

1979

Paul D. Levie, Trustee of the Paul D. and Rae Levie Trust Dated November 20, 1973 v. Sevier County, A Political Subdivision of the State of Utah, Ivan Mills, Dean Co Nielsen, Elmo Herring, Scott Hawley, Grant Ogden T. M. Ashman, Arno Bastian, and N. andy Winget : Brief of Appellant-Plaintiff

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Earl S. Spafford; Attorney for Plaintiff-Appellant K.L. McIlff; Attorney for Defendants-Respondents

Recommended Citation

Brief of Appellant, *Levie v. Sevier County*, No. 16652 (Utah Supreme Court, 1979).
https://digitalcommons.law.byu.edu/uofu_sc2/1943

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

PAUL D. LEVIE, Trustee of :
the Paul D. and Rae Levie :
Trust Dated November 20, 1973 :

Plaintiff-Appellant, :

vs. :

SEVIER COUNTY, a political :
subdivision of the State :
of Utah, IVAN MILLS, DEAN C. :
NIELSEN, ELMO HERRING, :
SCOTT HAWLEY, GRANT OGDEN :
T. M. ASHMAN, ARNO BASTIAN, :
and N. ANDY WINGET, :

Defendants-Respondents .

BRIEF OF APPELLANT

Appeal from a Judgment
Of the Sixth Judicial District Court
Of Sevier County
Honorable Don V. [illegible]

Earl S. Spafford
Spafford & Dibb
431 South Third East
Salt Lake City, Utah 84111

Attorneys for
Plaintiff-Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

PAUL D. LEVIE, Trustee of :
the Paul D. and Rae Levie :
Trust Dated November 20, 1973 :

Plaintiff-Appellant, :

vs. :

SEVIER COUNTY, a political :
subdivision of the State :
of Utah, IVAN MILLS, DEAN C. :
NIELSEN, ELMO HERRING, :
SCOTT HAWLEY, GRANT OGDEN :
T. M. ASHMAN, ARNO BASTIAN, :
and N. ANDY WINGET, :

Case No. 16652

Defendants-Respondents.:

BRIEF OF APPELLANT-PLAINTIFF

Appeal from a Judgment
Of the Sixth Judicial District Court
Of Sevier County, Utah
Honorable Don V. Tibbs, Judge.

Earl S. Spafford
Spafford & Dobb
431 South Third East
Salt Lake City, Utah 84111

K. L. McIff
151 North Main Street
Richfield, Utah 84701

Attorneys for
Plaintiff-Appellant

Attorney for
Defendants-Respondents

TABLE OF CONTENTS

	Page
Statement of the Nature of the Case	1
Disposition by the Lower Court	1
Relief Sought on Appeal	2
Statement of Facts	2
Legal Argument	6
Point I	6
DEFENDANTS' REFUSAL TO APPROVE PLAINTIFF'S SUBDIVISION PLAT, WHICH COMPLIES FULLY WITH APPLICABLE ZONING ORDINANCES, IS ARBITRARY AND CAPRICIOUS. THE COURT ERRED IN SUSTAIN- ING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.	
Point II	14
THE SEVIER COUNTY BOARD OF COMMISSIONERS ACTED ARBITRARILY AND CAPRICIOUSLY BE DEPRIVING PLAINTIFF OF HIS ADMINISTRATIVE REMEDIES.	
Point III	16
WHETHER DEFENDANTS ACTED ARBITRARILY AND CAPRICIOUSLY IS A MATERIAL FACT, SHARPLY DISPUTED, THEREBY MAKING IT ERROR FOR THE COURT TO GRANT SUMMARY JUDGMENT.	
Conclusion	18

TABLE OF CITATIONS

STATUTES CITED

Utah Code Ann. § 17-21-12 (1953)	14
Utah Code Ann. § 17-27-1 (1953)	11
Utah Code Ann. §§ 17-27-9 to 17-27-11 (1953)	11
Utah Code Ann. § 17-21-8 (1953)	14
Utah Code Ann. § 17-27-12 (1953)	11, 14

Utah Code Ann. § 17-27-13 (1953)	8
Utah Code Ann. § 17-27-15 (1953)	14
Utah Code Ann. § 17-27-16 (1953)	15

CASES CITED

Bennett v. Price, 446 P.2d 419 (Colo. 1968)	17
City of Colorado Springs v. Street, 81 Colo. 181, 254 P. 440 (1927)	13
Contracts Funding and Mortgage Exchange v. Maynes, 527 P.2d 1073 (Utah 1974)	11
Cubby v. Hammond, 68 Ariz, 17, 198 P.2d 134 (1948)	8
Frederick May v. Dunn, 13 Utah 2d 40, 363 P.2d 266 (1962)	18
Housely v. Anaconda Co., 19 Utah 2d 124, 427 P.2d 390 (1967)	19
K & L Distributors, Inc. v. Murkowski, 486 P.2d 351 (Alaska 1971).	17
Lund v. Cottonwood Meadows Co., 15 Utah 2d 305, 308, 392 P.2d 40,42 (1964)	15
Naylor v. Salt Lake City, Corp., 17 Utah 2d 300, 10 P.2d 764 (1966)	7
State ex rel. Ogden v. City of Bellevue, 45 Wash 2d 592, 275 P.2d 899 (1954)	13

IN THE SUPREME COURT OF THE STATE OF UTAH

PAUL D. LEVIE, Trustee of :
the Paul D. and Rae Levie :
Trust dated November 20, 1973:

Plaintiff, : Case No. 16652

vs. :

Sevier County, a political :
subdivision of the State :
of Utah, IVAN MILLS, DEAN C. :
NIELSEN, ELMO HERRING, :
SCOTT HAWLEY, GRANT OGDEN :
T. M. ASHMAN, ARNO BASTIAN, :
and N. ANDY WINGET, :

Defendants. :

BRIEF OF APPELLANTS-PLAINTIFFS

STATEMENT OF THE NATURE OF THE CASE

Plaintiff sued the County Board of Commissioners seeking a determination that his proposed subdivision plat satisfies the requirements of the GRF-1 zone and should, therefore, be approved.

DISPOSITION BY LOWER COURT

Both plaintiff and defendants moved for summary judgment. After oral argument, the Court took the motion under advisement and subsequently granted defendants' motion. In a very brief order, the Court determined that plaintiff's proposed subdivision plat did not meet the requirements of the GRF-1 zone. The Court offered no

justification for its decision.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the summary judgment in favor of defendants. In addition, plaintiff seeks a finding of summary judgment in favor of plaintiff on the grounds that, as a matter of law, defendants acted arbitrarily and capriciously by: 1) not approving plaintiff's plat which satisfies all of the GRF-1 zone requirements, and 2) depriving plaintiff of his administrative remedies.

STATEMENT OF FACTS

Pursuant to Utah Code Ann. §§ 17-27-1 to 17-27-27 (1953), the Sevier County Board of Commissioners on July 19, 1965, adopted a Sevier County Zoning Ordinance and an official zoning map of Sevier County (Hawley deposition, p. 8).

Article IV, §4-18, of the zoning ordinance provides:

Subdivision development plan.

The owner or owners of any land of not less than three (3) acres in area, desiring to subdivide such land, shall submit to the Planning Commission a complete development plan in accordance with the subdivision regulations of Sevier County. (Emphasis added)

The only subdivision regulation for the Sevier County ever enacted by the Board of Commissioners regulates the subdivison of mountainous and semi-mountainous land

in the unincorporated territory of the county. Said subdivision regulation, according to its terms, does not apply to plaintiff's application. This is admitted and acknowledged by the director of Sevier County Planning and Zoning, Scott Hawley (Hawley deposition, pp. 9-10).

According to the zoning ordinance and the official zoning map, plaintiff's subject property is and at all times has been included in the GRF-1 Grazing, Recreation and Forestry Zone (R. 60). Uses permitted in this zone include "One family dwellings - farm labor dwellings."

Article VIII, 8-5-3 (R. 70), Area Requirements, of the zoning ordinance provides that:

In order to discourage urbanization in this zone, an area of not less than three acres shall be provided and maintained for each one family and/or two family dwelling, except that the area of a building site in a summer homes subdivision may be reduced to one-half (1/2) acre, when such subdivision has been approved by the Planning Commission. For all other buildings there shall be no minimum area requirements.

In meetings between the Sevier County Zoning Commission and plaintiff, certain suggestions and requests were made, such as; that creek lots be set back at least 100 feet from Clear Creek; that no mobile homes be permitted; and that restrictions be prepared so providing. It was also discussed that the means of establishing a home owners association would be provided for in the restrictive covenants and that said association would aid or manage the garbage and trash collection and disposal (plaintiff's deposition,

A proposed plat map of the development was prepared and submitted to the Planning and Zoning Commission by the project engineer, Ray Blackham. The plan submitted was a proposal to develop the area into lots. Each lot was to be in excess of one-half (1/2) acre (R. 52) pursuant to Zoning Ordinance Article VIII, 8-5-3 (R. 70), permitting such when approved by the Planning Commission.

The proposal was reviewed by defendants in a Sevier County Zoning Board meeting held March 31, 1976 (R. 61). At the meeting, which plaintiff attended, no specific objections or findings were made or found by the Board (R. 61). There were general objections indicating that the County Attorney did not want the property subdivided. Standards for roads were discussed, but no specific requirements were made or requested. Problems of school transportation were also discussed.

Plaintiff's representative, Ray Blackham, appeared at the Sevier County Commission meeting on April 5, 1976, where he presented plaintiffs proposal. After reviewing the proposal and the planning commission's recommendation (R. 61), the defendants denied plaintiff's application (R. 65). Plaintiff was notified of defendants' decision on or about May 6, 1976, by receipt of a letter dated April 29, 1976, from Devon Polson (R. 66). The letter was purportedly signed by Scott Hawley.

Plaintiff responded to this denial in letter dated June 18, 1976, advising the Commissioners that the applicant

was desirous of meeting any and all requirements and that applicant would redesign the subdivision to eliminate any objections and to conform to any requirements of the zoning ordinance (plaintiff's deposition, p. 17). Plaintiff made frequent personal and verbal inquiries as to what he needed to do to obtain approval of the plat, but was given no advice or information as to requirements that had not been met.

Plaintiff recognized that pursuant § 8-5-3 (R.70) of the zoning ordinance, building sites could be reduced to one-half (1/2) acre lots only if approved by the planning commission. In such a case, some discretion was given to the Planning and Zoning Commission and Board of Commissioners. Plaintiff, therefore, revised the proposed plat of Clear Creek Heights and provided for each lot to contain in excess of three acres, thus complying fully and completely with the zoning ordinance ("An area of not less than three acres shall be provided and maintained for each one family, and/or two family dwelling.") Plaintiff thereby removed any necessity for the exercise of discretion on the part of the Board of Commissioners.

After revision of the subdivision plat, it was again submitted to the Sevier County Board of Commissioners and plaintiff was advised that the consideration of the same would be had at a duly scheduled meeting on April 19, 1977, following a public hearing on the adoption of a proposed new zoning and subdivision ordinance for Sevier County.

Plaintiff attended the meeting and, after the discussion on the proposed new ordinance was concluded, plaintiff asked to be heard regarding approval of his subdivision plat application. Plaintiff was advised by Mr. Hawley and by Ken Melaird, who was proposing the new subdivision and zoning ordinance, that plaintiff's proposed subdivision was not permitted in the GRF-1 zone and there was nothing further to consider. No formal meeting or discussion on the question was conducted at that time nor did plaintiff have an opportunity to be heard. Plaintiff was not advised of any formal action taken, either then or at a later time (Hawley deposition p. 29, lines 3-12; plaintiff's deposition, p. 35, lines 5-25).

The Sevier County Planning and Zoning Commission and Sevier County Commissioners have consistently and repeatedly refused to give further consideration to the approval of plaintiff's subdivision (plaintiff's deposition p. 35, lines 5-25). The Sevier County Planning and Zoning Commission and its director, as well as the County Commissioners, have consistently refused to give further details or reasons for the failure and refusal to approve plaintiff's subdivision plat.

LEGAL ARGUMENT

POINT I

DEFENDANTS' REFUSAL TO APPROVE PLAINTIFF'S SUBDIVISION PLAT, WHICH COMPLIES FULLY WITH APPLICABLE ZONING ORDINANCES, IS ARBITRARY AND CAPRICIOUS. THE COURT ERRED IN SUSTAINING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

In Naylor v. Salt Lake City Corp., 17 Utah 2d 300, 410 P.2d 764 (1966), the Utah Supreme Court held that:

In conformity with well established rules relating to the powers of administrative bodies, it is to be assumed that they have some specialized knowledge of the conditions and the needs upon which the discharge of their duties depends. Because the law imposes this duty primarily upon the Commission, and because of its presumed expertise in fulfilling that responsibility, the court will not invade the province of the Commission and substitute its judgment therefore; nor will it interfere with the prerogatives of the Commission unless it is shown to be so clearly in error that there is no reasonable basis whatsoever to justify it and its action must therefore be regarded as capricious and arbitrary. (emphasis added)

The defendant's refusal to approve plaintiff's subdivision plat is "so clearly in error that there is no reasonable basis whatsoever to justify it." Therefore, its actions must be "regarded as capricious and arbitrary."

The Sevier County Zoning Ordinance authorizes nine different zones, one of which is the GRF-1 zone. A careful analysis of the entire ordinance and the requirements of the GRF-1 zone makes clear the necessity of defendants' approval of plaintiff's subdivision plat.

A. Plaintiffs proposed subdivision plat satisfies the requirements of the GRF-1 zone.

Zoning ordinances are a limitation on a property owners rights. Hence the requirement in Utah--that such ordinances and regulations should be designed only "for the purpose of promoting the health, safety, morals, convenience,

order, prosperity or welfare of the inhabitants of Utah. Utah Code Ann. § 17-27-13 (1953). Therefore, a zoning ordinance, being in derogation of common law property rights, should be strictly construed. Any ambiguity or uncertainty should be decided in favor of the property owner. Cubby v. Hammond, 68 Ariz, 17, 198 P.2d 134 (1948).

It is clear that under the Sevier County Zoning Ordinance the regulations included as §§ 8-5-2 to 8-5-8, have been adopted with the express purpose of accomplishing the stated objectives and purposes of the GRF-1 zone.

Article VIII, § 8-5-1 provides:

The objectives of establishing the GRF-1 Grazing, Recreation and Forestry Zone are:

1. To promote the use of land for forestry, fish, wildlife and recreational and livestock grazing purposes.
2. To secure economy in the cost of supplying police and fire protection, roads and other public services, and to reduce waste from an excessive mileage of roads.
3. To preserve insofar as possible, natural scenic attractions natural vegetations, and other natural features within the zone.
4. To prevent the scattering of commercial and urban uses into the zone.
5. To promote sanitation and protect and conserve the water supply and other natural resources.

Section 8-5-1 then continues:

In order to accomplish these objectives and purposes and to protect the essential characteristics of the zone, the following regulations shall apply in the GRF-1 Grazing, Recreation and Forestry Zone: (Emphasis added)

Sections 8-5-2 to 8-5-8 follow as those regulations designed to accomplish the objectives of the GRF-1 zone. Therefore, if the plaintiff can meet the requirements under §§ 8-5-2 to 8-5-8, he should be considered as having satisfied the stated objectives and purposes of the GRF-1 zone.

The plaintiff satisfies the § 8-5-2 Use Requirements Regulation. His proposed subdivision plat includes one single family dwelling per lot. The GRF-1 zone allows "One family dwellings." Article II of the Sevier County Zoning Resolution defines "family" as

An individual or two (2) or more persons related by blood, marriage or adoption living together in a dwelling unit. Guests in excess of two (2) who pay for meals or room shall be considered as boarders.

The same article defines a "dwelling" as:

A building or portion thereof designed exclusively for residential occupancy, but not including hotels, tourist cabins, and boarding houses.

Article II defines a "one family dwelling" as: "A detached building containing only one dwelling unit."

Thus, § 8-5-2, in conjunction with Article II, expressly authorizes single family, residential dwellings in a GRF-1 zone. The plaintiff satisfies this requirements.

The addition of "farm labor dwellings" following "one-family dwellings" in § 8-5-2 is confusing and ambiguous.

There is no definition in Article II clarifying "farm-labor

dwelling." Therefore, the court should interpret "farm-labor dwellings" in favor of the plaintiff land owner as an addition to and not a qualification of "One-Family Dwelling."

In addition, the court should note the express authorization in § 8-5-2 of the use of "Private summer cottages and accessory buildings." Contrary to the defendants' argument, the regulation writers distinguished between summer cottages and single-family residential dwellings, and allowed the use of both types of dwellings.

Plaintiff satisfies the § 8-5-3 area requirements regulation. Section 8-5-3 requires that "an area of not less than three (3) acres shall be provided and maintained for each one-family and/or two-family dwelling". In addition, § 8-5-3 provides that "a subdivision may be reduced to one-half (1/2) acre when such subdivision has been approved by the planning commission." Thus the planning commission has discretion to allow a subdivision with lots smaller than three (3) acres as long as they are larger than one-half (1/2) acre. But the regulations divest the planning commission of any discretion in approving subdivisions with lots larger than three (3) acres. A subdivision with lots larger than three (3) acres, that otherwise meets the GRF-1 requirements, must be approved by the county planning and zoning commission.

The Plaintiff's first submitted plan was a proposal to develop the property into lots, each in excess of one-half (1/2) acre. The defendants exercised their discretion and rejected the proposal. However, the plaintiff's second

proposal provided for each lot to contain in excess of three (3) acres. Thus, the plaintiff has strictly complied with § 8-5-3 and defendants have no authority to reject the plaintiff's proposal on this ground.

All of the remaining requirements under the GRF-1 zoning regulations have been met and are not in issue. Therefore, by satisfying all of the regulations under §§ 8-5-2 to 8-5-8, the "objectives and purposes" of protecting "the essential characteristics of the GRF-1 zone" are satisfied.

B. The Sevier County Board of Commissioners has a Ministerial duty to Approve plaintiff's plat that has satisfied all of the GRF-1 zone requirements.

Under Utah law, the Sevier County Board of Commissioners has the authority to zone and regulate the unincorporated territory within the county. Utah Code Ann. §§ 17-27-1, 17-27-9 to 17-27-11 (1953). The Commissioners also have the authority to enforce the zoning regulations by withholding building permits. Utah Code Ann. § 17-27-12 (1953). However, these legislative and administrative powers cannot be confused. The County Board of Commissioners has the power to legislate by adopting zoning ordinances and regulations. But once having legislated it is then the commissioners' responsibility to enforce the zoning ordinance and its regulations.

In Contracts Funding and Mortgage Exchange v. Maynes, 527 P.2d 1073 (Utah 1974), a County Board of Commissioners ignored this important distinction between their legislation

and enforcement functions. In Maynes, a property owner attempted to secure a building permit in a section of the county that was not zoned, having done everything necessary under the then existing laws. Instead of granting the permit, the County Board of Commissioners passed a zoning ordinance excluding the property owner's proposal. The Utah Supreme Court held that the property owner, having done everything necessary under existing laws, must have his application approved. The court explained:

The simple fact is, that a property owner, having done everything necessary under existing laws, cannot be expected to be circumscribed by ex post facto modus operandi leges, such as zoning ordinances presuming to upside-down the hour glass. (id. at 1074).

Rather than passing ex post facto zoning regulations, the defendants are attempting to block the plaintiff's application for a building permit using a similar form of after the fact legislation. The defendant commissioners do not cite specific zoning regulation which bar the plaintiff's application, but simply claim that the plaintiff's proposed development "is inimical to most, if not all, of the objectives of this zone." (see, Defendant's Motion for Summary Judgment)

By discussing, writing, debating and adopting the Sevier County Zoning Ordinance and its regulation the defendant Commissioners satisfied their legislative function. At that time, and in the form of use, area, width, yards and public health requirements, defendants decided what was consistent with, and what was inimical to, the objectives of the GRF-1

zone. By now attempting to define the plaintiff's proposed development as "inimical to the objectives" of the GRF-1 zone, when the GRF-1 requirements have been satisfied, the defendant Commissioners are legislating after the fact.

This principle is clearly recognized in other jurisdictions. In State ex rel. Ogden v. City of Bellevue, 45 Wash 2d 492, 275 P.2d 899 (1954), the court ruled that a use permit must issue as a matter of right where the property owner has complied with the zoning ordinance. The court explained:

The discretions premissible in zoning matters is that which is exercised in adopting the zone classifications with in the terms, standards, and requirements pertinent thereto, all of which must be by general ordinance applicable to all persons alike. The acts of administering a zoning ordinance do not go back to the questions of policy and discretion which were settled at the time of the adoption of the ordinance. Administrative authorities are properly concerned with questions of compliance with the ordinance, not with its wisdom. (id. at 902). See also City of Colorado Springs v. Street, 81 Colo. 181, 254 P. 440 (1927).

The use, area, width, yards and public health requirements found in Article VIII, §§ 8-5-2 to 8-5-6, were instituted to accomplish the objectives and purposes of the GRF-1 zone; and the plaintiff's proposed development satisfies all of these requirements. Under these circumstances, the defendant commissioners do not have the right, authority, or power to refuse to approve plaintiff's plat. By so doing, defendant's actions were capricious and arbitrary.

POINT II

THE SEVIER COUNTY BOARD OF COMMISSIONERS
ACTED ARBITRARILY AND CAPRICIOUSLY
BY DEPRIVING PLAINTIFF OF HIS ADMINISTRATIVE
REMEDIES.

Under Utah law, a developer desiring approval of a plat must first submit his proposed plat to the Board of County Commissioners who will then either grant or withhold a building permit. Utah Code Ann. §§ 17-21-8, 17-27-12 (1953). If a plat is not approved he then can appeal the decision to the Board of Adjustment, provided the Board of Adjustment has the jurisdiction and power to consider the case.

Utah Code Ann. §§ 17-27-15, 17-27-16 (1953).

The plaintiff first sought defendant's approval of the plat containing one-half (1/2) acre lots. The defendant Board rejected the proposal. The plaintiff revised the plat and provided that each lot contain in excess of three (3) acres, thus fully complying with the zoning ordinance.

The revision of the subdivision plat was again submitted to defendants, as required by Utah Code Ann. §§ 17-21-8 and 17-21-12. Without the benefit of a formal meeting, discussion or any formal action, the plaintiff was informed that his proposed subdivision was not permitted in a GRF-1 zone. Plaintiff was not advised of any formal action taken either then or at a later time. Rather than holding a hearing and formally granting or rejecting the proposal, the defendant Board has done nothing.

Section 17-27-16 of the Utah Code provides:

Upon appeals the board of adjustment shall have the following powers:

(1) To hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by any administrative official or agency based on or made in the enforcement or the zoning resolution. (emphasis added)

The Utah Supreme Court explained that § 17-27-16 of the Utah Code is designed "to assure speedy appeal to the proper tribunal any grievance that a party may have who is adversely by a decision of an administrative agency." (emphasis added) Lund v. Cottonwood Meadows Co., 15 Utah 2d 305, 308, 392 P. 2d 40, 42 (1964).

The Board of Adjustments only has power to hear appeals based on some affirmative and official action taken by the Board of County Commissioners. By refusing to consider plaintiff's second proposal, the defendant Board did not and has not made "any order, requirement decision or refusal" from which plaintiff can appeal before the board of adjustment. Thus, defendants have effectively cut plaintiff off from his administrative remedy.

The defendant Sevier County Board of Commissioners as a duty under the law to review plaintiff's proposed development and either approve or reject it, thereby preserving his administrative remedies. By their refusal to even consider plaintiff's second proposal they have acted in direct violation of Utah law. Such action is arbitrary and capricious.

POINT III

WHETHER DEFENDANTS ACTED ARBITRARILY AND CAPRICIOUSLY IS A MATERIAL FACT, SHARPLY DISPUTED, THEREBY MAKING IT ERROR FOR THE COURT TO GRANT SUMMARY JUDGMENT'.

The question of whether or not the defendants acted arbitrarily and capriciously is fraught with numerous questions of fact, all of which are sharply disputed by the parties. The granting of the defendant's motion for summary judgment is, therefore, error.

In order to avoid the taint of having their actions declared arbitrary and capricious, the defendants must show facts evidencing that; a fair hearing, or that any hearing at all, was accorded to the plaintiff; that all interested parties were given a reasonable opportunity to be heard; that a quorum of the commission was present, and that a majority agreed upon the determination that was made (see 2 Am Jur 2d, Administrative Law; pp. 650-652). Plaintiff's deposition, at pages 31 through 38, painfully details the failure of the defendants to comply with any of the foregoing requirements.

At page 31 of his deposition the plaintiff testified that "everybody started to walk out of the building after the zoning meeting." Speaking to one of the defendants he asked, "well aren't we going to have a hearing" (Plaintiff's deposition, p. 32). These pages of the deposition show the frustration of the plaintiff in trying to gather around

a conference table one or two of the commission members to gain a listening ear. Facts indicating the presence of a quorum or a majority decision are nonexistent.

The significance of these factual matters is set forth in the case of Bennett v. Price, 446 P.2d 419, 421 (Colo. 1968). In the Bennett case the Colorado Supreme Court stated that:

[i]n determining whether any administrative action is arbitrary, capricious, unreasonable, or an abuse of discretion, it is necessary to look at the functions of the agency involved and the totality of the factual background in which the agency was functioning at the time of the challenged act: (emphasis added).

The necessity for the review of the factual background of alleged arbitrary and capricious actions is further set forth in K & L Distributors, Inc. v. Murkowski, 486 P.2d 351, 357-8 (Alaska 1971). In this case, the court stated that they would review the matter to determine that:

[n]o findings were made except on due notice and opportunity to be heard, that the procedure at the hearing was consistent with a fair trial, and that the hearing was conducted in such a way that there is an opportunity for a court to ascertain whether the applicable rules of law and procedure were observed. The review of factual determinations becomes a review to find whether the administrative decision has passed beyond the lowest limit of the permitted zone of reasonableness to become capricious, arbitrary or confiscatory.

The facts, as viewed in the light most favorable to the plaintiff, clearly show that the defendants acted arbitrarily and capriciously. At the very least, such

facts are sharply disputed.

The Utah Supreme Court has repeatedly ruled that summary judgment is a drastic remedy and should be granted only with reluctance and with great caution. Housely v. Anaconda Co., 19 Utah 2d 124, 427 P.2d 390 (1967). This principle is stated plainly in Frederick May & Co. v. Dunn, 13 Utah 2d 40, 368 P.2d 266 (1962):

To sustain a summary judgment, the pleadings evidence, admissions, and inferences must show that there is not a genuine issue of material fact and that the winner is entitled to a judgment as a matter of law. Such showing must preclude, as a matter of law, all reasonable possibility that the loser could win if given a trial.

Plaintiff respectfully submits that the granting of a summary judgment, in the matter now before the Court, is error.

CONCLUSION

Plaintiff's subdivision plat containing three (3) acre lots with one single family dwelling per lot complies fully with the regulations and requirements under the GRF-1 zone.

Despite the qualification of plaintiff's subdivision plat under the GRF-1 zoning regulations, the lower court sustained defendant's motion for summary judgment without explaining the grounds for its decision. Such was in error. Furthermore, significant disputes about facts, material to plaintiff's claims, preclude the granting of the defendant's motion for summary judgment.

The court should have sustained plaintiff's motion for summary judgment because:

(1) Defendant's refusal to approve plaintiff's subdivision plat, which complies fully with the GRF-1 zoning ordinance, is arbitrary and capricious, and

(2) Defendants' refusal to allow plaintiff access to his administrative remedies is arbitrary and capricious.

Respectfully submitted this 7th day of December, 1979.


EARL S. SPAFFORD

MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing to K. L. McIff attorney for the defendants and respondents, at 151 North Main Street, Richfield, Utah 84701, this 7th day of December, 1979.

