

1980

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 Defendants-Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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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,

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BRIEF OF DEFENDANTS-RESPONDENTS

---

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

---

Earl S. Spafford  
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PAUL D. LEVIE, Trustee of  
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C. NIELSEN, ELMO HERRING  
SCOTT HAWLEY, GRANT OGDEN,  
T.M. ASHMAN, ARNO BASTIAN,  
and N. ANDY WINGET,

Defendants, : Case No. 16652

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BRIEF OF RESPONDENTS-DEFENDANTS

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STATEMENT OF THE NATURE OF THE CASE

Plaintiff sued Sevier County, The Board of County Commissioners and the Sevier County Planning Commission members seeking to compel the defendants to approve plaintiff's subdivision or, in the alternative, judgment and damages for the unlawful taking of plaintiff's property.

DISPOSITION BY LOWER COURT

Both plaintiff and defendants moved for summary judgment. After oral argument the court granted defendants' motion and specifically found that the action of the defendants in denying approval of plaintiff's subdivision was

not arbitrary or capricious and that plaintiff had not exhausted the necessary administrative remedies.

#### RELIEF SOUGHT ON APPEAL

Defendants seek an order affirming the judgment of the trial court.

#### STATEMENT OF FACTS

The defendants, for purposes of this appeal, do not dispute the facts as outlined in the plaintiff's brief inasmuch as a summary judgment must not be based on disputed issues of material fact and the record must indicate that the defendants are entitled to a judgment as a matter of law. Thus, all facts cited by the plaintiff are either correct or immaterial.

#### LEGAL ARGUMENT

##### POINT I

DEFENDANTS' REJECTION OF PLAINTIFF'S  
PROPOSED SUBDIVISION WAS NOT ARBITRARY OR  
CAPRICIOUS AND SHOULD BE SUSTAINED.

Pursuant to statutory mandate the plaintiff's proposed subdivision was reviewed and rejected since such a development was inconsistent with the county development master plan and the intent of the zone within which the land was located.

In Gayland v. Salt Lake County, 11 Utah 2d 307, 358 P. 2d 633 (1961), the court outlined the standards by which

zoning decisions are reviewed:

"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 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."

In Naylor v. Salt Lake City Corp., 17 Utah 2d 300, 410 P. 2d 764 (1966) the Court indicated that it would not interfere with a planning 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."

On or about July 19, 1965, Sevier County adopted a zoning resolution containing nine different zones, one of which is designated as GRF-1, GRAZING, RECREATION AND FORESTRY ZONE. The resolution provides:

"The GRF-1 Grazing, Recreation and Forestry Zone has been established as a district in which the primary use of the land is for grazing, recreational, forestry and wildlife purposes. In general, this zone covers the open portions of the county which is occupied largely by grazing land, mountains, and canyons.

"This zone is characterized by naturalistic land areas interspersed by farms, ranches, recreational camps and outdoor recreational facilities. Natural and man-made lakes are also characteristic of this area."

The resolution states six objectives of establishing the GRF-1 Zone. They are as follows:

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 other urban uses into the zone.
5. To promote sanitation and protect and conserve the water supply and other natural resources.
6. To protect urban development.

After reviewing the plaintiff's proposal, the Planning Commission recommended that the Board of County Commissioners disapprove the proposal and cited the obvious incompatibility of the proposal with the stated objectives.

The Utah State Supreme Court has recently considered a request similar to the plaintiff's request in the instant case and, in Seal v. Mapleton City, 598 P.2d 1346 (1979), the Court said:

"The City, in an expansion movement involving the furnishing of essential public services, has a generous latitude for controlling and administering such expansion and services to advance the public welfare, and a concomitant latitude of discretion to approve plans affecting other citizens and interests. The trial court recognized the public welfare and its equation with the City's responsibility incident to health, cleanliness and overall supervision of building projects that are or are not to become a part of the City and its administrators' duty to manage.



In the instant situation, Sevier County was faced with a proposal for a subdivision which would have, if completed, constituted the largest unincorporated community-type development in the County. The proposed development is located 8 miles from the nearest fire support and 16 miles from the County Sheriff's Office which would be charged with police protection. In addition, the area is bisected by the proposed Interstate 70 highway which would cause numerous problems of access to all lots and require inordinate expenditures of either State or County funds for passage across the freeway.

The above cited cases and the decision of the Sevier County Officials in the instant case are not only justified, but demanded by the very purpose for zoning regulations as outlined by Section 17-27-13, Utah Code Annotated, (1953), which states:

"Such regulations shall be designed and enacted for the purpose of promoting the health, safety, morals, convenience, order, prosperity or welfare of the present and future inhabitants of the state of Utah, including, amongst other things, the lessening of congestion in the streets or roads or reducing the waste of excessive amounts of roads, securing safety from fire and other dangers, providing adequate light and air, classification of land uses and distribution of land development and utilization, protection of the tax base, securing economy in governmental expenditures, fostering the state's agricultural and other industries, and the protection of both urban and nonurban development."

The defendants respectfully submit that the acceptance of plaintiff's proposal by Sevier County would have been, as the District Court in Seal v. Mapleton City, supra, acknowledged,

"capricious, arbitrary and discriminatory against all other citizens of the community . . ."

The decision by Sevier County Officials was well reasoned and should be upheld.

## POINT II

THE PLAINTIFF FAILED TO EXHAUST ADMINISTRATIVE REMEDIES PRIOR TO THE INSTITUTION OF THE PRESENT ACTION.

Sections 57-5-3 and 17-27-21, Utah Code Annotated, 1953, as amended, require approval of all subdivision plats by the board of county commissioners or their authorized representatives prior to becoming effective.

In the present case, the plaintiff's initial proposal was disapproved as being inconsistent with the objectives of the zone in which the land was located. Plaintiff then enlarged the proposed lots and again met with the Sevier County Planning Commission and was told that the objections to the first proposal were felt to necessitate objection to the amended proposal.

Section 17-27-16, Utah Code Annotated, 1953, discusses the powers of boards of adjustment as follows:

"Appeals to the board of adjustment may be taken by any person aggrieved by his inability to obtain a building permit, or by the decision

of any administrative officer or agency based upon or made in the course of the administration or enforcement of the provisions of the zoning resolution. . . ."

"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 an error in any order, requirement, decision or refusal made by administrative official or agency based on or made in the enforcement of the zoning resolution . . . ."

Contrary to the position of the plaintiff in this matter, a decision was rendered by the Sevier County Officials. The plaintiff asserts that a refusal to grant reconsideration of a prior decision although such refusal and the rationale therefor are clearly stated does not come within the parameters of "order, requirement, decision or refusal" as specified in Section 17-27-16, Utah Code Annotated. Such an argument not only contradicts the clear intent of the statute but, if given legal effect, would allow governmental entities to force members of the public to the cost, both in time and money, of litigation as opposed to an administrative appeal merely by refusing to consider propositions within their discretion.

The law in Utah is well settled with regard to exhaustion of administrative remedies and it is clear that the plaintiff has failed to follow the appropriate course of action. Lund v. Cottonwood Meadows Co., 15 Utah 2d 305, 392 P. 2d 40 (1964), Seal v. Mapleton City, 598 P.2d 1346 (1979).

### CONCLUSION

On the basis of the facts and authority set out herein, Defendants-Respondents respectfully submit that the judgment of the trial court should be affirmed.

Respectfully submitted this 15<sup>th</sup> day of January, 1980.



R. Don Brown  
Sevier County Attorney

### MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing to Earl S. Spafford, attorney for the Plaintiff-Appellant, at 431 South Third East, Salt Lake City, Utah 84111, this 15<sup>th</sup> day of January, 1980.

