

1979

Wright Development, Inc. v. The City of Wellsville : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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WRIGHT DEVELOPMENT, INC.,)
a corporation,)

Plaintiff and)
Appellant)

vs.)

Case No. 16531

THE CITY OF WELLSVILLE,)
a municipal corporation,)

Defendant and)
Respondent.)

---oooOooo---

RESPONDENT'S BRIEF

An Appeal from the Judgment of the First Judicial
District Court in and for the County of Cache, Utah

The Honorable VeNoy Christoffersen

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FILED

SEP 18 1979

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RESPONDENT'S BRIEF

NATURE OF THE CASE

This is an action by appellant seeking a Writ of Mandamus requiring respondent to approve a final subdivision plat of appellant and further seeking declaratory relief relating to the requirements of respondent's ordinances and the requirements of state law.

DISPOSITION IN THE LOWER COURT

At the conclusion of appellant's presentation of its case during a hearing held March 2, 1979, respondent moved for the dismissal of the same. The Trial Court took said motion under advisement and requested the submission of

of Memoranda of Law by the parties. Memoranda were filed with and reviewed by the Trial Court. The Trial Court thereupon granted respondent's Motion to Dismiss, denied appellant's request for Writ of Mandamus and found that respondent had in effect at all times pertinent to this action validly enacted Subdivision and Water Ordinances which effectively responded to appellant's request for Declaratory Relief.

RELIEF SOUGHT ON APPEAL

Respondent respectfully requests that this Court affirm in its entirety the decision of the Trial Court and in addition, award the respondent its costs incurred in the defense of this appeal.

STATEMENT OF FACTS

Respondent ("Wellsville City," hereafter) deems it necessary to present a concise statement of the facts of this case inasmuch as the statement presented by appellant ("Wright," hereafter) fails accurately to reflect all of the relevant facts and circumstances at issue.

Wright is the contract-purchaser of the property in question herein (Trial Transcript, "TR" hereafter, at 20, line 24.) The property has been annexed and apparently zoned for a subdivision. (TR at 6, lines 16, 17 and 20.) A preliminary plat was caused by Wright to be prepared and presented to Wellsville City's Planning and Zoning Commission. (TR at 7,

lines 3-5.) Said preliminary plat was introduced into evidence as plaintiff's Exhibit No. 1. (TR at 8, lines 15-18.) Said preliminary plat was apparently considered by said Planning Commission and on its face indicates that the Commission gave its approval thereto on August 4, 1977. (TR at 11, lines 3-6.)

There are general notes in the lower left hand corner of said preliminary plat, (plaintiff's Exhibit No. 1) and General Note No. 5 refers to a letter dated September 23, 1977. (TR at 8, lines 9-14.) The city engineer approved said preliminary plat on September 23, 1977, the same date as said letter (TR at 12, lines 23 and 24) and said letter was admitted into evidence as plaintiff's Exhibit No. 2 solely as evidence of what the city engineer required before he would approve the plat and of what conditions Wright agreed to. (TR at 28-29, lines 10-17, lines 1-3.) Said letter was not attached to said preliminary plat when it was submitted to the Planning Commission, it was attached at the time it was submitted to the city engineer. (TR at 29, lines 5-15.) In fact, the said Planning Commission considered and approved said plat approximately six weeks before said letter came into existence. (TR at 25, lines 1-3.)

Subsequently, Wright caused a final plat for the first phase of its development to be prepared and submitted to the city's Planning Commission, which approved it. (TR at 14, lines

13-17.) Said final plat was also submitted to Wellsville's City Council, which refused to grant approval. (TR at 14, lines 18-22.)

It became evident after Wright concluded its presentation that the refusal on the part of the City Council was well justified. No evidence was produced that either the Planning Commission or the City Council ever accepted the alleged conditions of Wright's September 23, 1977 letter, particularly those relating to water line size and location. Additionally, Wright's own testimony demonstrated several areas where it had failed to comply with the City's subdivision and water ordinances. All other matters cited by Wright in its statement of the facts are beside these central points; to-wit: Wellsville City Council was never proven to have accepted the six-inch water line proposal, or to even have known of its existence at the time of the alleged acceptance; Wright acknowledges its refusal to comply with Wellsville City's request concerning the provision of water to the proposed development; (TR at 19, lines 15-21.) and Wright's own testimony demonstrates a failure to comply with Wellsville City's applicable ordinances. (TR at 15-21.)

After hearing Wright's evidence at the hearing held March 2, 1979 and after reviewing the Memoranda submitted by the

the parties and the applicable ordinances, the Court issued its Memorandum Decision on April 2, 1979 and stated:

As this Court has recently stated in a Cache County case, Thurston vs. Cache County, it is not the position of the Court to substitute its judgment for those charged with making a decision under the appropriate ordinances.

...

...(T)he Court feels that the judgments made by the community authorities in regard to the requirements on the final plat as to such items as provisions for water for the subdivision and provisions for the handling of storm water drainage for the subdivision are serious matters and the judgment and decision of the local authorities in this matter will not be changed by the Court in substituting its own judgment as to these issues. Therefore, the Court holds that what remains is not merely a ministerial act but the decisions are discretionary ones and mandamus will, therefore, not lie and defendant's Motion to Dismiss is hereby granted.

The Court then proceeded to enter appropriate Findings of Fact, Conclusions of Law and an Order Denying Writ of Mandamus and Dismissing Plaintiff's Complaint.

ARGUMENT

POINT 1. APPELLANT HAS THE BURDEN TO SHOW ITS CLEAR AND INDISPUTABLE RIGHT TO THE ISSUANCE OF A WRIT OF MANDAMUS AS REQUIRED BY LAW AND MANDAMUS DOES NOT LIE TO COMPEL THE PERFORMANCE OF DISCRETIONARY ACTS.

The appellant, having moved the Trial Court for the issuance of a Writ of Mandamus requiring the respondent to approve the final plat of the appellant, is confronted with

with the fact that the rule that the burden of proof rests upon the party who asserts the affirmative of an issue applies in Mandamus proceedings (52 Am. Jur. 2d 786, Sec. 466, Burden of Proof).

It goes on in the same section to state the following:

Thus, the burden is upon the applicant to show that his right to the issuance of the writ is clear and indisputable and, except as to allegations that are admitted by the answer or otherwise, he must prove every fact that is the foundation of his proceeding. He must show an enforceable right; an imperative duty of the respondent to perform; the authority, ability, and means of the respondent to perform; a breach or nonperformance by the respondent of his duty; the lack of another plain, speedy, and adequate remedy; the performance or compliance with necessary conditions precedent, including, where necessary, a demand for performance and a refusal thereof; and, if the duty in question is discretionary, that there was an arbitrary exercise or abuse of discretion. (Emphasis added.)

In 52 Am. Jur. 2d 360, Sec. 35, "Caution in Granting". it states:

The function of mandamus is to compel action by the respondent, and it cannot be employed to adjudicate and establish rights or define duties. The courts act with caution with respect to the writ and award it only in cases where it clearly appears that under the law it ought to issue, upon a clear showing as to the applicant's right, and the respondent's duty. (Emphasis added.)

In 52 Am. Jur. 2d 388, Sec. 64, "Requirement that right be clear, certain and complete", it states:

The function of mandamus is not to establish rights, but to enforce rights that have been established. To warrant the issuance of the writ, not only must there be a legal right in the relator,

but, owing to the extraordinary and drastic character of mandamus and the caution exercised by courts in awarding it, it is also important that the right sought to be enforced be clear and certain. There must be an immediate right to have the act in question performed, and such right must be specific, well defined, and complete, so as not to admit of any reasonable controversy. The writ does not issue if the right in question is doubtful, incomplete, inchoate, or qualified; nor if such right has not matured by reason of the failure to perform conditions precedent; has been lost or barred by lapse of time; or there is a substantial defect in the proof of the relator's right. (Emphasis added.)

In 52 Am Jur. 2d 397, Sec. 76, "Discretionary or permissable duties or acts", it states:

The duties which fall within the scope of mandamus are legal duties of a specific, imperative and ministerial character, and in the absence of statute which validly may be enacted, the writ will not issue to compel the performance of discretionary acts. With respect to duties that are not peremptory, the officer must be left free to decide whether he will perform the act demanded or secure by appropriate procedure a judicial determination of the extent of his duty. The performance of an act which is merely recommended by a superior authority may not be compelled by mandamus.

Discretion, as thus intended, means the power or right conferred upon the respondent by law, of acting officially under certain circumstances according to the dictates of his own judgment and conscience, and not controlled by the judgment or conscience of others. It arises when the act in question may be performed in one of two ways, either of which would be lawful, and it is left to the will of the performer to determine in which way it shall be done. (Emphasis added.)

In 52 Am. Jur. 2d 399, Sec. 78, "Control or review of discretion", it states:

Thus, mandamus will not lie to control the discretion of a court or judicial officer, or to compel its exercise in a particular manner, except in those rare instances when under the facts it can be legally exercised in but one way, nor is it a proper remedy to control acts of governmental bodies when acting within the scope of their legal powers. Mandamus is not an instrument for the instruction of public officers as to the manner in which they shall discharge duties which call for the exercise of discretion, as distinguished from the performance of ministerial duties.

Where, as to the facts, there exists any admissible doubt, or where reasonable men might conscientiously differ with respect to discretion or the absence thereof, the courts have with practical unanimity declined to interfere by mandamus, and whenever an element of discretion enters into the duty to be performed, the functions of mandatory authority are short of their customary potency and become powerless to dictate terms to that discretion. The court is without power to substitute its discretion for that of a public officer or body, or where the act is discretionary, to direct that it be performed in a specified manner. (Emphasis added.)

In 52 Am. Jur. 2d 406, Sec. 83, "Duty subject to performance of conditions precedent," it states:

Performance by the relator of all acts that are conditions precedent to the imposition of a duty on the respondent is essential in order to give rise to the right to mandamus, and the writ will not issue against a public official until everything has been done that is necessary in order to make it his ministerial duty to act." (Emphasis added.)

Additionally, in Saviers vs. Rickey, 529 P. 2d 1285 (Idaho, 1974), it states:

A writ of mandate will issue to a party who has a clear legal right to have the act performed if the officer against whom the writ is sought has a

duty to act and if the act be ministerial and not require the exercise of discretion."

Finally, this Court has, in the case of Rose vs. Plymouth Town, 173 P. 2d 285, 286 (Utah, 1946), stated:

Mandamus will not lie to compel the performance of acts necessarily involving the exercise of judgment and discretion on the part of the officer, board or commission at whose hands performance is desired. The court may, under proper circumstances, require an inferior tribunal to exercise its discretion but will not prescribe how it shall do so. The court cannot substitute its own judgment for that of the tribunal to which the discretion was committed by law. The writ can be used only to compel an officer or town officials to perform a duty, a ministerial act or an administrative act, about which it would have no discretion.

The foregoing statement of the law very clearly sets forth the burden of proof which must be met by appellant in order to qualify for the relief it seeks. It is respondent's contention, as illustrated below, that appellant failed to meet its burden of proof; and that in any event discretionary acts are at issue.

POINT II. APPELLANT FAILED TO MEET THE BURDEN OF PROOF REQUIRED FOR THE RELIEF SOUGHT; FURTHERMORE, THE APPELLENT'S REQUEST FOR RELIEF DEALS WITH ACTS WHICH ARE DISCRETIONARY IN RESPONDENT.

In light of the law as set forth above, it is respondent's position that appellant has not met its burden to show that its right to the issuance of the writ is clear and indisputable. In its brief on appeal, appellant states the law as holding that if a subdivider complies with all the requirements of valid subdivision control laws, regulations and ordinances, approval

of the plat becomes a ministerial act. (Appellant's Brief at 8-9.) In Paragraph 4 of appellant's Complaint, appellant alleges that it has so complied with all conditions validly imposed by the respondent and with state law and respondent's ordinances. The statements in and of themselves demonstrate the fatal defect in appellant's case, i.e. before a ministerial approval can be demanded compliance must be shown. Appellant failed to show such compliance during its presentation. In fact, appellant failed to cite even one of the particular laws or ordinances by name or by reference that it claimed to have complied with or that it claimed was invalid. It was not until appellant had rested that respondent's counsel, during argument on the Motion to Dismiss presented copies of applicable ordinances to the Trial Court. (TR at 40, 44.) Copies of respondent's subdivision and water ordinances were submitted to the Trial Court at its request by respondent with its Memorandum in Support of Motion to Dismiss. The issue of their validity is dealt with in Point III below. Reference will not be made thereto for purposes of illustrating wherein appellant has failed to comply therewith.

Reference is made to Chapter 3, "Preliminary Plat," of the Subdivision Ordinance, Section 3-1(3) (g), where it states:

3. Proposed Plan. The subdivision plan shall show:

...(g) A tentative plan or method by which the subdivider proposes to handle storm water

drainage for the subdivision." (Emphasis added.)

It goes on to state immediately thereafter:

Where necessary, copies of any agreements with adjacent property owners relevant to the proposed subdivision shall be presented to the Planning Commission."

Additional reference is made to Chapter 4, "Final Plat," of the Subdivision Ordinance, Section 4-1, where it states:

The plat shall contain all information required on the preliminary plat except contours...

By appellant's own admission through Mr. Wright and Mr. Hall while testifying, no such plan is shown on its preliminary plat. (Plaintiff's Exhibit No. 1.) No such plan is shown on the Final Plat either. (Plaintiff's Exhibit No. 3.) It was not stated and is not known if it is intended that drainage is to be obtained outside the boundaries of the proposed subdivision. If such is the plan agreements must be produced with adjacent land owners granting permission for such a plan. Given the proposed size of appellant's subdivision and its location in the Wellsville foothills, the plan for handling storm water drainage is of great concern and not to be dealt with lightly. It is within the respondent's prerogative and in fact is a legal duty imposed by ordinance, to require that appellant show evidence of its right to discharge the storm water onto adjacent property if such is intended and its plan for drainage in any event, given the provisions of respondent's ordinance just cited.

Appellant's preliminary plat shows appellant is retaining protection strips between its property and that of adjacent landowners. Chapter 6, Section 6-3 of the Subdivision Ordinance allows the retention of such a strip of land, but requires that an agreement be made by the subdivider setting forth the circumstances under which such a strip will be deeded in the future. Said section requires that one copy of the agreement be submitted by the city attorney, after approval by him, to the Planning Commission prior to the approval of final plat. By appellant's own admission, this was not done and has not been done.

At the hearing of this matter, it was established by Mr. Wright's testimony that the appellant is not the fee title owner of the property it seeks to subdivide, but is the contract purchaser of the same. Appellant's Final Plat contains an owner's dedication, executed by "Robert M. Wright, President, Wright Development Company." Appellant, in its Complaint herein, states in Paragraph 2 thereof that it is "...the owner of a tract of land...". Such is not the case for purposes of an owner's dedication as required by respondent's Subdivision Ordinance and state law.

Utah State law provides that:

It shall be lawful for any owner of land to lay out and plat such land into blocks, lots, streets, alleys and public places" (S^c 5-1 U.C.A. 1953) [Emphasis added]

The State law then provides:

Whenever any lands are hereafter so laid out and platted the owner of the same shall cause to be made an accurate map or plat thereof, particularly setting forth and describing:

(1) All the parcels of ground so laid out and platted, by their boundaries, course and extent, and whether they are intended for streets, alleys or other public uses, together with such as may be reserved for public purposes.

(2) All blocks and lots intended for sale, by numbers, and their precise length and width." (57-5-2 U.C.A. 1953) [Emphasis added]

After the map or plat is made, the statute requires that the same,

...be acknowledged by such owner before some officer authorized by laws to take the acknowledgment of conveyances of real estate... (57-5-3 U.C.A. 1953). [Emphasis added.]

then in 57-5-4 U.C.A. 1953, it is provided that:

Such maps and plats, when made, acknowledged, filed and recorded, shall operate as a dedication of all such streets, alleys and other public places, and shall vest the fee of such parcels of land as are therein expressed, named or intended for public uses in such county, city or town for the public for the uses therein named or intended. [Emphasis added]

Chapter 4, Final Plat, Section 4-1(1) (g), of Ordinance states:

(1) Description and delineation. The Final Plat shall show: (g) The dedication to the city of all streets and highways included in the proposed subdivision.

It is clear from these references that the owner of a proposed subdivision must dedicate the streets and highways

within a subdivision to the city and that the title to be acquired by the city by virtue of such dedication is a fee title.

The question then becomes whether appellant can convey a fee title to this property by virtue of its signing, acknowledging and recording the subdivision plat. The answer to this question is that appellant could only give in its dedication what it has and it does not have the fee title. For the respondent to obtain the fee title as the statute, 57-5-4 U.C.A., 1953 and its ordinance requires, would mean the fee title holder from whom appellant is purchasing this property on contract, would have to join as a party to the dedication proceedings of the subdivision plat. The fee title owners are not parties to the final plat and as submitted, appellant's plat does not comply with the applicable ownership dedication requirement of Utah law and defendant's ordinance.

Appellant contends that its Exhibit No. 2, the letter signed by Mr. Wright and dated September 23, 1977, is legally binding as a list of the conditions the respondent required and agreed to as a condition to signing appellant's Preliminary Plat. Yet appellant's own testimony failed to show these conditions were ever accepted by respondent's Planning and Zoning Commission or City Council, or by anyone other than respondent's

then acting city engineer, said letter bearing a date which was approximately six weeks after respondent's Planning Commission signed appellant's Preliminary Plat (See plaintiff's Exhibit No. 1). Respondent is not altering requirements as claimed by appellant, appellant is simply claiming the imposition of conditions that were never imposed or accepted by respondent in said letter. The letter does deal with issues of legitimate concern to respondent in the proposed development, but the letter has not been shown to be a statement of conditions respondent imposed and is bound to.

In particular, appellant is claiming that respondent accepted and is bound by the six-inch water line proposal contained in said letter. The most that can be said is that respondent's then city engineer accepted the proposal. The fact is that neither the city engineer, nor the Planning Commission has the authority to bind the respondent with respect to its water system. The control of said system is held exclusively by the City Council of respondent. Reference is made to Sections 25 and 43 of the respondent's Water Ordinance, which state:

25. Extension of Water or Sewer Mains Within the City. Any person or persons, including any subdivider, desiring to have the water or sewer mains extended within the City, and being willing to advance the whole expense of such extension, and receive the return of an agreed portion thereof, as hereinafter provided, may make a description of such proposed extension accompanied by a map showing the location thereof, which petition shall also contain an offer to advance the whole expense of making the same as said expense shall be certified by the water superintendent. The City Council may grant or deny said petition as in its discretion seems best for the welfare of existing and future users in the

City.

43. Under Control of the City Council. The water works and sewer system constructed, owned, and controlled by this City to supply the municipality and the citizens thereof with water and sewer services shall be known and designated as the City Water Works and the City Sewer System; they shall be the property of the City, and shall be under the sole and exclusive control of the City Council, who may from time to time direct the construction of such reservoirs, water tanks, water mains, fire hydrants, sewer connections, outfall lines and facilities of every description, as the necessities of the inhabitants of the City may require. (Emphasis added.)

Section 10-7-14, U.C.A., provides enabling legislation for the above and states:

Rules and Regulations for Use of Water. Every city and town may enact ordinances, rules and regulations for the management and conduct of the water-works system owned and controlled by it.

Appellant's evidence failed to show appellant's compliance with said Section 25 and failed to show any acceptance by the respondent's City Council of Paragraph 4 of the said letter of September 23, 1977. Even if said letter were binding on respondent, said paragraph 4 fails to adequately and completely set forth the necessary details in order to ascertain the obligations of the parties. Inasmuch as the provision of water in adequate quantities and of sufficient quality is a legitimate concern of respondent and a matter within the legitimate control and discretion of the respondent's City Council, appellant's request for Mandamus is not well founded where appellant has failed and refused to comply with respondent's legitimate requests and requirements that prior to respondent's approval of appellant's final plat, appellant demonstrate ability and willingness to supply a sufficient volume and quality of water.

to its proposed subdivision, so that culinary, fire and irrigation needs can be met.

Finally, appellant seems to claim that once an approval has been obtained at any stage in the proceeding the respondent is forever estopped from attempting to correct oversights or outright violations of its ordinances. In response, the respondent submits that it is axiomatic that the respondent has the power to regulate and control the subdivision of property within its corporate boundaries as a lawful exercise of its police powers for the promotion and protection of the general welfare and well-being of present and future residents of the respondent. (See Sec. 10-9-25 U.C.A. 1953) This, the respondent has done by appropriate ordinance, and it grants the authority to review proposed developments and impose reasonable conditions prior to giving approvals for the developer to proceed with his development. In 82 Am. Jur. 2d 665, Section 166, it states:

The legislative provisions for subdivision controls usually specify, either broadly or in more or less detail, the standards and considerations for the review of subdivision plats, and the reviewing board itself may have the discretion to frame detailed standards or requirements. Thus, where it is within its delegated authority, the reviewing authority may consider, or the local governing body or reviewing authority may impose conditions concerning the dedication or reservation of land; proposed streets and highways, and the dedication of land therefor; parks, playgrounds, and recreational areas; educational facilities; water supply, drainage and sewers; the availability of utility services; processing and

and inspection fees; and performance bonds. Also, in reviewing a subdivision plat and imposing conditions, the reviewing authority may consider how the newly platted area would tie in with or affect adjacent or outside areas.

Section 7-2 of the city's Subdivision Ordinance states:

The Planning Commission, the City Council and such other departments and agencies of city government as are specified under the provisions of this title are hereby designated and authorized as the agencies charged with the enforcement of the provisions of this title and shall enter such actions in court as are necessary. Failure of such departments to pursue appropriate legal remedies, shall not legalize any violation of such provisions. [Emphasis added.]

Chapter 4, Section 2(g) of said Subdivision Ordinance requires that the city attorney's and City Council's "Certificates of Approval" be on the final plat. They are both vitally involved in the enforcement of said Ordinance, and are both integral links in the process the developer must follow to gain appropriate approvals. Yet, the main thrust of appellant's argument seems to be that neither can exercise any discretion nor fulfill their role which requires them to enforce the provisions of said Ordinance. Apparently, for whatever reason, a drainage plan was not incorporated in and included as a part of appellant's preliminary plat. That does not obviate the absolute need for one, nor does it forever preclude the respondent from requiring one if it is reasonably necessary, especially given the preliminary stage appellant's project is in. As can be noted while reading said Subdivision Ordinance, several steps

must be taken and approvals obtained and several agencies, boards, commissions or people are charged with its enforcement. They serve as checks and balances to each other and an oversight by one should not be construed as a waiver and estoppel, particularly with respect to said necessary improvements.

The appellant's argument that the respondent cannot compel a commitment to install certain improvements prior to the approval of the development is without merit. The appellant's proposed subdivision encompasses 78 lots with potentially many more people than that who will reside therein, and covers several acres in the foothills somewhat removed from present population concentrations. The question is not one of the desirability of adequate drainage, access and water supply. The desirability and necessity of these items are beyond question in this case. It is really a question of who should pay for them and at what point the appellant can be required to demonstrate adequate provision for them.

The appellant's act in attempting to secure approval of his plats is voluntary. No law requires him to subdivide his land and sell it by plat. The fact that adequate water must be delivered to his property for 78 homes, the fact that adequate access must be provided thereto, the fact that protective strip agreements must be made, and the fact that an adequate drainage system must be provided are all necessities which are

specifically and uniquely attributable to appellant's activities. But for appellant's project, there would be no need for any of the suggested improvements.

It is submitted that the exact plan for water supply, drainage, etc. is unique to each proposed development. The respondent is vested with authority to review each such proposed development within its corporate boundaries and within an exercise of reasonable discretion impose conditions and exact certain commitments, prior to granting approval, that are deemed necessary for the protection of the general health and welfare of the community as a whole and the development in particular. The burden is on the appellant to demonstrate the unreasonable and arbitrary nature of the conditions imposed and commitments requested, if such is the claim made by appellant. To this effect, this Court has stated, in Child vs. City of Spanish Fork, 538 P.2d (184, 186 (1975), the following:

Courts should interfere with determinations of city council only when the decisions or actions taken are clearly outside the authority of the council, or are so wholly unreasonable and unjust that they must be deemed capricious and arbitrary in adversely affecting someone's rights.

Respondent submits that it is clear on the record that appellant did not meet the exacting burden of proof exacted upon a request for a Writ of Mandamus, particularly where, as in this case, the Writ is sought to compel the performance of discretionary acts.

POINT III. AT ALL TIMES PERTINENT TO THIS ACTION
RESPONDENT HAD IN EFFECT, VALIDLY ENACTED SUB-
DIVISION AND WATER ORDINANCES.

Point III is a restatement of Finding No. 13 of the
Trial Court. Appellant objected to said finding. Respon-
dent directs the Court's attention to Rule 9(2)(b), Utah Rules
of Evidence. Said Rule 9 is entitled "Facts Which Must or
May be Judicially Noticed" and Section 2 thereof provides in
pertinent part:

(2) Judicial notice may be taken without request
by a party, of ... (b) ... duly enacted ordinances
... of governmental subdivisions ... of this state ...

Appellant's Complaint, at Paragraph 4 thereof, alleged
that appellant had complied with respondent's ordinances that
apply to appellant's final plat; appellant's Memorandum in Sup-
port of said Complaint cites law which speaks of valid subdivi-
sion control laws; and appellant's amendment to its Complaint,
in Paragraph 2 thereof, alleged a contention had arisen be-
tween plaintiff and defendant "... concerning the interpre-
tation of the City Ordinances which are applicable." Two
legal Memoranda were filed with the Court by appellant after
it filed the amendment to its Complaint. At the time of
respondent's oral Motion to Dismiss at the conclusion of the
presentation of appellant's evidence in the hearing on this
matter, respondent's counsel referred to the ordinances of
respondent which are applicable and the Court requested copies
stating it could take judicial notice of the same if there were

no objections. No specific objections thereto have been raised by appellant until the filing of its brief on appeal herein, notwithstanding ample opportunity to do so. Even now, after referring to Section 25 of respondent's water ordinance and generally stating that the entire water ordinance is invalid, appellant's brief merely states that:

Part of plaintiff's contentions are that the applicable ordinances are not all valid.
(Appellant's Brief at p. 14.)

More specific prayers for relief, objections, and reasons for invalidity would seem to be required. In any event, the Trial Court properly took judicial notice of respondent's Subdivision and Water Ordinances and the Trial Court's finding and subsequent order adequately disposes of appellant's request for declaratory relief inasmuch as it found the ordinances to be valid and enforceable. This issue is dealt with in Point IV below.

POINT IV. APPELLANT'S PRAYER FOR DECLARATORY RELIEF WAS ANSWERED BY THE TRIAL COURT AND APPELLANT WAS REQUIRED TO COMPLY WITH LEGITIMATE CONDITIONS IMPOSED BY APPLICABLE ORDINANCES AND RESPONDENT.

It is apparent from appellant's brief that Wright is not pleased with the Trial Court's disposition. That fact does not detract from the clarity and definiteness of the Trial Court's decision. The decision is clear upon a reading of the Memorandum Decision, Findings, Conclusions and Order. Appellant is found to have failed to comply with legitimate

Ordinances are found to be valid and effective; and in particular, it is found that appellant must comply with the respondent's requirements as to an eight inch water line.

On page 8 of its brief, appellant contends that there was no evidence presented to show such a water line was reasonable or necessary. Respondent submits that appellant is attempting, without legal basis, to shift its burden of proof to respondent. It is appellant who must first present evidence that it is unreasonable and unnecessary.

Appellant presented no evidence whatsoever that the requested eight (8) inch line is not necessary to adequately service its development. Appellant has merely suggested that such a requirement is invalid according to general law, state law and respondent's own ordinances and because of the expense involved. Appellant fails to cite any of respondent's ordinances or state law to support this bald assertion. Appellant does cite some cases, from jurisdictions far removed from this locality, to support his contentions, but failed to present any evidence that anyone but appellant would benefit from the proposed line extension. Through it all, appellant seems to be claiming that the respondent should provide and pay for all necessary improvements which are outside the boundaries of appellant's proposed subdivision. Such a requirement could very nearly bankrupt a city such as respondent, given the large areas for development within its corporate limits, or at least

put a very heavy and unjustified burden on present residents thereof.

The general law with respect to the extension of a municipal water system within the boundaries of the municipality is found in 78 Am. Jur. 2d 910-11, which states:

Although there exists, of course, a basic underlying obligation of a municipal corporation owning a general domestic water system to supply impartially all applicants in substantially like position to those being served, it has quite generally been held or recognized that a municipality exercises a discretionary function in deciding whether or not to extend its system to an entirely new section within its territorial limits, and cannot be compelled to do so at the instance of a prospective consumer, at least if its basis for refusing is in any way reasonable and does not, therefore, involve any abuse of discretion, or arbitrary or fraudulent action. When factors such as physical remoteness of the locality in which service is sought and disproportionate expense are present, the exercise of discretion in refusing to make water system extensions is very generally upheld. Even apparently reasonable extensions have been held properly within the discretionary power of a municipality to refuse. (Emphasis added.)

Such law can well be extended to other types of improvements a city is called upon to make. Respondent has never denied appellant the right of access to its water supply not other municipal services; it has only requested that appellant make provision for getting those services to his property, i.e., adequate conveyance facilities, without detriment to existing users.

In the Rose vs. Plymouth Town case, supra, this Court

dealt with the case of an individual who claimed the absolute, vested right to the extension of the city's water lines at city expense merely because he was an occupant of premises within the town limits. In response to such a contention the Court stated:

...But the plaintiff contends that the town board has no discretion in the matter and that he has a clear, legal and vested right by virtue of the fact that his premises are within the town limits. He makes the contention that the town is bound to supply every inhabitant within its limits with water. If this contention is right, the consequence is that the town board, acting for the town, is legally bound to supply water to all inhabitants, no matter how ruinous and destructive the result might be. The unsoundness of this contention is easily demonstrable. The testimony of expert engineers is not necessary to satisfy a reasonable mind that to compel a town to supply water to all inhabitants regardless of cost might create a burden which could not be borne. It should be kept in mind that this is not a case where a resident of the municipality is attempting to compel the city authorities to make a connection from its water main already laid in the street in front of his residence, nor is it an attempt to compel them to merely turn the valve and permit the water to flow into his house as in *Home Owners' Loan Corp. v. Logan City*, 97 Utah 235, 92 P.2d 346.

Unless the town authorities are shown to have failed to exercise judgment or discretion such that a refusal to extend the water system would be unreasonable their decision is final. See *Lawrence v. Richard*, 11 Me.95, 88 A. 92, 47 L.R.A., N.S., 654, and note *Greenwood v. Provine*, supra. The record does not reveal such arbitrary action. Therefore, the judgment of the town officials is conclusive. If this

were a case where the town authorities had refused to connect the plaintiff's residence to a main already laid or if the plaintiff had financed the cost of the extension and agreed to accept water at the prescribed rates in payment therefor, the remedy might lie, because the writ would then be for the purpose of compelling the town to perform a duty, a ministerial act about which it would have no discretion. But such is not this suit. The effort here is to compel the extension of the water system a considerable distance under circumstances which call for reason and judgment and the exercise of discretion and are not ministerial. Mandamus will not lie. Rose vs. Plymouth Town, supra, at 286,7. [emphasis added.]

The correlation between the Rose case and this is direct. If the respondent cannot compel the appellant to lay the required line, then the obvious implication of appellant's argument is that respondent must lay it to appellant's boundaries. It is to be noted that appellant never raises evidence directed to the reasonableness of respondent's water line requirements, it only questions the reasonableness of requiring appellant to pay therefore. To require that respondent or any other city or town provide improvements to a proposed subdivision is to place an unreasonable and untenable burden thereon. Simply to state the proposition is to demonstrate its unreasonableness.

The fact is, that along with the power to reasonably

control the subdivision of property, as has been shown, respondent has the power to control and regulate its water system and water supply for the benefit and welfare of present and residents. Respondent must ascertain that the future residents of appellant's proposed development will have adequate and sufficient water and other services of all the necessary and customary types, and should not be compelled to grant an approval to a proposed Final Plat until a commitment to provide these services is made by appellant.

POINT V. THE TRIAL COURT'S FINDINGS OF FACT ARE SUPPORTED BY THE EVIDENCE AND SHOULD BE AFFIRMED.

Respondent made a thorough response to appellant's objections to the Findings of Fact and Conclusions of Law which was filed with the Trial Court on or about April 19, 1979. Reference is made thereto and said response is incorporated herein. Respondent submits that said response adequately deals with Point IV of appellant's brief.

CONCLUSION

The Trial Court was correct in denying appellant's request for a Writ of Mandamus compelling respondent to approve appellant's Final Plat in light of appellant's failure to comply with legitimate requirements of respondent's ordinances and City Council and was correct in thus dis-

missing appellant's Complaint. The Trial Court correctly found respondent had applicable and valid ordinances in effect during the time relevant to appellant's Complaint and that they imposed obligations to be complied with by appellant. The Trial Court's order should be affirmed in its entirety.

DATED this 17th day of September, 1979.

OLSON, HOGGAN & SORENSON

/s/ L. Brent Hoggan

L. Brent Hoggan

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I mailed two copies of the foregoing Brief of Respondent, postage prepaid, to W. Scott Barrett, Barrett & Mathews, 300 South Main Street, Logan, Utah 84321, this 17th day of September, 1979.

/s/ Bruce L. Jorgensen

Bruce L. Jorgensen