

1999

# Kirk Gardner v. Perry City and Brad Wilkinson : Reply Brief

Utah Court of Appeals

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## Recommended Citation

Reply Brief, *Gardner v. Perry City*, No. 990080 (Utah Court of Appeals, 1999).  
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CKET NO. 990080

IN THE UTAH COURT OF APPEALS

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KIRK GARDNER,

Plaintiff/Appellant,

Case No. 990080 - CA

vs.

Priority No. 15

PERRY CITY and BRAD WILKINSON,

Defendants/Appellees.

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REPLY BRIEF OF APPELLANT

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THIS IS AN APPEAL FROM A JUDGMENT IN THE  
FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY, STATE OF UTAH  
THE HONORABLE CLINT S. JUDKINS

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**FILED**

AUG 11 1999

COURT OF APPEALS

*Calendared  
Oct 26 @ 10:00*

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
ARGUMENT .....	1
I. THE REQUIREMENTS OF § 10-9-403 ARE PLAIN AND VALID .....	1
1. § 10-9-403(1)(b) Does Not Upset the Statutory Zoning System .....	3
2. Sections 402 and 403 Are Congruent .....	4
II. ORDINANCE 2.3(4) IS VALID AND WAS PLAINLY VIOLATED .....	6
1. Standard of Review .....	6
2. Ordinance 2.3 Is Valid .....	8
3. The Requirements of Ordinance 2.3 Are Clear and Mandatory ....	8
4. Ordinance 2.3 Was Violated .....	10
III. THE SUBDIVISION ISSUE IS PROPERLY BEFORE THIS COURT	12
IV. THE LIS PENDENS SHOULD REMAIN PENDING APPEAL .....	15
V. APPELLANT HAS MET ALL PREREQUISITES FOR RELIEF .....	18
1. Appellant Has Standing to Challenge the City’s Actions .....	19
2. The City’s Actions Are Void Regardless of “Prejudice” .....	20
CONCLUSION .....	21
CERTIFICATE OF SERVICE .....	22

## TABLE OF AUTHORITIES

### CASES CITED:

<i>Bagnall v. Suburbia Land Co.</i> , 579 P.2d 914 (Utah 1978) .....	14, 17
<i>Boulder Mountain Lodge v. Town of Boulder</i> , 373 Utah Adv. Rep. 5 (Utah 1999) .....	2
<i>Board of Ed. v. Salt Lake County</i> , 659 P.2d 1030 (Utah 1983) .....	18
<i>Brendle v. City of Draper</i> , 937 P.2d 1044 (Utah Ct. App. 1997) .....	9
<i>Chambers v. Smithfield</i> , 714 P.2d 1133 (Utah 1986) .....	14
<i>Herr v. Salt Lake County</i> , 525 P.2d 728 (Utah 1974) .....	9, 13
<i>Hidden Meadows Dev. Co. v. Mills</i> , 590 P.2d 1244 (Utah 1979) .....	17
<i>Sandy City v. Salt Lake County</i> , 794 P.2d 482 (Utah App. 1990) .....	7
<i>Springville Citizens v. City of Springville</i> , 365 Utah Adv. Rep. 23 (Utah 1999) .....	9, 18-20
<i>Thurston v. Cache County</i> , 626 P.2d 440 (Utah 1991) .....	9
<i>Timm v. Dewsnup</i> , 921 P.2d 1381 (Utah 1996) .....	15-17
<i>Tygesen v. Magna Water Co.</i> , 375 P.2d 456 (Utah 1962) .....	13

### RULES AND STATUTES CITED:

Rule 24(b)(1), Utah Rules of Appellate Procedure .....	7
Rule 8(c), Utah Rules of Civil Procedure .....	13
Rule 12(h), Utah Rules of Civil Procedure .....	13
Rule 15(c), Utah Rules of Civil Procedure .....	14

Rule 4-501(2)(b), Utah Code of Judicial Administration .....	19
Section 10-9-104, Utah Code .....	8
Section 10-9-204, Utah Code .....	3
Section 10-9-402, Utah Code .....	1, 4-8
Section 10-9-403, Utah Code .....	1-6, 8
Section 10-9-1001, Utah Code .....	19-20

**TREATISES CITED:**

<i>Anderson's American Law of Zoning</i> § 11.24 .....	18
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**REPLY BRIEF OF APPELLANT**

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**ARGUMENT**

**I. THE REQUIREMENTS OF § 10-9-403 ARE PLAIN AND VALID**

In Point I of their respective briefs, Appellees deny that Section 10-9-403(1)(b), Utah Code should be read to require the Perry City Council to refer the January 21, 1998 recommendation back to the Planning Commission prior to the Council's February 28, 1998 zoning amendment action(s). Appellees contend that the statutory system for land-use regulation would be turned on its head if the legislative body must refer a rezone matter back to the Planning Commission. Appellees also claim that the reference in Subsection (2) to the preceding Section 10-9-402 specifically allows the City Council to make whatever changes it

deems appropriate to zoning amendment recommendations from the Planning Commission.

Both of these arguments ignore the primary rule for statutory construction, recently summarized by the Utah Supreme Court in *Boulder Mountain Lodge v. Town of Boulder*, 373 Utah Adv. Rep. 5 (Utah 1999):

When interpreting a statute, this Court's "primary goal is to give effect to the legislature's intent in light of the purpose the statute was meant to achieve." . . . "The best evidence of the true intent and purpose of the Legislature in enacting the Act is the plain language of the Act." . . . Accordingly, we "look first to the plain language of the statute and assume that each of its terms was used advisedly. The language is therefore read literally unless such a reading proves to be unreasonably confused or inoperable. . . ."

*Id.*, at 7 (citations omitted).

The language of Section 10-9-403(1)(b) is plain. Subsection (1)(a) clearly states what the legislative body "may amend."<sup>1</sup> Subsection (1)(b) clearly states conditions under which the legislative body "may not make" such amendments. It unmistakably prohibits Council action on "any amendment . . . unless the amendment was proposed by the planning commission or is first submitted to the planning commission for its approval, disapproval, or recommendations." Appellant has earlier demonstrated that the Council's action did not match the rezone application or the corresponding planning commission recommendation. Under the rule of statutory construction expressed above, the plain language of Section 10-9-403(1)(b) must be adhered to unless it is "unreasonably confused or inoperable."

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<sup>1</sup>These include amendments to "the number, shape, boundaries, or area of any zoning district" per subsection (1)(a)(I), such as the rezone in question.



### **1. § 10-9-403(1)(b) Does Not Upset the Statutory Zoning System**

Appellees worry that the statutory requirement that the Planning Commission first review changes proposed by the Council necessarily hands over to the Planning Commission legislative powers and functions reserved for the legislative body. This imagined usurpation, they say, turns the statutory system for municipal land use upside down. The opposite is true. If Appellees had their way, a Perry City could negate the power and duty of its Planning Commission to review rezone proposals by reshaping other proposals that the Planning Commission reviewed before the Council's permutations. "The planning commission shall: . . . recommend zoning ordinances and maps, and amendments to zoning ordinances and maps, to the legislative body as provided in this chapter." § 10-9-204(2), Utah Code. There is no point to empowering the commission to hold hearings, deliberate, and bring its advisory expertise to bear on the question of a rezone recommendation if the Council can wilfully turn the rezone decision into something that was never before the commission. The state legislature adopted the explicit language of subsection (1)(b) advisedly. It is consistent with the duties imposed by statute on planning commissions.

Appellees warn that following subsection (1)(b) could result in labyrinthine procedures in which the Planning Commission retains effective control over the Council's decisions. But there is nothing in the statute that requires a council to accept recommendations from the planning commission. Even if a planning commission rejects a proposed amendment, the Council can grant the rezone petition. The statutory requirement

that midstream changes go back to the planning commission is an appropriate way of ensuring that planning commissions review all proposed changes to the zoning ordinance, regardless of whether they are in the form of a new petition or a change to an old petition. Because the Council retains the decision-making power, none of the evils perceived by Appellees exist in the system. But even if these claimed troubles were real, the Utah Legislature has clearly outlined the procedure; it should not be changed by judicial action.

## **2. Sections 402 and 403 Are Congruent**

Appellees see irreconcilable conflicts in the way § 10-9-403 operates and the provisions of § 10-9-402. In Subsection 403(2) the following cross-reference appears:

The legislative body shall comply with the procedure specified in Section 10-9-402 in preparing and adopting an amendment to the zoning ordinance or the zoning map.”

Section 402 outlines the procedure for the adoption of a zoning ordinance. Subsection (1) describes the proceedings before the planning commission, which under Section 402 “shall prepare and recommend to the legislative body a proposed zoning ordinance, including the full text of the zoning ordinance and maps, . . .”. Subsection (2) describes the procedure for getting the zoning ordinance before the Council, including provisions for notice and hearing. Subsection (3) provides that after the hearing, the Council has three choices:

- (a) adopt the zoning ordinance as proposed;
- (b) amend the zoning ordinance and adopt or reject the zoning ordinance as amended; or
- (c) reject the ordinance.

Section 10-9-402(3), Utah Code.

By cross-referencing Section 403(2) to the “*procedure* specified in Section 10-9-402” (emphasis added), the Utah Legislature must have intended that notice and hearing are the same for amendments to an *existing* zoning ordinance as they are for the *original* adoption of the entire zoning ordinance. The text of Section 402 obviously applies to the initial “[p]reparation and adoption” of an entire zoning ordinance; the text of Section 403 obviously applies to “Amendments and rezonings,” as the respective titles to those sections also indicate.

Appellees argue the “procedure specified in Section 10-9-402” includes the Council’s option under 10-9-402(3)(b) to amend and immediately adopt a recommendation. This argument fails for several reasons. Such a construction pits Subsection 402(3)(b) in irreconcilable conflict with Subsection 403(1)(b): one subsection gives the Council the power to make immediate changes, while the other prohibits the Council from making changes without sending the changes back to the Planning Commission. Appellees’ construction makes Sections 402 and 403 effectively identical. The strain Appellees’ approach places on the texts of the two Sections is manifest in Appellees’ odd quotation of Section 403(b), where in three places the word “ordinance” is replaced with “[amendment]”. *See Perry City Brief, Page 11.*<sup>2</sup>

There is no real conflict in the two provisions. Under Section 402, the planning commission makes an initial draft of the zoning ordinance. After notice and hearing, the

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<sup>2</sup>Regarding statutory interpretation, Brad Wilkinson adopted Perry City’s arguments by reference. *See Wilkinson Brief, Page 6, note 1.*

Council can accept, reject, or change the zoning ordinance without first having to send it back to the planning commission. This is a sensible, practical approach to the establishment of the zoning regime because the number of possible versions of a comprehensive zoning ordinance is nearly limitless, with each variable needing to be considered in relation to numerous other unfixed variables. The Utah Legislature, whether wisely or unwisely, chose to make the comprehensive zoning ordinance a document initiated once in the Planning Commission, and decided on once in the Council. Section 403 is different. Now that the zoning regime is in place, amendments to it are, by definition, not comprehensive. Each proposed change or rezone can be and must be viewed individually. With far fewer variables in play, the Planning Commission and Council can each pay closer attention to the details of the proposed change, and can give better consideration to the effect of a change on the other now-fixed provisions of the zoning ordinance. It does not matter what the policy was behind the differences in Sections 402 and 403 or whether there was a policy reason for the two provisions, those differences exist because the legislature intended them to exist. There is nothing inconsistent in the two provisions since they apply in two different circumstances.

## **II. ORDINANCE 2.3(4) IS VALID AND WAS PLAINLY VIOLATED**

### **1. Standard of Review**

Appellees responded with several arguments to the Appellant's point that Perry Ordinance 2.3 was violated. Much of Appellees' argument was devoted to the question

whether the alterations made by the Council on February 26, 1998 were sufficient to constitute a “change” or whether a “substantive” change was needed to trip the requirement of Planning Commission review. Appellees did not respond directly to the more basic issue of what standard would be applied to determine if the recommendation was “changed.”<sup>3</sup> Mentioned throughout Brad Wilkinson’s Brief is the notion that if there is any reasonable basis to justify the City’s actions, they should be upheld, citing *Sandy City v. Salt Lake County*, 794 P.2d 482 (Utah App. 1990). This is not the standard applicable to this case. As pointed out in the pleadings, in the Brief of Appellant (See P. 13), and as acknowledged by Brad Wilkinson (See Wilkinson Brief P. 9), in this case the City’s actions are challenged on the basis of *illegality*. There is still a presumption of validity, but the presumption is overcome upon a showing that the City failed to “strictly comply” with its own ordinances. Since the matter was decided against Appellant on summary judgment, the facts must be construed in a light most favorable to Appellant on the question, among others, whether the Perry City Council “changed” the Planning Commission recommendation.

As they did with the enabling statute, Appellees urge a strained and unreasonable construction of Perry City Ordinance 2.3, based on theories that Section 10-9-402 invalidates the ordinance, and that Perry City’s interpretation should control.

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<sup>3</sup>On the issue of whether the ordinance was violated, Appellant proposed a “correctness” standard of appellate review. See Gardner Brief, Pages 1-2, Issue 1. Neither of the Appellees challenged or restated the issue, and neither suggested a different standard of review in the appropriate section of their respective Briefs, indicating they were “not dissatisfied” with Appellant’s statements. See Rule 24(b)(1), Utah Rules of Appellate Procedure.

## **2. Ordinance 2.3 Is Valid**

The issue of the application of Section 10-9-402 has been discussed above. It is not in conflict with either Section 403 or the corresponding Perry City Ordinance 2.3. By statute, a city may elect to have zoning ordinances more strict and imposing higher standards than those required by the enabling statute. Section 10-9-104(1), Utah Code. If Ordinance 2.3 is stricter than either Section 402 or 403, such higher standard is still within Perry City's power to enact. Brad Wilkinson's expression of this argument is less subtle than that of the City; Brad Wilkinson says Ordinance 2.3 is invalid. Wilkinson Brief, P. 16. These arguments are late on two counts. Perry City passed the ordinance in the first place. And neither of the Appellees raised the question of the validity of the ordinance with the trial court. They have not preserved the issue for this appeal.

## **3. The Requirements of Ordinance 2.3 Are Clear and Mandatory**

Appellees try to bootstrap the City's position by referring to the challenged action as a special interpretation by the legislative body of its procedural ordinance. The Court should have no regard for the City's interpretation because it directly contradicts the plain language of the ordinance. It is true that the Council decided their "adjustments" and actions did not involve "any change" under the ordinance. It is true that the Council decided, at least implicitly, that the ordinance phrases "shall refer such change back" and "shall start over at

Step 1" were not mandatory in nature.<sup>4</sup> Such an interpretation is untenable. *Herr v. Salt Lake County*, 525 P.2d 728 (Utah 1974). In the face of the clear directives of the ordinance, the City's self-serving view that it has followed the ordinance cannot be afforded any weight. It is no surprise that the City thinks it acted properly. If such expressions were binding, every attempt at judicial review would be fruitless.

Appellees claim that only "substantive" changes are to be referred back to the Planning Commission. These arguments fail because they presuppose the existence of an ambiguity in this unmistakably clear ordinance. Yet they reveal an underlying hypocrisy in the City's position. Like other municipalities chafing under their own ordinances, Perry City would like the power to transform procedural mandates into situational requirements. This Court should reject such attempts for the reasons stated in *Springville Citizens v. City of Springville*, 365 Utah Adv. Rep. 23, 26 (Utah 1999).

Municipal zoning authorities are bound by the terms and standards of applicable zoning ordinances and are not at liberty to make land use decisions in derogation thereof. *See Thurston v. Cache County*, 626 P.2d 440, 444-45 (Utah 1981). The irony of the City's position on appeal is readily apparent: the City contends that it need only "substantially comply" with its ordinances it has legislatively deemed to be mandatory. Stated simply, the City cannot "change the rules halfway through the game." *Brendle v. City of Draper*, 937 P.2d 1044, 1048 (Utah Ct. App. 1997). The City was not entitled to disregard its mandatory ordinances.

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<sup>4</sup>In an effort to distinguish *Springville Citizens v. City of Springville*, 365 Utah Adv. Rep. 23 (Utah 1999), Appellees argue that because Perry City has not specifically defined "must" and "shall" in its ordinances as mandatory terms, "must" and "shall" as used in Perry City ordinances are not mandatory. Such terms are plain and mandatory in nature, regardless of the existence of a specific ordinance defining them as such. When Perry City expects compliance with its ordinances by citizens, it considers the "shall" and "must" words to be mandatory.

Perry City Ordinance 2.3 is valid and clear. Compliance with its provision is not optional.

#### **4. Ordinance 2.3 Was Violated**

Brad Wilkinson leads off his argument with the claim that Appellant has not preserved error<sup>5</sup> with regard to one of the changes made by the Council to the Planning Commission recommendation. He claims that there is no support in the record for the fact that the property of unwilling owners was dragged into the rezone during the February 26, 1998 Council hearing. This attack on Appellant's Brief is factually unfounded. There is ample support in the record regarding this change. Brad Wilkinson refers the Court to page 14 of Appellant's Brief for the supposedly "unsupported" fact allegation. The facts were first mentioned in Appellant's Statement of Facts, numbers 19 and 20 at page 9. These facts included quotes and paraphrases from the record, the source of which was Perry City's minutes of the Council meeting of February 26, 1998, attached to an affidavit and made a part of Appellant's motion for summary judgment. Far from being obscure, the minutes clearly reflect the accuracy of Appellant's statements of fact. Following are unabridged excerpts of the exchange which Appellant pointed to as an example among many of the changes wrought by the Council:

Following a Council discussion on the remaining property requested for rezone, Judy Bylsma reminded the council that when rezoning no islands can be

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<sup>5</sup>Under the heading "Plaintiff Presents a Spurious Fact Issue which Was Non-Existent at the Trial Court Level." Wilkinson Brief Pp. 6-8.



left within the zone. Councilman Steven Pettingill pointed out there is also a peninsula left on the north end of Sunridge Subdivision.

MOTION: Councilman Bruce Payne made a motion to approve zone change from present zoning to R1 for all remaining zone change petitioners excluding the Wilkinson property, the Sunridge Subdivision, Robert Jenson and Jerry Capener properties. To include all islands and peninsulas not attached to petition. Seconded by Councilman Carol Billings. Councilman Bruce Payne, Carol Billings and Desmond Thomas voted in favor. Councilman Steven Pettingill voted against the motion.

Dave Curtis strongly disapproved of rezoning his property without his permission or proper notice. Mayor Allen warned that major changes were being made without proper procedure being followed. These changes will have a major impact on people and all issues have not been addressed.

R. 85-86. The particulars of this change were discussed at length during the hearing on summary judgment. Most of the above passage was read out loud to the trial court. Tr. 13-15. Judge Judkins inquired specifically about the facts and claimed significance of the change, and counsel for Brad Wilkinson and Appellant both expressed their views. Tr. 23-28. The facts on which Appellant claimed that Perry City added unwilling landowners to the rezone were direct, clear, well documented, and properly included in the record in minutes prepared by the City. It was not “Plaintiff’s speculations” as Brad Wilkinson asserts. Wilkinson Brief, P. 7.

Brad Wilkinson attempts to minimize the import of the “added owner” change by mischaracterizing statements made by Appellant’s counsel during argument on the motions for summary judgment. The claim is that Appellant “conceded and stipulated” the issue away. Wilkinson Brief, Pp. 7-8. The issue of the addition of non-petition property as an impermissible change is still before this Court. After the detailed facts about the added

property were cited at the hearing, the trial court and counsel for Brad Wilkinson inquired about whether the added property was included in the scope of the notice. Counsel for Appellant conceded that the notice was worded broadly enough to have encompassed the “islands” and “peninsulas” within its outer boundaries. Appellant maintained, however, that the added property was not included in the petition for rezone. Since the Planning Commission adopted the petition as its recommendation to the Council, the property added by the Council was not in the recommendation. The Council therefore changed the recommendation as it concerned the added property.. Under the ordinance a change in the recommendation is sufficient to trigger a return trip to the Planning Commission regardless of the absence of discrepancies between the notice and the Council’s action. This sequence was explained several times to the trial court. The argument that the Council changed the recommendation of the Planning Commission has been reiterated in the Brief of Appellant at pages 11, 13-15, and 20. Appellant preserved this issue for appeal. Appellant has never waived this issue. Appellant has never conceded facts which would lead to a different result.

The tacked-on property is one of several significant changes made by the Council contrary to Ordinance 2.3.

### **III. THE SUBDIVISION ISSUE IS PROPERLY BEFORE THIS COURT**

Perry City and Appellant both argued that the validity of the Subdivision depends on the validity of the preceding rezone. For the first time in any of these proceedings, Brad Wilkinson argues in his brief that the subdivision question is “time-barred”. Brad Wilkinson

admits that the issue of timeliness was not mentioned in the proceedings below. He claims that this Court should nonetheless consider the argument because the issue is “jurisdictional.”

There is no question that this Court has jurisdiction to hear the appeal, including Appellant’s claim that the subdivision fails because the rezone fails. All parties, including Brad Wilkinson, admitted in the “Statement of Jurisdiction” section of their respective briefs that this Court has jurisdiction. The question whether an action is timely filed in the District Court is one of limitations. *Herr v. Salt Lake County*, 525 P.2d 728 (Utah 1974) dealt with the administrative appeal from one county entity to another, and interpreted the “shall” provisions tied to time as mandatory. Brad Wilkinson did not raise the defense of limitations below, and so should be precluded from arguing the matter on appeal. *Tygesen v. Magna Water Co.*, 375 P.2d 456 (Utah 1962); *see also* Rules 8(c) and 12(h), Utah Rules of Civil Procedure.

The amended complaint need not have been filed within thirty days after the City’s decision on the subdivision. The original complaint was already on file at the time of the decision on the subdivision. The original complaint sought the following relief: “For a preliminary and permanent injunction prohibiting the [City] from implementing or enforcing the Council’s February 26, 1998 decisions.” R. 22. Approval of the subdivision is one of the actions Appellant sought to enjoin. The amendment of the complaint specified one of the actions taken pursuant to the rezone. For limitations purposes, the amendment relates back to

the original complaint.<sup>6</sup> Rule 15(c), Utah Rules of Civil Procedure.

Brad Wilkinson asserts that each action of the City must be separately (and timely) appealed to the district court. But Appellant's claim to the subdivision's invalidity stems directly from the invalidity of the rezone. All other actions taken pursuant to the rezone, including the recording of the plat, the issuance of building permits on restricted lots, etc. fall with the rezone. The inclusion of Brad Wilkinson as a party makes it impossible for him to claim he was unaware of the problems associated with the rezone. What Brad Wilkinson does in reliance on the rezone, including the development of the subdivision, he clearly does at the risk that his development will be undone by later judicial action. Much as he dislikes it, Brad Wilkinson's characterization of Appellant's argument on this point is an accurate statement of the law:<sup>7</sup>

In essence, Plaintiff argues that the City must stop transacting business regarding the rezoned property, or that all subsequent City decisions will be subject to invalidation, pending the outcome of Plaintiff's suit.

Wilkinson Brief, P. 17. The City can elect to continue issuing permits and approving lots

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<sup>6</sup>Arguably, the causes of action against Brad Wilkinson as a defendant do not relate back to the filing of the complaint because Brad Wilkinson was a new party who probably had no identity of interest with Perry City. But the timeliness issue does not hinge on the claim against Brad Wilkinson.

<sup>7</sup>Brad Wilkinson asserts that Appellant has not cited legal authority to this effect. At Page 18 of Appellant's Brief the case of *Chambers v. Smithfield*, 714 P.2d 1133 (Utah 1986) was cited for the proposition that "Appellees are precluded from claiming financial or other harm will result from the undoing of the Wilkinson Subdivision." In addition, Appellant quoted from *Bagnall v. Suburbia Land Co.*, 579 P.2d 914 (Utah 1978) and cited several other cases to show that all persons with notice of the litigation are subject to its ultimate outcome. See Appellant's Brief Pp. 18-19.

pending litigation, but all that takes place will be subject to judicial review. Those who unknowingly rely on the City's subsequent actions will be protected from harm. Brad Wilkinson does not qualify as an innocently unaware party. Neither does anyone who, with actual or constructive knowledge of this litigation, purchased or improved any rezoned property relying on the validity of the rezone.

Once the challenge was timely made to the rezone, it came within the power of the district court to declare the rezone invalid. The City cannot deprive the district court of its prerogative by taking later actions in furtherance of the rezone.

#### **IV. THE LIS PENDENS SHOULD REMAIN PENDING APPEAL**

Appellees both defended the district court's order "releasing" the lis pendens. Brad Wilkinson argues that it was incumbent on Appellant to move to stay the court's release order and post a supersedeas bond. Perry City argues that the lis pendens is automatically removed upon final judgment, and if notice of the appeal is necessary, a new lis pendens should be filed. In a sense, Appellees are making these arguments not for themselves but for non-parties who may later appear and claim they are not subject to the litigation because they acquired property in good faith during a time when the lis pendens was not in effect. The case cited by all parties on this point, *Timm v. Dewsnup*, 921 P.2d 1381 (Utah 1996), was at a stage similar to the instant one when it was decided on appeal. It was not known whether there were any purchasers who had acquired interests during a gap in the lis pendens. The matter was remanded to the trial court to determine if such purchasers existed and what their

level of knowledge was concerning the litigation. In the instant case, the possibility of a good faith purchaser is slim.<sup>8</sup> Nonetheless, the Court should overturn the trial court's order and clarify the rules regarding lis pendens and appeals so that trial courts, litigants and title insurance companies can proceed with minimal confusion.

As mentioned before, a lis pendens is a mechanism by which third parties are made aware of the existence of litigation and of the potential effect on real property of the litigation's outcome. The presupposition of the *Timm* opinion is that if a trial court "releases" a lis pendens, third party purchases are not thereafter on notice of the pendency of the litigation. A search of real property records would reveal the existence of a lis pendens and a "release".<sup>9</sup> At this point a reasonably prudent purchaser would know that although litigation was pending, the trial judge determined that it could have no effect on the property. The problem is that the litigation isn't necessarily over, and the trial judge's determinations are subject to reversal on appeal. A reasonably diligent purchaser would still be on inquiry notice of that potential regardless of the trial judge's order. Until the time for appeal has passed, or until a final non-appealable ruling is made by an appellate court, the case is still pending, and the original lis pendens is effective to supply notice.

The Utah Supreme Court has already determined that a lis pendens filed during lower

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<sup>8</sup>Counsel for Appellant addressed the problems associated with lis pendens and appeals in a letter to the Court dated January 7, 1999. R. 191-92. In that letter, Appellant's counsel mentioned the possible filing of another lis pendens during appeal "[t]o avoid confusion and preserve [Appellant's] rights to an effective appeal." R. 191.

<sup>9</sup>Perry City argues that entry of a final judgment has the same effect as a specific order releasing the lis pendens.

court proceedings is effective to provide notice of a later appeal from those proceedings. *Hidden Meadows Dev. Co. v. Mills*, 590 P.2d 1244, 1248 (Utah 1979). The *Timm* case dealt with an interlocutory order “releasing” the lis pendens. The Utah Supreme Court found error in the trial judge’s release order, and “reinstated” the lis pendens on the unexpressed assumption that during the interim third parties were not put on notice of the suit by the earlier lis pendens. The case at bar presents a hybrid of the *Hidden Meadows* and *Timm* cases. This litigation ended in the trial court and Appellant filed this appeal. Following *Hidden Meadows*, the old lis pendens would provide notice to third parties of the pendency of the appeal. However, in the same order that terminated the litigation below, Judge Judkins “dissolved” the lis pendens. Under the *Timm* approach, the effectiveness of the “released” lis pendens would be suspended until “reinstated” by this Court. These two approaches should be reconciled bearing in mind the purpose of lis pendens.

The doctrine of lis pendens preserves the status quo by keeping the subject of the lawsuit within the power and control of the court until a judgment or decree [*or decision not subject to further appeal*] shall be entered. The recording of a lis pendens serves as a warning to all persons that any rights or interests they may acquire in the interim are subject to the judgment or decree [*or decision on appeal*].

*Bagnall v. Suburbia Land Co.*, 579 P.2d 914, 916 (Utah 1978) (citations omitted)(italics added as paraphrase).

Appellant submits that the approach which best serves the purpose of lis pendens and promotes clarity and certainty in real estate transactions is to treat interim orders “releasing” lis pendens as ineffectual to remove constructive notice of the pending litigation. A trial court should not prohibit a litigant from providing actual notice to third parties of the

pendency of litigation. The trial court should be no more capable of interfering with constructive notice.

## V. APPELLANT HAS MET ALL PREREQUISITES FOR RELIEF

In Point V of Brad Wilkinson’s brief, he relies heavily on *Springville Citizens v. City of Springville*, 365 Utah Adv. Rep. 23 for his assertion that Appellant is not entitled to relief because, supposedly, no “prejudice” has been shown.<sup>10</sup> The passage of *Springville Citizens* highlighted by this contention reads as follows:

The City’s failure to pass the legality requirement of section 10-9-1001(3)(b), however, does not automatically entitle plaintiffs to the relief they request. Rather, plaintiffs must establish that they were prejudiced by the City’s noncompliance with its ordinances or, in other words, how, if at all, the City’s decision would have been different and what relief, if any, they are entitled to as a result. *See, e.g., Board of Ed. v. Salt Lake County*, 659 P.2d 1030, 1035 (Utah 1983) (noting that recovery for failure of county to follow mandatory statutory requirements required showing of prejudice from such failure); *see also Anderson’s American Law of Zoning* § 11.24 (explaining that party challenging approval of P.U.D. must show “actual injury”).

*Id.*, 365 Utah Adv. Rep. at 26.

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<sup>10</sup>Brad Wilkinson goes on to claim that it was shown that Appellant did not suffer prejudice. The facts cited for this proposition, dealing with a second attempted subdivision approval and second lawsuit are not appropriately before the Court. Brad Wilkinson argued to the trial court that a second round of approval made the present litigation “moot.” Tr. 20, 28. The trial court properly determined that that matter was not before the court and would not be considered. Tr. 33.



## **1. Appellant Has Standing to Challenge the City's Actions**

The Utah Legislature has established the criterion for standing to challenge municipal zoning decisions in the district court. “Any person adversely affected by any decision . . . may file a petition for review of the decision in the district court . . .” Section 10-9-1001(2), Utah Code. In connection with the motion for summary judgment, Appellant testified that he was adversely affected by the City’s decisions, and provided factual details as to his standing. Affidavit of Kirk Gardner, ¶¶ 6-8, R. 104. Appellant included the facts regarding standing in the Statement of Facts in the accompanying memorandum. Memorandum Supporting Motion for Summary Judgment, Statements of Fact 1-4, R. 49-50. Appellees did not contest any of the facts claimed by Appellant, and so they were deemed admitted under Rule 4-501(2)(B), C.J.A. The facts regarding Appellant’s status as a person “adversely affected” by the City’s decisions, together with all other facts stated in the Memorandum, have been referred to all along as stipulated. *See* discussion at Page 6 of the Brief of Appellant.

Appellant has clearly qualified as a person who, according to the legislature, can challenge the City’s actions. The statutory standard is “adversely affected.” If the showing of “prejudice” mentioned in *Springville Citizens* is a different standard, it is judicially imposed on those who seek relief other than or additional to that afforded by the appeals provisions of Section 10-9-1001.<sup>11</sup>

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<sup>11</sup>The *Springville Citizens* decision qualifies the application of the “prejudice” by referring to “the relief they [plaintiffs] request.” The case cited in the opinion as supporting a “prejudice” requirement obviously deals with relief other than review of a decision under Section 10-9-1001, namely recovery of damages.

## 2. The City's Actions Are Void Regardless of "Prejudice"

An appeal to the district court from a land use decision is strictly limited in scope by the statute authorizing the appeal. Appellee's have made frequent reference to the presumption of validity mandated in Section 10-9-1001(3)(a). Subsection (b) provides for additional limitations, which are very pertinent to the "prejudice" issue raised by Brad Wilkinson.

(3) The courts shall:

...  
(b) determine only whether or not the decision is arbitrary, capricious, or illegal.

The statute is clearly mandatory ("**shall**") and restrictive ("**only**"). The moment a district court goes beyond the question of "adversely affected" and adds a requirement of "prejudice" before declaring a City's action invalid, it steps outside the bounds of its statutory review authority.<sup>12</sup> There are several policy reasons why the "prejudice" showing should not be superimposed on the appeals process. City officials could feel they have carte blanche to err in procedure if each time a challenge is brought, they can uniformly defend by claiming the same decision would have been made regardless of procedural defects. No matter how the policy debate over "prejudice" would shape up, the decision to include or exclude such a requirement rests exclusively with the legislature. So far, no "prejudice" requirement exists.

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<sup>12</sup>Admittedly, the language of the *Springville Citizens* opinion could be read to permit judicial tampering with the statutory elements necessary to overturn a zoning decision. Because the potential conflict between a "showing of prejudice" requirement and Section 10-9-1001(3)(b) is never discussed in the opinion, it is doubtful the issue was discernibly briefed. See *Springville Citizens*, 365 Utah Adv. Rep. at 27, note 2.

## **CONCLUSION**

The requirements imposed by statute and ordinance in the event of a desired change to a zoning amendment are explicit. Those requirements do not conflict with other statutes or ordinances, but rather are consistent with the purposes and overall system for municipal land use regulation. Perry City's Council violated the requirements by substantially changing the Planning Commission's recommendation.

The objection to the subdivision approval was subordinate to and inherent in Appellant's challenge to the rezone, and was therefore not time barred. In any case, Brad Wilkinson has waived the limitations defense by not raising it in the trial court.

This Court should declare the trial court's attempt to dissolve the lis pendens to be null. The lis pendens continues to impart constructive notice of the litigation as long as appeal rights have not expired, notwithstanding the trial court's order.

Finally, the uncontested facts show that Appellant has standing to bring this action, and the statutory requisites for a favorable outcome have been met notwithstanding any "prejudice" argument.

**DATED** August 11, 1999.

**BARRETT & DAINES**

A handwritten signature in black ink, appearing to read "C. L. Daines", is written over a horizontal line.

Christopher L. Daines  
Attorney for Appellant

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of August, 1999, I caused to be mailed, postage prepaid, two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to each of the following:

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