

1979

Ken Thurston v. Cache County et al : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

KEN THURSTON,

Plaintiff and
Appellant

vs.

CACHE COUNTY, et al.

Defendant and
Respondent

Civil No. 16544

MICHAEL P. NIELSEN,

Plaintiff and
Appellant

vs.

CACHE COUNTY, et al.

Defendant and
Respondent

RESPONDENT'S BRIEF

Appeal from a Judgment Dismissing Plaintiffs' Complaint
In The District Court of the First Judicial
District In and For Cache County, Utah
The Honorable VeNoy Christoffersen, District Judge

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TABLE OF CONTENTS

	<u>PAGE</u>
NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	3
STATEMENT OF FACTS	3
STATEMENT OF POINTS	11
ARGUMENT	13
POINT I:	
THE DENIAL OF PLAINTIFF'S APPLICATION FOR CONDITIONAL USE PERMITS WERE BASED UPON FACTUAL GROUNDS AND THE INFORMED JUDGMENT DECISION OF THE CACHE COUNTY PLANNING AND ZONING COMMISSION AND THE CACHE COUNTY COMMISSION AND BY REASON THEREOF WAS NOT ARBITRARY, DISCRIMINATORY, UNREASONABLE AND UNCONSTITUTIONAL	13
POINT II:	
THE APPLICABLE CACHE COUNTY ZONING ORDINANCES, ARE NOT ADMINISTERED IN AN UNCONSTITUTIONAL MANNER	19
POINT III:	
PLAINTIFF CLAIMS THAT THE COUNTY COMMISSIONERS VIOLATED THEIR OWN PROCEDURAL RULES BY NOT SUPPLYING EITHER PLAINTIFF WITH WRITTEN NOTIFICATION OF THEIR DECISION GIVING REASONS THEREFOR. SUCH PROCEDURAL DEFECTS, IF PRESENT, WERE REMEDIED BY THE PRESENCE OF PLAINTIFFS THEMSELVES IN THE PROCEEDINGS AND IN THE PROCEEDINGS IN THE DISTRICT COURT	22

TABLE OF CONTENTS
(Continued)

	<u>PAGE</u>
POINT IV:	
PLAINTIFF'S ARGUMENT THAT "PURSUANT TO THE CACHE COUNTY ZONING ORDINANCE A ONE HALF ACRE LOT IN AN AGRICULTURAL ZONE IS UNRESTRICTED," IS WITHOUT MERIT . . .	23
POINT V:	
THE CACHE COUNTY ORDINANCES ARE IN ACCORDANCE WITH THE STATE ENABLING ACT	25
POINT VI:	
THE PROVISIONS AND INTERPRETATION OF THE CACHE COUNTY ZONING ORDINANCES ARE NOT UNCONSTITUTIONALLY DISCRIMI- NATORY EITHER IN THEIR ENACTMENT OR IMPELMENTATION	26
POINT VII:	
THE TRIAL COURT ERRED IN REFUSING TO DISMISS PLAINTIFF'S ACTION ALLEGING A CAUSE OF ACTION BASED UPON MANDAMUS . . .	30
CONCLUSION	31

AUTHORITIES CITED

CASES

Construction Ind. Ass'n. Sonoma City vs. City of Petaluma 522 F.2d 897 (1975)	16
Crestview-Holladay Homeowners Association, Inc. vs. Engh Floral Company 545 P.2d 1150	28

TABLE OF CONTENTS

(Continued)

	<u>PAGE</u>
Fox vs. Buffalo Zoning Board 401 N.Y.Supp.2d 649 (1978)	14
Gayland vs. Salt Lake Couty, et al. 11 Ut.2d 307, 358 P.2d 633 (1961)	13 & 32
Golden vs. City of St. Louis Park, Minnesota 122 N.W.2d 570 (1963)	27
Hay vs. Township of Grow 206 N.W.2d 19 (1973)	17 & 23
Kotrich vs. County of Du Page 10 Ill.2d 181, 166 N.W.2d 601 (1960)	17
Lemir Reality Corp. vs. Larkin 204 N.Y.Supp.2d 584	30
Naylor vs. Salt Lake City Corporation 398 P.2d 27 (1965), 16 Ut.2d 192	17
Osius vs. St. Clair Shores 75 N.W.2d 25 (1956)	15
Phi Kappa Iota Fraternity vs. Salt Lake City 212 P.2d 177 (1949)	16 & 28
State ex rel. Bishop vs. Morehouse, et al, Utah 112 P.169 (1910)	30
Ybarra vs. City of Town of Lausaltos Hills 503 F.2d 250 (1974)	15

TEXTS AND TREATISES

52 Am. Jur2d Mandamus §73, 76, 77, 78, 79, 80	24
Cache County Zoning Ordinance - § 7.2(6)	22
Cache County Zoning Ordinance - §13-2(9)	24
Cache County Zoning Ordinance - Chapter 4	24

TABLE OF CONTENTS
(Continued)

	<u>PAGE</u>
Cache County Zoning Ordinance - Chapter 7	25
Utah Code Annotated - §17-27-1	25
Utah Code Annotated - §17-27-2	25
Utah Code Annotated - §17-27-15	25
Utah Code Annotated - §17-28-9	26

IN THE SUPREME COURT OF THE STATE OF UTAH

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vs.,

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Defendant and
Respondent

RESPONDENT'S BRIEF

NATURE OF THE CASE

The two actions were consolidated by the Trial Court because of the similarity of the facts and law common to both cases. The Plaintiffs brought individual actions seeking a judicial review of a decision by the Cache County Commission to deny the Plaintiff's conditional use permits.

The Complaint sounded in Declaratory Relief and Mandamus. The Defendant answered both actions generally denying

the allegations of Plaintiff's Complaint and affirmatively alleging that the acts of the Defendant were discretionary and in compliance with a valid Court Ordinance.

DISPOSITION IN LOWER COURT

The Trial Court, the Honorable VeNoy Christoffersen, District Judge, presiding, heard this matter on the 7th day of March, 1979. Both sides presented evidence and submitted the case to the Court together with written memorandums with regards to the law.

The Court issued a Memorandum Decision on the 28th day of March, 1979 denying relief sought by Plaintiffs on the following grounds:

1. That the Court should not evaluate the merits of the Cache County's ordinance.
2. That the Court should not determine whether an ordinance is good or bad legislation or should or should not be enforced.
3. That the Court will not substitute its judgment for those charged with making a decision under the appropriate ordinance.
4. That the preferential use of agricultural land is given to anyone who desires to use the land for agriculture purposes and for no other reason and therefore, the ordinance is not discriminatory nor is it unconstitutional as urged by Plaintiff.

RELIEF SOUGHT ON APPEAL

The Respondents seek to have the decision of the District Court of Cache County sustained and the Complaint of Plaintiffs dismissed.

STATEMENT OF FACTS

Prior to July 6, 1978, the Cache County Zoning Ordinances provided that a person must own specific acreage of land in order to construct the residence thereon. Various zones were marked as 10 acres, 20 acres and 40 acre zones. The affect of this zoning ordinance was to carve up productive farmland into nonproductive acreages and to create 10, 20, and 40 acre subdivision lots. The ultimate affect of this procedure was to destroy the farmland of this County by the creation of tracks of land that are uneconomical and unfit for farming.

The Board of County Commissioners of Cache County in the year 1970 pursuant to Title 17 Chapter 27 of the Utah Code Annotated, adopted a Master Plan for Cache County (Ex. No. 2). As the Master Plan relates to the agricultural land it states as follows at page 18:

"In order to protect the agricultural land from the adverse effects of scattered and premature urbanization, it is recommended that future urban expansion be confined to the 'urban area,' as designated on the master plan map, and the existing incorporated cities and towns.

Experience in other parts of the state has demonstrated that a mixture of agricultural and nonagricultural uses has a detrimental effect on the farmer . . . Therefore, it becomes important to protect these areas

for agricultural use and to foster programs that will economically strengthen the agricultural base.

Good farmland is limited in an area and difficult to create or replace. Large acreages will unavoidably be lost to urbanization to support economic development which will be of benefit to all the residents of the County. However, it is unwise to add to this loss thru scattered, uncoordinated developments which are of little or no value to the general public."

On June 23, 1970, the Cache County Commission adopted a zoning ordinance (Ex. D-1) in Cache County, Utah in which the Commission set forth the purpose of the agricultural zone which is as follows in Section 13-1:

"To preserve those areas of Cache County, Utah which are best suited for agriculture and to insure that residential and other development in the County occurs in an orderly fashion, at the least cost to the taxpayer, and harmony with the intent of the Comprehensive Plan."

The Exhibit D-2 reflects that in August, 1977, Cache County Commission recognizing that the 1970 Master Plan did not deal adequately with present problems held five (5) community meetings for the purpose of gathering input from the citizens as to the adjustments to be made to the County Master Plan. As a result of this action taken on the 20th of October, 1977, Cache County Commission adopted the policy plan for Cache County (Ex. D-2) which established the following goals for agricultural land use at page 10:

"To promote an agricultural industry that efficiently produces and markets high quality food and fiber: is profitable to farm

operators and contributes a high income flow to the local economy.

Land uses which threaten the efficiency of irrigation systems will be prohibited unless the applicant can show how the impact of a development will not seriously affect the operation of the system.

To protect agricultural areas from scattered and incompatible urban intrusions. Urban uses such as subdivisions or manufacturing concerns not only affect the overall character of an agricultural area but also raise the land values of nearby agricultural property. With increased land values it becomes more profitable for the farmer to sell his land for development than to continue farming the land. Allowing scattered and incompatible urban intrusions subjects more land to development pressures, thereby causing prime farmland to be taken out of production prematurely."

In the goals for residential land use, the policy plan (Ex. D-2) states as follows at page 12:

"Development of prime farmlands will be limited to very low density rural development. In order to provide a reasonable opportunity for farm families and others to deed land to children, small building lots may be split from each parcel held in individual ownership. Clustering of these lots will be required to reduce the need for roads and to preserve the integrity of the land for agricultural uses."

The Cache County Commission on July 6, 1978 amended the zoning ordinance (Ex. D-18, 19 and 1) and created within that ordinance an agricultural zone whose purpose is as follows, Section 13.1:

"To preserve those areas of Cache County, Utah which are best suited for agriculture and to insure that residential and other

development in the County occurs in an orderly fashion, at the least cost to the taxpayer, and in harmony with the intent of the Comprehensive Plan."

Under the new ordinance certain uses were permitted as follows (Ex. D-18, 19 § 13.2.10):

"For those owners actively engaged in the raising of livestock, agriculture, or dairying as a primary occupation, secondary dwellings for members of the owner's immediate family (related by blood, marriage, or adoption) or a hired worker may be permitted on an adjacent lot belonging to the owner which complies with the area, width, and yard requirements of the R-1-10 zone. All dwellings are subject to the approval of the sanity sewer system by the Board of Health and any and all other ordinances as established by Cache County."

Conditional uses were single family dwellings and other uses not pertinent to this appeal.

In order to administer the granting of conditional uses Section 7-2 of the Zoning Ordinance (Ex. 18) was amended which reads as follows:

"The Planning Commission may approve, modify and approve, or deny the conditional use application. In approving any conditional use, the Planning Commission may find that the proposed use meets the criteria established in the Numerical Evaluation System which has been developed by the Planning Commission in accordance with the intent of the Cache County Comprehensive Plan and that the proposed use will not be detrimental to the health, safety, or general welfare of persons residing in the vicinity, or injurious to property in the vicinity."

The Numerical Evaluation System (Ex. D-2, D-4, and D-17) was adopted to serve as an additional criteria for the

purpose of determining whether or not a conditional use should be granted. The Numerical Evaluation System is weighed in a fashion to give greater points to residential development that is closer to pre-existing development and has available to it roads and utilities which are necessary for the urbanization of farmland. Points are deducted for prime farmland and other conditions which would benefit agriculture or be a detriment to the continuation of agricultural pursuit.

FACTS INCIDENT TO THURSTON CASE

On November 16, 1978, Plaintiff applied for a conditional use permit and submitted the fee required therefor. An on-site inspection of the Thurston property totaled 500 points on the Numerical Evaluation System (Ex. D-3, P-4)

On November 27, 1978 the Planning Commission met in a special meeting and denied Plaintiff's request on the following grounds:

1. Point system was not high enough to warrant a permit.
2. Objection from adjacent property owners.
3. Bull pasture next door.
4. Well and sewer problems. (Ex. D-7)

On December 14, 1978 the Cache County Planning Commission again met and for a second time denied Plaintiff Thurston's request citing as the reasons for the denial as follows:

1. Lack of points.
2. Objection from neighboring property owners.
3. Water problems.
4. Area is predominantly agriculture.
5. That the application is not in keeping with the intent of the Master Plan and ordinances.

Thereafter, Thurston appealed to the Cache County Commission (Ex. D-1, P-28) pursuant to the provisions of the ordinance and the Cache County Commission:

1. On December 19, 1978 they tabled the matter until the Commission could get reasons for the denial from the Planning Commission. A letter was drafted to the Cache County Commission by the Planning Commission. (Ex. P-14, D-23)

2. On January 16, 1979 they upheld the decision of the Planning and Zoning Commission and denied the Plaintiff's request. The request was denied for the reasons set forth in a letter from Cy McKell, Chairman of the Planning and Zoning Commission addressed to T. Ray Theurer, Cache County Commissioner (Ex. P-11, 23)

The Plaintiff, Kenneth R. Thurston, admitted on cross examination that he was not a farmer by occupation and that he was a contractor and that the conditional use permit was not for himself but for another person notwithstanding his representat

in the application which would lead one to believe that the property was to be his personal residence. (TR. 30, 31, 32, and 34)

In the trial of the matter, the staff of the Planning and Zoning Department, the members of the Planning and Zoning Commission, and the County Commissioners each testified as to the application of the Plaintiff; the hearings involving the Plaintiff's application; their reasons for the denial of his application. Their testimony substantiates their prior denial of the Plaintiff's application. The entire record reflects substantial grounds and reasons for the denial of the Plaintiff's application.

FACTS INCIDENT TO THE NIELSEN CASE

On September 28, 1978 the Plaintiff Nielsen applied for a conditional use permit which would allow subdivision of 10 acres of property owned by him into two 5 acre parcels and a resident constructed upon the subdivided tract of land. .
(Ex. D-16)

The application reveals that the Plaintiff Nielsen is not a person who is actively engaged in the raising of livestock, agriculture, as a primary occupation.

On October 12, 1978 the Planning Commission considered Plaintiff's request for a conditional use permit and the permit was denied because of the following: (Ex. P-8)

1. Lack of points. (Ex. D-17, P-8)
2. Community services not available.

3. Property one mile from the nearest city.
4. Road Access.
5. The Master Plan.

On October 20, 1978 the Plaintiff appealed the decision of the Planning Commission to the Cache County Commission.

On October 31, 1978 the Cache County Commission discussed the appeal at length and denied the Plaintiff's request for conditional use permit thereby upholding the decision of the Planning Commission of Cache County.

At the trial of the matter, Plaintiff Nielsen testified that the Planning and Zoning gave their reasons to Plaintiff for the denial of his permit verbally and in writing.

(TR. 110 Lines 22, 23, 24, 25)

In similar fashion to the Ken Thurston case, the record reflects that the employees of the Planning and Zoning Commission testified as to the events which took place with regards to the Nielsen case. The members of the Planning and Zoning Commission testified as to their reasons for the denial of the permit in the Nielsen case and the County Commissioners testified as to their reasons for the denial of the permit in the Nielsen case. The record then reflects substantial reasons why the Plaintiff was denied a conditional use permit to construct the residence.

Glenwood Lee Richardson at Transcript 118 expressed the reasons for the implementation of a conditional use system

in Cache County as being an improvement over the prior system of allowing a house per 10, 20 or 40 acre tract of land. Question, "and why was the development of the 10 acre plot not desirable?" Answer, "well, it reflects on that that you just used in that it increases the service, cost to the taxpayer increased drastically in trying to serve the various residences that were spread out, and the dividing up of agricultural land in a smaller parcel none of which seem to be feasible to farm."

Plaintiff's Exhibit 15 was shown to the County Planner who stated that the 10 acre tracts of land with the residence thereon in the area of Plaintiff Nielsens proposed construction was the specific instance that triggered the County Commission to abandon the 10 acre tract of land verses the conditional use permit system.

STATEMENT OF POINTS

I

THE DENIAL OF PLAINTIFF'S APPLICATION FOR CONDITIONAL USE PERMITS WERE BASED UPON FACTUAL GROUNDS AND THE INFORMED JUDGMENT DECISION OF THE CACHE COUNTY PLANNING AND ZONING COMMISSION AND THE CACHE COUNTY COMMISSION AND BY REASON THEREOF WAS NOT ARBITRARY, DISCRIMINATORY, UNREASONABLE AND UNCONSTITUTIONAL.

II

THE APPLICABLE CACHE COUNTY ZONING ORDINANCES ARE NOT ADMINISTERED IN AN UNCONSTITUTIONAL MANNER.

III

PLAINTIFF CLAIMS THAT THE COUNTY COMMISSIONERS VIOLATED THEIR OWN PROCEDURAL RULES BY NOT SUPPLYING EITHER PLAINTIFF WITH

WRITTEN NOTIFICATION OF THEIR DECISION GIVING REASONS THEREFOR. SUCH PROCEDURAL DEFECTS, IF PRESENT, WERE REMEDIED BY THE PRESENCE OF PLAINTIFFS THEMSELVES IN THE PROCEEDINGS AND IN THE PROCEEDINGS IN THE DISTRICT COURT.

IV

PLAINTIFF'S ARGUMENT THAT "PURSUANT TO THE CACHE COUNTY ZONING ORDINANCE A ONE HALF ACRE LOT IN AN AGRICULTURAL ZONE IS UNRESTRICTED," IS WITHOUT MERIT.

V

THE CACHE COUNTY ORDINANCES ARE IN ACCORDANCE WITH THE STATE ENABLING ACT.

VI

THE PROVISIONS AND INTERPRETATION OF THE CACHE COUNTY ZONING ORDINANCES ARE NOT UNCONSTITUTIONALLY DISCRIMINATORY EITHER IN THEIR ENACTMENT OR IMPLEMENTATION.

VII

THE TRIAL COURT ERRED IN REFUSING TO DISMISS PLAINTIFF'S ACTION ALLEGING A CAUSE OF ACTION BASED UPON MANDAMUS.

VIII

CONCLUSION

ARGUMENT

I

THE DENIAL OF PLAINTIFFS APPLICATION FOR CONDITIONAL USE PERMITS WERE BASED UPON FACTUAL GROUNDS AND THE INFORMED JUDGMENT DECISION OF THE CACHE COUNTY PLANNING AND ZONING COMMISSION AND THE CACHE COUNTY COMMISSION AND BY REASON THEREOF WAS NOT ARBITRARY, DISCRIMINATORY, UNREASONABLE AND UNCONSTITUTIONAL.

This Court in the case of Gayland vs. Salt Lake County et al. 11 Ut.2d 307, 358 P.2d 633, this Court stated as follows at page 635:

"In support of its contention that the refusal to approve its application was an arbitrary deprivation of property rights, Plaintiff argues that the Commission improperly heard, considered and based its determination on protests and representations in the general area. We do not see any impropriety in the Commission receiving and taking into account any information they had to offer bearing on the problem under consideration."

This Court, in the same case at page 636, also held with regards to zoning matters as follows:

"In zoning, as in any legislative action, the functioning authority has wide discretion. Its action is endowed with a presumption of validity; and it is the court's duty to resolve all doubts in favor thereof and not to interfere with the Commission's action unless it clearly appears to be beyond its power; or is unconstitutional for some such reason as it deprives one of property without due process of law, or capriciously and arbitrarily infringes upon his rights therein or is unjustly discriminatory. The burden was upon the plaintiff to show that the Commission's action was suffused with one

or more of those faults, which burden has not been sustained. Even though it be true that information was presented at the hearing which would have justified the Commission in amending the zoning ordinance as advocated, it is also true that the situation presented can be so viewed as to point to the conclusion that the action taken was reasonable and proper. Under such circumstances it was not the prerogative of the Court to substitute its judgment for that of the Commission."

The record is repleat with substantial reasons stated and given for the decision made by the Planning and Zoning Commission and the Cache County Commission. The record reflects that one party or the other called as a witness the majority of the staff of the Planning and Zoning Commission together with the members of the Zoning Board and two of the Cache County Commissioners. Each of these witnesses articulated reasons for denial of the permits. *Hay vs. Township of Grow*, 206 N.W.2d 19 at page 23.

Plaintiff claims that there was no factual date upon which the Zoning Board of the Planning Commission could validly base a denial of the permit. In answer to this, Defendant submits the entire transcript to the proceedings and the documentation as evidence that the denial of the permits in each case were based upon facts and show administrative discretion on the part of the Defendants making the decision.

The undersigned does not disagree with the general proposition stated in cases cited by the Plaintiff of *Fox vs. Buffalo Zoning Board* 401 N.Y. Supp.2nd 649 which cites the

proposition that a permitted use may not be denied on the ground that there is community pressure against it, nor *Osius vs. St. Clair Shores, Michigan* 75 N.W.2d. 25 which states that an ordinance denies equal protection of the laws where it permits officials to grant or refuse permits without the guidance of the standard.

The Plaintiff claims that there are no standards set forth in the ordinances of Cache County and therefore, they were denied equal protection of the law. The standards set forth in the Cache County Ordinance are not such that a hard and fast rule is promulgated such as a building may be built on a 10 acre tract of land but not on a 5 acre tract of land. Cache County found that such an ordinance was defeating the purpose and actually taking land out of agricultural production. It is conceded that there is an administrative discretion in the Cache County Ordinances, however, the allegation by the Plaintiff that the ordinances lack standards is refuted by reading of the ordinances, Policy Plans and Master Plans which is used in the exercise of the discretion.

The Plaintiffs also claim discrimination because they are not farmers. *Ybarra vs. City of Town of Lausaltos Hills* 503 F.2d 250, 1974 Appellants were Mexican-Americans who claimed that the large lot zoning ordinance of the town was unconstitutional in that it discriminated against low-income individuals. The Appellants contended that they did not need to show

that the ordinance discriminated against the poor. The Court held that the ordinance did not violate the equal protection clause because the ordinance was rationally related to preserving the towns rural environment. See also *Construction Ind. Ass'n., Sonoma City vs. City of Petaluma*, 522 F.2d 897, where the city limited building permits in an effort to regulate its own growth. The Court held that the concept of public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces, and low density of population and to grow at an orderly and deliberate pace. The Federal Court said as follows at page 908:

"If the present system of delegated zoning power does not effectively serve the state interest in furthering the general welfare of the region or entire state, it is the state legislature's and not the federal Courts' role to intervene and adjust the system. As stated *supra*(1), the federal court is not a super zoning board and should not be called on to mark the point at which legitimate local interests in promoting the welfare of the community are outweighed by legitimate regional interests."

This Court has treated the questions of discrimination in the case of *Phi Kappa Iota Fraternity vs. Salt Lake City* 1949, 212 P.2d 177 where this Court said that the exercise of discretionary power to district and zone cities for various purposes will not be interfered with by the Courts unless the discretion is abused. The Court also said at page 181:

"There are, of course, various solutions for zoning problems such as this; and

opinions may differ as to which is the more efficacious. But it is not for the court to weigh the respective merits of these solutions. That is the duty that lies upon the shoulders of the governing body which is by statute authorized to district and zone cities. The selection of one method of solving the problem in preference to another is entirely within the discretion of the commission; and does not, in and of itself, evidence an abuse of discretion."

See also Naylor vs. Salt Lake City Corporation, 398 P.2d 27 where this Court speaking thru Justice Callister said at page 29:

"We recognize, and reiterate, the proposition that courts of law cannot substitute their judgment in the area of zoning regulations for that of a city's governing body. Also, we are more than cognizant of the proposition that the governing body of a city is endowed with considerable latitude in determining the proper uses of property within its confines."

The specific question involved in this appeal concerning a conditional use permit has not been the subject matter of a Supreme Court decision coming out of the State of Utah. However, the Illinois case of Kotrich vs. County of Du Page Illinois 166 N.E.2d 601 states as follows at page 126:

"The plaintiffs also contend that an ordinance providing for special uses is invalid because it does not specify standards by which the county board of supervisors is to judge whether a special use permit should be granted. Although the ordinance does not prescribe standards in so many words, it does state that special uses are established for the purpose of providing 'for the location of special classes of uses which are deemed desirable for public welfare within a given district or districts, but which are potentially incompatible with typical uses herein permitted within them It also empowers the board of

supervisors to impose 'such . . . conditions as it considers necessary to protect the public health, safety and welfare.' A fair reading of the ordinance shows that it contemplates that the county board will weigh the desirability of the proposed use against its potential adverse impact. Since the board of supervisors is a legislative body, precise standards to govern its determination are not required . . . "

Under Point I the Plaintiffs further argument is that the Cache County Zoning Ordinance regulates persons and not the use of property.

This claim can be made by any individual who feels that the decision of a County Planning and Zoning Board adversely affects his interest. However, a review of the Cache County Ordinance reveals that permitted uses in the agricultural zone are related to agriculture. Settlement of this State was accomplished by a farmer situating a residence on a tract of land and putting that land to use for the purpose of raising crops or livestock. A visual inspection of the communities of our State would reveal this to be the rule from the inception of settlement of our State. The Cache County Zoning Ordinance recognizes farming as a legitimate area of zoning concern and the right and necessity of a farmer to reside on the land he is engaged in farming. It further recognizes the time honored tradition and practice of children being able to occupy secondary dwellings on the land. This has the effect of encouraging families to remain actively engaged in the raising of livestock and farming as a primary occupation. This then is not regulating the individual

but is regulating the land uses of agriculture and this should be distinguished from situations occurring in manufacturing, commercial or residential zones.

The undersigned has not been able to find a case decided in the United States which involves an agricultural zone and the exact point covered by the Plaintiffs argument.

II

THE APPLICABLE CACHE COUNTY ZONING ORDINANCES ARE NOT ADMINISTERED IN AN UNCONSTITUTIONAL MANNER.

The Plaintiff claims the Cache County Ordinances are unconstitutionally administered in that the Plaintiffs have been denied due process citing other instances of conduct on the part of the Planning Commission which are inconsistent with their own decision.

The Plaintiff's case should be determined on the strength of their argument and not on the weaknesses of others.

As indicated elsewhere in the brief, the present Cache County Zoning Ordinances evolved by reason of the inability of the A-10, A-20, and A-40 zoning concept to preserve the agricultural atmosphere of Cache County. The County Commission then passed an ordinance wherein housing, other than agricultural related housing, is to be developed on a conditional use system in areas where the impact on agricultural interest will be least and to implement this plan a point system was adopted as a guideline to the determination of whether land might be used for residential purposes or best left to agricultural interest.

Ex. P-18. The point system was only a guideline and was not developed as a hard and fast rule for making the determination. The various members of the Cache County Planning Commission and the Cache County Commission have, in the hearing, verbalized their reasons for the denial of Plaintiff's applications which judgment decisions are made in addition to the point system adopted by the Court.

Plaintiff claims that Cache County does not comply with their policy plan (Plaintiff's Brief, page 19). Plaintiff claims nowhere has it been shown by the County that denying permits on small non-economic agricultural zone parcels could possibly accomplish that objective of the policy plan.

The Plaintiff claims that the County should show that the denying of permits on small non-economic agriculturally zoned parcels accomplishes the objective of the policy plan. In making this argument the Plaintiffs ignore the following facts:

1. That the small non-economic agriculturally zoned parcels were once part of a larger economically productive tract of agricultural land and could be in the future attached to and become part of a larger economically feasible agricultural unit.

2. Owners can, by deed, create an unlimited number of small non-economic parcels of land for residential use.

The guideline of the Master Plan is to protect agricultural areas from scattered and incompatible urban intrusions. The Plaintiffs propose such scattered and incompatible urban intrusions unrelated to agricultural pursuits which has the affect of raising land values and encourages the once profitable farmer out of agricultural pursuits and into subdivision pursuits which cause prime farm land to be taken out of production prematurely. The means of accomplishing this task is as follows: A person involved in agriculture owns an agriculturally feasible economic unit of land. At an intersection or along a county road, the farmer sells a 3 acre unit to a home contractor who after the purchase claims the unit purchased is not economical as farm land, obtains a building permit and builds a residence on the property. Not needing the other 2 acres purchased he elects to sell off another tract claiming that that land is not of agricultural importance as it is not an economical unit. If the Planning Commission allows the conditional use permits in such instances, the farmer is then persuaded to sell another non-economical agricultural unit to the same or another individual who will again make the representation that the unit being non-economical for agriculture purposes should be subdivided for residential purposes and the urban intrusion is complete and the objects of the Master Plan are defeated. In the Plaintiff's case, the Planning Commission saw fit to terminate further urban intrusion. It is only logical that if past errors

were made by the Planning Commission, correction of those errors or elimination of the problem does not constitute an arbitrary, unreasonable, or capricious act on their part.

III

PLAINTIFF CLAIMS THAT THE COUNTY COMMISSIONERS VIOLATED THEIR OWN PROCEDURAL RULES BY NOT SUPPLYING EITHER PLAINTIFF WITH WRITTEN NOTIFICATION OF THEIR DECISION GIVING REASONS THEREFOR. SUCH PROCEDURAL DEFECTS, IF PRESENT, WERE REMEDIED BY THE PRESENCE OF PLAINTIFFS THEMSELVES IN THE PROCEEDINGS AND IN THE PROCEEDINGS IN THE DISTRICT COURT.

Section 7.2(6) of the County Ordinance provides that in connection with appeals to the County Commission from decisions of the Planning and Zoning Commission the Board of County Commissioners may affirm, modify, or reverse the decision of the Planning Commission. However, the Board of Commissioners shall present in writing the reasons for its action.

It is conceded in the Thurston case, no written decision was ever given to Thurston. However, Thurston was present at the meeting, heard all the argument, and was advised of the decision of the Commission at that time.

Upon this proceeding in Court, both sides produced evidence concerning the reasons for the decision and the decision itself. It is the Defendant's position that any procedural defect was cured by the Court proceeding in this case.

With regards to the Plaintiff Nielsen, a written decision was in fact given to him with no reasons given therefor. However, he was also at all of the meetings, heard all of the

discussion and was with the County Commission at the time the appeal decision was made and heard the reasons for the decision. Again, the Court proceedings have cured any procedural defect there may have occurred in the other proceedings.

Hay vs. Township of Grow, Minnesota, 1973, 206 N.W.2d 19 where the Court said at page 23:

"The extremely brief treatment accorded these factors was not remedied during the subsequent judicial proceedings. The town board did not state, nor was it demonstrated in the trial court, that the proposed use would endanger the public health or safety or the general welfare of the community."

It is the Defendant's position that if there were any procedural defects, the same were cured by the trial before the Court as exemplified by the entire record, exhibits, and files in this case.

IV

PLAINTIFF'S ARGUMENT THAT 'PURSUANT TO THE CACHE COUNTY ZONING ORDINANCE A ONE HALF ACRE LOT IN AN AGRICULTURAL ZONE IS UNRESTRICTED' IS WITHOUT MERIT.

The Appellant argues that the point system and conditional use permit requirement applies only to restricted lots.

A restricted lot is a lot which does not meet all the area, width, yard and other requirements of the ordinance or a lot which meets those requirements but the severance of which created a restricted lot out of the portion retained by the grantor. Definition No. 78 Ex. D-1.

Exhibit 19, which is the agricultural zone, states the permitted and conditional uses without mentioning restricted lots. However, the cover page mentioning effects of the agricultural zone indicate that all existing land parcels except for restricted lots will be eligible for one building permit for a single family dwelling after the amendment is adopted. This is in accordance with sub-paragraph 9 of Section 13-2 of the Agricultural Zone. The Ordinance further states that a restricted lot remains, under the new ordinance, a restricted lot unless conditional use approval is received from the Planning Commission. Chapter 4 of the Zoning Ordinances relates to the Board Adjustment and their power to grant a variance which has nothing to do with the point system and its granting of the conditional use permit. It would appear that the Plaintiff in Point 4 is confusing the powers of a Planning Zoning Board to grant a conditional use permit and those of a Board of Adjustment to grant a variance. Plaintiff correctly interprets the ordinance in concluding that a lot one half acre or larger is not a restricted lot but is incorrect in claiming that the point system applies only to restricted lots. How the Plaintiff concluded that the point system only applied to restricted lots is not understandably set forth in the brief and will not be dealt with further.

V

THE CACHE COUNTY ORDINANCES ARE IN ACCORDANCE WITH THE STATE ENABLING ACT.

Section 17-27-1 U.C.A. 1953 as amended states that the Board of County Commissioners is empowered to zone all or any part of the unincorporated territory of a County. This the Cache County Commission has done by virtue of the Cache County Zoning Ordinance. Ex. D-1.

Section 17-27-2 creates a Planning Commission for each County and Section 17-27-15 creates a Board of Adjustment.

The Planning Commission has a purpose of establishing a Master Plan and determining the general characteristic of each portion of the County. The Board of Adjustment has the obligations to take appeals by any person upon his inability to get a building permit or by the decision of any administrative officer or agency based upon or made in the course of the enforcement of the provisions of the Zoning regulation. The ordinance, Ex. D-1, states further powers of the Board of Adjustment none of which include an appeal from a denied petition for a conditional use permit. On the other hand, Chapter 7 of the Cache County Zoning Ordinance, Ex D-1, specifically sets forth a procedure whereby the Planning Commission of Cache County has broad powers to approve or deny conditional use applications and that appeals from decisions of the Planning Commission go directly to the Board of County Commissioners. The Defendants claim in their brief that the customary method of providing for the issuance

of special permits is through the Board of Adjustment citing a case in the Northwest Reporter. Under Section 17-27-9 U.C.A., the Planning Commission is given the right to regulate the location, height, bulk, and size of buildings, percentages of lots which may be occupied, the sizes of lots, the density and distribution of population and the location and use of buildings and structures for trade, industry, residents, recreation, public activities or other purposes and the uses of land for trade, industry, recreation and other purposes. Clearly the Planning Commission has the right to issue conditional use permits as defined by the Cache County ordinance under this provision of the State statute.

The Defendant, in its brief, interchangeably uses the words "Conditional Use Permit" and "Special Permit." A reading of the Cache County ordinance will reflect that a conditional use permit is issued by the Planning and Zoning Commission and a special permit is issued by the Board of Adjustments and that there is a substantial difference between the two permits. The appeal here is concerned with only a conditional use permit.

VI

THE PROVISIONS AND INTERPRETATION OF
THE CACHE COUNTY ZONING ORDINANCES
ARE NOT UNCONSTITUTIONALLY DISCRIMINATORY
EITHER IN THEIR ENACTMENT OR
IMPLEMENTATION.

The issue presented to this Court is not whether there is discrimination, but rather whether the discrimination in this case is unlawful discrimination. The difference being that the

is throughout the period of our lives discrimination of one sort

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or another. Lawful discrimination can be defined as that found in veterans exemptions for the payment of property tax, discrimination based upon age, income and even occupation. Lawful discrimination can be used by the State of Utah in granting exceptions to a class of people or permission to a specific class of people.

Middle income, non-farming Utahns are not allowed the following privileges:

- A. Deduction of gas tax on off-road gasoline.
- B. Green belt exemption for taxes on farmland.
- C. No license for non-highway vehicles although the same may be driven on a highway.
- D. Exemptions for age given on income taxes or exemptions for age given on property taxes.
- E. Food stamps, welfare benefits.
- F. The list goes on.

Therefore, the question becomes one of unlawful discrimination. Unlawful discrimination is clearly shown in the case of Golden vs. City of St. Louis Park, Minnesota, 1963 122 N.W.2d 570 where Morris Golden was denied an application for a permit to construct an automobile reduction yard in a heavy industrial zone. The Court in its decision detailed business by business similar operations within the area including smelters, chemical manufacturing concerns, window manufacturing business', cement blocks, gas companys, and other allied

business'. The Court further found that there were no homes within the immediate vicinity. The Court held that in determining whether or not a municipalities action in denying a property owners application for a special building permit under relevant zoning ordinances was arbitrary, unreasonable, or discriminatory the Court should base its findings upon credible evidence. The Court further said that the functions of this Court are the same as in all cases where fact questions have been determined by a trial court.

The Plaintiffs call the word discrimination but Defendants call it discretion.

Phi Kappa Iota Fraternity vs. Salt Lake City, 1949, 212 P.2d 177, the Court says at page 179 that:

"The exercise of [discretionary] power will not be interfered with by the courts unless the discretion is abused."

Crestview-Holladay Homeowners Association, Inc. vs. Engh Floral Company, Utah, 545 P.2d 1150 where the Court said as follows at page 1151:

"In the review of zoning cases the function of the court is narrow and its scope is limited to a determination of whether or not the action of the Board of County Commissioners, as a legislative body, is illegal, arbitrary, discriminatory or capricious . . . It is the policy of this court, as enunciated in its prior decisions, that it will avoid substituting its judgment for that of the legislative body of the municipality."

The legislative body of Cache County determined that there was sufficient grounds for the denial of the building

permits of the Plaintiffs and gave their reasons therefore. Under the point system, parcels were not entitled to a conditional use permit and the Defendants did not meet the criteria of the ordinance. The Plaintiffs may call this discrimination, however, the fact of the matter is that it is the discretion of the Planning Commission. Their discretion was based upon facts supporting a criteria set forth in an ordinance all of which has been reviewed by the District Court of Cache County.

The Cache County Commission gave a conditional use permit to a man by the name Wheeler whose property was in the vicinity of Thurston's property. That conditional use permit was based upon factors which appeared favorably for Wheeler and which did not appear favorably for Thurston such as the actual quality of the soil in the two tracts of land being unuseable in the Wheeler case whereas the Thurston property was at one time prime agricultural land. The record reflects that the top soil was removed from the Thurston property to serve as fill around another house. Thurston now claims that by the removal of the top soil the property is no longer prime. A similar argument could be made for any soil within the State of Utah if that argument is acceptable in this case.

For purposes of argument, if the Cache County Commission erred in granting the Wheeler permit that does not give the Defendant Thurston a springboard upon which to claim a discrimination in this case. A Zoning Commission, if it once

errs, has the right to recognize that error and prevent a duplication of error in future instances and the recognition of the error does not grant a right to subsequent owners to claim discrimination. See Lemir Reality Corp. vs. Larkin 204 N.Y.Supp.2d 584 where that Court said:

"Nor was the issuance of the permits required because the Board had given its consents to similar activities in the immediate neighborhood. The board might refuse to duplicate previous error, or change its views as to what was for the best interests of the town. On the conceded facts, the determination made by the town board was neither arbitrary nor capricious and the court may not substitute its judgment, in the premises, for that of the town board."

VII

THE TRIAL COURT ERRED IN REFUSING TO DISMISS PLAINTIFF'S ACTION ALLEGING A CAUSE OF ACTION BASED UPON MANDAMUS. TR.120.

The first claim of Plaintiff alleges an abuse of a discretionary function.

Plaintiff's second claim seeks a Writ of Mandamus to compel the Defendants to perform a discretionary function, which the Plaintiff is not entitled to. See State ex rel. Bishop vs. Morehouse, Utah, 1910 112 P. 169, see also 52 Am Jur 2d §73, 76, 77, 78, 79 and 80 in which it appears that the law is well settled that Mandamus will not lie to compel the performance of a discretionary act. And by reason thereof, the Plaintiffs claim for a Writ of Mandamus should have been dismissed by the trial court.

VIII

CONCLUSION

Cache County, like many other counties, has experienced a "land boom" in the last several years. As a result of a substantial population increase, a demand has been created for building lots in the rural atmosphere. The effect of the demand has increased the pressure on traditional farmers to sell their property in 40, 20, and 10 acre home lots which following construction have become 10 acre weed patches with a home upon one portion of the tract. Recognizing the problem and in an effort to correct it, the Cache County Commission adopted an amended agricultural ordinance wherein building permits for non-related farm families would be controlled by a system of conditional use permits. The agricultural land of the County was graded and the grading system used in a computation to determine whether or not a permit should be granted when coupled with other facts and recommendations.

It is acknowledged that the conditional use system does not have the accurate definable standards of an agricultural 10 acre tract building lot system but the system has advantages in controlling growth, maintaining agricultural land, and preventing the intrusion of urban development onto the farmer.

How often do we hear from a new resident in an agricultural zone say that uses of bull pastures, hog pens, and lambing sheds are offensive and objectional to the new resident

and should be removed. In an effort to prevent the urban intrusion, Cache County has adopted a Conditional Use Plan which through the guidelines adopted by the Board of County Commissioners allows the Planning Commission of Cache County to determine whether or not an urban intrusion is desirable, and if desirable, where it is desirable and where it is objectional. It is conceded that there is a measure of discretion given to the Planning Commission, however, by reason of the failure of prior systems the solution lies in granting to the Planning and Zoning Board the discretionary function, consistent with established criteria, of determining where and under what circumstances urban intrusion may occur in the farmlands of this community.

Although the Plaintiff claims discrimination, the proper phrase should be discretion. The record, exhibits, and files in this case indicate that the Planning and Zoning Board and the Board of County Commissioners of Cache County exercised a discretionary function based upon standards in an ordinance and in so doing denied permit applications by Plaintiffs. That such actions were based upon facts and conclusions all of which were presented to the District Court of Cache County and approved by that Court. This Court function is stated very succinctly in the case of *Gayland vs. Salt Lake County*, 11 U.2d 307, 358 P.2d 633, where the Court said as follows at page 636:

"In zoning, as in any legislative action, the functioning authority has wide discretion. Its action is endowed with the presumption

of validity; and it is the court's duty to resolve all doubts in favor thereof and not to interfere with the Commission's action unless it clearly appears to be beyond its power; or is unconstitutional for some such reason as it deprives one of property without due process of law, or capriciously and arbitrarily infringes upon rights therein, or is unjustly discriminatory. The burden was upon the plaintiff to show that the Commission's action was suffused with one or more of those faults, which burden has not been sustained. Even though it be true that information was presented at the hearing which would have justified the Commission in amending the zoning ordinance as advocated, it is also true that the situation presented can be so viewed as to point to the conclusion that the action taken was reasonable and proper. Under such circumstances it was not the prerogative of the court to substitute this judgment for that of the Commission."

DATED this 9th day of October, 1979.

F. L. GUNNELL
Cache County Attorney

BY George W. Preston
GEORGE W. PRESTON
Deputy Cache County Attorney

CERTIFICATE OF MAILING

I do hereby swer that I amiled a true and correct copy of the above and foregoing Brief to W. Scott Barrett of BARRETT & MATTHEWS, Lawyers, 300 South Main Street, Logan, Utah 84321 on this 9th day of October, 1979.

Nancy Bartholomew
SECRETARY