TRIAL COURT BASED ITS JUDGMENT ON THE EXISTENCE OF CONDITIONAL USE PERMITS FOR THE SIGNS, AND IN SO DOING COMMITTED CLEAR ERROR	11
II. UDOT MARSHALED THE RELEVANT EVIDENCE DEMONSTRATING THE TRIAL COURT'S ERRORS.	13
III. ADMINISTRATIVE RULE R933-2-3(4) RENDERS THE AREA IN QUESTION UNLAWFUL FOR SIGNS	14
IV. KUNZ MISSTATES THIS COURT'S REMAND INSTRUCTION, THE LOWER COURT'S FINDINGS AND CONCLUSIONS DO NOT SATISFY THAT INSTRUCTION, AND THE RECORD DOES NOT SUPPORT THE JUDGMENT	18
CONCLUSION	23

TABLE OF AUTHORITIES

CASES

	Page
<u>Acton v. Deliran</u> , 737 P.2d 996 (Utah 1987)	14
<u>Kunz v. State</u> , 913 P.2d 765 (Utah App. 1996)	<i>passim</i>
<u>Slattery v. Covey & Co., Inc.</u> , 909 P.2d 925 (Utah App. 1995)	2, 14, 18
<u>Utah Dept. of Transp. v. ROA General</u> , 927 P.2d 666 (Utah App. 1996)	5

CONSTITUTIONAL PROVISIONS, STATUTES AND RULE

Utah Code Ann. § 27-12-136.3(3) (1995)	2, 3, 9, 10, 16, 17
Utah Code Ann. § 27-12-136.4 (1996 Supp.)	15
Utah Code Ann. § 27-12-136.5 (1993)	15
Utah Code Ann. § 27-12-136.6 (1995)	14
Utah Code Ann. §§ 63-46a-4	15
Utah Admin. Code R933-2-3(4) (1994)	9, 15, 16, 17
Utah Admin. Code R933-2-3(14) (1994)	4

OTHER AUTHORITIES

Kenneth C. Davis, Richard J. Pierce, Jr., <u>Administrative Law Treatise</u> , § 6.3 (3rd ed. 1994)	15
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OUTDOOR ADVERTISING, a	:	
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	:	Case No. 970216-CA
Plaintiff/Appellee,	:	
	:	
vs.	:	Priority No. 15
	:	
STATE OF UTAH, UTAH DEPARTMENT	:	
OF TRANSPORTATION,	:	
	:	
Defendant/Appellant.	:	

REPLY BRIEF OF DEFENDANT/APPELLANT

REPLY REGARDING STANDARD OF REVIEW

Issue No. 3 is, as to the specific factors the Court of Appeals directed the District Court to consider, a question of law. Those factors are "actual land use" and whether the zoning body perpetuated the prior zoning designation of Washington County. Kunz v. State, 913 P.2d 765, 769 (Utah App. 1996). The primacy of these factors is established by this Court's specific identification of these factors, and by this Court's instruction to the District Court to address them. The consequence of the

District Court's failure to follow this Court's specific directive is a question of law, reviewable without deference to the District Court's determination. Slattery v. Covey & Co., Inc., 909 P.2d 925 (Utah App. 1995).

Issue No. 4, relating to the District Court's explicit disregard of the controlling section of law as essentially unworkable, is also a question of law. Id.

REPLY TO APPELLANT'S STATEMENT OF THE CASE

The ultimate issue in this appeal is whether the three billboards are in an area "zoned for the primary purpose of allowing outdoor advertising." Utah Code Ann. § 27-12-136.3(3) (1995). But to decide that question, this Court directed the District Court to consider "not just the stated purpose of the zoning body" but certain specific factors. Kunz, 913 P.2d at 769. The only two factors this Court specifically required the District Court to consider were "actual land use" and any evidence the zoning body perpetuated the Washington County zoning classification, which under Kunz would leave the area unlawful for signs. Id. Those two factors must, by virtue of their specification, be the dominant considerations in deciding the

ultimate issue. Those two factors are discussed in UDOT's opening brief.

Less specifically, this Court directed consideration of all evidence "relevant" to the ultimate question of whether the area is within the phrase "areas zoned for the primary purpose of allowing outdoor advertising" as used in Utah Code Ann. § 27-12-136.3(3) (1995). Id. The most salient evidence to this end, beyond the two primary factors just noted, is the evidence that Mr. Eveleth, the owner of the land the signs were on and the person who would benefit financially by addition of the small area of the signs to the area annexed and zoned commercial by Toquerville in December of 1993, was the single moving force without whom that particular portion of the annexed property would not have been included in the Toquerville annexation and zoning to commercial. Appellant's Br. at 30-32. This Eveleth land that would not have been annexed and zoned commercial absent Eveleth's involvement is in the aberrant bump at the top of the map constituting Kunz's Addendum No. 5.

The tax revenues from the signs, the only commercial enterprise there has ever been in this area, is also

significantly relevant. This is so because this Court recognized that "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" (Kunz, 913 P.2d at 769), and therefore directed the District Court to look beyond "the stated purpose of the zoning body or local government" to more objective factors. Id.

The signs were illegal under the February, 1993 UDOT Remand Order this Court held governed Kunz by res judicata. Id. at 769-770. That is relevant to counter Kunz's claim that the signs were only "non-conforming" and not illegal,¹ and hence need not comply with Toquerville or State requirements for new signs.²

¹"The term 'illegally erected' or 'illegally maintained' is not synonymous with the term, 'nonconforming sign', nor is a sign with 'grandfather' status synonymous with the term, 'nonconforming sign.'" Utah Admin. Code R933-2-3(14) (1994).

²UDOT can require Kunz to comply with the Toquerville ordinance as well as State law as a condition to the issuance of State sign permits based on a ruling of this Court in another sign case:

The State certainly has inherent authority to identify an existing requirement of law and make it a condition to the granting of a permit or lease. The application of an existing requirement of law is not equivalent to imposing new conditions not otherwise required by law.

Kunz does not rebut the centrally relevant and dispositive facts UDOT marshaled in its opening brief in support of the conclusion that the area where the signs stood is within the phrase, "areas zoned for the primary purpose of allowing outdoor advertising." Kunz's brief does discuss why Toquerville did not zone certain other areas commercial, but that is not the question. More generally, Kunz's brief rambles through large amounts of matter irrelevant to the ultimate issue.

At page 4 of its brief, Kunz lumps Eveleth in with a group of owners as initiators of the annexation. That is an attempt to gloss the specific testimony given by the annexing coordinator that the request of Eveleth, the owner of the land the signs were on, was the reason for the annexation of that particular small area and that without his request that portion would not have been added. (R. 855-56, 876; see also Appellant's Br. at 30-32).

Though Kunz showed that there had been some potential interest in commercial development "of property right on the Anderson Junction 1-15 Interchange," (Appellee's Br. at 4-5), it did not show any "actual land use" as commercial. Further, Kunz

Utah Dept. of Transp. v. ROA General, 927 P.2d 666, 668-69 (Utah App. 1996).

failed to show any interest at all in commercial development in the area where the signs are, 2,000 to 3,000 feet from the interchange (R. 1024-25), up a rural frontage road. (R. 1004).

Kunz claims that "a majority of town residents" and "most residents" favored creation of a commercial zone. Appellee's Br. at 5. There was, of course, no testimony from "a majority of town residents" or "most residents." Moreover, the record references Kunz supplies do not show that any witness even says that "a majority" or "most" residents favored such creation. Further, Kunz's assertion, Appellee's Br. at 5, that owners of property "on the intersection desired [a commercial] designation to accommodate future commercial development plans, . . . and tax base benefits" does not reasonably relate to the area of the signs, the closest of which was 2,000 feet away. (R. 1024-25.)

Kunz concedes that the zoning designation of Washington County was considered. Appellee's Br. at 5. The testimony of Mayor Wahlquist goes much further and shows that Toquerville perpetuated that designation,³ which this Court held was illegal for signs based on the final UDOT Order on Remand. Kunz, 913

³R. 985; Appellant's Br. at 28.

P.2d 969-70.

The statement of Kunz that "there was never any discussion of the outdoor advertising signs as justification for a Highway Commercial (H.C.) Zoning designation" is typical of Kunz's unsupported and unsupportable generalizations. Appellee's Br. at 6. The record reference Kunz supplies shows one person saying he had not heard discussion of the signs at the meetings he attended.

The supposed "fact" that "the current Toquerville zoning ordinance did not address outdoor advertising specifically," Appellee's Br. at 6, is simply not a fact. The Toquerville sign ordinance was adopted in 1982 (R. 957), in effect at the time of the Toquerville annexation and zoning (R. 984), placed into evidence at the remand trial as Kunz's Exhibit 2, and attached to Kunz's brief as Addendum 6. And that ordinance bars any sign larger than 8 feet x 12 feet and any sign without a conditional use permit. There must have been some lapse in communication in the portion of colloquy between Mr. Ronnow and the witness reported at R. 911-12 with regard to the existence or non-existence of a Toquerville sign ordinance. This is shown later

in that colloquy where Mr. Ronnow himself refers that witness to Toquerville's "sign ordinance." (R. 928, 11 2.)

What Kunz refers to as "the zoning map" (p. 6) was an "interim zoning map" that was never formalized into a final document. (R. 981) Kunz's characterization of the "SIGNS" portion of the Toquerville ordinance is a completely nonsensical blurring of what that sign ordinance plainly means. The sign ordinance (Appellee's Br., Addendum 6 at 29) reflects the requirements for a sign in Toquerville. These requirements are that an advertising sign is limited to 8 x 12 feet in size and 18 feet in height, must have a conditional use permit, and is limited to indirect lighting. Mr. Ronnow and the witness demonstrated their understanding that this ordinance requires a conditional use permit, in the following exchange:

MR. RONNOW:

Q. Based on the H-C ordinance, the highway commercial ordinance we've been discussing and provisions therein, and the chapter 12 sign ordinance, Toquerville's zoning ordinance that we're now discussing, can an applicant seek a conditional use permit in highway commercial for an advertising sign"

A. Yes, sir.

(R. 929, 11 9-15).

The District Court was indisputably correct in its

recognition that it was the intent of the Toquerville sign ordinance that "any signage of the type involved in this litigation be permissible only by conditional use permit." (R. 768, ¶ 8). The District Court was indisputably incorrect in basing its judgment on the premise that conditional use permits must have been obtained for the signs because placement of the signs "could only be done by conditional use permit,"⁴ when no evidence of conditional use permits had been submitted.

REPLY TO CERTAIN ASSERTIONS IN KUNZ'S SUMMARY OF ARGUMENTS

UDOT replies here to some of Kunz's assertions in its Summary of Arguments. First, UDOT's brief marshals evidence in its statement of facts and discussion of discrete issues.

Administrative Rule R933-2-3(4) (1994) clarifies Utah Code Ann. § 27-12-136.3(3) (1995) and makes an area illegal for billboards where, as here, the "primary activity" on the land is outdoor advertising. This Court directed the District Court to consider all relevant evidence bearing on whether the area is zoned for the primary purpose of allowing outdoor advertising and Kunz approvingly quotes the District Court's declaration that its

⁴(R. 769, ¶ 10).

inquiry was to have "extremely broad horizons." (R. 842; Appellee's Br. at 22). Thereupon Kunz submitted in evidence in the remand trial and the District Court accepted, Kunz's Exhibit 2, the Toquerville ordinance, which had never been introduced before in this case. Now, Kunz objects to UDOT's submission, at that same remand trial, of Administrative Rule R933-2-3(4) (1994) and UDOT's argument thereon. (R. 708-09.) The administrative rule is no less relevant than the Toquerville sign ordinance and should not be excluded from consideration.

Kunz is incorrect that UDOT did not make this argument regarding the rule, below. (See R. 708--"R933-2-3(4) of the Utah Administrative Code clarifies the definition in Utah Code Ann. § 27-12-136.3(3) (1995) that was otherwise considered ambiguous") This argument will be further developed below.

The list of "factors" Kunz claims the District Court considered does not support the District Court's findings or judgment. This will be treated below.

The Court's reasoning did not logically support the findings, and the relevant facts in the record require reversal.

ARGUMENT

I. THE TRIAL COURT BASED ITS JUDGMENT ON THE EXISTENCE OF CONDITIONAL USE PERMITS FOR THE SIGNS, AND IN SO DOING COMMITTED CLEAR ERROR

Kunz refuses to acknowledge the fact that the trial court gave as its reason for concluding that the signs were not in an area zoned for the primary purpose of allowing outdoor advertising, "the fact that the placement of advertising signs within the Eveleth property after Toquerville annexed and zoned the subject property could only be done by conditional use permit." (R. 769, ¶ 10). This finding is clear error and invalidates the judgment. First, such a fact has no bearing on whether the signs are in an area zoned for the primary purpose of allowing outdoor advertising. Second, the supposed "fact" is a non-fact. There was no evidence of conditional use permits for the signs and there could not have been any because the signs were in violation of the 8 x 12 foot size requirement of the Toquerville ordinance. Appellee's Br., Addendum 6.

The signs were illegal under the February 1993 UDOT Order on Remand, by res judicata. Kunz, 913 P.2d at 769. The signs were also "illegal and subject to removal" on a separate basis. Id.

at 770. As "illegal" signs, the signs were not "non-conforming" and were subject to Toquerville's (and the State's) requirements for new signs.⁵

Kunz's refusal to acknowledge the District Court's repeated reference to the Toquerville ordinance's requirement of "conditional use permits" for the signs as the basis for its decision⁶ is a statement by Kunz that the sun is not shining while it sees it shine. This is a variation of Kunz's refusal to acknowledge that Toquerville has a sign ordinance that requires conditional use permits. Kunz's counsel and witness know better:

MR. RONNOW:

Q: Based on the H-C ordinance, the highway commercial ordinance we've been discussing and provisions therein, and the chapter 12 sign ordinance, Toquerville's zoning ordinance that we're now discussing, can an applicant seek a conditional use permit in highway commercial for an advertising sign?

A. Yes, sir.

R. 929, 11 9-15.

⁵One cannot help but wonder whether the fact that Toquerville's legal counsel has been a partner in the same firm as that of Kunz's counsel from the time of the Toquerville annexation and zoning to the present has anything to do with Toquerville's lack of enforcement of the Toquerville sign ordinance.

⁶(R. 768-69, ¶¶ 8 and 10).

As noted above, the planner to whom Kunz refers at page 13, Mr. Sizemore, apparently had some lapse in communication with Kunz's counsel at the trial regarding the Toquerville sign ordinance, for the irrefutable fact is that Toquerville did have a sign ordinance. (See Kunz's Exhibit 2 at trial and Addendum 6 attached to its brief.) That there may have been an intention to amend it (never implemented) (R. 933) does not cancel its existence. Again, Kunz focuses on reasons not to zone certain other areas "commercial." That does not rebut the evidence UDOT marshaled in its opening brief showing that the area of the signs is an area zoned for the primary purpose of allowing outdoor advertising.

II. UDOT MARSHALED THE RELEVANT EVIDENCE DEMONSTRATING THE TRIAL COURT'S ERRORS

Issue No. 1 relates to the Court's reliance on a non-existent fact, irrelevant to the ultimate issue. It is philosophically impossible for UDOT to prove a negative -- that the fact does not exist. All UDOT need do is show that the lower court based its ruling on a supposed fact and then observe that there is no evidence in the record of the existence of that fact. Kunz has had its opportunity to show the existence of that fact

and has not done so. The non-existent fact on which the court rested was the supposed existence of conditional use permits for the signs. There being no evidence of such permits and such evidence being irrelevant, the findings fail to "show that the court's judgment or decree 'follows logically from, and is supported by, the evidence,'" as required by Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987).

As to issue No. 3, the trial court's entry of judgment without regard to the specific factors the Court of Appeals directed it to consider is a question of law. Slattery v. Covey & Co., Inc., 909 P.2d 925 (Utah App. 1995). UDOT has, in any case, marshaled the evidence showing the trial court's clear error in disregarding the dispositive evidence. Issue No. 4, the trial court's dismissal as impracticable of the statute this Court identified as controlling, is a question of law. Id.

III. ADMINISTRATIVE RULE R933-2-3(4) RENDERS THE AREA IN QUESTION UNLAWFUL FOR SIGNS

Utah Code Ann. § 27-12-136.6 (1995) (unchanged in material respects since the 1994 adoption of R933-2-3(4) (1994)) empowers UDOT to make rules to "control" outdoor advertising and provide "enforcement" of the Utah Outdoor Advertising Act. Pursuant to

that grant and the Utah Administrative Rulemaking Act, UDOT adopted rule R933-2-3(4) (1994) of the Utah Administrative Code after notice and opportunity for public comment and hearing. See Utah Code Ann. §§ 63-46a-4 (1996 Supp.) and 63-46a-5 (1993). R933-2-3(4) (1994) is a "legislative rule".⁷ A "legislative rule has the same binding effect as a statute. It binds members of the public, the agency, and even the courts, in the sense that courts must affirm a legislative rule as long as it represents a valid exercise of agency authority." Davis & Pierce, § 6.3.

The rule does not have any retroactive effect upon Kunz. At least from the time of the February, 1993 UDOT Order on Remand, it has been illegal to have signs at the location in issue.

⁷ Many legislative rules "interpret" statutory language, in the sense that they announce the agency's construction of a statute it has responsibility to administer. A rule that performs that interpretative function is a legislative rule rather than an interpretative rule if the agency has the statutory authority to promulgate a legislative rule and the agency exercises that power. Some legislative rules go much further than adopting a construction of a statute, of course. Some legislative rules impose new obligations through exercise of legislative authority delegated by statute.

Kenneth C. Davis, Richard J. Pierce, Jr., Administrative Law Treatise, § 6.3 (3rd ed. 1994). (Hereafter Davis & Pierce).

Kunz, 913 P.2d at 769-70 (holding that "Kunz is bound by the UDOT Order on Remand" and that the signs are "illegal"). The 1994 administrative rule was made after that 1993 UDOT Order holding the signs unlawful and before Kunz obtained any valid permits (it still has none), and therefore that rule does not retroactively divest Kunz of any rights, including rights to sign permits.

UDOT did raise the "ambiguity" of the statute below. (R. 708-09.) The ambiguity arises from the ellipsis in the phrase in § 27-12-136.3(3), "areas zoned for the primary purpose of allowing outdoor advertising." To make the grammatical structure complete one could read it "areas [that were] zoned . . .," or "areas [that are] zoned . . ." If one reads it "areas [that are] zoned for the primary purpose of allowing outdoor advertising," the focus shifts from any specific action that was taken when the zoning was initiated and the time past when that occurred, to the purpose presently served by the zoning and the present statutes. Reading the phrase in this latter sense is consistent with the Court of Appeals' directive to the lower court to consider present "actual land uses" in its factual inquiry. In view of this ambiguity, UDOT appropriately adopted clarifying rule R933-

2-3(4), that recognizes both senses of the phrase, pursuant to its statutory authority and duty.

Contrary to Kunz's assertion, the phraseology of the UDOT Order on Remand was consistent with the latter sense of the statute and the rule. That phraseology is as follows: "[T]he zoning as 'commercial' is 'for the primary purpose of allowing outdoor advertising'" (emphasis added.) (R. 215.) And UDOT has consistently so argued throughout the proceedings. (See, e.g., R. 1054 -- the "actual land use . . . shows the purpose served by the zoning.")

Kunz argues that the rule contradicts the statute. This is not true; it clarified Utah Code Ann. § 27-12-136.3(3) (1995). At the very least, rule R933-2-3(4) can be taken as creating a very strong presumption that where the primary (or even more, only) activity on the land the signs are on is outdoor advertising, that advertising is unlawful. In view of the argument Kunz makes in favor of a very broad scope of inquiry at the remand trial and its introduction at the remand trial for the first time of the Toquerville ordinance, administrative rule R933-2-3(4) (1994) should be applied to perpetuate the

unlawfulness of this area for signs.

IV. KUNZ MISSTATES THIS COURT'S REMAND INSTRUCTION,
THE LOWER COURT'S FINDINGS AND CONCLUSIONS DO
NOT SATISFY THAT INSTRUCTION, AND THE RECORD
DOES NOT SUPPORT THE JUDGMENT

This Court's remand is not "in effect a mandate to review the Toquerville planning process." (Kunz's brief, p. 22.) The remand instruction is what it is, and is reported and matched to the evidence in UDOT's opening brief.

UDOT never urged the lower court not to consider the factors identified by this Court. UDOT objected to evidence that arises from certain unreliable circumstances and sources, based on law it cited to the Court. (R. 737-40). The District Court having admitted and considered Kunz's submissions, UDOT urges only that its submissions and arguments be admitted and considered on a level playing field. The lower court's failure on remand to follow a specific instruction of the remanding court is a breach of the law of the case and is a question of law. Slattery v. Covey & Co., Inc., 909 P.2d 925 (Utah App. 1995). The District Court's findings do not meet this Court's remand instructions and the judgment should be reversed.

Whether the lower court received evidence and testimony

regarding a matter says nothing about whether the court genuinely considered it. That becomes apparent only in the court's findings and conclusions. UDOT's opening brief details the dispositive omissions and flaws in those findings and conclusions. Kunz's factors A through G do not support the District Court's findings or judgment.

A. ANNEXATION AT EVELETH'S REQUEST. There is no reference in the District Court's findings to a petition for annexation. The general existence of a petition is not relevant anyway. What is relevant about the annexation process, however, is that the sole initiating force for adding the portion of land the signs were on to the land originally proposed for annexation was Mr. Eveleth, the owner of the land the signs were on and the lessor of that portion to Kunz. This is established by the specific and uncontradicted testimony of Kimball Wallace, the Toquerville city engineer, quoted and discussed in UDOT's opening brief. Appellant's Br. at 30-32. Without that Toquerville annexation, the signs would be unlawful without more as part of Washington County, under the UDOT Order on Remand this Court held bound Kunz by res judicata. Kunz, 913 P.2d 769.

B. ACTUAL LAND USE/LACK OF COMMERCIAL DEVELOPMENT. It was patent error for the trial court to disregard as irrelevant "actual land use," the first factor this Court directed the lower court to consider. Id. Indeed, the most probative evidence presented at the trial was the absence of any commercial development (other than the signs) in the naturally beautiful area of the signs. Yet the trial court recited its findings of fact and stated its conclusion of law before it made any reference to actual land use. (R. 1065-67). And the after-thought, hypothetical, reference the District Court did make to actual land use renders it clear the court did not consider that use in reaching its conclusion. The record reflects that reference as follows:

But if it were left to the Court to determine to which use this property had been placed, the only conclusion that the Court could come to on the basis of this record is that the only use that this property has ever had during the times pertinent 1987 to date has been the maintenance of outdoor advertising.

(R. 1067-68, emphasis added).

The Court of Appeals identified the first factor for consideration to be "actual land use," and then the lower court says, "if it were left to the Court to determine to which use

this property had been placed" There is no "if" about it. That determination was left to the trial court, it was central to disposition of the case, by this court's instruction, it was disregarded by the lower court, and the lower court's failure to rely on it is reversible error.

C. "PROPOSED" LAND USES. This Court directed consideration of "actual land use," not "potential" land use. Kunz, 913 P.2d at 769. In any event, there was no finding or even testimony to the effect that anyone has ever had any interest in placing commercial activity in the area of the signs, 2,000 to 3,000 feet from the intersection.

D. PERPETUATION OF WASHINGTON COUNTY ZONING DESIGNATION. The District Court entered no finding regarding Toquerville's perpetuation of the Washington County zoning, despite the Court of Appeals' explicit indication that perpetuation of the Washington County zoning, under which the area was illegal for signs, was a factor to consider. Id. UDOT has taken the position that the District Court did not need further evidence on the question whether Toquerville perpetuated the Washington County zoning that was illegal for signs, because this Court has

already found that "Toquerville . . . chose to retain the 'highway commercial' zoning for the area." Id. at 767. However, if the further evidence received on that factor is considered necessary or useful, it further supports the conclusion that Toquerville perpetuated Washington County's zoning.

Mr. Peterson may not have been aware of the Washington County zoning, but the Toquerville Planner, Mr. Sizemore, was aware of it. (R. 892, 902). Most significantly, the only witness who actually voted on the Toquerville zoning, Mayor Wahlquist, testified that "Toquerville left the zoning of the Eveleth land the signs are on just as it was when the land was only in the county." (R. 985; Appellant's Br. at 26-30). This perpetuation of the Washington County zoning that was unlawful for signs supports unlawfulness of the area for signs.

E. NO UTILITIES OR INFRASTRUCTURE. The District Court did find there was no utility or infrastructure in the area of the signs. (R. 768, ¶ 5 -- "There is no evidence of any utility ever servicing the property - water, power, gas, sanitary sewer or other utilities"). This finding is supported by the record and supports the conclusion the zoning was not for commerce other

than the signs. The District Court inexplicably considered that irrelevant, tossing it off as an after-thought, after already having rendered its legal conclusion. (R. 1067).

F. SIGNAGE ISSUES. The relevant aspects of the signage issues, that show illegality of the signs, are discussed in UDOT's opening brief. Again, Toquerville did have a sign ordinance at the time of the annexation and zoning. Appellee's Br., Addendum 6.

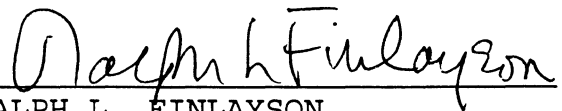
G. LACK OF EVIDENCE OF CONDITIONAL USE PERMITS UNDER TOQUERVILLE ORDINANCE. The finding upon which the District Court based its judgment -- that Toquerville must have issued conditional use permits for the signs because the Toquerville ordinance required conditional use permits for signs of this type -- was based on thin air. There was no evidence of any conditional use permits since none had ever been issued. Appellant's Reply Br. at 6-7, 11-13. Moreover, this factor is irrelevant to the ultimate issue.

CONCLUSION

The central finding of the trial court based on nonexistent Toquerville conditional use permits is clearly erroneous. The

findings of the trial court are erroneous as a matter of law as to those factors it failed to consider in disregard of this Court's explicit instructions. The findings do not show that the trial court's judgment follows logically from and is supported by the evidence, and therefore the judgment should be reversed. The record reflects that the immediate area of the sign, as an area that is zoned for the primary purpose of allowing outdoor advertising, is not part of a "commercial or industrial zone" under the statute or rule, and outdoor advertising in that area is therefore unlawful. This Court should so hold.

DATED this 14th day of August, 1997.


RALPH L. FINLAYSON
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of
the foregoing REPLY BRIEF OF DEFENDANT/APPELLANT, postage
prepaid, this 14 day of August, 1997, to the following:

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