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Harmon City v. Draper City and Does 1-100 : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

HARMON CITY, INC., Plaintiff-Appellant, vs. DRAPER CITY, and DOES 1-100, Defendants-Appellees.	Case No. 981628-CA Priority No. 15

REPLY BRIEF OF APPELLANT HARMON CITY, INC.

APPEAL FROM THE SUMMARY JUDGMENT AND ORDER OF DISMISSAL ENTERED BY THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, UTAH, ON AUGUST 25, 1998, THE HONORABLE JUDITH ATHERTON PRESIDING

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vs.	:	
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I. DRAPER CITY'S PROPOSED STANDARD OF REVIEW IGNORES THE STATUTE

Draper City urges this Court to interpret the "arbitrary and capricious" standard of *Utah Code Ann.* § 10-9-1001 ("Section 1001") to mean "reasonably debatable." (Brief of Appellee, pp. 12, 15.) Draper City has pulled this standard from Smith Investment Co. v. Sandy City, 958 P.2d 245 (Utah App. 1998), and alleges that it is supported by land-use case law which differentiates between administrative and legislative decisions. As argued in Harmon's Brief, Smith Investment is inapplicable because it was not decided under Section 1001. (Brief of Appellant, pp. 18-19.) Further, the land-use case law cited by Draper City all pre-dates Section 1001, which was enacted in 1991. In essence, Draper City would have this Court rule as if *Utah Code Ann.* § 10-9-101 *et seq.* ("Chapter 9") had never been recodified and Section 1001 never enacted. The Court should not be persuaded.

The pre-existing case law under Chapter 9 is simply not clear. In some cases, the "reasonably debatable" standard of judicial review was applied to a city council's zoning decisions. *See* Crestview-Holladay Homeowners Ass'n v. Engh Floral, 545 P.2d 1150 (Utah 1976). However, in one zoning case this standard was rejected and a higher "arbitrary and capricious" standard was imposed. *See* Gibbons & Reed Company v. North Salt Lake City, 431 P.2d 559 (Utah 1967). Some cases explicitly interpreted the phrase "arbitrary and capricious" to mean "substantial basis in fact." *See* Davis County v. Clearfield City, 756 P.2d 704 (Utah App. 1988), *cert. den.*, 765

See Davis County v. Clearfield City, 756 P.2d 704 (Utah App. 1988), *cert. den.*, 765 P.2d 1278 (1988). Other cases used these terms to affirm land use decisions without engaging in a review of the evidence at all. *See* Naylor v. Salt Lake City Corporation, 410 P.2d 764 (Utah 1966).

As pointed out in Harmon's Brief, if the legislature had wanted the "reasonably debatable" standard to apply, it could have said so in Section 1001. (Brief of Appellant, p. 20.) By the same token, if it had wanted the courts to continue to apply the standard as they had been, the legislature could have left this issue alone. But it did not. Instead, the legislature silenced the cacophony of the prior case law by providing one standard for all land use decisions, "arbitrary, capricious or illegal," when it recodified Chapter 9 and enacted Section 1001.

Certainly this phrase was deliberately chosen. It is used elsewhere in Chapter 9, and has been defined and construed to mean "supported by substantial evidence." *See Utah Code Ann.* § 10-9-708 ("Section 708"); Wells v. Board of Adjustment, 936 P.2d 1102, 1105 (Utah App. 1997).[1] This Court has already construed the "arbitrary and capricious" standard under Section 1001 and held that it requires "evidence...adequate to convince a reasonable mind to support the decision." Brown v. Sandy City Bd. of

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[1] Draper City argues that if "arbitrary and capricious" means the same thing in both Sections 1001 and 708, the separate provisions would be redundant. Harmon's submits that, in construing statutes, courts should guard against contradictory interpretations rather than harmless redundancies. Moreover, it is not redundant for the legislators to clarify that the same standard of review applies to land use decisions by municipalities (Section 1001) and boards of adjustment (Section 708), especially in light of the prior inconsistent case law.

Adjustment, 957 P.2d 207, 210 (Utah App. 1998). In construing Section 1001's arbitrary and capricious standard, the Court's primary focus should be on the statute and cases decided under it--not the confusing and inconsistent case law prior to its enactment.

II. IT IS REASONABLE TO REQUIRE LAND-USE DECISIONS TO BE SUPPORTED BY FACTS IN THE RECORD.

Contrary to Draper City's contentions, the cases cited by Harmon's support the idea that land-use decisions must be supported by facts in the record. In Gibbons & Reed Co. v. North Salt Lake City, 431 P.2d 559, 563 (Utah 1967), the Utah Supreme Court found "sufficient evidence in the record" in support of overturning a zoning ordinance enacted by North Salt Lake. The Supreme Court engaged in this analysis after noting defendant's arguments that "zoning is a legislative function" subject to a "reasonably debatable" standard. Gibbons & Reed, 431 P.2d at 562.

In Kanfer v. Montgomery County Council, 373 A.2d 5, 11-20 (Md.App. 1977), the city council denied a rezoning application, contrary to the recommendation of a hearing examiner. In pronouncing the standard of review, the court ruled that even the fairly debatable standard required that the decision under review be supported by substantial evidence in the record:

> On an appeal from the grant or denial by the legislative body of an application for a zoning reclassification, the function of the reviewing court in Maryland is indeed restricted and the "fairly debatable" rule is applicable. *Otherwise stated, the appellate court may not substitute its judgment for that of the zoning body and should affirm when the latter's decision is supported by substantial evidence*....a zoning application may

> be reversed by an appellate court when the action appealed from is shown to be "arbitrary, capricious or illegal."

Kanfer, 373 A.2d at 12 (emphasis added). Then, just as Harmon's requests in this case, the court examined each reason given by the city council to see if it was supported by evidence in the record. Id. at 13-16. Because the reasons were not supportable--indeed the evidence called for the granting of the rezoning application--the court held that the city council's decision was arbitrary and capricious.

Even in one of the cases cited by Draper City, the court examined the record for "findings of fact supported by substantial evidence" when reviewing a "legislative" decision. Sparks v. Douglas County, 904 P.2d 738, 742 (Wash. 1995). In Sparks, after pronouncing the standard quoted by Draper City (Brief of Appellee, p. 15.), the Washington Supreme Court upheld a decision by county commissioners which was based on traffic studies, current road widths, and well-documented findings. The court concluded: "Because its determination [the county commission's] was made upon honest and due consideration of substantial evidence, it was neither arbitrary nor capricious." Sparks, 904 P.2d at 743 (emphasis added).

Appellee's position that it is "absurd" to apply a substantial evidence measure (Brief of Draper City, p. 17) is simply not well taken. In addition to the cases cited above, land use disputes implicating the First Amendment also require courts to examine facts in the record in order to determine whether restrictions on speech are necessary to serve a significant government interest. For example, in Renton v.

Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), a municipality passed a zoning ordinance banning "adult" theaters from zones around churches, parks, schools, etc. In response to the argument that the proffered justifications were "conclusory and speculative," the Supreme Court examined the record and found that the municipality relied on "studies," and "detailed findings" of fact. Renton, 89 L.Ed.2d at 39-40. *See also*, Ward v. Rock Against Racism, 491 US 781, 109 S.Ct. 2746, 105 L.Ed.2d 661, 675 (1989) (where, in upholding sound restrictions on public concerts, the Supreme Court referred to evidence in the record about the affects of sound amplification).

Certainly Harmon's is not asking this Court to subject the City Council's decision to "strict scrutiny." But the cases cited above illustrate a point: requiring a factual basis for zoning decisions does not constitute undue judicial interference into the legislative process. Of course the City Council may impose restrictions on how Harmon's uses its own property. Under Section 1001, however, these restrictions must have some factual basis beyond merely the "subjective opinions" of the City Council Members. (*See* Brief of Appellee, p. 17.)

III. THERE IS NO EVIDENCE IN THE RECORD THAT SUPPORTS THE DECISION OF THE CITY COUNCIL

Beginning on Page 19 of its Brief, Draper City argues that the record contains evidence that would support a denial of Harmon's rezoning application. However, Draper City does not cite to any facts in the record. Instead, it points out that the City

Council was not legally obligated to follow the recommendation of the Planning Commission; that Draper's general plan, which allows for Harmon's proposed zoning, is only an advisory guideline; and that the City Council heard both sides of the issue. In other words, as long as the proper process is followed and the municipality does not offend any existing statutes or regulations, its decision is not "arbitrary, capricious or illegal." This interpretation goes too far. Harmon's recognizes the judicial deference and the presumption of validity that must be afforded to a city council's rezoning decision under Section 1001. However, these decisions must be supported by some evidence in the record.

. The case before the City Council could not have "gone either way." (Brief of Appellee, p. 11.) The tally of the vote (3-2) and the level of "public clamor" are largely irrelevant. Still, Draper City argues that because the City Council's action was supported by public opinion, its decision was appropriate. Under this theory, judicial review is almost reduced to review of an opinion poll. The public clamor doctrine guards against this: although public views should be considered by a city council, they cannot be the sole basis for a decision. *See* Davis County v. Clearfield City, 756 P.2d 704, 711 (Utah App. 1988), *cert. den.*, 765 P.2d 1278 (1988). In this case, the only basis for the City Council's decision was the "not in my back yard" sentiment voiced by some neighboring residents. Three City Council members caved into this sentiment and reasoned that the proposed development was "not compatible" with the existing neighborhood. As the court held in Kanfer, this is not sufficient. *See* Kanfer, 373

A.2d at 13-14. Under Section 1001, in making a decision that will restrict an owner's use of its property, a municipality must have a factual basis for its action.

Here, there simply is no factual basis. In its Brief, Harmon's identified each of the reasons given by the City Council, examined the relevant parts of the record, and established that these reasons were unsupported by facts in the record. (Brief of Appellant, pp. 23-27.) Draper City has not responded to this analysis or disputed its conclusions.[2] Harmon's is not asking the Court to choose one alternative among a number of reasonable outcomes, and this litigation is not about how much evidence constitutes "substantial evidence." The evidence in the record leads to only one reasonable conclusion: Harmon's rezoning application should be approved. The City Council's decision is not supported by any facts in the record.[3]

CONCLUSION

Simply put, Section 1001's arbitrary and capricious standard requires a factual basis in the record for rezoning decisions. All the facts in the record demonstrate that the development is compatible with the existing neighborhood and that the rezoning application should have been approved. For this reason, the Court should reverse the

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[2] Indeed, the evidence relied upon by Harmon's consists largely of studies conducted, and conclusions drawn, by Draper City's own experts: the Planning Commission and its Staff. *See* Addendums C, D, E, and F to Appellant's Brief.

[3] In this regard, contrary to Draper City's assertions, Kanfer and Bentley v. Valco, Inc., 741 P.2d 1266 (Colo. App. 1987), are instructive. Even under the language articulated by those courts, "overwhelming evidence to the contrary" and "no competent evidence," the City Council's decision in this case cannot stand.

District Court's decision to award summary judgment to Draper City, and direct the District Court to grant Harmon's Motion for Summary Judgment and enter an order requiring the City Council to approve Harmon's re-zoning and conditional use application.

DATED this 22nd day of July, 1999.

PRINCE, YEATES & GELDZAHLER

By _____
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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of July, 1999, I caused the original and seven true and correct copies of the foregoing REPLY BRIEF OF APPELLANT HARMON CITY, INC. to be hand delivered to the Utah Court of Appeals and two copies to be mailed, first-class postage prepaid thereon, to the following:

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