2001

Jack F. Scherbel v. Salt Lake City Corporation : Petition for Rehearing

Utah Supreme Court

Leon A. Halgren; Attorney for Appellant.
Bruce Baird; Assistant City Attorney; Attorney for Respondent.

IN THE SUPREME COURT OF THE STATE OF UTAH

19633

JACK F. SCHERBEL,

Plaintiff-Appellant

vs.

SALT LAKE CITY CORPORATION, et. al.

Defendants-Respondents.

Case No. 19633

PETITION FOR REHEARING

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CASES CITED

STATEMENT OF BASIS OF PETITION

It is respectfully submitted that several errors appear in the Court's statement of the facts as those facts are set forth in the record on appeal, which facts and the law as discussed herein, should materially alter this Court's decision. Some facts have been misapprehended and the law as applied thereto has been overlooked in this Court's decision.

Appellant now comes before this Honorable Court and requests that the Court review the said record and the case law as it appears to apply to the facts in the record and thereby grant to your appellant an opportunity for oral argument and discussion of such issues as are presented in this petition, as provided in Rule 35 of the Utah Rules of Appellate Procedure.

ARGUMENT

The Court's attention is respectfully requested in reviewing certain statements made in its decision of May 3, 1988, which do not properly state the facts and the legal posture of the parties herein.

There is also case law which this Court overlooked in rendering its decision, which your petitioner respectfully submits, provides a firm basis to grant this petition and reconsider its decision.

POINT I

PARTS OF THE DECISION INDICATE THAT THE COURT MISAPPREHENDED THE FACTS

The record on appeal clearly demonstrates and is supported by

both the Appellant's and Respondent's respective briefs, that your petitioner filed with the City an Application for A Building Permit on the form provided by the City in initiating his quest for a building permit and that along with the said application it was necessary to file a detailed schematic drawing done by an architect, showing elevations, set-back, side and rear yard, off-street parking available, et. cet., all of which was far more than a preliminary sketch or conceptual proposal. (See Plaintiff's Exhibit No. 39) The architect's technical and to-scale drawing was the basis, and the only basis, on which the Planning and Zoning Commission could and did act in making its determination as to whether or not the proposed structure would be in compliance with the zoning ordinances of the City at that time.

After a study of said Exhibit No. 39 and the information given in the Application for a Building Permit, the Planning and Zoning Commission did on the 29th day of October of 1979 approve said Application and Plan (Exhibit No. 39). Thereafter, the issuance of the Building permit by the City's building inspector was a mere administrative formality. In the normal course of events, after approval of the Application the building permit is issued and there is no further review. That is it!! The building inspection department is only involved to make sure that the building is constructed in accordance with the approved plan and that the building code is adhered to as the building is being built. The building code has nothing to do with the planning and zoning considerations which have already been met when the plan is approved.

In every application for a building permit, a prerequisite to obtaining such permit is that the detailed plans conform with the zoning ordinances of that city. Once the planning commission has reviewed the detailed plans and given the application its stamp of approval, there is no further review or action to be taken by any city official, unless a party with standing properly challenges the approval and in such event the city and its attorney would be supporting the decision of its planning commission which has the authority and the expertise to make such determination. There is just no basis in the law to allow the city attorney to take a position adverse to the official decision and determination of that city's planning commission. If the decision and final approval of the planning commission of a particular project were nebulous and subject to political machinations and the political pressures of special interest groups, as is clearly shown in the record in the instant case, a landowner or developer would never know when he had the "green light", signalling him to proceed with his financing and such resultant ambiguous and uncertain status of approval would also create havoc in the financial community of this state as well.

Another misapprehension of the facts is noted in the second paragraph of page 2, wherein the Court states:

> In May of 1979, before Appellant's preliminary application to the HLC, the structure of Salt Lake City's government was changed.

Factually, the question of the change of the City's form of government was submitted to the voters on the first Tuesday of November 1979, and by this vote the change took place as of January 1, 1980. There was, therefore, no change in the actual

structure of the City's government at the time (October 24, 1979) Appellant submitted to the HLC his proposed project, nor at the time (October 29, 1979) he received a favorable decision of approval from the Planning and Zoning Commission, which body chose to not follow the recommendation of the HLC. The Court in its decision refers to the proceeding before the Planning and Zoning Commission as an appeal by Mr. Scherbel from the decision of the HLC, which statement is clearly in error. The HLC, as constituted, did not have and authority to either approve or disapprove plans for proposed structures. The HLC was merely an advisary committee with no power or authority to bind any city agency and in particular, the Planning and Zoning Commission. It is, therefore, error to imply that any position taken by the HLC was given the dignity of a binding order which the Planning and Zoning Commission had to review as an appellate body in either approving or denying an application.

Another misapprehension of the facts is found in the last sentence of the second paragraph of page 2 of the Court's Decision, wherein the ruling states:

> A new form of government went into effect in January of 1980, after appellant's preliminary application to the HLC, <u>but before his appeal from the Planning Commission's later decision was taken</u>. (Emphasis Added)

The error is in the last twelve words of this sentence as underlined above. The record is clear that Mr. Scherbel, your petitioner, at no time took an appeal from the decision of the Planning Commission. His posture before the District Court was at all times that said Court should rule, as this Court has now ruled,

i.e., the action of the City Council was a nullity and that the City should not be permitted a full hearing to thereby allow the District Court to substitute its judgment for the decision of the City's Planning and Zoning Commission, contrary to law.

POINT II

AFTER DETERMINING THAT THE CITY COUNCIL'S ACTION WAS A NULLITY, THE DECISION OF THE DISTRICT COURT SHOULD, LIKEWISE, BE SET ASIDE AS REQUIRED BY CASE LAW

In a recent case this Court considered the role of the District Court in a review of a decision of the board of adjustment and in that case this Court clearly stated that it was reversible error for the court to weigh anew the underlying factual considerations rather than just determine whether or not the decision of the board of adjustment was arbitrary or capricious. Xanthos v. Bd. of Ajdustment of Salt Lake City, 685 P^2 1032 (Ut. 1984)

In the instant case, as in the Xanthos case, the role of the District Court should have been limited to a determination of whether there was evidence in the record to support the decision of the Planning Commission as being not arbitrary or capricious. Had the lower court ruled correctly under the separation of powers doctrine and thereby declared a nullity the action of the City Council, it logically would then have been limited to an inquiry and determination as to whether or not there was evidence in the record to support the decision of the Planning Commission in approving the Appellant's application for a building permit.

Furthermore, it is interesting to note that had the lower

court ruled correctly on the law, there would have been no one before the court to oppose the applicant (your petitioner), since, obviously, the City Attorney would have no client to represent because that office could not then have taken a position contrary to the decision and official action of the Planning Commission's approval of Mr. Scherbel's application for a building permit. At that juncture of the case, the correct ruling of the District Court would have placed the City Attorney in the untenable position of having to then act in contravention of the decision of the official body of the City which by law was vested with the authority and had the expertise to inquire into the questions of whether or not a proposed structure would meet all the requirements of the zoning laws of the City and which Commission had carefully studied Mr. Scherbel's Exhibit No. 39 and found that it did fully comply.

There appears to be absolutely no legal or logical basis for a ruling, on the one hand, that the action of the City Council was of no legal effect (a nullity) and then, on the other hand, for accepting as valid the ruling of the lower court which ignored that basic and well established law as set forth in the Xanthos case (supra), which court, as the record clearly shows, retried the whole case de nuevo, substituting its judgment for the judgment of the Planning Commission.

CONCLUSION

On the basis of the foregoing discussion, it is respectfully submitted that there have been sufficient misapprended facts and principles of law overlooked that this Honorable Court should grant

a Rehearing and allow oral argument, whereby this Court can reconsider it present decision and the effect it may have in the future development of this state and the need for certainty in the decisions of administrative bodies such as the Planning and Zoning Commissions of the numerous subdivisions of this state as those decisions may affect and relateto the financing of any proposed projects. Such matter should never be left to the behest of ad hoc committees and organizations which through political pressure interfere with the orderly process of government.

Dated: May 17, 1988.

Leon A. Halgren
Attorney for Petitioner

CERTIFICATION OF ATTORNEY

I, Leon A. Halgren, attorney of record for your Petitioner and Appellant, certify to this Honorable Court that this petition is filed and presented in good faith and not for any purpose of delay.

Leon A. Halgren