

1989

Leland Fitzgerald v. Utah County : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS

BRIEF

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DOCKET NO.

894123

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LELAND FITZGERALD and HELEN S.
FITZGERALD,

Plaintiff/Appellant,

vs.

UTAH COUNTY, a body corporate
and politic of the State of
Utah and a governmental entity
of the State of Utah, JEFF
MENDENHALL, GORDON BUCKLEY
ROSE, IVA SNELL, KEITH RICHAN,
JERIL WILSON, LYNN DAVIS and
JOHN DOES 4 through 20,

Defendants/
Appellees.

BRIEF OF APPELLEES, UTAH
COUNTY, JEFF MENDENHALL,
GORDON BUCKLEY ROSE, IVA
SNELL, KEITH RICHAN, JERIL
WILSON, LYNN DAVIS

Case No. 89-4123

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH

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FILED
United States Court of Appeals
Tenth Circuit

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ROBERT L. HOECKE
Clerk

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STATEMENT OF PRIOR OR RELATED APPEALS

Pursuant to Rule 28.2(a) of the Rules of Court of the United States Court of Appeals for the Tenth Circuit, defendants-appellees file this Statement certifying that there are no prior or related appeals in this matter.

STATEMENT OF THE CASE

Appellants (hereinafter "Fitzgeralds") filed this lawsuit based on 42 U.S.C. § 1983, alleging violation of various constitutional rights by the appellees (hereinafter "Utah County") relating to the Fitzgeralds' ownership interest in approximately 27,000 acres of land in an area known as "Cedar Valley," located in Utah County, Utah. In addition, the Fitzgeralds sought to invoke the District Court's pendent jurisdiction over claims for malicious prosecution and defamation of the Fitzgeralds' business and personal reputations.

The essence of the Fitzgeralds' Complaint was that implementation and interpretation of certain zoning ordinances by officials of Utah County, pursuant to authority granted by enabling legislation of the State of Utah, was improper. The Fitzgeralds allege that Utah County officials imposed unreasonable conditions on the acquisition of waivers from subdivision plat filing requirements by requiring the recording of restrictive covenants limiting the use of land to agricultural purposes, as required by Utah County ordinances. As a result of these decisions and actions by Utah County officials, the Fitzgeralds contend they have been deprived of constitutional rights to the unfettered acquisition, enjoyment and alienation of property.

The Fitzgeralds asked the District Court to find that the Utah County ordinances were facially unconstitutional and had been applied in an unconstitutional manner against them. The Fitzgeralds also requested that the District Court find that Utah

County's enforcement of the ordinances constituted a taking of property without just compensation and that the Fitzgeralds had suffered defamation plus other constitutional injury.

Utah County moved for summary judgment on all claims. On September 7, 1988, the District Court granted Summary Judgment on all issues except the "defamation plus damage to an interest in property" cause of action. The District Court ordered the Fitzgeralds to submit additional briefing on this issue and also ordered Utah County to submit a responsive memorandum. After receipt of those supplemental memoranda, the District Court, on July 25, 1989, granted Summary Judgment on the defamation plus issue and Judgment dismissing all of appellants' claims was entered on August 21, 1989.

STATEMENT OF FACTS

1. The Fitzgeralds had an ownership interest in approximately 27,000 acres of land in an area known as Cedar Valley, Utah County, Utah. (Document 63 at 3).

2. The subject property is unincorporated. (Document 63 at 4).

3. Appellee Utah County is a political subdivision organized and existing under and by virtue of the laws of the State of Utah. (Document 63 at 4).

4. Appellee Jeff Mendenhall is now employed as the Planning Director of Utah County and has been so employed since April, 1978. (Document 63 at 4).

5. Appellee Gordon Buckley Rose is currently employed as a Planner by Utah County and has been an employee of Utah County at all times mentioned in appellants' Complaint. (Document 63 at 4).

6. Appellee Iva Snell was employed by Utah County at all times mentioned in appellants' Complaint, but has since retired. (Document 63 at 4).

7. Appellee Keith Richan, previously named as defendant John Doe 1 in appellants' designation of John Does, was formerly a member of the Board of County Commissioners of Utah County. He was previously the Chairman of the Utah County Planning Commission. (Document 63 at 4 and Document 80, Exhibit B at 6).

8. Appellee Jeril Wilson, previously named as defendant John Doe 2 in appellants' designation of John Does, was formerly a member of the Board of County Commissioners of Utah County. (Document 63 at 4).

9. Appellee Lynn W. Davis, previously named as John Doe 3 in appellants' designation of John Does, was a Deputy Utah County Attorney. In May, 1987 he was appointed as a Judge in the Eighth Circuit Court for the State of Utah. (Document 63 at 5).

10. On or about December 22, 1976, Utah County passed the 1976 Revised Zoning Ordinance of Utah County, Utah. (Document 63 at 5).

11. The Ordinances contained provisions requiring the filing of a plat for the subdivision of land, § 4-3-52, and allowed for an exemption from the subdivision plat filing requirement upon satisfactory completion of covenants precluding the residential or non-agricultural use of such land until an approved subdivision plat had been recorded, § 4-3-53. (Document 63 at 5).

12. The Fitzgeralds purchased approximately 9,000 acres in Cedar Valley on May 18, 1978 from Wallace Ohran who had purchased the property from the Cooperative Security Corporation; this acreage is known as the Monte Vista parcel. The Fitzgeralds' family purchased stock in the Monte Vista Ranch Corporation and appellants personally own 24% of the stock. (Deposition of Leland A. Fitzgerald, May 14, 1987, pages 7-8; Document 63 at 6).

13. The Fitzgeralds purchased approximately 12,940 acres on January 31, 1977; this acreage is known as the McKinney parcel. The Fitzgeralds intended to ranch a portion of the land and sell part of it. (Deposition of Leland A. Fitzgerald, May 14, 1987, page 50; Document 63 at 6).

14. The Fitzgeralds purchased approximately 5,000 acres by contract from James Dupratt in September, 1977; this acreage is

known as the Dupratt parcel. (Deposition of Leland A. Fitzgerald, May 14, 1987, page 89; Document 63 at 6).

15. The Fitzgeralds purchased 920 acres from Eldred Nichols on March 19, 1979; this acreage is known as the Nichols parcel. (Deposition of Leland A. Fitzgerald, May 14, 1987, pages 100-101; Document 63 at 6).

16. The Fitzgeralds purchased approximately 53 acres from Robert Stewart on October 11, 1978; this acreage is known as the Stewart parcel. (Deposition of Leland A. Fitzgerald, May 14, 1987, page 105; Document 63 at 7).

17. Appellee Buckley Rose reviewed recorded real estate transactions in Cedar Valley at the direction of the Utah County Commission. (Affidavit of Gordon Buckley Rose; Document 63 at 7).

18. The subject parcels lie partially or entirely within the following designated zones: Mining and Grazing 1 (M & G-1), Rural Residential 5 (RR-5) and Agricultural 1 (A-1). (Document 63 at 7).

19. The appellants never appeared before or petitioned for an appearance before the Utah County Board of Adjustment. (Deposition of Leland A. Fitzgerald, May 14, 1987, page 128; Document 63 at 7).

20. No application for subdivision plat approval for the subject property was ever submitted to Utah County by the

Fitzgeralds or filed with the Utah County Recorder. (Document 63 at 7).

21. Many of the facts stated by the Fitzgeralds are based exclusively on conclusory affidavits signed by appellant Leland Fitzgerald. The Affidavit was the subject of a Motion to Strike before the District Court. Appellants did not submit a response to the Motion to Strike. (Documents 84, 85).

22. In response to the District Court's Order to submit an additional memorandum and evidence regarding the defamation plus claim, the Fitzgeralds submitted a document entitled "Supplementation of the Record" which consisted of a two paragraph affidavit from the Leland Fitzgeralds together with copies of various uniform real estate contracts. Utah County moved to strike the affidavit because it did not comply with Rule 56, Federal Rules of Civil Procedure and otherwise contained matters which were inadmissible. (Documents 92 through 96).

23. The lawsuit filed by Utah County against the Fitzgeralds in the Fourth District Court for the State of Utah was dismissed pursuant to a Stipulation and Agreement signed by both parties. The Stipulation and Agreement specifically recited that filing of the Stipulation and Order dismissing the Complaint would not act as a waiver or release of any of the defenses of Utah County for any of the causes of action alleged in the Fitzgeralds' lawsuit in the United States District Court for Utah. (Appellants' Addendum, L).

ARGUMENT

POINT I

APPELLANTS' FEDERAL CONSTITUTIONAL CLAIMS FAIL AS A MATTER OF LAW.

A. The Applicable Statutes and Ordinances in Question are a Constitutionally Valid Exercise of the Police Power.

The Fitzgeralds allege that Utah County Ordinance § 4-3-53 (Addendum K, Appellants' Addendum) is an unconstitutional exercise of the County's police power because it prohibits the sale of land without County approval. This allegation is false both as a matter of fact and as the ordinance was applied by Utah County officials.

The ordinance in question merely requires that an owner of property who sells land without first recording a subdivision plat, as required by State statute and County ordinance, obtain a waiver from the plat filing requirement from the County. The waiver will be granted if the owner and buyer of property record satisfactory deed covenants which insure that the property will, in fact, be used for the purposes which allow exemption from the plat filing requirement, i.e., bona fide agricultural, commercial, manufacturing and industrial use.

The purpose for this covenant requirement is to guarantee that buyers and sellers of property understand the zoning limitations affecting the property. Utah County decided that the

covenant requirement was a reasonable method to enforce zoning decisions of the County and to notify buyers of property that use of the land may be restricted, despite "marketing" representations made by sellers. Discovery in this case reveals that the Fitzgeralds sold large tracts of land to buyers knowing that the buyers planned to further divide the purchased property for sale as residential property, not agricultural land as it was zoned.

Utah County's ordinance was reasonable and was a rational method to accomplish a legitimate governmental purpose. It is axiomatic that all presumptions favor the validity and reasonableness of zoning ordinances and regulations adopted by local government authorities. The burden is clearly upon the party seeking judicial relief from such government action to establish that the ordinance in question does not permit any possible interpretation that would justify its adoption; or that the action of the local zoning authority is arbitrary or capricious, having no substantial relationship to promoting the safety, order, prosperity and general welfare of the community. South Gwinnett Venture v. Pruitt, 491 F.2d 5, 7 (5th Cir. 1974), Cert denied, 419 U.S. 837 (1974); 101A, C.J.S., Zoning and Land Planning, § § 310 - 311.

It has long been recognized that considerable flexibility should be afforded and maxim deference should be given to local zoning authorities in confronting emerging land use issues.

Village of Euclid v. Ambler Realty Company, 272 U.S. 365 (1926);
Berman v. Parker, 348 U.S. 26 (1954).

Utah County has an obvious and legitimate interest in promoting orderly growth and providing public services to the unincorporated areas of the County through the process of requiring the filing of subdivision plats. The County has been granted that authority through applicable State enabling legislation, Utah Code Ann. § 17-27-1 et. seq. (1953, as amended). In addition, Utah County has an interest, rationally related to a legitimate public purpose, in protecting the use of land for agricultural purposes in rural, unincorporated areas of the County, which is also recognized in the enabling legislation in question.

The District Court agreed that the ordinance was a valid exercise of the police power. The District Court also found that the Fitzgeralds' interpretation of the State enabling legislation was in error:

. . . The court notes that plaintiffs [appellants] claim that Utah Code Annotated § 17-27-27 precludes counties from interfering with the right to sell properties under the enumerated exceptions . . . However, the applicable ordinances do not preclude subdivision of agricultural land for agricultural purposes. Rather, they merely insure by requiring covenants be filed that land exempted from the subdivision requirements in § 17-27-27 shall not be utilized for any purpose that would otherwise require the filing of a subdivision plat. These ordinances impose reasonable regulations not

inconsistent with [the statute], well within the County's authority.

(Memorandum Decision, September 7, 1988, page 4).

The District Court further found that the ordinances were constitutionally enacted pursuant to valid, police power authority. The ordinances obviously related to zoning and planning functions of the County by promoting controlled growth and insuring that lands used for one purpose were not "funneled" into another purpose through the exemption from subdivision plat filing requirements. The Court recognized that zoning decisions are a legislative function and courts should avoid substituting their judgments for that of the legislative body of a municipality, Crest View-Holladay Homeowners' Association, Inc. v. Engh Floral Company, 454 P.2d 1150, 1152 (Utah 1976).

Contrary to the Fitzgeralds' assertions, the ordinance did not invest County officials with unconstitutional authority. The Fitzgeralds complained of "difficulty" in complying with the ordinance. This "difficulty" was no doubt occasioned because buyers and sellers of the property became aware, through the ordinance, that the property in Cedar Valley was restricted to agricultural use, inconsistent with the "marketing" which accompanied many of the sales. The ordinance was neither vague nor arbitrary and as the District Court found "the ordinances . . . sufficiently spell out what is required of a subdivider. Persons of common sense and understanding would not have to guess

at the meaning of the ordinances." (Memorandum Decision, September 7, 1988, page 7).

B. The Ordinances Were Constitutionally Applied.

The Fitzgeralds contend that enforcement of Utah County Ordinance 4-3-53 was unconstitutional because it violated their rights to procedural due process. Utah County submits that the procedural due process claim is without merit for at least two reasons. First, the Fitzgeralds did not have any property interest protected by the federal constitution which was affected by application of the ordinance. Second, the Fitzgeralds' claims are not ripe because they failed to pursue available administrative remedies.

Regarding the first defect in the Fitzgeralds' position, they complain that they enjoyed an unfettered right to receive a waiver or exemption from the normal subdivision plat filing requirement. However, they point to no legal authority recognizing that an expectation of receiving an exemption or waiver from normal requirements constitutes a protected property interest. Hope of obtaining a waiver is not an entitlement, but rather rests with the discretion of government officials. Even if Utah County officials violated the ordinance in its application, (which Utah County denies) such a violation does not implicate the federal constitution.

It has long been recognized that § 1983 imposes liability only for violations of rights protected by the constitution, not simply for all claims which may be cognizable under state tort, statutory or contract law. To do otherwise would make the Civil Rights Act a "font of tort law to be superimposed upon whatever system may already be administered by the states," Paul v. Davis, 424 U.S. 693, 701 (1976). Every act by a state official does not necessarily rise to constitutional dimensions, Baker v. McCollan, 443 U.S. 137 (1979). Furthermore, violations of state statutes or municipal ordinances do not necessarily create a cause of action under § 1983, nor do they necessarily state a violation of the due process clause. Kompare v. Stein, 801 F.2d 883 (7th Cir. 1986).

The existence of a state created procedure which provides a remedy for one who challenges the enforcement of a statute or ordinance is one factor to be considered in deciding whether the appellants' "interest" is protected by the Federal Constitution. Parratt v. Taylor, 451 U.S. 527 (1981); Boston Environmental Sanitation Inspectors Association v. Boston, 794 F.2d 12 (1st Cir. 1986). Spence v. Zimmerman, 873 F.2d 256, 261 (11th Cir. 1989) ("Ordinance enforcement . . . is not the stuff of which constitutional violations are made"); Burrell v. City of Kankakee, 815 F.2d 1127, 1129 (7th Cir. 1987); Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982).

As to the second defect in the Fitzgeralds' due process claim, Utah County contends that the Fitzgeralds have not suffered a due process violation because an adequate state remedy was available which provided redress for the specific grievance of which the Fitzgeralds complain. However, the Fitzgeralds made no attempt to obtain relief through administrative procedures and therefore the extent of the government's action was never determined, despite the existence of an opportunity to receive procedural due process.

The concepts of finality and adequacy of state remedies in the context of a § 1983 claim were first enunciated in Parratt v. Taylor, supra, where the Court identified one of the critical elements of a valid Fourteenth Amendment Due Process Claims as "including only those deprivations which occur, without due process of law." The Parratt Court extensively evaluated what pre- and post-deprivation remedies may be available to an aggrieved party under applicable state law and adopted the following approach:

We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoided the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment. 451 U.S. at 542 (citing Bonner v. Coughlin, 417 F.2d 1311, 1319 (7th Cir. 1975)).

Such analysis has been refined by later decisions and was particularly emphasized in Williamson Regional Planning

Commission v. Hamilton Bank, 105 Sup.Ct. 3108 (1985). There, the Court made reference to Parratt and concluded that constitutional guarantees may be adequately satisfied by a state's provision of a meaningful post-deprivation process. The Court held that state action may not be "complete" in the sense of causing a constitutional injury, unless or until the state fails to provide an adequate post-deprivation remedy. Id. at 3121. See also McDonald, Summer and Frates v. County of Yolo, 106 Sup.Ct. 2561 (1986).

This court has addressed a similar claim very recently in Landmark Land Company of Oklahoma, Inc. v. Buchanan, 874 F.2d 717 (10th cir. 1989). In Landmark a developer brought a cause of action under 42 U.S.C. § 1983 claiming that officials of Del City, Oklahoma violated procedural due process by failing to issue certain building permits and that the failure to do so resulted in financial losses to the developer. This Court found that assuming the developer (Landmark) had a federally protected property interest in the permits, the City could not withhold them without affording due process. The Court noted that the developer had a property interest only to the extent to which Oklahoma law or local ordinance gave it a "legitimate claim of entitlement" as opposed to a mere "unilateral expectation." (Quoting Littlefield v. City of Afton, 75 F.2d 596, 599-603 (8th Cir. 1986)). The Court then held that consideration of the extent of the property interest was not necessary since Landmark

had received all of the process due by appearance before the Del City Board of Adjustment. The Court also found the developer's taking and substantive due process claims were not ripe for federal review because the City's actions had not reached sufficient finality regarding the property in question.

In the instant case, the Fitzgeralds, unlike the developer in Landmark, made no application of any kind to the Utah County Board of Adjustment for review of the decisions of the zoning officials concerning any alleged errors of interpretation reportedly made regarding the validity of the waiver of subdivision plat filing requirements which the Fitzgeralds attempted to obtain. In the context of possible deprivation of constitutional rights, the Fitzgeralds suffered no due process violation because they blatantly failed to take advantage of administrative and judicial relief which was available to them. If the Fitzgeralds were dissatisfied with the decisions of zoning officials, they had an opportunity to appear before the Utah County Board of Adjustment, Utah County Ordinance for § 4-7-13. The Board had the power to

". . . Hear and decide appeals concerning errors of interpretation reportedly made by a zoning administrator."

The Fitzgeralds claim that they do not allege errors of interpretation by zoning administrators; but that allegation is simply not tenable. Disagreements about waivers from the subdivision plat filing requirement and the sufficiency of

restrictive covenants could have been heard and decided by the Board of Adjustments. The Fitzgeralds never made an appearance before the Board of Adjustment nor did they petition to the Board for review of their disagreements with zoning officials. As this court noted in Landmark Land Company, "[a]s long as Landmark had 'the opportunity to be heard at a meaningful time and in a meaningful manner,' the 'fundamental requirement of due process' is satisfied." Landmark at 723-724.

The Fitzgeralds also could have obtained judicial review of an adverse decision by the Board of Adjustments. The Fitzgeralds allege that judicial review was impossible because the Utah Governmental Immunity Act, 63-30-1, et. seq., Utah Code Ann. (1953, as amended) creates immunity from damages for certain of the allegations in the Fitzgeralds' Complaint. Reference to the Utah Governmental Immunity Act does not cure the defects in the Fitzgeralds' position, however. Utah Code Ann. § 10-9-15 (1953, as amended) provides explicit authority for Utah Courts to review complaints of any person aggrieved by a decision of the Board of Adjustment. The statute also provides that such a person may maintain a plenary action for relief. Again, the invalidity of the Fitzgeralds' position is clear: they could have petitioned the Board of Adjustment for review of zoning officials' decisions, they did not do so. If the decision of the Board of Adjustment were adverse, the Fitzgeralds could have obtained judicial review of the Board of Adjustment's decision. The

Fitzgeralds failed to avail themselves of these explicit remedies and consequently their due process claim was dismissed.

The Fitzgeralds complain that the actions of Utah County officials were intended to interfere with the Fitzgeralds' right to alienate their property and further frustrated their dream of developing a rural, agricultural community in Cedar Valley. In this respect, the Fitzgeralds are much like the real estate developer in Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982). The developer in Creative Environments, Inc. submitted a subdivision plan which was rejected by the town's planning board. The developer then asserted a claim under 42 U.S.C. § 1983 that the town's officials violated the developer's due process and equal protection rights by "distorting" and misapplying statutory and regulatory development laws, 680 F.2d at 831. Further, the defendants [Planning Board] allegedly interpreted the laws "in ways which frustrated plaintiffs'" project. Id. at 833.

While recognizing that "it is not impossible to derive a theoretical basis for [plaintiffs'] arguments," the First Circuit affirmed defendants' summary judgment, holding that such claims are:

[T]oo typical of the run of the mill dispute between a developer and a town planning agency, regardless of [plaintiffs'] characterizations of it and of defendants' alleged mental states . . . Every appeal by a disappointed developer from an adverse ruling by a local . . . planning board necessarily

involves some claim that the board exceeded, abused, or "distorted" its legal authority in some manner, often for some perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal questions under § 1983.

Id. at 833 (emphasis in original).

In elaboration, the court stated that the federal constitution is not invoked "simply because a local planning board . . . makes demands which arguably exceed its authority under the relevant state statutes." Id. at 832 n.9. "§ 1983 is not a means of litigating the correctness of . . . state or local administrative decision." Id. "Were such a theory to be accepted, any hope of maintaining a meaningful separation between federal and state jurisdiction in this and many other areas of law would be jettisoned." Id. at 831.

C. Plaintiffs Claims For Taking of Their Property Should be Dismissed.

Landmark Land Company of Oklahoma, Inc. v. Buchanan, 874 F.2d 717 (10th Cir. 1989) also disposes of appellants' taking claim. In Landmark the court found that in order to assert a taking claim under § 1983 and the Fifth and Fourteenth Amendments "the government entity charged with implementing the regulations [must have] . . . reached a final decision regarding the application of the regulations to the property at issue." Citing

Williamson Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 105 Sup.Ct. 3108 (1985). The court also noted, "[a] 'final decision' requires not only an initial rejection of particular development proposal, but a definitive action by local authorities indicating with some specificity what level of development will be permitted on the property in question." 874 F.2d at 720.

The Fitzgeralds cannot even allege that they attempted to obtain a final decision from Utah County or that the County ever decided with specificity what limitations, if any, would apply to the Fitzgeralds' sale of their property. The Fitzgeralds failed to make any application to the Board of Adjustment regarding decisions of Utah County zoning officials. Therefore under Landmark and Williamson County, the Fitzgeralds' claim for a taking lacks ripeness and finality and must be dismissed.

Moreover, the Fitzgeralds cannot show and failed to present any evidence before the District Court that they were denied all viable uses of their property. The District Court recognized the weakness of the Fitzgeralds' taking claim. The District Court found that, "[t]he Supreme Court in emphasizing the character of the governmental action [has said that] land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests and does not 'does not den[y] an owner economically viable use of his land.'" Citing Nolan v. California

Coastal Commission, 107 Sup.Ct. 3141 (1987) (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

The District Court's decision is entirely consistent with this court's decision in Landmark. This Court said, "[i]f Del City den[ies] [Landmark] 'all use of its property for a considerable period,' Landmark will have a claim for temporary taking under the Supreme Court's recent holding in First English Evangelical Lutheran Church v. County of Los Angeles." Id. at 721. The Fitzgeralds have not been denied all use of their property, even for a temporary period. First, the Fitzgeralds could comply with the plat requirements and develop the land through that process. Second, the Fitzgeralds could alienate the land or develop it for agricultural purposes without subdividing. Third, the Fitzgeralds have not shown that they cannot possible comply with the restrictive covenants requirements. Fourth, the Board of Adjustment could afford some relief.

Landmark also addresses the Fitzgeralds' claim of frustrated sales:

"It is true that the delays entailed in this requirement [finality of government action] might result in certain injuries to land-owners. Indeed, Landmark alleges it lost two sales because of the regulatory cloud over its head. However, "[m]ere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership'" citing Agins v. City Tiburon, 447 U.S. 255, 263 n.9.

The Fitzgeralds' taking claim is not ripe because there has been no finality of Utah County's decision and it is therefore impossible to determine what affect, if any, the County's exercise of its police power had on the Fitzgeralds' property. Moreover, the Fitzgeralds failed to demonstrate that Utah County's actions denied them all economically viable uses of their property. Consequently, the Fitzgeralds' taking claim must be dismissed and the decision of the District Court affirmed.

D. Plaintiffs Have Failed to Establish a Viable Claim for Alleged Defamation Plus Constitutional Injury.

The District Court in its September 7, 1988 Memorandum Decision granted appellees' Motion for Summary Judgment on all issues except the claim of defamation plus constitutional injury. The Court instructed the parties to provide addition briefing and evidence on this issue. The Fitzgeralds submitted a two paragraph affidavit together with copies of various uniform real estate contracts in response to the Court's instruction. The District Court reviewed this "supplementation of the record" and issued a second Memorandum Decision dismissing the defamation plus constitutional injury claim. The Fitzgeralds' defamation plus constitutional injury claim is defective and was properly dismissed for two reasons. First, the Fitzgeralds have failed to prove any defamatory statements were made, despite abundant

opportunity to do so and second, there is no separate constitutional injury related to the alleged defamation.

The Fitzgeralds, in conclusory fashion, assert that various County officials made statements which harmed the Fitzgeralds' business interests. The Fitzgeralds further claim that the filing of a lis pendens constituted a slander of title sufficient to establish their defamation claim. There was no evidence presented to the District Court of any statements made by Utah County officials and the lis pendens was dismissed by stipulation and agreement of the parties based on the Fitzgeralds' willingness to comply with Utah County ordinances. Furthermore, the Fitzgeralds presented no evidence that any business relationships or contractual agreements were interfered with or breached because of any statements by County officials or the filing of the lis pendens.

In a similar case, the United States District Court of Colorado in Walters v. Linhof, 559 F.Sup. 1231, 1234 (D. Colo. 1983) granted defendant's Motion for Summary Judgment. In Walters, land developers had brought a defamation action based upon allegedly defamatory statements contained in letters by various defendants to county land use departments, county officials and to the editor of a local newspaper. The Court, in dismissing these claims, stated:

The statements do no injury to the reputation or the character of the plaintiffs. I recognize that in the area of politics these

statements may contribute to a decision which is adverse to plaintiffs plans for the construction, but economic advantage is not the legal equivalent of reputation. In fact, public hearings and free and open communication by citizens with public agencies and public officials give the First Amendment its raison d'etre. (Emphasis added.)

Any statements or representations made by Utah County regarding appellants land were done in the proper discharge of their official duty. Appellees have the obligation to place actual or prospective purchasers on notice of any potential limitations with respect to the use of their property. This type of communication is not considered libelous or slanderous and is privileged under Utah Law. Utah Code Ann. § 45-2-3 (1953 as amended). In Walters, supra, the Court stated:

Proceedings for rezoning and development of a project the size of that proposed by plaintiffs falls within the 'interest of social importance' category. Additionally, statements made during judicial proceedings are absolutely immune. Proceedings of boards and commissioners that are judicial or quasi judicial in nature are protected. To hold otherwise would chill First Amendment rights to express an opinion and publicly comment on judicial or quasi judicial proceedings. Even if not absolutely privileged, the statements would most likely be qualifiedly or conditionally privileged.

559 F.Supp. at 1237.

Accordingly, if statements and representations were made by Utah County to prospective purchasers about the zoning requirements in Cedar Valley, they were not defamatory as a matter of

law. In the alternative, any such statements or representations are privileged communications.

Finally, in order for the alleged defamation to be actionable, the Fitzgeralds must show it was the direct result of actual malice. Direct Import Buyers Association v. KSL, Inc., 572 P.2d 692, 696 (Utah 1977). Although the Fitzgeralds have alleged that certain statements and representations were false, and that these statements and representations damaged their business and personal reputations, they have failed to plead or allege any actual malice on the part of Utah County. Utah County submits that there was no showing of defamatory statements and appellants have failed to satisfy this prong of the defamation plus constitutional injury claim.

Assuming, however, that the Fitzgeralds could establish the elements of a pendent state law claim for defamation, their defamation "plus" constitutional injury claim is still defective. The District Court's decision on this issue is very relevant. The District Court acknowledged that defamation, standing alone, cannot be the basis for an action under 42 U.S.C. § 1983. Paul v. Davis, 424 U.S. 693, 701 (1976). The Court further found that in order to "succeed under § 1983, a plaintiff whose reputation has been injured by the remarks of a public official must also show that he has suffered an additional "tangible" injury, such as loss of employment as a result of the defamation. See also Corbitt v. Andersen, 778 F.2d 1471, 1474 to 1475 (10th Cir.

1985). The District Court then analyzed whether the alleged injury suffered by the Fitzgeralds, i.e., the slowdown in sales of property to new buyers and the failure of previous buyers to make contract payments, is a sufficient "tangible" injury to constitute infringement of a liberty or property interest protected by the federal constitution.

The District Court held that tangible injury must be inflicted by the government directly, apart from the consequences flowing from an injury to reputation because of the independent actions of third parties. This decision is consistent with several decisions of the United States Supreme Court as well as other Circuit Courts of Appeal. In Paul v. Davis, 424 U.S. 693 (1976) the Court stated:

We have noted the 'constitutional shoals' that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law; (citations omitted); a fortiori, the procedural guarantees of the Due Process Clause cannot be the source for such law . . . [W]e think that the weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the due process clause of the Fifth or Fourteenth Amendment.

The United States Supreme Court in Board of Regents v. Roth, 408 U.S. 564 (1972) likewise refused to extend the due process clause to include the type of claim made by the Fitzgeralds here. The United States Supreme Court held:

It was this alteration [alteration or extinguishment of a right or status previously recognized by state law], officially removing the interest from the recognition and protection previously afforded by the state, which we found sufficient to invoke the procedural guarantees contained in the due process clause of the Fourteenth Amendment. The interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the "liberty" or "property" recognized in those decisions. Kentucky law does extend to respondent any legal guarantees of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather his interest in reputation is simply one of number which the state may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in the deprivation of any "liberty" or "property" recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the state's laws. For these reasons, we hold that the interest and reputation asserted in this case is neither "liberty" nor "property" guaranteed against state deprivation without due process of law.

The District Court noted that a few Courts have interpreted Paul v. Davis differently, but the Court nevertheless found that to establish defamation plus constitutional injury, defamation by a state actor must involve some "tangible change of status vis a vis the government." Doe v. United States Department of Justice, 753 F.2d 1092, 1109 (D.C. Cir. 1985). The Ninth Circuit Court of Appeals in Havis v. Thorton, 609 F.2d 372 (9th Cir. 1979) affirmed the dismissal of a § 1983 action where the plaintiffs

alleged that due to the governments defamation they lost large sums of money. The Ninth Circuit found that Paul v. Davis must be read in the context of government employment cases which involve situations where a right or status previously recognized by state law was distinctly altered or extinguished. Havis at 375.

The D.C. Circuit in Doe interpreted Paul v. Davis in similar fashion, stating:

This Circuit . . . has consistently interpreted Paul's "stigma plus" test to require two forms of government action before a plaintiff can "transform a [common law] defamation into a [constitutional] deprivation of liberty . . ." First, the government must be the source of the defamatory allegations . . . Second, the resulting "stigma" must involve some tangible change of status vis a vis the government.

Id. at 1108-1109.

The analysis in Doe requires defamation plus an injury directly caused by the government as opposed to "injury caused by the actions of some third party acting upon the public official's defamatory remarks." Dower v. Dickinson, 700 F.Supp. 640, 646 to 47 (S.D.N.Y. 1988).

This Court's decision in Corbitt v. Anderson, 778 F.2d 1471 (10th Circ. 1985) is not inconsistent with such an analysis. Corbitt bases its "tangible" injury analysis on the fact that the defendant interfered with the plaintiff's right to pursue government contracts and future employment opportunities, indicating

that tangible injury requires some change in a party's status vis a vis the government, rather than injury caused by the acts of third parties based upon public officials' allegedly defamatory remarks.

The First Circuit in Creative Environments, Inc. v. Estabrook, 680 F.2d 822 (1st Cir. 1981), cert denied 459 U.S. 989 (1982) held that:

Property is not denied without due process simply because a local planning board rejects a proposed development for erroneous reasons or makes demands which arguably exceed its authority under relevant state statutes.

See also Culebra Enterprises Corp. v. Rio, 613 F.Supp. 146 2(D.P.R. 1985), vacated on other grounds, 622 F.Supp. 128 (D.P.R. 1985) (the right to property or entitlement does not include the right to develop land).

The Fitzgeralds' status vis a vis Utah County is unaltered and no property or liberty interest previously protected by the State or the County has been extinguished by Utah County's actions. The Fitzgeralds are absolutely free to alienate their property and this was true before and after the alleged defamatory remarks. The Fitzgeralds further claim that their property was more difficult to sell after the alleged defamatory remarks. However, this type of injury, even if supported by the evidence, flows from the decisions of private, nongovernmental actors, which injuries do not constitute a governmental deprivation of liberty or property without due process in violation of the

Constitution. Furthermore, the Fitzgeralds may resort to state courts for a remedy to the alleged defamation. The District Court found, "[i]t was the decisions of non-governmental third parties, the purchasers and potential purchasers, coupled with plaintiffs' own failure to comply with the 1976 revised zoning ordinance which caused the injuries alleged by plaintiffs." See Rice v. Vigil, 642 F.Supp. 212, 215 (D.N.M. 1986); Sullivan v. New Jersey, Division of Gaming Enforcement, 602 F.Supp. 1216, 1220 (D.N.J. 1985).

The District Court also found that even if a "tangible" injury had been shown, the Fitzgeralds failed to show that a genuine issue of fact existed as to whether the alleged deprivation occurred without due process. The District Court's analysis indicated that while a pre-deprivation procedure may not have been practical, post-deprivation remedies including state court actions for defamation, slander of title, interference with business relations and interference with contractual relations could have been pursued. The Fitzgeralds failed to avail themselves of any of these possible remedies. Consequently, the Fitzgeralds totally failed to prove their defamation plus constitutional injury claim and the District Court, after careful review, properly dismissed it.

POINT II

APPELLANTS' CLAIMS FOR MALICIOUS PROSECUTION AND IMPAIRMENT OF CONTRACT MUST BE DISMISSED.

The Fitzgeralds do not address their impairment of contract or malicious prosecution claims in their brief. The District Court noted in its September 7, 1988 decision that the common law tort of malicious prosecution does not create a federal constitutional claim under § 1983, citing Friedman v. Skokie, 763 F.2d 236, 239 (7th Cir. 1985) (citing Lynley v. Amoco Production Company, 639 F.2d 671, 673 (10th Cir. 1981)). The Court also found that the essential elements of a malicious prosecution were absent in the Fitzgeralds' case.

The Court further observed in its July 25, 1989 decision that the Fitzgeralds apparently conceded that their impairment of contracts claim under 1983 should be dismissed, citing Poirier v. Hodges, 445 F.Supp. 838, 842-43 (M.D. Flor. 1978). Utah County merely notes that these issues have not been raised to this Court and the District Court's decision granting Utah County's Motion for Summary Judgment should be affirmed.

POINT III

ALL INDIVIDUALLY NAMED DEFENDANTS ARE
ENTITLED TO IMMUNITY AS A MATTER OF LAW.

A. Defendant Lynn Davis is Absolutely Immune From Liability Under § 1983 for Actions in His Role as a Deputy Utah County Attorney.

Even when viewed in a light most favorable to the Fitzgeralds, their Complaint clearly demonstrates that all actions attributable defendant Davis were undertaken in his capacity as Deputy County Attorney, bringing him within the scope of the absolute immunity recognized in Imbler v. Pachtman, 424 U.S. 409 (1976). The importance of allowing a public prosecutor to discharge his responsibilities without fear of the possible consequence of exceeding his jurisdiction in the initiation and presentation of the case was reaffirmed in Lerwill v. Joslin, 712 F.2d 435 (10th Cir. 1983).

B. All Other Individual Defendants Acted in an Objectively Reasonable Manner and Are Entitled to Qualified Immunity.

The United States Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800 (1982), recognized the fact that local officials would inevitably be subjected to the aggravation and expense of trial where they performed discretionary functions and did not violate clearly established constitutional rights because of their

inability to prove subjective good faith as a matter of law. The Court held:

We conclude the bare allegations of malice should not suffice to subject governmental officials either to the cause of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 410.

Under Harlow, Id. and Anderson v. Creighton, 107 Sup.Ct. 3034 (1987) the individual appellees are entitled to qualified immunity.

Utah County was likewise entitled to summary judgment and that decision should be affirmed. The Fitzgeralds failed to present any evidence showing that actions or statements by non-policy makers were illegal or made pursuant to an official custom, policy or practice. Rather, the District Court found that statements and actions, if they occurred, were random, unauthorized statements made by employees of Utah County.

CONCLUSION

The Fitzgeralds characterize this case as one involving Utah County's intentional efforts to improperly control and prohibit the sale and use of the Fitzgeralds' property. This characterization is not correct and ignores fundamental legal

principles regarding the appropriate exercise of the police power by Utah County. The Fitzgeralds failed to take advantage of available administrative remedies to resolve disagreements about interpretation of county ordinances. Consequently, many of the Fitzgeralds' claims are not ripe for decision by this Court. Other claims, specifically the defamation plus constitutional injury claim, fail because the Fitzgeralds did not suffer a "tangible" injury protected by the federal constitution. The Fitzgeralds allege, but offer no evidence, that third parties acted or failed to act in response to Utah County's decisions. However, the conduct of third parties, under these circumstances, does not implicate constitutional protections. Finally, individual appellees are entitled to qualified immunity or absolute immunity and Utah County was entitled to summary judgment because no action of an individual appellee was the result of a County policy, practice or custom.

The Fitzgeralds had significant opportunity to present to evidence to the District Court regarding all of their claims, particularly the defamation plus constitutional injury claim. This case was filed in 1982 and the Fitzgeralds had several years to gather and marshall evidence. Their only evidence, however, was conclusory affidavits which were improper under Rule 56, Federal Rules of Civil Procedure and otherwise failed to present admissable evidence as required by Rule 56 and Celotex v. Catrett, 477 U.S. 317 (1986). Therefore, the District Court's


decision granting appellees' Motion for Summary Judgment should be affirmed by this Court.

REQUEST FOR ORAL ARGUMENT

Appellees, Utah County, Jeff Mendenhall, Gordon Buckley Rose, Iva Snell, Keith Richan, Jeril Wilson and Lynn Davis hereby request oral argument.

DATED this 20th day of December, 1990.

SNOW, CHRISTENSEN & MARTINEAU

By 
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CORRECTED CERTIFICATE OF SERVICE

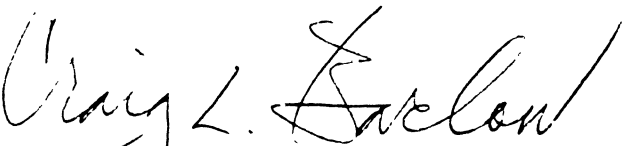
I hereby certify that on the 20th day of December, 1990,
four copies of the foregoing Appellees' Brief were mailed to the
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