1981

Reuel S. Kohler and Dolores M. Kohler v. Town of Garden City, Utah, A Municipal Corporation and Birdie Properties, a Partnership v. Town of Garden City Utah A Municipal Corpoation, Mack J. Madsen, and Leola S. Madsen : Reply of Defendant/Appellant Garden City To Cross-Appellant Brief

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

REUEL S. KOHLER and DOLORES M. KOHLER, Plaintiffs/Respondents, vs. TOWN OF GARDEN CITY, UTAH, a municipal corporation, Defendant/Appellant,	
BIRDIE PROPERTIES, a partnership, Plaintiff/Respondent/ Cross-Appellant, vs. TOWN OF GARDEN CITY, UTAH, a municipal corporation, MACK J. MADSEN, and LEOLA S. MADSEN, Defendants/Appellant/ Respondents/Cross-Respondents.	REPLY OF DEFENDANT/APPELLANT GARDEN CITY TO CROSS-APPELLANT BRIEF Case No. 17346

REPLY OF DEFENDANT/APPELLANT GARDEN CITY TO CROSS-APPELLANT BRIEF

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NATURE OF THE CASE

Plaintiff Birdie Properties brought this action for a declaratory judgment to quiet title against claims of the Town of Garden City to an alleged 66 foot public highway along the north portion of beachfront property at Bear Lake that Birdie Properties had previously purchased from Defendants Mack and Leola Madsen under an executory real estate contract.

This action was consolidated with Kohler vs. Town of Garden City as it involved similar claims against Garden City by the Kohlers.

DISPOSITION IN THE LOWER COURT

The Lower Court, Judge VeNoy Christoffersen, found that a road along the northerly portion of the Birdie Property had been dedicated to the public as a highway by user, to a width of 20 feet as oppossed to the 66 feet claimed by Garden City. The Court dismissed the claim against the Madsens and awarded no damages.

NATURE OF RELIEF SOUGHT ON APPEAL

The Town of Garden City seeks affirmation of the Lower Court's judgment.

STATEMENT OF FACTS

The Town of Garden City agrees that Madsens entered into a real estate contract in the summer of 1978. The balance of the statement of facts set forth by Respondent Birdie Properties is argumentative and inadequate and Garden City sets forth its view of the evidence as follows:

1. Garden City was formally incorporated on January 1, 1934. The town adopted a plat map which included the street known as Second North, which is the subject of the litigation herein.

2. The town based its claim to the 66 foot wide right-of-way embracing Second North on the plat originally made around the turn of the century evidencing a 66 foot wide

street. Said plat was ruled inadmissable, which was the basis upon which the appeal by the Town of Garden City was filed in the Kohler vs. Garden City matter currently before the Court. The town's claim that a public right-of-way was established, is based upon the testimony of long-time city residents who were questioned at trial:

A. Albert Charrington was called as a witness in behalf of the Plaintiff and testified that:

Direct Examination

By Mr. Lloyd;

Q. "Will you state your name, sir?

A. Albert Charrington.

Q. Where do you reside?

A. Garden City.

Q. And your home is to the north of the property owned by Dr. Davis; is that correct?

A. That's correct.

Q. When did you build your home?

A. 1966.

Q. How did you get in and out of your property when you started building your home?

A. Well, I came down that roadway which I thought was a roadway.

Q. Would you describe physically what it looked like?

A. Well, we drove a car down there and there was no problem." (Transcript pages 165 and 166)

The Plaintiff argues that the road should not be deter to be 66 feet wide, or even 20 feet wide because "snow is not removed." (Brief of Respondent page 8) However, it should be kept in mind that Garden City does not remove sno on any of the streets other than the state highways because of funding restraints.

B. Mayor Otto Mattson testified:

Direct Examination

By Mr. Low;

"Q. Otto, are you familiar with the two roads, the Birdie road and the Kohler road, which we have been talkin about here today?

A. Yes, sir, known as Tommy's Lane and the Lake Road.

Q. How long have you been familiar with those two roads, lanes, rights-of-way, whatever?

A. My grandfather lived there. We used to sleigh ride there.

Q. Have you seen other people use those roads during your lifetime?

A. Yes sir.

Q. Have you seen how people use those two roads?

A. Yes, I have launched boats personally off of both of them.

Q. In what capacity have you seen other people use them besides yourself?

A. To camp on, access to the lake mainly.

Q. The Birdie properties, have you ever seen any improvements being made on those roads during your lifetime, or on that road during your lifetime?

A. Yes sir, Mayor Nelson did.

Q. When was that?

A. In the early sixties."

(Transcript pages 183, 184, 187.)

C. Roadbeds were constructed by the WPA during the 1930s as public works projects on lanes extending into Bear Lake, which were described by George Patience, an engineer, as being shown on an aerial photograph, exhibit 34:

Voir Dire Examination

By Mr. Lloyd;

"Q. I believe you just testified that you saw the Kohler Lane and then you marked it with the letter "B". Don't you mean you only saw half of the Kohler Lane, marked with the letter "B"?

A. The Kohler Lane is down here.

Q. I'm sorry; the Birdie Properties Lane.

A. No, I can see except for it's obscured by trees, I can see the lane to where it goes into the trees, and indications of a lane on this side, although the trees grow towards the lake so much it is a little hard on that side."

Mr. Patience, an engineer, testified that he could see the road except for those portions obscured by the trees.

Mr. Lloyd said that he could not see the road.

D. Ross Pope, a lifelong resident of Garden City, testified of continual use on the road which is the subject of this suit, and used it to go swimming and for coasting in the winter, and for ice skating. (TR-238). He also testified that people used the lanes to walk to the lake. (TR-239).

E. LaVon Sprouse, a lifelong resident of Garden City (age 79 years), stated that the property upon which the road sits was used as a park. (TR-254). He also stated that people in Garden City used the north part of the park owned by the Hodge Brothers.

F. Ora Lutz, who lived 35 years at the corner of State Street and 200 North Street, described the road in more specific detail. It should be remembered that Mrs. Lutz was Plaintiff's witness, and was questioned in this regard by Mr. Lloyd.

Direct Examination

By Mr. Lloyd;

"Q. I call your attention to a street running further to the east, just to the north and straight to the east going down to the lake. Are you acquainted with that little area down there?

A. Yes.

Q. And how long have you resided in Garden City?

A. Most of my life.

Q. So you're basically familiar with traffic up and down in front of your house?

A. Yes.

Q. And probably up and down this side street and what appears to be some kind of a road going toward the lake?

A. Right.

Q. What was that area which now appears to be some sort of a road like 35 years ago?

A. Well, a little dusty road.

Q. Was it actually a road?

A. Well, there were some cars that went down it.

Q. What would you describe it as?

A. Now I haven't been down below the top of the hill for quite some time, but the cars go back and forth all the time, so I assumed it was a pretty nice road.

Q. Prior to the time that [Abe Charrington] built his home, say 15 years ago, what would have been the traffic up and down that area?

A. There was always traffic going up that road, it seems like.

Q. Did you ever have occasion to go down there with your children for swimming or other activities?

A. You bet.

Q. When you were going down the lane were you aware that you were on anybody's property in particular?

A. No. No, I thought it was open to the public.

Q. How many times a year would you have used the Cook's lane?

A. When my family was small, daily, three or four times a day maybe.

Q. Who else would go down Cook's Lane to the Lake? Other people that lived in the town?

A. Oh, yes, uh-huh. Everyone felt quite free to go down there." (TR pages 109, 110, 112 and 113 and 114.)

ARGUMENT

POINT I. THE EVIDENCE AND TESTIMONY DEMONSTRATED BY CLEAR CONVINCING PROOF A DEDICATION TO THE PUBLIC.

U.C.A. Section 27-12-89 states that:

> "Public use constituting dedication. --A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years."

A case decided previously by the Utah Supreme Court is particularly helpful in light of the "dead-end" status of the road in question. In the case of Bonner vs. Sudbury vs. Salt Lake City Corporation, 18 U.2d 140, 417 P.2d 646 (1966), the issue of dedication by a municipal corporation of a dead-end street was litigated. In that matter, Mr. Bonner sued to prevent the Defendants from using the dead-end street, called McClelland Street, in Salt Lake City. After a trial on the merits, the District Court found that it had been used as a public street for more than 10 years and hence under Section 27-12-89, UCA 1953, it was deemed to have been dedicated to a public use and gave judgment for the Defendants. That is the same statute being used to

assert a dedication by the Town of Garden City. In that matter, the Supreme Court stated: "In considering that problem it is our duty to analyze the evidence and whatever reasonable inferences may be drawn therefrom in the light most favorable to the findings and judgments. Staley v. Grant, 2 U.2d 421, 276 P.2d 489 (1954)." In that case, as in the case at bar, the facts showed that records of the city indicated a plat of the public streets since the early 1900s. In that case, as in the one at bar, the City had paved the street. A number of witnesses testified that the street had been used by various people for various reasons over the years. The court stated; "Although there has never been much traffic there due to the fact that it is a narrow dead-end alley, the fair inference from the evidence is that it had been used by anyone who so desired; and that there has been no substantial interference therewith for at least 25 years and in fact "since the memory of man runneth not to the contrary." (P 648). The court concluded all of the facts should be considered together, and "where there is dispute about whether a public use is established, determination of the facts and resolution of the issue is primarily the responsibility of the trial court."

Plaintiff's own witnesses have provided ample evidence that the road in question was, in fact, used openly, continuously, and notoriously for in excess of 35 years. (TR-110, 114 and 115). No objections to the use of the road by the record

owners was ever made according to the testimony at the trial. The brief of Respondent Birdie Properties properly points out the important legal principles regarding the burden of proof to determine public dedication of a roadway in the case of Peterson v. Combe, 20 U. P.2d 276, 438 P.2d 545 (1968). The Peterson, supra., case establishes five standards upon which the dedication of a road for public use must occur. They are:

1. Dedication of rights to the public generally must be displayed by clear and convincing evidence. Such intent may be shown by words, acts, or deeds of the owner. Automotive Products Corporation vs. Provo City Corporation, 28 U. 2d 358, 502 P.2d 568 (1972). The open, notorious and continuous use by the public in general for numerous and varied purposes has been clearly met by the testimony of all of the witnesses previously discussed (Abe Charrington, Otto Mattson, Ross Pope, LaVon Sprouse, and Ora Lutz).

2. Individual property rights must not be lightly treated. Therefore, a public dedication cannot occur over the protest of the landowners if they have not waived such right to protest through open, notorious and continuous use of the property for the requisite number of years. It should be noted that no testimony was offered at the trial to evidence any objection by the previous owners of the property (Spencers, Cooks or Charingtons) and no evidence or testimony was offered to show that any of the previous

owners had ever objected to the use of the road, including Plaintiff's own witnesses.

3. Has the public generally used the road for public uses for ten years or more? Again, the answer to that question may be found in the testimony of Plaintiff's witnesses wherein it is described that the road was used for access to Bear Lake for swimming, horseback riding, tourist access, sledding in the winter, and picnics. The point must be made that public use is a conglomoration of special and private interests magnified many times over. In the instant case, there was no blockage by the owners for use by the public; no protests were ever lodged by the owners to the public use; and the evidence and testimony is clear that the public in fact used the property for multiple and varied reasons.

4. Public use must not be restricted to the immediatel adjoining property owners. Of course property owners cannot be the sole basis upon which public use is claimed, but adjoining landowners are obviously part of the public, and therefore entitled to be included in the grouping known as "the public." In this case, virtually every witness testified to having used the road in question, and having observed others using the road in question for a number of years (see testimony of Ora Lutz beginning at TR-106, Albert Charrington beginning at TR-165, Otto Mattson beginning at TR-180, Ross Pope beginning at TR-233, LaVon Sprouse beginning at TR-251). Use was not restricted to adjoining landowners.

5. Recorded written documents should be granted a high degree of sanctity and respect. However, written documents are not a pre-requisite of the establishment of a public dedication of a road. See Thomson et al vs. Nelson et al., 2 U. 2d 340, 273 P.2d 720 (1954).

The basic question is whether the road constituted a "public thoroughfare." In the case of Thomson vs. Nelson, 2 U. P.2d 340, 345, 273 P.2d 720 (1954), the definition is given as:

> "A place or way through which there is passing or travel. It becomes a public thoroughfare when the public have a general right of passage. Under this statute the highway, even though it be over privately owned ground, will be deemed dedicated or abandoned to the public use when the public has continuously used it for a thoroughfare for a period of ten years, but such use must be by the public."

The evidence and testimony at the trial indicates that that is the precise fact situation we have before us. The public used it for at least 50 years, and probably much longer than that for numerous and uncontested purposes.

The only possible objection which could be argued was made by an adjoining landowner (Abe Charington) when he "shoed away disorderly teenagers by calling the County Sheriff." (TR-172). This is not an objection to the use of the road, but rather to an abuse of the property. There is a critical difference.

A dispute as to when the road was grated and oiled was evident from the testimonies of Mr. Charrington (who remembered work done in 1972) and Mayor Mattson (who recollected his predecessor improving the property in the mid 1960s). However, the 10 years of public use does not run from the time that improvements occur, but from the time the road exists and public use begins. The evidence in that regard shows that the road was indisputeably in use in 1907 (TR-234) and continued through 1945 (TR-109), to the present.

POINT II. THE EVIDENCE SUPPORTS A FINDING OF AT LEAST A TWENTY FEET WIDTH FOR PUBLIC THOROUGHFARE.

Respondent argues that it is somehow to the advantage of Garden City to "seize one or more" roads for public access to Bear Lake. This is argumentative and not based on the facts or issues raised at the trial level. The city derives no direct economic advantage from maintaining public access to a public resource. But it is true that the original town fathers recognized the utility to their citizens as well as the citizens of the state by allowing open and public access to the lake--which original intent is shown by the map which was sought to be introduced by the Defendant Garden City demonstrating such intent. This "city bible" was deemed inadmissable by the trial court, but the contemporary town fathers certainly adhere to that original desire. No economic benefit derives to the town of Garden City from maintaining public access, but a valid community benefit

does occur. The truth of the matter is that it costs Gard City more to maintain and police the roads because they ar accessed by the public than if they were privately maintai and controlled. Respondent insists on asserting an unholy intent by Garden City to "seize 66 feet of property" to benefit the public. Again, public parking and public impr do not come "at no cost to the town council," and the 66 feet is the distance originally shown to be the width of al streets in Garden City, with the exception of the ones designated 99 feet. If Garden City wanted a public beach front for its citizens (which it does not), it would not rely on a 66 foot dead-end road as the total beach resource

The whole argument presented by Respondent following t statement of Point II, p. 14 of Respondent's Brief has nothi to do with a finding of a 20 foot width for a public thoroug The text which follows the statement of the argument is irrelevent to the question at hand. No discussion by any witness and no evidence offered by the Plaintiffs at the trial court level discussed or raised the issue of future development by the city in any form whatsoever. Consequentl the whole of the argument following the statement on page 1 of Respondent's brief is irrelevent and immaterial, and should not be raised for the first time on appeal.

An example of such irrelevent argument is the allegatio by Respondent Birdie Properties that the town intends to prohibit building permits on the property until a 66 foot

wide street to Bear Lake is dedicated to the public use. According to the Respondent; "the trial court should have addressed this issue in its judgement." It is difficult to understand how the trial court should have addressed this issue in its judgment when it was never presented by any evidence or testimony at the trial court level. No such discussion at the trial level ever occurred. The fact of the matter is that counsel for Respondent attempted to introduce the issue into the order prepared for the Judge's signature, but the Judge recognized the immateriality of the matter and struck it from the proposed judgment, which is now complained about by the Respondent.

It is unclear for what purpose the Respondent raises the issue of admissability of the survey map which was excluded at the trial level. Argument number 4 of the Respondent's brief apparently attempts to anticipatorily argue the propriety of the original exclusion. Since the matter is not properly raised in the Respondent's brief, it will not be addressed by the Appellant except to dispute the allegation that the survey "was clearly contrary to the public record" and to dispute that the document was objected to by all parties present."

The issue of the trial court's ruling on hearsay and foundation are more properly argued in the briefs of Appellant Garden City and Respondent Reuel S. Kohler Appellant.

CONCLUSION

Respondent Birdie Properties makes an argument in equity that the road should revert to private use because "permitting the public at large to use the lane will also result in parking and congestion near the lake front and no facilities for public use, which increases the burden on the property owners." If this is true, then parking ordinance enforcement is the proper solution. It is unlikely there will be any great influx to the area other than the normal and steady use which has occurred for the past 50 years. Besides, this argument should have been made at the trial level, and cannot now be relitigated as new issues on appeal.

The same is true of the argument that Garden City is threatening to apply its subdivision ordinances to prevent development of the property in violation of those ordinances. This too is improper argument because this is the first time the issue has been raised. It should be addressed in another forum when and if a subdivision plot plan is proposed to Garden City, and the City can address the issues of subdivision proposals by developers in the context of the municipal subdivision ordinances.

The testimony of multiple witnesses demonstrates by clear and convincing proof that the dedication of the road to the public occurred at least 50 years ago, and has continued without interruption since that time. While it is arguable

that the evidence fails to support a finding of 99 feet, or even 66 feet as a public thoroughfare described in the judgment, there can be little doubt that the trial court was convinced that the public had acquired and maintained at least a 20 foot access width to Bear Lake. Unless it can be shown that the trial court erred by ignoring the clear and convincing evidence to the contrary, its judgment must remain in tact. The trial court apparently agreed with the argument by the town of Garden City that it is unwise and unsound public policy to restrict access to one of Utah's great natural resources to the wealthy few who can afford to own the property abutting that resource, and who then subsequently attempt to restrict access for their personal and private use to the exclusion of the public. Based upon the evidence and testimony, the ruling of the trial court should be upheld.

Respectfully submitted this ___ day of _____, 1981.

HILLYARD, LOW & ANDERSON

_____

HERM OLSEN

Attorney for Garden City

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing REPLY OF DEFENDANT/APPELLANT GARDEN CITY TO CROSS-APPELLANT BRIEF was mailed postage prepaid on the 3rd day of March, 1981, to the following:

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