

1999

Kirk Gardner v. Perry City and brad Wilkinson : Brief of Appellee

Utah Court of Appeals

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990080

IN THE UTAH COURT OF APPEALS

KIRK GARDNER,

Plaintiff/Appellant,

vs.

PERRY CITY and BRAD WILKINSON,

Defendants/Appellees

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Case No. 990080-CA

Priority No. 15

BRIEF OF APPELLEE BRAD WILKINSON

THIS IS AN APPEAL FROM A JUDGMENT IN THE
FIRST JUDICIAL DISTRICT IN AND FOR BOX ELDER COUNTY,
STATE OF UTAH
THE HONORABLE CLINT S. JUDKINS

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IN THE UTAH COURT OF APPEALS

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vs.	*	Case No. 990080-CA
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PERRY CITY and BRAD WILKINSON,	*	Priority No. 15
	*	
Defendants/Appellees	*	

STATEMENT OF JURISDICTION

This court has jurisdiction of this appeal pursuant to Utah Code Ann. §78-2-2(3)(j) (1953 as amended) and Utah Code Ann. §78-2a-3(2)(j) (1953 as amended).

STATEMENT OF DETERMINATIVE LAWS

Utah Code Ann. §10-9-401 (1953 as amended):

The legislative body may enact a zoning ordinance establishing regulations for land use and development that furthers the intent of this chapter.

Utah Code Ann. §10-9-402 (1953 as amended):

(1) The planning commission shall prepare and recommend to the legislative body a proposed zoning ordinance, including both the full text of the zoning ordinance and maps, that represents the commission's recommendations for zoning all or any part of the area within the municipality.

(2) (a) The legislative body shall hold a public hearing on the proposed zoning ordinance recommended to it by the planning commission.

(b) The legislative body shall provide reasonable notice of the public hearing at least 14 days before the date of the hearing. If a municipality mails notice of a proposed zoning change to property owners within that municipality within a specified distance of the property on which the zoning change is being proposed, it

shall also mail equivalent notice to property owners of an adjacent municipality within the same distance of the property on which the zoning change is being proposed.

- (3) After the public hearing, the legislative body may:
 - (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.

Utah Code Ann. §10-9-403 (1953 as amended):

- (1) (a) The legislative body may amend:
 - (i) the number, shape, boundaries, or area of any zoning district.
 - (ii) any regulation of or within the zoning district; or
 - (iii) any other provision of the zoning ordinance.
- (b) The legislative body may not make any amendment authorized by this subsection unless the amendment was proposed by the planning commission or is first submitted to the planning commission for its approval, disapproval or recommendations.
- (2) 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.

Utah Code Ann. §10-9-1001 (1953 as amended):

- (1) No person may challenge in district court a municipality's land use decisions made under this chapter or under the regulation made under authority of this chapter until that person has exhausted his administrative remedies.
- (2) Any person adversely affected by any decision made in the exercise of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local decision is rendered.
- (3) The courts shall:
 - (a) presume that land use decisions and regulations are valid; and
 - (b) determine only whether or not the decision is arbitrary, capricious, or illegal.

Perry City Database 2.3, Procedure for Zone Change Amendment:

- 1. The Planning Commission shall review the Zone Change Amendment Application and submit its recommendations in writing concerning the proposed amendment to the City Council within thirty (45) [sic] days from receipt of the amendment application. If the Planning Commission fails to make a recommendation

at the end of forty-five (45) days, it shall be presumed that the proposed amendment is recommended for approval by the Planning Commission and the City Council shall then take action.

The Planning Commission shall recommend adoption of a proposed zone change amendment where the following findings are made:

- a. The proposed amendment is in accord with the goals of the Master Plan of Perry City.
- b. Changed or changing conditions make the proposed amendment reasonably necessary to carry out the purposes of this ordinance.
- c. The proposed amendment does not represent spot zoning.

2. After receipt of the written recommendations of the Planning Commission for rezoning or annexation, the City Council shall give notice of a public hearing, to be advertised for at least 15 days to consider such amendment as provided by law for zoning amendments. Written notification of this public hearing to consider rezoning or annexation amendments shall be mailed by certified mail to all property owners within three hundred (300) feet of the property proposed for rezoning or annexation.

3. After the required public hearing has been held on the proposed amendment, the City Council may adopt or reject such amendment or annexation.

4. If the City Council proposes to make any change in the amendment as submitted to it by the Planning Commission, or as advertised, it shall refer such change back to the Planning Commission and the procedure shall start over at Step 1.

5. Where an application for zoning amendment has been denied, any resubmitted application shall be processed in accordance with the procedure outlined above.

SUMMARY OF THE ARGUMENT

Plaintiff alleges that the Perry City Council violated state statute and local ordinance by voting to approve rezones for various properties incrementally, after separating the properties out from a 245 acre block that had been approved for rezone

by the Perry Planning Commission. Wilkinson argues that the relevant state statute, Utah Code Ann. §10-9-402, not only allows the action taken by the City Council, but grants the City power to take much broader actions than the action taken in this matter.

Furthermore, the City Council's action in deliberating on rezone approvals for separate properties incrementally did not constitute a "change" in the Planning Commission's rezone recommendation, and thus did not require the City Council to obtain Planning Commission approval of the City Council's actions, as might otherwise have been required by the ordinance. The City Council debated the proper interpretation of the ordinance prior to taking its action, and determined that its action fairly fell within the requirements of the ordinance. The City's interpretation of its ordinance is reasonable, justified, and is the best evidence of the legislative intent of the ordinance. Thus, the City's ordinance interpretation should be upheld. However, the local ordinance itself must be invalidated to the extent that it limits and prohibits the City Council from exercising powers which are specifically granted to it in the zoning ordinance enabling statute, Utah Code Ann. §10-9-402.

The court lacks jurisdiction of Plaintiff's claim that the Wilkinson Subdivision approval is illegal, because Plaintiff has failed to file its appeal petition in District Court within 30 days of Perry City subdivision decision, pursuant to Utah Code Ann. §10-9-1001.

Plaintiff's request for reinstatement of the Lis Pendens should be denied.

Furthermore, because Plaintiff has failed to file a motion for stay, any reinstatement of the Lis Pendens would only apply to unsold subdivision lots. Thus, overturning the City's land use decision would lead to an undesirable checkerboard result, with some subdivision lots being subject to the outcome of litigation, while others would not be. Such a result would violate proper land use policies.

Finally, even if the court rules that the City's actions were illegal, there is sufficient record evidence for the court to uphold the City's decision for lack of prejudice to Plaintiff, given that the Planning Commission has unanimously expressed its approval of the Wilkinson rezone.

ARGUMENT

I. PERRY'S FEBRUARY 26, 1998 REZONING DECISION DID NOT VIOLATE THE STATE ZONING ENABLING STATUTE.

The statutory requirements for planning commission participation in rezone decisions pursuant to Utah Code Ann. §10-9-402 and §10-9-403, are much less restrictive than the corresponding Perry City ordinance. Section 10-9-403(2) requires that the legislative body "shall" comply with §10-9-402 procedures when adopting an amendment to the zoning ordinance or zoning map. The procedure outlined in §10-9-402(3) provides that, after planning commission review and public hearing, the legislative body may: (a) adopt the rezone, (b) **amend the rezone, and then adopt or reject the amended rezone**, (c) or reject the rezone.

Ironically, of the three procedural paths provided to the City Council by §10-9-402(3), remand to the Planning Commission is not even a option. The Planning Commission is an advisory body to the legislative body. Utah Code Ann. §10-9-204. It's role in rezoning is to propose rezoning amendments or to approve, disapprove or make recommendations on rezone proposals, §10-9-403(1)(b), and then send its advisory recommendations to the legislative body. §10-9-402(1). Armed with these recommendations, the legislative body holds a public hearing, §10-9-402(2), and makes a final determination of the language and provisions of the rezone ordinance, and whether to accept or reject the rezone. §10-9-402(3). Perry City's decision to deliberate on the recommended zone changes incrementally or separately, without obtaining permission from the advisory body, falls well within the legislative body's broad rezoning powers granted by §10-9-402 and §10-9-403.¹

II. THE ACTIONS OF THE PERRY CITY COUNCIL DID NOT VIOLATE THE CITY'S ZONING ORDINANCE.

A. Plaintiff Presents a Spurious Fact Issue which Was Non-Existent At the Trial Court Level.

At the bottom of page 14 of his Appellate Brief, Plaintiff makes a fact allegation which is unsupported by the record: that the City Council rezoned some property which was never included in the Planning Commission recommendation.

¹ Pursuant to Rule 24(h), Utah Rules of Appellate Procedure, Wilkinson adopts by reference the arguments set forth Perry City's Appellate Brief, p. 5-12, as additional support for the statutory compliance arguments set forth herein.

This allegation was first raised by Plaintiff at the Summary Judgment hearing, and was the basis of several probing questions from the court and Wilkinson's counsel as to whether there any evidence to support such an allegation. See Hearing Transcript, R. 205, at 23-28. After much discussion regarding Plaintiff's speculations on the matter, and assurances from the Perry City Clerk attending the hearing that Plaintiff's speculations were unfounded, Plaintiff conceded that all Property rezoned was part of the 245 acres for which public notice was given after the Planning Commission made its recommendation. R. 205, Page 28, Lines 6-7.

This concession is important because Plaintiff's own statement of fact alleges that "[o]n January 21, 1998, The Perry City Planning Commission recommended to the Perry City Council a rezoning of 245 acres to an "R1" zone." R. 50, Fact Statement No. 5. The Planning Commission minutes also refer to the proposed zone change as consisting of 245 acres. See R. 71, last paragraph. If Plaintiff alleges that the Planning Commission approved a zone change of 245 acres, and concedes that public notice was given regarding a proposed zone change for 245 acres and that all rezoned property was part of the 245 acres notice area, there are simply no record facts upon which to allege that the City Council rezoned property which was not part of the Planning Commission's Recommendation.²

² Plaintiff's speculation is based on a obscure passage from the City Council Hearing, in which the City approved of rezoning particular properties, "[t]o include all islands and peninsulas not attached to the petition." R. 150, Last Paragraph. This is appropriate, since the content of the original petition does not limit the Planning Commission or the

Plaintiff has failed to provide any admissible evidence tending to prove that property was rezoned which was not included in the Planning Commission Recommendation. Furthermore, the only time Plaintiff ever raised speculations about this issue, he conceded facts which lead to an opposite conclusion. It was based on Plaintiff's stated facts and concessions of facts at the hearing, that the court concluded at the hearing that "[t]he facts were stipulated to so this matter is proper for a ruling on a motion for summary judgment." Hearing Transcript, R. 205, Page 36, Lines 23-24. Plaintiff may not raise new issues of fact on appeal, which were conceded and stipulated to at the trial court.

B. No "Change" Was Made To The Petition During The February 26, 1998 Meeting Which Required A Referral Back To The Planning Commission.

The power of a city to zone and regulate land use is a legislative function specifically delegated by statute to cities. Utah Code Ann. §10-9-401 (1998). Court oversight of zoning and land use legislation is very limited:

The Court shall:

- (a) presume that land use decisions and regulations are valid; and
- (b) determine only whether or not the decision is arbitrary, capricious, or illegal.

Utah Code Ann. §10-9-1001(3) (1998).

City Council in the breadth of their zoning decision. However, there is nothing in this quoted language which requires the conclusion that, ipso facto, the City Council rezoned property not included in the Planning Commission's recommendation.

Utah courts have determined that the statutory presumption of validity requires the upholding of zoning regulations and decisions, unless the court can find no reasonable basis justifying their validity:

It is well established in Utah that courts of law cannot substitute their judgment in the area of zoning regulations for that of the [municipality's] governing body. Instead, the courts afford a comparatively wide latitude of discretion to administrative bodies charged with the responsibility of zoning, as well as endowing their actions with the presumption of correctness and validity, because of the complexity of factors involved in the matter of zoning and the specialized knowledge of the administrative body. Thus, the courts will not consider the wisdom, necessity, or advisability or otherwise interfere with the zoning determination unless it is shown that there is no reasonable basis to justify the action taken. *Sandy City v. Salt Lake County*, 794 P.2d 482, 486-87 (Utah App. 1990)(citations omitted).

The presumption of validity, while intended to be a significant barrier to overturning legislative/administrative decisions of cities, is not absolute or boundless. For example, if a city makes a land use decision in clear contravention of its own ordinances, the decision may be overturned for illegality. See *Springville Citizens v. City of Springville*, 365 Utah Adv. Rep. 23, 1999 Utah Lexis 28, 18 (Utah 1999); *Thurston v. Cache County*, 626 P.2d 440, 445-46 (Utah 1981). A review of the *Springville Citizens* case is helpful to show the difference between lawful and illegal land use decisions.

In *Springville Citizens*, which has some superficial similarities to the case before the court, the Springville City Council, among other things, modified a PUD to include nine new conditions, and then approved the PUD without first remanding it be

reviewed by the Planning Commission. *Id.* at 10. The Council's action was in clear contravention of a city ordinance which required that if modifications are required by the city council, such modifications "must" first be reviewed by the Planning Commission. *Id.* Furthermore, the words "must" and "shall" as used in this and other violated ordinances were explicitly defined in Springville ordinances as designating mandatory actions. At trial and on appeal, the city argued that while it admittedly violated the remand provision of the ordinance, as well as several other ordinances, there was "substantial compliance" with the city's ordinances. *Id.* at 17. The court rejected this argument, observing that while substantial performance may be sufficient for discretionary actions, the city had itself removed any discretion it might have otherwise had, by enacting ordinances which used language specifically defined to be mandatory. *Id.* at 16-17. Given that the meaning of the ordinances were clearly defined, the city could not "change the rules halfway through the game." *Id.*

The facts presented in this case are quite different from those in *Springville Citizens*. Unlike the *Springville Citizens* example, there is a significant issue of interpretation of a City ordinance in the present case, which cannot be resolved by mere reference to legislative definitions. Furthermore, unlike the majority of the reported cases where ordinances are inadvertently violated, and then minimized or re-interpreted later by the violating party, Perry City engaged in a substantial debate regarding the interpretation of its own ordinance prior to taking the action which Plaintiff contends is unlawful.

While a transcript is not available of the February 26, 1998 Perry City Council meeting in which the zone change approval was granted, minutes of the meeting reveal that there was much deliberation and discussion regarding why the proposed zone change amendment needed to be passed in an incremental or separate fashion, and whether such action comported with the Perry City zone change amendment ordinance. See Minutes of February 26, 1998, R. 150. Councilman Carol Billings proposed that properties recommended for zone change be separated out and then voted on for zone changes. R. 150. Councilman Desmond Thomas moved to act on the Wilkinson zone change as a separate item because Wilkinson had a development plan. R. 150. Councilman Pettingill, while supporting the incremental approach to zone changes, argued that to do so without remanding to the Planning Commission would violate the City's zone change amendment ordinance. R. 150. However, the Council's disagreement with Councilman Pettingill's interpretation was made clear when there was no second for his motion to refer the zone change back to the planning commission. R. 150. Councilman Bruce Payne argued that separating out certain property within the zone change amendment petition for approval did not violate existing law, including the city's ordinance. R. 150. Councilman Payne further argued that the ordinance was intended to prevent the council from changing the recommended zone designation for any of the properties without remand, but, that it did not prevent incremental approval of the properties. R. 150. The majority of the counsel also interpreted the ordinance in the same manner as Councilman Payne,

therefore, the Council approved Wilkinson's zone change (4-1), with Councilman Pettingill registering the sole dissenting vote. R. 150.

Where legislative "language is plain and unambiguous, it must be held to mean what it expresses, and no room is left for construction." *Board of Education v. Salt Lake City*, 659 P.2d 1030, 1035 (Utah 1989). In this case, Plaintiff argues that the "any change" language in the remand provision of Perry City Ordinance 2.3, plainly and unambiguously prevented the City Council from deliberating on the large, 245 acre re-zoning recommendation in an incremental fashion. However, the word "change" is not defined in the ordinance, and is subject to the reasonable interpretation of the same governing body which enacted the ordinance. Indeed, it is difficult to fathom how Plaintiff's interpretation is the only plain and unambiguous meaning, when the majority of the governing body understood and interpreted the ordinance to have a different meaning than Plaintiff did, even after the issue was fairly debated prior to voting.

Courts often look to administrative interpretation and practice of the body taking action to find a proper meaning of the statute or ordinance in question. *Salt Lake City v. Salt Lake County*, 568 P.2d 738 (Utah 1977); *Condas v. Salt Lake County*, 295 P.2d 829 (Utah 1956). In this case, the governing body which interpreted the ordinance is the same legislative body that has ultimate authority to enact, repeal or amend all city ordinances, including the ordinance which Plaintiff

seeks to interpret to his favor. The city's governing body is in the best position to interpret its own zoning ordinance.

Upholding the legislature's specified intent is the hallmark of the court rules of construction for statutes and ordinances:

To resolve conflicts in interpretation of statutes or ordinances, we look to well-settled rules of statutory construction. First, in cases of apparent conflict between provisions of the same statute, it is the Court's duty to harmonize and reconcile statutory provisions, since the Court cannot presume that the legislature intended to create conflict. **Further, a provision treating a matter specifically prevails over an incidental reference made thereto in a provision treating another issue, not because one provision has more force than another, but because the legislative mind is presumed to have stated its intent when it focused on that particular issue.** (citations omitted)
Bennion v. Sundance Development Corp., 897 P.2d 1232, 1236 (Utah 1995).

While there is no evidence that the City Council deliberated on the narrow issue of incremental passage of zone changes recommendations when it initially enacted its procedural zone change amendment ordinance, there is substantial legislative history demonstrating that the legislative mind was focused on this issue when it adopted the Wilkinson rezone.³ The specific treatment of this issue in its recent amendment to

³It is significant that the governmental action required in a zone change is enactment of a legislative amendment of the zoning ordinance, Utah Code Ann. § 10-9-401, et seq., rather than some administrative action, approval, permit, or variance, as in *Springville Citizens*. The re-zone ordinance enacted has the same legislative stature as the procedural ordinance which governed its enactment. Furthermore, the re-zone ordinance is the most focused manifestation of legislative intent on the issue raised by Plaintiff, and must be construed so as to not conflict with other ordinances, where possible. *Bennion v. Sundance Development Corp.*, 897 P.2d 1232, 1236 (Utah 1995).

the zoning ordinance is a clear expression of legislative intent regarding interpretation of its zone change amendment ordinance.

Finally, Plaintiff cannot prevail in this matter by merely arguing that Plaintiff's interpretation is better or more persuasive than Perry City's interpretation. Rather, the test for determining the validity of the City's land use decisions is whether "there is no reasonable basis to justify the action taken." *Sandy City v. Salt Lake County*, 794 P.2d 482, 486-87 (Utah App. 1990). Plaintiff presents numerous arguments as to why the interpretation of the majority of the governing body should be supplanted by his own interpretation or the interpretation of the minority of the City Council. However, Plaintiff has failed to demonstrate that there is no reasonable basis to justify the City's actions. *Id.* Therefore, the city's actions must be upheld.

C. Appellant's Interpretation Of The Perry Ordinance Would Be A Violation of Utah Code Ann. §10-9-402 And §10-9-403 And Must Therefore Be Rejected.

Wilkinson adopts by reference the arguments set forth in Perry City's Appellate Brief, p.16-18, pertaining to conflicts between the zoning enabling statute and Perry City's zone change amendment ordinance. Additionally, Wilkinson supplements the arguments set forth of the Perry City Brief with the following observations.

Utah Code Ann. §10-9-401, enables a municipal legislative body to enact a zoning ordinance "that furthers the intent of this chapter." Section 10-9-403 specifically provides that after the planning commission has made its recommendations on a proposed rezone and the legislative body has held public hearing, the legislative

body may amend the rezone and then adopt or reject the amended rezone. §10-9-403(3)(b). Nevertheless, Perry City's Database Ordinance 2.3, paragraphs 3-4, purports to deny the legislative body the power to amend, then adopt or reject the amended ordinance:

3. After the required public hearing has been held on the proposed amendment, the City Council may adopt or reject such amendment or annexation.

4. If the City Council proposes to make any change in the amendment as submitted to it by the Planning Commission, or as advertised, it shall refer such change back to the Planning Commission and the procedure shall start over at Step 1.

In comparing the City's ordinance to the enabling statute, Paragraph 3 permits the legislative body to take the actions allowed by §10-9-402(3)(a) ("adopt the zoning ordinance as proposed") and §10-9-402(3)(c) ("reject the ordinance"). However, Paragraph 4 of the ordinance specifically prohibits the legislative body from taking the action allowed by the statute pursuant to §10-9-402(3)(B) ("amend the zoning ordinance and adopt or reject the zoning ordinance as amended"). Contrary to the enabling statute, under the Ordinance, a rezone amendment cannot be proposed, voted on, and approved by the City Council. If the City Council proposes an amendment pursuant to the Ordinance Paragraph 4, it is the equivalent of a rejection of the rezone pursuant to Paragraph 5, because either action requires petitioner to start the process over again at the Planning Commission. See Para.4 and 5, Perry City Ordinance 2.3.

By explicitly forbidding legislative action which is specifically allowed under the zoning enabling statute, the Perry City Ordinance fails to "further the intent" of the zoning enabling statute, §10-9-401, but rather violates and conflicts with the statute. As set forth in authorities extensively cited by Perry City in its Appellate Brief, the Perry City Ordinance must be held to be invalid to the extent that it conflicts with specific statutory provisions.⁴

III. PLAINTIFF IS TIME-BARRED FROM ALLEGING INVALIDITY OF WILKINSON SUBDIVISION APPROVAL.

Plaintiff has failed to contest the Wilkinson Subdivision approval within 30 days of Perry City's final approval of the subdivision as required by Utah Code Ann §10-9-1001(2). Therefore, Plaintiff's cause of action for invalidating the subdivision approval is jurisdictionally barred.

Plaintiff filed his original Complaint against Perry City on March 30, 1998, alleging only that the rezone ordinance was invalid. R. 20. Wilkinson was not named as a party, nor was Wilkinson's subdivision approval at issue, in the original Complaint. R. 20. On May 28, 1998, the Perry City Council granted final approval of the Wilkinson Subdivision, by unanimous vote. R. 98 and R. 10. On June 30,

⁴ It is important to point out that the planning commission remand provision in *Springville Citizens*, was not a zoning issue controlled by the same statute as is controlling in this case. Nor was the statutory validity of the remand ordinance ever raised in *Springville Citizens*. Thus, the Supreme Court's implicit approval of the remand ordinance existing in that case provides no precedent whatsoever to the statutory conflict issues raised in this case.

1998, Plaintiff filed an Amended Complaint, which for the first time named Wilkinson as a party and claimed that the Wilkinson Subdivision approval was invalid. R. 1. See Court Docket. However, the Amended Complaint was filed more than thirty days after subdivision approval.

While the 30 day limitation of Utah Code Ann §10-9-1001(2) was not raised at the trial court, it is a jurisdictional statute. *Herr v. Salt Lake County*, 525 P.2d 728, 730 (Utah 1974) (appeal time period imposed in land use legislation is jurisdictional). Jurisdictional issues may be raised and adjudicated for the first time on appeal. *In re Adoption of B.O.*, 927 P.2d 202, 206 (Utah App. 1996); *Wilde v. Union Pacific*, 84 P.2d 1085, 1088 (Utah 1938); *Allen v. Gardner*, 143 P. 228, 230 (Utah 1914); *Golding v. Jennings*, 1 Utah 135, 139 (Utah 1874). Therefore, the jurisdictional issue is properly before this court.

Plaintiff, perhaps anticipating the 30 day issue, argues that by filing its initial Complaint against the city regarding the zone change ordinance, its has "preserve[d] effectual control of the judiciary over a decision to invalidate the rezone and all of its logical extensions." See Plaintiff's Appellate Brief at p. 18. 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. However, Plaintiff cites no legal authority for such a proposition.

The City's approval of the Wilkinson Subdivision and enactment of the rezone ordinance were separate and distinct governmental decisions. Utah Code Ann §10-9-

1001(2) requires that "any person adversely affected by a decision" must file a petition for review of the decision within 30 days after the decision is rendered. *Id.* Because Plaintiff failed to file an appeal petition within 30 days of the subdivision decision, Wilkinson has a vested right in the validity of the subdivision approval.

Plaintiff is expected to argue that an allegedly defected rezone makes subdivision approval inherently defective whether or not Plaintiff timely filed its appeal. However, there is no support for this proposition in the appeal statute. Zoning is only one of numerous considerations and procedures necessary to be followed in approving a subdivision. See generally Utah Code Ann. §10-9-801 et.seq. The very purpose of the of the 30 day statute is to prevent invalidity suits, unless the Plaintiff acts quickly. It does not matter whether Plaintiff alleges the subdivision decision is invalid because of zoning defects or any other procedural or substantive defect, the subdivision decision will be final and unalterable unless Plaintiff complies with the §10-9-1001 requirement to file his appeal petition within 30 days of the decision.

Moreover, Plaintiff's interpretation of the 30 day rule would render the statute meaningless. After all, the Wilkinson property consists of a only a small portion of the total acreage which was rezoned on May 28, 1998 by the Perry City Council; yet, Wilkinson was the only landowner which Plaintiff has sued or filed a Lis Pendens against. If the court accepts Plaintiff's theory that by merely suing the City regarding the rezone, that all future subdivision decisions are under the court's control, absurd

results would follow. Particularly, all other landowners who have obtained subdivision approval in the rezoned area, or may in the future obtain subdivision approval in the rezoned area, are subject to having the city's subdivision approval invalidated, regardless of whether Plaintiff brings suit against such landowners within 30 days or 30 months of the City's subdivision approvals. Such an interpretation would render the 30 day limitation of §10-9-1001 meaningless, and thus is ineffective as an excuse to Plaintiff's failure to comply with the 30 day rule.

Plaintiff is also expected to argue that he nevertheless complied with §10-9-1001(2), by filing his petition within 30 days of Wilkinson's recording of the subdivision plat. However, the mere recording of the subdivision plat is an action to be carried out by the landowner, not the city, and does not require a new or additional vote or decision by the city council. See Utah Code Ann. §10-9-804(3). It is the subdivision final approval, not that recording of the plat, that constitutes the governing body's decision. The timing of Wilkinson's recording of the plat is not a city decision which is subject to appeal. Thus, bringing suit within 30 days of plat recordation does not satisfy the requirement of bringing a petition "within 30 days after the local decision is rendered." Utah Code Ann. §10-9-1001(2).

Plaintiff also argues that because he notified the City and Wilkinson of his initial Complaint against the City, prior to the subdivision approval, that the

subdivision approval is somehow barred.⁵ However, the sending of demand letters or notices to potential litigants does not meet the requirements of Utah Code Ann. §10-9-1001(2). Rather, Plaintiff must timely file a petition contesting the local decision in District Court. *Id.* Indeed, the fact that Plaintiff took the time to replead his Complaint after the subdivision decision, to include arguments that the subdivision approval was illegal, suggests that Plaintiff well understood the necessity to make a claim regarding the subdivision approval, in order to preserve his position. Nevertheless, Plaintiff's Amended Complaint was simply too late to meet the requirements of Utah Code Ann. §10-9-1001.

Wilkinson's subdivision approval is valid and vested and Plaintiff's allegations of invalidity are time-barred.

IV. THE TRIAL COURT'S ORDER RELEASING THE LIS PENDENS SHOULD BE AFFIRMED. REINSTATEMENT OF LIS PENDENS WOULD ONLY AFFECT UNSOLD PROPERTIES.

At the summary judgment hearing of this matter, the court granted Wilkinson's request that Plaintiff's Lis Pendens be released. See Hearing Transcript, R. 205, p. 37. This ruling was incorporated into the Judgment, and served upon Plaintiff for review. R. 180-183. The Judgment was entered without timely objection from Plaintiff.

⁵ The City was never served with the original Complaint. The City was served with the Amended Complaint on July 8, 1999. R. 32. Wilkinson was never actually served with the Amended Complaint, but waived service by filing his Answer to the Amended Complaint on July 29, 1998. R. 28.

The court of appeals is empowered to make an independent determination of the correctness of the trial court's lis pendens release at the time of granting Judgment: "[w]hether a court may grant a party's requested relief from a lis pendens is a question of law which an appellate court reviews for correctness, according no deference to the trial court." *Timm v. Dewsnup*, 921 P.2d 1381, 1393 (Utah 1996). However, even an adverse determination on this issue has no import, and need not be reached, if the court otherwise upholds the summary judgment ruling. On the other hand, if the court were to vacate the Judgment and reinstate the Lis Pendens, it would not have the effect desired by Plaintiff, because it would only affect unsold property. *Timm* at 1394.

In *Timm v. Dewsnup*, the Supreme Court explained that the rule expressed in *Hidden Meadows Dev. Co. v. Mills*, 590 P.2d 1248, 1248 (Utah 1979), that an unreleased lis pendens endures during pendency of the appeal without the necessity of filing a supersedeas bond, is a rule that applies only to an **unreleased** lis pendens. *Timm* at 1394. The *Timm* court ruled that where the lis pendens is released by order of the trial court, the lis pendens will not endure appeal, unless the appellant makes a successful motion to stay the trial court's order as provided by Rule 62(d), Utah Rules of Civil Procedure and Rule 8(a), Utah Rules of Appellate Procedure. In this case, Plaintiff has failed to bring a motion to stay the Judgment, presumably because while Plaintiff was happy to play the role of spoiler of Wilkinson's subdivision, he did not

want to file the required supersedeas bond and thereby take the financial risk of failure on appeal. Rule 62(d)

Given the Plaintiff's failure to file a motion to stay, even if the Lis Pendens is reinstated in this case, as it was in *Timm v. Dewsnup*, any reinstatement would only apply to subdivision lots purchased after reinstatement. *Id.* Those bona fide purchasers who have already entered into sales contracts prior to any proposed reinstatement, are not subject to the outcome of the litigation. *Id.* Given this reality, if the court tampers with the City's land use decisions as requested by Plaintiff, the result would be a checkerboard effect on subdivision lots, with some lots being subject to the outcome of litigation, while other lots are not. The prospect of such a disparate and undesirable land use outcome reinforces the wisdom behind the public policy of affording tremendous deference to a governing body's land use decisions. *Sandy City v. Salt Lake County*, 794 P.2d 482, 486-87 (Utah App. 1990).

V. PLAINTIFF IS NOT PREJUDICED BY PERRY CITY COUNCIL'S LAND USE DECISIONS.

Even if the court concludes that the City Council's rezone was illegal, Plaintiff has to show prejudice from the illegality in order to prevail. *Springville Citizens v. City of Springville*, 365 Utah Adv. Rep. 23, 1999 Utah Lexis 28, 19 (Utah 1999) The issue of lack of prejudice was raised at the trial court, when Wilkinson argued that Plaintiff could not have been prejudiced by the decision made by the Council, since Plaintiff had notice of all hearings and meetings, had opportunities to speak against the

City's proposed decisions, and thereby exert a political influence on legislators. R. 144-45; *Naylor v. Salt Lake City*, 410 P.2d 764 (Utah 1966).

Plaintiff argues that he is prejudiced merely because he is an adjacent landowner who will be adversely effected if nearby property is down-zoned. However, this is not a valid prejudice issue because it is not based on the legality or illegality of the City's actions. The prejudice Plaintiff alleges is based on Plaintiff's disagreement with the City's political decision to allow the rezone, not on the alleged procedural defects argued by Plaintiff on appeal. Indeed, had the City acted in the procedural manner which Plaintiff now demands, the City would have come to the same political decision regarding the rezone, as demonstrated below.

In *Springville Citizens*, the court required that "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 be different** and what relief, if any, they are entitled to as a result." *Springville Citizens* at 19. The difference between *Springville Citizens* and this case, is that there is substantial record evidence for the Appeals Court to uphold the trial court's decision based on lack of prejudice. There is no need to wonder, speculate, or take evidence regarding what might have happened if Wilkinson's property rezone was individually reviewed by the Planning Commission--because it was reviewed.

After Plaintiff brought suit against Wilkinson, Wilkinson determined that it was prudent and less expensive to resubmit his individual rezone petition and thereby make

Plaintiff's procedural arguments moot, rather than get bogged down in litigation. As a result, Wilkinson submitted a rezone petition restating the provisions of the first rezone, which was unanimously approved by the Planning Commission and City Council. A copy of the Planning Commission's written approval is included in the record at R. 170. Consistent with Plaintiff's pattern of delaying political decisions through procedural pretexts, Plaintiff filed a new complaint against Perry City regarding the second rezone, citing a new selection of procedural defects, thereby preventing this matter from becoming moot.⁶ Wilkinson has no doubt that a third rezone attempt would merely inspire a third lawsuit by Plaintiff. However, a third rezone attempt would not make the Planning Commission's and City Council's intent to approve Wilkinson's rezone any more clear than it is now.

In summary, regardless of the procedural pretexts raised by Plaintiff in his second lawsuit, the Perry Planning Commission and City Council have unequivocally answered the question of "how, if at all, the City's decision would be different" if Wilkinson's rezone were reviewed by the Planning Commission and then voted upon by the City Council. *Springville Citizens* at 19. The clear answer is that its decision wouldn't be different at all; both bodies have voiced clear approval of Wilkinson's rezone. And, the power to rezone the Wilkinson Subdivision is within their political

⁶ The second lawsuit was filed in First District Court in and for Box Elder County, Civil No. 980100718. See discussion at R. 166.

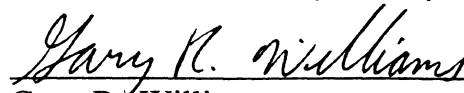
discretion. Thus, Plaintiff could not have been prejudiced by an alleged procedural failure to remand for Planning Commission review.

CONCLUSION

Perry City and Wilkinson have provided substantial and compelling evidence and argument that Perry City's zoning actions were reasonable and justifiable, and not violative of any statute or ordinance. Furthermore, Perry City's ordinance is itself invalid to the extent that it prohibits legislative action specifically granted by the enabling statute. Plaintiff is jurisdictionally barred from claiming invalid subdivision approval, for failure to meet the statutory 30-day appeal requirement. Furthermore, Plaintiff's failure to bring a motion for stay would lead to objectionable and ill-conceived zoning results if Plaintiff were to succeed in its claim to overthrow the City's land use decisions. Finally, the record evidence clearly demonstrates that Plaintiff was not prejudiced by the City's actions, and therefore Plaintiff may not prevail on its claims.

Based on the above, and the arguments set forth in Perry City's Appellate Brief which are adopted herein by reference, Wilkinson respectfully requests that this Court affirm the trial court's Judgment, and award Wilkinson his costs on appeal pursuant to Rule 34(a), Utah Rules of Appellate Procedure.

DATED this 12th day of July, 1999

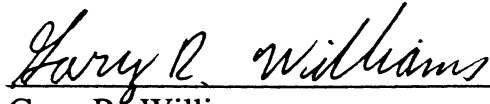


Gary R. Williams

Attorney for Appellee Brad Wilkinson

STATEMENT REGARDING ADDENDUM

No addendum is necessary under Rule 24(a)(11), Utah Rules of Appellate Procedure.



Gary R. Williams

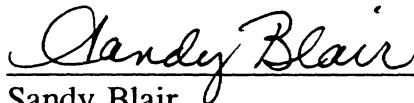
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CERTIFICATE OF MAILING

I hereby certify that on this 12th day of July, 1999, I sent two true and correct copies of the foregoing Brief of Appellee Brad Wilkinson by U.S. Mail, postage prepaid, to:

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