

1989

Heida L. Thurlow v. Park City, a body corporate and politic of the State of Utah : Reply Brief of Appellant

Utah Court of Appeals

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J. Craig Smith; Wheatley and Ranquist; James W. Carter; Attorneys for Defendant/Respondent.
Craig G. Adamson; Eric P. Lee; Dart, Adamson and Kasting; Attorneys for Plaintiff/Appellant.

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BRIEF

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DOCKET NO. 89-0152

~~IN THE~~ UTAH COURT OF APPEALS

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HEIDA L. THURLOW,

:

Plaintiff/Appellant,

:

Case No. 890152-CA

v.

:

PARK CITY, a body corporate
and politic of the State of
Utah,

:

Priority No. 14(b)

:

Defendant/Respondent.

:

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APPELLANT'S REPLY BRIEF

AN APPEAL FROM THE
THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY
THE HONORABLE J. DENNIS FREDERICK PRESIDING

Craig G. Adamson
Eric P. Lee
DART, ADAMSON & KASTING
310 South Main Street, Suite 1330
Salt Lake City, Utah 84101
Telephone: (801) 521-6383
Attorneys for Plaintiff/Appellant

J. Craig Smith
WHEATLEY & RANQUIST
60 East South Temple #1225
Salt Lake City, Utah 84111
Telephone: (801) 237-1700

James W. Carter
Post Office Box 1480
Park City, Utah 84060
Telephone: (801) 649-9321

Attorneys for Defendant/Respondent

DEPOSITED BY THE
STATE OF UTAH
AUG 17 1990

FILED

JUL 21 1989

Mary
Clerk of
Utah Court

IN THE UTAH COURT OF APPEALS

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HEIDA L. THURLOW,	:	
Plaintiff/Appellant,	:	
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Craig G. Adamson
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310 South Main Street, Suite 1330
Salt Lake City, Utah 84101
Telephone: (801) 521-6383
Attorneys for Plaintiff/Appellant

J. Craig Smith
WHEATLEY & RANQUIST
60 East South Temple #1225
Salt Lake City, Utah 84111
Telephone: (801) 237-1700

James W. Carter
Post Office Box 1480
Park City, Utah 84060
Telephone: (801) 649-9321

Attorneys for Defendant/Respondent

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ARGUMENT

POINT I: THE APPLICABLE STANDARD OF REVIEW IS WHETHER PARK CITY'S ACTIONS WERE IN EXCESS OF ITS AUTHORITY OR CONTRARY TO LAW.

The standard of review applicable to this matter is dictated by whether the questions at issue are factual or legal in nature. Park City argues that its decision to approve the project must stand unless found arbitrary and capricious. The arbitrary and capricious review standard applies in the context of factual disputes. The present dispute involves the interpretation of the Park City Land Management Code, a question of law. In this context, questions such as whether

Park City's approval was arbitrary or capricious are not pertinent.¹

In *Petty v. Utah State Board of Regents*,² the Utah Supreme Court expressly adopted the "legal basis" review standard. In identifying the proper focus of appellate review of an administrative agency decision, the Court sanctioned reversal in cases where the administrative agency "has in some way acted contrary to law or in excess of its authority."³

The cases cited by Park City in support of its contention that arbitrary and capricious is the only review standard available to this Court all involve situations where fact-based agency decisions are challenged. In *Cottonwood Heights v. Board of Commissioners*,⁴ the County Commission issued a permit to construct a 200-unit apartment complex. Plaintiff contended that the approval of the project was arbitrary and capricious for two reasons. First, the Commission had denied a similar application from a different applicant five months earlier, and no substantial change of circumstances had occurred. Second,

¹Arguably, Park City's actions are arbitrary and capricious since they are contrary to Code which authorizes the actions. This need not be decided because, as argued, the Court has another basis for reversing the actions.

²595 P.2d 1299 (Utah 1979).

³*Id.* at 1302.

⁴593 P.2d 138 (Utah 1979).

the Commission failed to gather all pertinent information from all possible sources.

Unlike the present matter, there was no question in *Cottonwood Heights* concerning whether the agency's actions were contrary to any ordinance or statute. The questions were factual in nature: (1) whether there was a substantial change in circumstances; and (2) whether all pertinent information had been gathered. Accordingly, the arbitrary and capricious review standard was appropriate.

Likewise, in *Davis County v. Clearfield City*,⁵ Plaintiff contended that Clearfield City's denial of a permit was without substantial basis in fact. The trial court agreed and found that the city's actions were arbitrary and capricious. On review, this Court also found that the reasons supporting the city's denial were arbitrary and capricious because they were without sufficient factual basis.

Finally, Park City cites *Xanthos v. Board of Adjustment*,⁶ for the proposition that the trial court may not substitute its judgment for a Board of Adjustment. Again, the questions were essentially factual. The Board of Adjustment found that Xanthos failed to show special circumstances warranting a

⁵758 P.2d 704 (Utah App. 1988).

⁶685 P.2d 1032 (Utah 1984).

variance. The trial court found that the circumstances shown by Xanthos were sufficient as a matter of public policy and, thereby, substituted its judgment for that of the Board. The Supreme Court reversed, noting that the trial court improperly disregarded the Board's finding of fact and substituted its own.

Thurlow does not dispute Park City's contention that arbitrary and capricious is the correct standard for review of an agency's fact-based findings. Agency interpretations of law, however, are subject to a more exacting standard. As the Utah Supreme Court indicated in *Petty v. Board of Regents*, the appropriate inquiry is whether the agency action is contrary to law or in excess of its authority.

**POINT II: PARK CITY'S APPROVAL OF THE PROJECT IS NOT
CONDITIONED ON THE DEVELOPER MEETING THE SIXTY PERCENT OPEN
SPACE REQUIREMENT.**

Park City acknowledges that the project, as approved, does not meet the open space requirement found at §10.9(h)(3) of the Land Management Code.⁷ In response to Thurlow's argument that the project approval should be reversed on this basis, Park City makes two arguments. First, Park City states that "the

⁷See Brief of Appellant at A-2 for a copy of the relevant section.

approval by Park City is conditional on the final site plans submitted and the actual project meeting the sixty percent open space requirement."⁸ The minutes from the Park City Planning Commission meeting at which the project was approved show three conditions to the approval, none of which mention the open space requirement:

- (1) City engineer approval of all grading, drainage, and utility plans;
- (2) Approval by the city landscape architect of a conceptual landscape plan, and posting of security to guarantee installation of all public improvements and landscaping;
- (3) Fire marshall approval of the project.⁹

In connection with this argument, Park City states "that the final plans have not been submitted as of yet to Park City."¹⁰ Whether the plans approved by Park City as a part of the overall project approval are final is not disclosed in the record. Park City raises this issue for the first time in its brief. Resolution of the issue is not necessary, however, because Park City approved the project in its *present*

⁸Brief of Respondent at 9.

⁹Minutes of the June 22, 1988, Park City Planning Commission meeting at 12 (R. 60).

¹⁰Brief of Respondent at 10.

configuration, a configuration that fails to meet the statutory open space requirement. Whether the developer will cure the deficiency at some later date is irrelevant. Park City's approval of the project is contrary to the requirements of the Land Management Code and, therefore, the approval must be reversed.

POINT III: THE QUESTION OF WHETHER THE PROJECT MEETS THE OPEN SPACE REQUIREMENTS WAS PROPERLY RAISED AND PUT AT ISSUE.

Park City argues that Thurlow failed to properly allege and put at issue the open space question.¹¹ Admittedly, the question is not raised in Thurlow's Amended Complaint. It was briefed and argued to the trial court, however, and Park City has no basis for objection to its consideration on appeal.

Thurlow first raised the issue in support of her Motion for Summary Judgment.¹² Park City addressed the issue in its opposing memorandum.¹³ Park City argued that the project meets

¹¹Brief of Respondent at 3 and 9.

¹²Memorandum in Support of Motion for Summary Judgment at 4 (R. 37).

¹³Memorandum in Support of Park City's Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment at 3, 4, and 7 (R. 130, 131, and 134).

the open space requirements and, in support, supplied copies of a portion of the project's plans.¹⁴

Thurlow again addressed the issue in her reply memorandum,¹⁵ then argued the point at the hearing on the cross-motions for summary judgment.¹⁶ At no time did Park City object to the trial court's consideration of the issue.

Utah Rule of Civil Procedure 15(b) provides that when issues not raised by the pleadings are tried with the implied consent of the parties, the issues are treated as if they were raised in the pleadings. Amendment to the pleadings may be allowed to raise these issues, but failure to amend does not affect the result.

Although Thurlow did not raise the open space issue in her initial pleading, she did raise it in the pleadings supporting her Motion for Summary Judgment. The issue was tried without objection and, therefore, with the implied consent of the parties. Pursuant to Rule 15, Park City may not now object to its consideration.

¹⁴R. 146.

¹⁵Memorandum in Reply to Park City's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Opposition to Park City's Cross-Motion for Summary Judgment at 2-3 (R. 148-149).

¹⁶Reporter's transcript at 2-3.

POINT IV: PARK CITY'S ARGUMENT REGARDING "CLUSTERING" DOES NOT ADDRESS THE ISSUE OF WHETHER FOURPLEXES ARE A PROHIBITED USE.

Park City argues at length in support of its contention that the Land Management Code allows "clustering" of structures. The contention itself is correct, but it does nothing to refute the fact that the project contains fourplexes, a prohibited use in the HR-1 zone.

Park City's justification for approving the project with fourplexes is that the Code's prohibition does not apply when the fourplex is part of a MPD. Apparently, the argument is that since MPD's are allowed as a conditional use in the HR-1 zone, and fourplexes may be incorporated into a MPD, fourplexes must be permitted in the HR-1 zone.¹⁷

The problem with this reasoning is that it ignores and is contrary to the express language of the Land Management Code. Section 10.9 of the Code states that a use, such as a fourplex, is permitted as a part of a MPD *only* if it is permitted in the zoning district in which the MPD is located.¹⁸

Furthermore, the Land Management Code contemplates the very situation advocated by Park City. The land use table that

¹⁷Brief of Respondent at 11.

¹⁸Section 10.9 is quoted and discussed at more length in the Brief of Appellant at 13.

describes the permitted, conditional, and prohibited uses in each zone contains the notation "c¹" in every block where the Code allows a use "within the zone only as a part of a [MPD], and not as an isolated land use."¹⁹ In other words, if fourplexes were allowed in the HR-1 zone as a part of a MPD, as Park City argues, the Notation "c¹" would appear in the block corresponding to fourplexes in the HR-1 zone. Because the notation does not appear in the block²⁰, the use is prohibited and Park City's approval of the project is contrary to the Code.

POINT V: APPLICATION OF THE UNIT EQUIVALENT FORMULA TO INCREASE THE NUMBER OF PERMITTED UNITS INCREASES DENSITY.

Section 10.9(b) of the Land Management Code provides as follows:

Maximum Density Requirements. The requirements of Section 7 (Use Tables) regarding maximum densities shall apply to all [MPD's]²¹

The Use Tables set the maximum density allowed in the HR-1 zone at one single family dwelling unit on each 1,875 square feet

¹⁹Reference Note 1 to the Land Use Tables, copies of which are attached to the Brief of Appellant at A-4 and A-5. (R. 158, 159.)

²⁰*Id.*

²¹Brief of Respondent at A-1 (R. 109).

of vacant land.²² The project contains 28,875 square feet of vacant land. Accordingly, the maximum number of units authorized by the Code is 15.4.²³

Despite this maximum, Park City approved the project with 36 units, or one on every 802 square feet of vacant land. Presumably, Park City approved this increase in density under the only exception to maximum density provided in the Code, found at §10.9(b):

Maximum Density Requirements. The requirements of Section 7 (Use Tables) regarding maximum densities shall apply to all [MPD's] except that the approving agency may increase the number of permitted units to the maximum bonus levels found in this chapter if it finds that the site plan contains areas allocated for usable open space in a common park area as authorized in this section, or that an increase in density is warranted by the design and amenities incorporated in the master planned development site plan, and the needs of the residents for usable open space can be met.²⁴

The §10.9(b) exception under which Park City was entitled to "increase the number of permitted units" is conditioned on one of two findings being made by the reviewing agency.

²²Brief of Appellant at A-8, 9 (R. 111, 102).

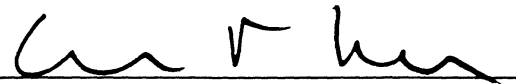
²³28,875 total square feet divided by 1,875 square feet per unit equals 15.4 units.

²⁴Brief of Appellant at A-1 (R. 109).

In response to Thurlow's position that Park City failed to make the required findings, Park City argued that no increase in density was allowed.²⁵ Park City acknowledges, however, that the project is approved with more than one unit for every 1,875 square feet. Therefore, Park City's position is untenable. An increase in the number of permitted units was allowed and, as previously noted, the required findings were not made.

For the foregoing reasons, and those stated in Thurlow's initial brief, the trial court's judgment should be reversed and remanded with instructions to enter judgment for Thurlow.

RESPECTFULLY SUBMITTED this 20 day of July, 1989.



Craig G. Adamson
Eric P. Lee
Attorneys for Plaintiff/
Appellant

²⁵Brief of Respondent at 13-14.

CERTIFICATE OF MAILING

I hereby certify that on the 20 day of July, 1989, four (4) true and correct copies of the foregoing Appellant's Reply Brief were mailed, first class, postage prepaid, to J. Craig Smith, WHEATLEY & RANQUIST, Eagle Gate Tower, #1225, 60 East South Temple, Salt Lake City, Utah 84111-1004, and James W. Carter, City Attorney, Park City Legal Department, 445 Marsac Avenue, P.O. Box 1480, Park City, Utah 84060.

A handwritten signature in black ink, appearing to be "C. Smith", is written above a horizontal line.