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# L.C. Canyon Partners, LLC, a Utah limited liability company v. Salt Lake County, a municipal corporation and subdivision of the State of Utah : Brief of Appellee

Utah Court of Appeals

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# IN THE UTAH SUPREME COURT

| | | |
|---|---|---|
| **L.C. CANYON PARTNERS, LLC,** a Utah limited liability company, | : | |
| Plaintiff/Appellant, | : | Supreme Court No. 20090569-SC<br>Priority 15<br>District Court Case No. 070903479 |
| *-vs.-* | : | |
| **SALT LAKE COUNTY,** a municipal corporation and subdivision of the State of Utah, | : | |
| Defendant/Appellee | : | |

## APPELLEE'S SUPPLEMENTAL BRIEF

### APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
### IN AND FOR SALT LAKE COUNTY
### HONORABLE DENISE LINDBERG


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FILED
UTAH APPELLATE COURTS

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## STATEMENT OF RELEVANT FACTS

1. On May 4, 2004, LC Canyon entered into a "Purchase and Sale Agreement" [the "Agreement"] with Richard Despain and members of his family acting collectively as owner and seller of the North Parcel, for purchase of the North Parcel together with other parcels owned by the same sellers located on the west side of North Little Cottonwood Canyon Road (SR 210). Eastham Depo 50:20 - 51:11, and Ex. 18. LC Canyon wanted to develop a single housing unit on the North Parcel. Plaintiff's Amended Complaint, ¶¶ 8, 9 [R. 44-45].

2. Under the Agreement, LC Canyon was required to purchase the North Parcel in order to purchase the property on the west side of North Little Cottonwood Canyon Road for its proposed subdivision development. The sellers required an "all or nothing" contract, not allowing individual parcels to be purchased on a piecemeal basis. Eastham Depo 18:2-5, 18-21, 62:12-18 [R. 192; 214]; Kesler Depo 28:5-9, 29:5-21 [R. 294-295] .

3. Mr. Kesler and Mr. Eastham met with County representatives before closing the purchase of the North Parcel and felt "comfortable" that their request for rezoning a 3.5-acre portion of the North Parcel would be approved. Kesler Depo 21:21 - 22:10 [R. 291-292].

4. LC Canyon became aware of the FR-20 zoning of the North Parcel in early 2004 before purchasing the North Parcel. Under the Agreement, LC Canyon's obligation to purchase the North Parcel was <u>not</u> made contingent upon its

ability to secure the desired rezoning from the County. Eastham Depo 22:4-10 [R. 196]. Kesler Depo 26:19-24 [R. 293].

5. On June 17, 2005, LC Canyon filed an application with the County seeking to rezone a 3.5-acre segment of the North Parcel from the existing FR-20 zone to the FR-2.5 zone (*i.e.*, forest/recreation uses, minimum lot size 2.5 acres per dwelling unit) [the "Rezone Application"]. Eastham Depo 39:7 - 40:6, Ex. 11 [R. 205-206].

6. On October 18, 2005, the Salt Lake County Council ["Council"], acting as the County's legislative body, preliminarily approved the Rezone Application by ordinance during a public hearing. Plaintiff's Amended Complaint ¶9. In said ordinance, the effective date of Council's approval was set fifteen (15) days thereafter, *i.e.*, November 2, 2005. Eastham Depo 24:10 - 26:26:21, Ex. 5 (minutes of October 18, 2005 Council meeting, ordinance approving Rezone Application, Sec. 3, p. 551; *see* Appellant's Brief, App. 3, p. LC 0103) [R. 221-231].

7. On October 25, 2005, the Council voted to reconsider its approval of the Rezone Application. Plaintiff's Amended Complaint ¶10 [R. 45] .

8. On November 1, 2005, the Council voted 5 to 2 in a public meeting attended by Mr. Eastham and Mr. Kesler to rescind its preliminary approval of the Rezone Application. Eastham Depo 28:16 - 30:12, Ex. 6 (minutes of November 1, 2005 Council meeting, pp. 574-578; *see* Appellant's Brief, App.

5, pp. SLCO - 00024-00028) [R. 232-242].

9. LC Canyon received prior notice of the November 1, 2005 meeting and the proposed reconsideration of the Rezone Application through a telephone call to Mr. Eastham from a County official. Eastham Depo 64:18 - 65:7 [R.215-216]; Kesler Depo 60:18 - 61:5 [R. 303-304].

10. At the November 1, 2005 Council meeting, both Mr. Eastham and Mr. Kesler appeared and spoke in opposition to rescission of the approval of the Rezone Application. Eastham Depo 65:6-13, Ex. 6 (minutes of November 1, 2005 Council meeting, pp. 574-578) [R. 238-242].

11. LC Canyon incurred no expense or liability in reliance on the Council's preliminary approval of the Rezone Application on October 18, 2005. Eastham Depo 65:17-21 [R. 216] ; Kesler Depo 51:22-25 [R. 298].

## SUMMARY OF THE COUNTY'S ARGUMENT

LC Canyon never acquired a "vested right" in rezoning of its land because the County's initial approval of rezoning never took effect. Moreover, LC Canyon never acted or relied upon, the initial rezoning vote of October 18, 2005. The County Council, as the County's legislative body, retained power to reconsider, amend or rescind its vote to rezone the North Parcel until "something has been done as a result of that vote that the assembly cannot undo" (Rule 37 Roberts Rules of Order). This is generally construed as when the ordinance became legally "effective."

Rule 37 is the default procedural mechanism for rescission as the County has no explicit procedure for rescission of an ordinance prior to its effective date. Whether intentionally following Rule 37 or not, the Council properly followed the procedures outlined in Rule 37 to pass a valid motion to rescind.

## ARGUMENT

## I

## The Council Was Well Within Its Authority To Rescind The Ordinance

From October 18, 2005 when the initial vote was taken until November 1, 2005 when it was rescinded, the ordinance was "passed," but had not taken "effect." Under state law, no ordinance passed by the county legislative body may take *effect* within less than 15 days after its passage.[1] (emphasis added) Pursuant to the above statute and the overwhelming weight of current municipal authority, the Council acted well within its authority to reconsider and rescind its vote to rezone LC Canyon's 15.26 acre North Parcel from FR-20 to FR-2.5. Such reconsideration and rescission may take place at a subsequent meeting.[2] The

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[1]UCA §17-53-208(3)(a).

[2]

Dal Maso v. Board of County Com'rs., 182 Md. 200, 206-07, 34 A.2d 464, 467 (1943)("'It is a general rule, subject to certain qualifications hereinafter noted, that a Municipal Corporation has the right to reconsider its actions and ordinances, and adopt a measure or ordinance that has previously been defeated or rescind one that has been previously adopted before the rights of third parties have vested. Moreover, in the absence of statute or a rule to the contrary, the Council may reconsider, adopt or rescind an ordinance *at a meeting subsequent to that at which it was defeated or adopted,* at least where conditions

overall purpose of this principle is to give the deliberative body the chance to discover and to correct its own errors[3].

### *(A) Rule 37 of Robert's Rules of Order Provides a Default Procedural Mechanism for Rescission*

Salt Lake County does not have an ordinance that specifically addresses the procedure to "rescind" an ordinance that has not yet taken effect. However, according to County ordinance, "procedural rules not specifically provided herein or by state law, county ordinance, or the plan, may be regulated, interpreted and construed in accordance with Robert's Rules of Order."[4] The pertinent rule in Roberts Rules of Order is Rule 37 which allows an assembly to rescind any vote except:

> votes cannot be rescinded *after something has been done as a result of that vote that the assembly cannot undo*; or where it is in the nature of a contract and the other party is informed of the fact; or where a resignation has been acted upon, or one has been elected to, or expelled from membership or office, and was present or has been officially notified.

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have not changed and no vested rights have intervened." 37 Am.Jur. sec. 150, p. 762.")(emphasis added).

3

*See, e.g.,* In re Fain, 65 Cal.App.3d 376, 389, 135 Cal.Rptr. 543, 550 (1976): "Any deliberative body-administrative, judicial or legislative-has the inherent power to reconsider an action taken by it unless the action is such that it may not be set aside or unless reconsideration is precluded by law. The power of administrative reconsideration is consistent with the principle that 'notions of administrative autonomy require that the agency be given a chance *to discover and correct its own errors*.'"(emphasis added; citations omitted).

[4]Salt Lake County Code of Ordinances §2.04.180 A.:

Thus, pursuant to County Ordinance Sec 2.04.180.A., the default procedure for rescission of an ordinance that has not vested or taken effect is Rule 37 of Roberts Rules of Order.

Contrary to appellant's argument, Rule 36 of Robert's Rules of Order is never invoked under Salt Lake County Code of Ordinances §2.04.180.A because County ordinance contains an express provision for "rehearing" or "reconsideration." Both parties agree, albeit under different legal theories, that a Rule 36 motion was unavailable to the Council.[5] Moreover, under Robert's Rules of Order, a Rule 37 motion is not dependent upon a prior Rule 36 motion. In fact, if the question of rescission may be reached through a motion to reconsider which has already been made, it must be done by recalling the motion to reconsider.[6] Therefore, under the default provision of County Ordinance and Rule 37 of Robert's Rules of Order, the Council properly considered a motion to rescind their vote.

While LC Canyon argues that as a matter of course, the vote on October 25, 2005 created vested rights, the argument fails because the rezoning ordinance did not, and could not under state law, vest or take effect. Moreover, the facts are undisputed that there was no detrimental reliance, or any development action taken for that matter, by LC Canyon

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[5]LC Canyon argues in its opening brief at pg. 26-29 that under the timing outlined in Rule 36, a motion to reconsider was unavailable for the Council and the County asserts in its brief at pg. 31-32 that the Council never defaulted to Rule 36 as there is a more specific County ordinance.

[6]"[A motion to rescind] cannot be made if the question can be reached by calling up the motion to reconsider which has been previously made." Rule 37, Robert's Rule of Order.

between the initial passage on October 18, 2005 and November 1, 2005.[7] Rule 37 is consistent with the Council's inherent authority to review and correct its own acts *sua sponte* before vested rights attach.

*(B) The Council Properly Followed the Procedures Outlined in Rule 37 of Robert's Rules of Order*

Rule 37 provided the Council with two procedural methods for conducting a valid motion to rescind. Rule 37 allows a motion to rescind as follows:

> Any vote taken by an assembly, except those mentioned further on, may be rescinded by a majority vote, provided notice of the motion has been given at the previous meeting or in the call for this meeting; or it may be rescinded without notice by a two-thirds vote, or by a vote of a majority of the entire membership.

Procedurally, the Council's vote to rescind met both standards outlined in Rule 37. A review of the County Council minutes from November 1, 2005[8] indicates that at its previous meeting on October 25, 2005, the Council provided notice that it was reconsidering its vote to rezone LC Canyon's North Parcel. Additionally, the Council provided actual notice to LC Canyon of its intent.[9] Thus, the Council met the procedural requirements of the first method to bring a valid motion to rescind outlined in Rule 37.

Even if the notice provided on October 25, 2005 were construed to be deficient under the notice provision of Rule 37, the Council's motion to rescind the vote to rezone did not

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[7]The remaining exceptions in Rule 37 are inapplicable to this matter. See, Appellant's opening brief pg. 18-26 and Statement of Relevant Facts ¶11.

[8]Exhibit B County Council November 1, 2005 minutes

[9]Statement of Relevant Facts ¶9.

require notice because it passed by a 5 to 2 vote, which is a two-thirds majority vote. Therefore in accordance with Rule 37, no notice was required for a valid motion to rescind, once the vote passed by a two-thirds majority vote. In sum, the Council was well within its right under and properly followed the procedures in Rule 37 to rescind their vote to rezone LC Canyon's 15.26 acre North Parcel from FR-20 to FR-2.5 on November 1, 2005.

## CONCLUSION

The Council properly moved to rescind its October 18, 2005 vote to rezone the 15.26 acre parcel on November 1, 2005. Under its inherent authority to review and reconsider its action before reliance by third parties, the Council moved to rescind its vote. The Council--whether inadvertently or intentionally--properly followed the procedure outlined in Rule 37 of Robert's Rules of Order. Therefore, the motion to rescind is valid.

DATED this 22nd day of June, 2011.

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* * * * *

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLEE'S SUPPLEMENTAL BRIEF** was mailed by U.S. First Class Mail, postage prepaid (2 copies) to:

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On this 22nd day of June, 2011.