

1989

# Morris W. Told and Elaine Told v. Salt Lake City Board of Adjustments : Petition for Writ of Certiorari

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

890174

IN THE SUPREME COURT OF THE STATE OF UTAH

MORRIS W. TOLD and ELAINE  
TOLD,

Petitioners and  
Appellants,

vs.

SALT LAKE CITY BOARD OF  
ADJUSTMENTS,

Supreme Court No. \_\_\_\_\_  
(Priority Category 13)

Respondent.

PETITION FOR WRIT OF CERTIORARI  
TO THE UTAH COURT OF APPEALS

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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MORRIS W. TOLD and ELAINE  
TOLD,

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SALT LAKE CITY BOARD OF  
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- - - - -

PETITION FOR WRIT OF CERTIORARI  
TO THE UTAH COURT OF APPEALS

- - - - -

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in affirming the District Court's Summary Judgment Decision (which affirmed the decision of the Salt Lake City Board of Adjustment) when the District Court considered improper evidence. More specifically, if an applicant for a zoning variance produces evidence before the Board of Adjustment showing numerous instances of zoning violations by surrounding neighbors in an effort to support a claim of discrimination and estoppel, can the City's subsequent enforcement actions against these neighbors be properly considered by the District Court in ruling as to the applicant's initial claim?

CITATION OF COURT OF APPEALS DECISION

The decision of the Court of Appeals was made pursuant to Rule 31 and was affirmed without opinion on February 24, 1989.

## JURISDICTIONAL GROUNDS

The decision of the Court of Appeals was rendered February 24, 1989. An extension of time to file the Petition for Writ of Certiorari was granted on March 23, 1989 by Justice Howe for a thirty day period. An additional extension was subsequently granted until May 1, 1989.

## CONTROLLING STATUTES

The decision of the Salt Lake City Board of Adjustment was made pursuant to Section 10-9-12 U.C.A. The decision of the District Court relating to judicial review of the Board's decision was made pursuant to Section 10-9-15 U.C.A.

## STATEMENT OF THE CASE

### A. Nature of the Case and Course of Proceedings Below.

This is an action involving a request for a zoning variance as to a carport built on Petitioners' property. The matter was first submitted to the Board of Adjustment and the request for a variance as to the carport was denied on March 16, 1987. Subsequently, Petitioners retained counsel and a new application for a variance was made. On May 26, 1987 after Petitioners submitted a list of 38 instances of similar violations in their immediate neighborhood the Board of Adjustment again denied the variance.

On June 15, 1987 Petitioners filed a "Petition for Relief of the Board of Adjustment Order" in the Third Judicial District Court. On January 11, 1988 the Honorable Richard Moffat executed an order granting defendant's Motion for Summary Judgment and finding that the actions of the Board of Adjustment were proper.

An appeal was taken to the Utah Court of Appeals which pursuant to its Rule 31 affirmed the decision without opinion on February 24, 1989. The present Petition for Writ of Certiorari is based upon these proceedings. A copy of the Board of Adjustment hearings, the Complaint of Petitioners in the District Court, the Findings and Decision of the lower court, and the decision of the Court of Appeals are attached herein as an appendix.

B. Statement of Facts.

It is the contention of Petitioner that the only facts which are necessary for the resolution of this case were developed before the Board of Adjustment at the two hearings. However, in addition to these "facts" the City filed an affidavit in the District Court in support of its Motion for Summary Judgment. In essence, the findings of the lower court are almost exclusively taken from that affidavit. The Affidavit of Merrill L. Nelson is attached herein as part of the appendix. In order to clarify the source of facts stated below a reference will be made to "Hearing I" as to the Board of Adjustment Hearing held on March 16, 1987, "Hearing II" as to the Board of Adjustment Hearing held on May 26, 1987 and "Affidavit" as to the Affidavit of Merrill L. Nelson.

Petitioners Morris and Elaine Told own a residence at 1655 Laird Avenue in Salt Lake City, Utah. A storm ruined the previous garage and also flooded their basement. Because of vandalism in the neighborhood they felt a garage would be necessary to keep their automobiles secured. (Hearing I). Mr. Told attempted to rebuild the garage on the foundation of the old one but it fell apart and was necessary to make a new foundation and footing. The

carport was built in order to keep the driveway free of snow and rain and to reduce the possibility of flooding to the house. (Hearing II). No building permit was obtained for either the carport or the garage.

Subsequently, the Tolds applied for a permit to construct an addition to the back of their residence. When applying for this permit they did not show the existence of the garage or the carport located in the backyard. The permit was granted based upon the plans as presented. (Hearing II).

The carport and garage is approximately one foot away from the east property line of the residence. This space requirement does not conform to the ordinances. The west side does contain adequate space.

During the first hearing it was noted in the minutes that "Mrs. Told explained that there are several residences around their home which have similar situations to theirs with a garage and a carport." The Board also noted "Mr. Told expressed his feelings that the garage is in keeping with the rest of the neighborhood because there are several other homes with garages with attached carports similar to theirs." (Hearing I).

In the second hearing the Tolds presented to the Board pictures and evidence that within a three-block radius there were 38 instances of similar alleged violations of carports and garages. Mr. Told's attorney presented pictures and addresses showing the homes in violation. (Hearing II).

At the conclusion of the first hearing the Board made the following order:



It is therefore ordered that the requested variance be denied. However, it is also ordered that a variance to allow the detached garage in the rear yard four feet (eave to eave) to the rear of the addition and closer than 15 feet to the neighbor's dwelling and that the carport be removed within 30 days of the dating of these findings and order. (Hearing I).

The second hearing affirmed this order. (Hearing II).

It should be noted that in both instances the decision of the Board of Adjustment was rendered on the same date that the hearings were held. No continuances or further hearings were granted in either instance.

Of the approximately 40 addresses given to the Board of Adjustment by the petitioners as evidencing similar violations, the City's Building and Housing Department allegedly investigated all of them and determined that 21 of the addresses did not have any violation because Section 51-13-1 of the Salt Lake City Ordinances allowed a detached accessory building properly located in the rear yard. (Affidavit). Of the remaining 19 addresses research showed that four of the addresses had received prior variances from the Board of Adjustment and one address was found to have a non-conforming use. Fourteen notices of violations were served by the Department. As a result of these notices three of the owners immediately complied by removing the illegal structures and eight of the owners applied for variances all of which were denied. (Affidavit).

Of these eight, six were allegedly ordered to remove the illegal structures within ninety days while two are on administrative hold while the City Council considers whether the ordinance should be amended to take into consideration the length

of time for which the illegal condition had existed and the innocent nature of the violation by the owner of the property. Of the owners of the three properties which did not bother to apply for a variance these were supposedly turned over to the City Prosecutor for future legal action. (Affidavit).

It should also be noted that Mr. and Mrs. Told each filed an affidavit stating that Mark Hasey, an employee of the Salt Lake City Board of Adjustment, had contacted some of these neighbors which were contained on the list of similar violations and informed these individuals that Mr. Told had given the City a list of violators. (The Affidavit of Morris Told is also attached to the appendix herein).

#### ARGUMENT FOR ISSUANCE OF THE WRIT

THE COURT OF APPEALS HAS INCORRECTLY DECIDED AN IMPORTANT QUESTION OF MUNICIPAL ZONING LAW BY ALLOWING EVIDENCE OF SUBSEQUENT ENFORCEMENT TO BE CONSIDERED IN A CLAIM OF DISCRIMINATORY ZONING.

This Petition reaches this Court on an appeal from an administrative decision of the Salt Lake City Board of Adjustment. The power of the District Court to review this decision is given pursuant to Section 10-9-15 which states:

The City or any person aggrieved by any decision of the Board of Adjustment may have and maintain a plenary action for relief therefrom in any court of competent jurisdiction.

This Court in Xanthos v. Board of Adjustment of Salt Lake City, 685 P.2d 1032 (Utah 1984) stated that a district court must review the Board of Adjustment's decision to determine whether the action taken is unreasonable or is arbitrary and capricious and that it must rely upon the record below but can supplement such

record with additional evidence which is "relevant to the issues that were raised and considered by the Board." Id. at 1035.

Thus, under this standard the scope of the District Court's decision was to determine whether or not the Board of Adjustment acted reasonably based upon the information which it had available to it at the time of its decision. While a district court can delve into facts which occurred during the administrative hearings, Davis County v. Clearfield City, 82 Utah Adv. Rpt. 8 (Utah App. 1988), the District Court cannot properly consider evidence which is subsequent to the administrative hearing process.

It will be noted that the order of the District Court is nearly identical to the Affidavit of Merrill L. Nelson filed by the City in support of its Motion for Summary Judgment. The Order and Affidavit contain three factual elements which were not brought before the Board of Adjustment: first, that the City's zoning enforcement department becomes aware of zoning violations in three ways (a) where plans are submitted; (b) where neighbors complain and (c) occasionally by a zoning inspector viewing a construction activity not in compliance with zoning; (Affidavit, para. 4; Summary Judgment Order, para. 3), second, that:

The City's resources are not sufficient to hire enough building inspectors to catch every violation before it is completed, and thus, the City relies heavily on being informed of violations by citizens. This is especially true where the illegal construction is done without a permit. (Affidavit, para. 5; Summary Judgment Order, para. 4).

The third factual element is the disposition and analysis of the some forty claimed violations of neighboring residences of the petitioners. All of these investigations occurred after the Board

of Adjustment had made its ruling that the variance to Petitioners be denied.

The consideration by the lower court and the subsequent affirmance by the Court of Appeals of these extraneous factors constitutes reversible error. More importantly, however, this Court should clarify the scope of evidence that can be reviewed by a district court in administrative actions involving zoning disputes. This is especially true in claims of discriminatory practices.

The decision of the District Court and the Court of Appeals flies against all administrative procedures and rules of evidence. This flagrant violation can be seen by the following analysis.

It is fundamental that a city cannot intentionally, deliberately or systematically discriminate against an individual or class of individuals by wrongfully applying zoning ordinances. Village of Columbiana v. Keister, 449 N.E.2d 465 (Ohio App. 1981). As stated by one court:

An intentional or deliberate decision by public officials, acting as agents of the state, not to enforce penal regulations against a class of violators expressly included within the terms of such penal regulation does, in our view, under the principles of Wick Wo [vs. Hopkins], 118 U.S. 356 (1886)] constitute a denial of the constitutional guarantee of equal protection of the laws. State v. Vadnais, 202 N.W.2d 657 (Minn. 1972).

Likewise, this Court in Salt Lake County v. Kartchner, 552 P.2d 136 (Utah 1976) has held that discriminatory enforcement by a city is a sufficient ground to deny a city equitable relief against the property owner. In that case, Salt Lake City attempted to remove a carport built in violation of set-back

zoning ordinances very much like the instant case. This Court held that the existence of six similar violations of set-back zoning ordinances within the vicinity of the carport erected in violation of the ordinance showed that the ordinance was being enforced in a discriminatory manner and therefore constituted sufficient ground for denial of a mandatory injunction against the carport.

In the instant case, Petitioners relied upon Kartchner and other cases involving discriminatory practices to assert that it was both inequitable and within the power of the Board to grant a variance when such discriminatory practices occur. The Board of Adjustment took no action itself to investigate these claims either in the first hearing or in the second. Instead, it denied the variances with no investigation as to the claims made by Petitioners. It was only after this lawsuit was filed and the City could see that the petitioners were relying upon these other instances that the enforcement investigation began.

If the time for determining zoning discrimination is allowed to occur after the administrative hearing then the whole purpose of discrimination claims has been effectively eliminated. If, for example, a homeowner is able to show at an administrative hearing that ten of his neighbors have not been prosecuted for the identical conduct under the principles mentioned above he should be entitled to some relief from enforcement. However, if the City after the administrative hearing is over can go out and merely begin prosecuting all ten of the neighbors when it would not have done so but for the hearing then the claim of discrimination

becomes a facade.

Using this same reasoning a landlord who is charged with discrimination against a black couple can eliminate all liability by merely renting to several black couples after a charge has been levied against him. At that point in time a plaintiff could not prove that racial discrimination has occurred. Obviously, such an approach is absurd and would allow a landlord, employer, or, in this case, a city to correct previous discriminatory practices after an action has been commenced.

Rule 407 of the Utah Rules of Evidence does not permit evidence of subsequent measures taken to correct defective conditions. This same theory is applicable to the instant case and should not allow the City to file a self-serving affidavit which goes well beyond any information which was before the Board of Adjustment at the time of the hearing.

The Board of Adjustment made its decision with absolutely no investigation of the other properties listed by Petitioners. It effectively assumed that it did not matter whether there were forty or a thousand other similar violations in the surrounding area and concluded that Petitioners in all events would not be given a variance. Petitioners submit that this type of reasoning is both arbitrary and capricious and that at the least the Board of Adjustment should have taken the opportunity to investigate these claims to determine if discriminatory enforcement was occurring. It did not do so and it is therefore improper for the District Court to consider subsequent information as to these properties and the inspection practices of Salt Lake City which

was not before the Board of Adjustment. For these reasons, therefore, this Court should grant certiorari to correct this erroneous procedure which has occurred in the administrative and judicial proceedings below.

In the alternative, if subsequent enforcement action is deemed relevant in a judicial determination of an administrative body's decision then an evidentiary hearing should have been ordered rather than allowing the matter to be decided on summary judgment. In this case both parties filed cross motions for summary judgment. However, this did not preclude a factual inquiry by the court. As noted by this Court:

Cross motions for summary judgment do not ipso facto dissipate factual issues, even though both parties contend for the purposes of their motions that they are entitled to prevail because there are no material issues of fact. AmJacs Interwest, Inc. v. Design Associates, 635 P.2d 53, 55 (Utah 1981).

The federal appeals court has explained this principle as follows:

This is so because by the filing of a motion a party conceives that no issue of fact exists under the theory he is advancing, but he does not thereby so concede that no issues remain in the event his adversary's theory is adopted. Nafco Oil and Gas, Inc. v. Appleman, 380 F.2d 323, 325 (10th Cir. 1967).

In the three prior cases interpreting decision of boards of adjustment none were decided on motions for summary judgment. See, Salt Lake County v. Kartchner, 552 P.2d 136 (Utah 1976); Provo City v. Hansen, 585 P.2d 461 (Utah 1978); Xanthos v. Board of Adjustment of Salt Lake City, 685 P.2d 1032 (Utah 1984). In a claim of discriminatory zoning it is proper to determine what actions a city has actually undertaken. At such a hearing it can

be determined with cross examination the ways in which zoning enforcement usually occurs and, in addition, it can be determined if indeed a city's resources are sufficient to find violations of zoning ordinances. Otherwise, any city in any lawsuit could always make a claim such as made by Mr. Nelson in his affidavit thereby precluding any further inquiry as to discriminatory practices.

Likewise, whether the forty property owners who were on the list given to the City by the petitioners actually are in violation of city ordinances should be examined by both parties rather than allowing the City to arbitrarily conclude which ones are in violation and which ones are not. It may well be, for example, that there are many more violations of the City ordinances than that claimed by Mr. Nelson in his affidavit. Since no evidence was taken as to these other claims and no opportunity was given to even cross examine Mr. Nelson as to his statements, the self-serving statements rubber-stamped by the District Court of the City's position are invalid and can carry no evidentiary weight. Thus, alternatively, this Court should accept certiorari for the purpose again of defining what scope of evidentiary hearing is required in discriminatory zoning cases to prevent this type of unfair judicial proceeding.

A third and final reason exists for reviewing the decision of the Court of Appeals and the District Court. If the City in a case involving zoning discrimination is allowed to bring charges against the other property owners listed by the petition such action effectively forecloses a petitioner from asserting a valid



defense because of the economic and social repercussions which will occur in his own neighborhood. Here, for example, it was necessary to obtain a restraining order against the City from informing the various persons listed by the petitioners that the investigation of the properties was being undertaken because of Petitioners' efforts. In effect, to allow this type of conduct to occur forces a petitioner in a zoning dispute to choose between asserting his rights of unlawful discrimination and keeping peace within his neighborhood. Certainly, if a city has not enforced a zoning regulation for years in a certain area it should be equitably estopped to enforce it against both the petitioner and those whom he lists.

Under this procedure approved by the lower court it would only be necessary for a city official to cite one homeowner for a zoning violation. At that point the homeowner could be asked to supply the city with a list of other claimed violators. The city could then approach each of these individuals and ask for further lists of violations. Soon, the city could be supplied with hundreds of alleged violations supplied by homeowners eager to escape sanctions not knowing that not only will they in fact receive sanctions but will also make sure that their neighbors and friends will also receive such sanctions. This system could undoubtedly save a city thousands of dollars a year since it would not need to hire patrolling building inspectors to look for violations but would only have to go to the residences previously investigated by other homeowners.

Such a system can hardly be condoned in a democracy. If a

city is unable to properly police its own zoning regulations when such regulations are easily visible to untrained property owners a major shakeup in the city's administrative enforcement officers should obviously occur.

This Court, therefore, should grant certiorari to review this type of practice which Petitioners claim is unreasonable and goes against the very heart of a harmonious community and neighborhood.

#### CONCLUSION

Although this case only involves a carport and a garage it is nevertheless worthy of review by this Court. In the past, this Court has prevented inequitable zoning discriminations from occurring in matters which are equally austere. If administrative bodies throughout the State of Utah are to be given credibility to pass upon important property rights then it is essential that these bodies properly hear and determine the claims of property owners.

Here, it is apparent that the Board of Adjustment in both hearings paid no attention to the claims of Petitioners that they had been misled into building their structures by the presence of numerous such structures within the surrounding neighborhood. Instead, the Board of Adjustment merely looked strictly at the zoning ordinances and denied Petitioners' claim for a variance. In doing so, they refused to consider legitimate claims which have been recognized by federal and state courts as defenses and justification for variances in zoning matters.

The District Court considered improper post-hearing evidence

submitted by the City for the sole purpose of eliminating these claims. If discrimination had occurred the point in time of relevancy was before the hearing and not after it. The City should not be allowed to eliminate equitable defenses by merely prosecuting everybody which for years it has refrained from doing. This type of conduct would never be permitted in any other category of discrimination cases either Federal or state. This type of conduct essentially tells a wrongdoer that discrimination is all right as long as the discriminatory practice is stopped as soon as a violation has been alleged. Obviously, social and legal policies strongly oppose such a contorted approach.

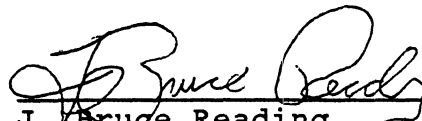
In addition, even if it is assumed arguendo that post-hearing events are relevant the petitioners are entitled to an evidentiary hearing rather than having the matter disposed on summary judgment. This procedure again allows a city to arbitrarily file a self-serving affidavit either denying any discrimination has occurred with other property owners or showing that such discrimination has been eliminated by vigorous enforcement. It is impossible, however, for a district court to know whether these claims are in fact true without the protections of cross examination and discovery which an evidentiary hearing would permit.

Finally, if a city can utilize a list of names given to is by a person accused of zoning violations, such use will have a significant chilling effect upon any future claims of zoning discrimination since the accused property owner must either elect to have a punishment inflicted against him by the zoning body or a

punishment inflicted against him by his neighbors and friends who he has, in effect, "turned in". A district court should be allowed to consider the circumstances of the discriminatory practice in enjoining a city from enforcing penalties against other property owners who may have also relied upon the existence of the practice when they themselves committed the same violation.

Because of these reasons, therefore, it is respectfully requested that this Court review the decision of the Court of Appeals, the District Court, and the Board of Adjustment in order to correct these inequities.

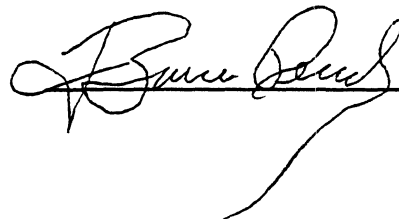
DATED this 1st day of May, 1989.



J. Bruce Reading  
Attorney for Petitioners

MAILING CERTIFICATE

I hereby certify that I mailed four true and correct copies of the foregoing Petition for Writ of Certiorari to the Utah Court of Appeals to Bruce R. Baird, Salt Lake City Attorney's Office, 324 South State, 5th Floor, Salt Lake City, Utah 84111 this 1st day of May, 1989.



## APPENDIX

BOARD OF ADJUSTMENT HEARING

May 26, 1987

BEFORE THE BOARD OF ADJUSTMENT, SALT LAKE CITY, UTAH

FINDINGS AND ORDER, CASE NO. 478-B

REPORT OF THE COMMISSION:

This is an appeal by Morris W. Told at 1665 Laird Avenue for a variance to legalize an addition to a single-family dwelling, attached carport and garage under construction without the required side and rear yards in a Residential "R-2" District.

Elaine Told, Morris Told and J. Bruce Reading, attorney were present. Mr. Hafey explained that this same request was before the Board on March 2, 1987 and was denied. They want to legalize an addition to a single-family dwelling in the rear, a carport in the side yard and an L-shaped garage addition in the rear yard. The garage is attached to the addition by the carport. The garage and carport do not have a side yard or rear yard, so the house does not have the required side yard on the east or rear yard. Mr. Reading explained that he realized that this case has been before the Board before, but the reason they decided to come before the Board again is they felt that there was an issue which was not discussed which should have been. They believe that this violation is in place because Mr. Told wanted to enjoy his land as many of his neighbors had enjoyed theirs. Mr. Reading explained that in researching this case he had come across a case involving a man named Karchner who had a run-in with the County Board of Adjustment. The request involved a carport alongside his house which was in violation. The Board denied the case and so he appealed to the Supreme Court. The Supreme Court said where there were six other violations similar to his within his neighborhood, it would be unfair not to allow his carport to remain. This is the reason the case has again come before the Board. In a 3 block radius of the Told home, there were 38 instances which had violations similar to the Told's. Mr. Reading presented pictures and addresses showing the homes in violation. Mrs. Pace noted that these other homes don't have the composite problems which the Told's has. Mr. Reading stated that their feeling was that this argument doesn't hold water because it is hard to decide when to start to enforce the ordinance. The Tolds want the same right to enjoy their property as their neighbors. Mr. Reading questioned how severe this violation is. Mr. Reading stated that Mr. Told built on an existing garage foundation; however, his error was building on the back of his house too close. Mrs. Pace pointed out that not getting a building permit was also an error. Mr. Nelson also noted that the garage sits on a new foundation and footings. Mr. Told explained that the floor was taken out after the garage was built. It was noted that the original garage was legal and this garage would also be legal by itself. Mr. Reading suggested that he was not trying to justify what Mr. Told did. But he feels with this situation, where there are many other homes in the area with similar violations, selective enforcement is not appropriate.

Mr. Told explained concerning the permit. At that time, he had water pouring into the house and he came to the One Stop Counter and asked what he should do and was told to show what was not legal on the plans. The reason the garage is on a new foundation and footings is in the

process of building on the old one, it fell apart, so he was a victim of the previous builder. Mrs. Pace pointed out, however, that the previous garage did not have the "L" extension or the same proximity to the house. Mr. Told explained that they were in the process of getting a permit by way of having the plans drawn. Mr. Told was reminded that permits are issued after plans are presented and approved. They had the plans just about done when it was enforced on. It was noted that the plan which was submitted for the building permit did not show everything which is on the property. Mr. Told stated that he was told what to put on the plan and this is what he included. Mrs. Told felt that since the neighbors did not oppose this construction, it should not be a problem.

There were no protests. Later in the meeting, the Board discussed the various aspects of the case. The Board noted that the Tolds are not willing to compromise. The Board also noted the text of the previous decision where a variance was granted to legalize the garage and addition to the rear of the dwelling subject to conditions.

From the evidence before it and after further consideration, it is the opinion of the Board that the granting of the requested variance would be inimical to the best interest of the district and contrary to the spirit and intent of the Zoning Ordinance, since the Board could find no unusual condition attached to this property which would deprive the owner of a substantial property right or use of his property which would justify the granting of the requested variance.

IT IS THEREFORE ORDERED that the requested variance to legalize an addition to a single-family dwelling, attached carport and garage under construction without the required side and rear yards be denied. This decision is in keeping with the decision on the previous Board Case No. 435-B which grants a variance to allow the detached garage in the rear yard 4 feet (eave to eave) to the rear of the addition and closer than 15 feet to the neighbor's dwelling. The carport is to be removed within 30 days of the dating of the Findings and Order.

Action taken by the Board Of Adjustment at its meeting held May 11, 1987.

Dated at Salt Lake City, Utah this 26th day of May, 1987.

  
Chairman BW

  
Acting Secretary



BOARD OF ADJUSTMENT HEARING

March 2, 1987

BEFORE THE BOARD OF ADJUSTMENT, SALT LAKE CITY, UTAH

FINDINGS AND ORDER, CASE NO. 435-B

REPORT OF THE COMMISSION:

This is an appeal by Morris W. Told at 1665 Laird Avenue for a variance to legalize an addition to a single-family dwelling, attached carport and garage under construction without the required side and rear yards in a Residential "R-2" District.

Elaine Told and Morris Told were present. Mr. Hafey explained that this structure on Laird Avenue is a single-family dwelling. The Tolds have constructed an addition on the rear of this building which, if the addition alone were there, would meet the ordinance requirements because it would have a 30 foot rear yard and the house has a 9 foot plus side yard on the west side and at least 10 feet or more on the east side. They have constructed an "L" shaped garage in the back yard (a detached garage can go in a rear yard as long as it is 4 feet from the rear of the building) but it is attached to the house with a carport which is the reason the dwelling has no side yard and no rear yard because the garage is attached to the carport. Mr. Told explained that a storm ruined their previous garage and flooded their basement and this was the reason they built the new garage. They rebuilt their garage because they need security for their cars from vandalism in their neighborhood. Mr. Told expressed his feeling that the garage is in keeping with the rest of the neighborhood because there are several other homes with garages with attached carports similar to theirs. The purpose of the carport is to keep the driveway clear of ice and snow. Mrs. Told explained that there are several residences around their home which have similar situations to theirs with a garage and carport.

There were no protests. Later in the meeting, the Board discussed the various aspects of the case. It was noted that the carport is about a foot from the east property line and the garage is about 6 inches from the east property line. The Board was also concerned about access to the rear yard if there were a fire with so little space between the buildings and the property line on the east. Mr. Told said that there is good access on the West side. It was also noted that when the Tolds came in to get a permit for the addition to the rear of the dwelling, the plan did not show the garage and the attached carport which are already built. The plan the permit was issued on indicated the addition met all the ordinance requirements. It was also noted that the application for a variance to legalize the building as built was filed prior to the building permit for the addition being issued.

From the evidence before it and after further consideration, it is the opinion of the Board that the granting of the requested variance to legalize an addition to a single-family dwelling, attached carport and garage under construction without the required side and rear yards would be inimical to the best interest of the district and contrary to the spirit and intent of the Zoning Ordinance, since the Board could find no unusual condition attached to this property which would deprive the owner of a substantial property right or use of his property which would justify the granting of the requested variance.

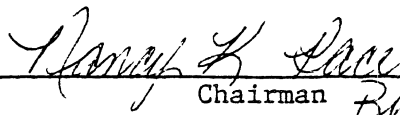
Findings and Order  
Case No. 435-B  
Page 2

IT IS THEREFORE ORDERED that the requested variance be denied. However, it is also ordered that a variance to allow the detached garage in the rear yard 4 feet (eave to eave) to the rear of the addition and closer than 15 feet to the neighbor's dwelling and that the carport be removed within 30 days of the dating of these Findings and Order.

THE FAILURE OF THE APPLICANT TO ABIDE BY THE CONDITIONS OF THIS VARIANCE SHALL CAUSE IT TO BECOME NULL AND VOID, WHICH IN EFFECT IS THE SAME AS THE VARIANCE HAVING BEEN DENIED.

Action taken by the Board of Adjustment at its meeting held March 2, 1987.

Dated at Salt Lake City, Utah this 16th day of March, 1987.

  
\_\_\_\_\_  
Chairman *BW*

  
\_\_\_\_\_  
Acting Secretary

PETITION FOR RELIEF OF BOARD  
OF ADJUSTMENTS ORDER

J. BRUCE READING, #2700  
MORGAN, SCALLEY & READING  
Attorneys for Plaintiffs  
261 East 300 South, Second Floor  
Salt Lake City, Utah 84111  
Telephone: (801) 531-7870

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY  
STATE OF UTAH

---

MORRIS W. TOLD and ELAINE : PETITION FOR RELIEF OF BOARD  
TOLD, OF ADJUSTMENTS ORDER IN CASE  
NUMBER 478-B

Plaintiff,

vs.

SALT LAKE CITY BOARD OF : Civil No.  
ADJUSTMENTS,

Defendant. : Judge

---

COME NOW the plaintiffs and allege and petition the  
above-entitled Court as follows:

1. The plaintiffs are the owners of a residence  
located at 1665 Laird Avenue, Salt Lake City, Utah.
2. Pursuant to Utah Code Annotated § 10-9-15, the  
plaintiffs have been aggrieved by the decision by the Board of  
Adjustments. Said decision is attached hereto as Exhibit A and  
made by reference a part hereof.
3. The plaintiffs petition the denial of a variance to  
legalize an addition to a single family dwelling, attached  
carport and garage based upon the Board of Adjustments caprice  
and arbitrariness in the following regards:

a. There is nothing in the findings that objectively would indicate why the granting of the requested variance would be inimical to the best interest of the district and contrary to the spirit and intent of the zoning ordinance.

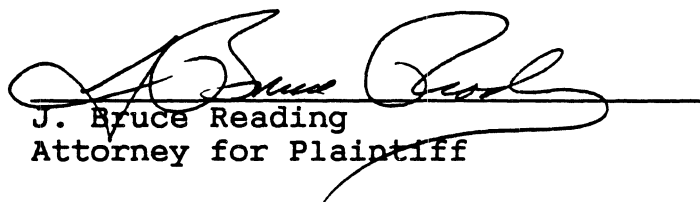
b. There is nothing in the findings that objectively would indicate that the Board of Adjustments considered the fact that the plaintiffs would be deprived of privileges possessed by other property owners in the same district.

4. The plaintiffs petition the denial of the above variance based upon the Board of Adjustments discriminatory manner in enforcing the zoning ordinance in that there are at least thirty-eight (38) known violations of a similar nature in the vicinity. In fact, these violations are within three city blocks of plaintiffs' property.

WHEREFORE, the plaintiffs pray that the order denying the invariance be reversed and the variance be granted.

DATED this 15 day of June, 1987.

MORGAN, SCALLEY & READING

  
J. Bruce Reading  
Attorney for Plaintiff

Plaintiff's address:  
1665 Laird Avenue  
Salt Lake City, Utah

AFFIDAVIT OF  
MERRILL L. NELSON

BRUCE R. BAIRD, #0176  
Assistant City Attorney  
Attorney for Defendant  
324 South State Street, Fifth Floor  
Salt Lake City, Utah 84111  
Telephone: (801) 535-7788

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

MORRIS W. TOLD and ELAINE,  
TOLD,

Plaintiffs,

vs.

SALT LAKE CITY BOARD OF,  
ADJUSTMENTS,

Defendant.

AFFIDAVIT OF  
MERRILL L. NELSON

Civil No. C87-0450

Judge Richard H. Moffat

STATE OF UTAH )

County of Salt Lake )

) ss.

Merrill L. Nelson, being first duly sworn on oath, deposes and says as follows:

1. Your affiant is a Zoning Official for the Salt Lake Building and Housing Department.
2. In that position, your affiant is familiar with the zoning enforcement policies of the City generally and specifically with the "Told case".
3. The Tolds' property at 1665 Laird Avenue in Salt Lake City is in a Residential "R-2" zone.
4. The City's zoning enforcement department usually becomes aware of zoning violations in three ways: (a) when plans are submitted; (b) when neighbors complain; and (c) occasionally by a zoning inspector viewing a construction activity not in compliance with zoning.



5. The City's resources are not sufficient to hire enough building inspectors to catch every violation before it is completed, and thus, the City relies heavily on being informed of violations by citizens. This is especially true where the illegal construction is done without a permit.

6. The Tolds' garage at 1665 Laird Avenue was constructed without a building permit.

7. The Tolds obtained a building permit for a two-story addition to their house by submitting plans to the Building Department which failed to show the garage which they had previously constructed without a permit.

8. The Tolds built the carport which is the subject of this complaint without a building permit.

9. The Tolds' property and structures at 1665 Laird Avenue violate the sideyard setback requirements of Section 51-14-3, Revised Ordinances of Salt Lake City, by the carport being attached to the garage and the house.

10. After constructing the three improper structures, the Tolds sought a legalization variance from the Board of Adjustment which was initially denied on March 2, 1987.

11. Plaintiffs again petitioned the Board of Adjustment for legalization, this time relying on Salt Lake County v. Kartchner, 552 P.2d 136 (Utah 1976), and presented a list of allegedly similar violations near the plaintiffs' property. (See Exhibit A attached to this Affidavit.)

12. The City's Building and Housing Department investigated all of the alleged violations and determined that twenty-one of the addresses did not have any violations because Section 51-13-1, Revised Ordinances of Salt Lake City, allowed a detached accessory building properly located in the rear yard.

13. Of the twenty-one remaining addresses on the Told list, two were simple duplications (i.e., the exact same address listed twice).

14. Of the remaining nineteen addresses with similar violations, research showed that four of the addresses had received prior variances from the Board of Adjustment and one address was found to have a non-conforming use.

15. After completion of the research, your affiant caused notices to be served on fourteen properties with violations.

16. As a result of these enforcement notices, three of the properties immediately complied by removing the illegal structures.


17. Eight of the properties applied for variances, all of which have been denied.

18. Of these eight, six have been ordered to remove the illegal structure within ninety days, while the other two have been put on administrative hold while the City Council considers whether the ordinance should be amended to take into consideration the length of time for which the illegal condition has existed and the innocent nature of the owner of the property (i.e., if the violating structure was created by a prior owner).

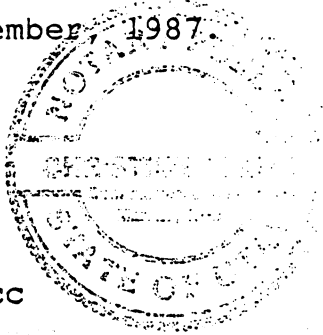
19. The three properties which did not even bother to apply for a variance are being turned over to the City Prosecutor for future legal action.

Further your affiant sayeth not.

DATED this 27th day of September, 1987.

  
MERRILL L. NELSON  
Zoning Official

SUBSCRIBED AND SWORN to before me this 27th day of  
September, 1987.



  
NOTARY PUBLIC, residing in  
Salt Lake County, Utah

BRB:cc

**AFFIDAVIT OF  
MORRIS W. TOLD**

J. BRUCE READING, #2700  
MORGAN, SCALLEY & READING  
Attorneys for Plaintiffs  
261 East 300 South, Second Floor  
Salt Lake City, Utah 84111  
Telephone: (801) 531-7870

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY  
STATE OF UTAH

---

MORRIS W. TOLD and ELAINE : AFFIDAVIT OF MORRIS W. TOLD  
TOLD,

Plaintiffs,

vs.

:

SALT LAKE CITY BOARD OF  
ADJUSTMENTS,

Civil No. C87-4050

Defendant.

: Judge Richard H. Moffat

---

STATE OF UTAH )  
 : ss.  
COUNTY OF SALT LAKE )

Morris W. Told, being first duly sworn, deposes and  
states as follows:

1. I am over the age of eighteen (18) and I am a  
resident of Salt Lake County, State of Utah.
2. I have personal knowledge of the facts testified to  
in this affidavit.
3. I am a plumber and approximately ninety percent of  
my business comes from my neighborhood.
4. On or about March 6, 1987, I taped a telephone  
conversation which I had with Mark Hafey, an employee of the Salt

Lake City Board of Adjustments, regarding a possible appeal of the Board's denial of a variance.

5. During that conversation we discussed the possibility of presenting a list of other potential violators to the Board.

6. I expressed to Mr. Hafey my concern that if I turned a list over to the Board, that list might be used to go after those people and that my name would be given as a source.

7. During our telephone conversation Mark Hafey promised me that he would not reveal my name.

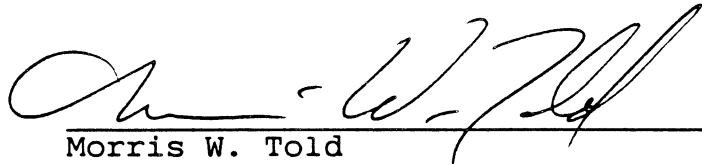
8. I relied on Mr. Hafey's promise and presented a list of other possible violations to the Board.

9. On or about July 15, 1987, Mr. Hafey informed me that he had given my name to one of those individuals on the list.

10. I can no longer rely on Mr. Hafey's promise because my business will be damaged if my neighbors learn that I gave their addresses to the Board as possible violators of the ordinance.

The foregoing facts are within my personal knowledge, and if called as a witness, I could and would testify to those facts.

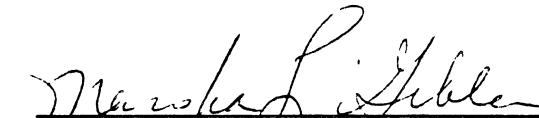
DATED and executed this 6<sup>th</sup> day of August, 1987.

  
Morris W. Told

SUBSCRIBED AND SWORN to before me this 17<sup>th</sup> day of  
August, 1987.

My Commission Expires:

4-1-89

  
NOTARY PUBLIC  
Residing at: Salt Lake  
County, Utah

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT



BRUCE R. BAIRD, #0176  
Assistant City Attorney  
Attorney for Defendant  
324 South State Street, Suite 510  
Salt Lake City, Utah 84111  
Telephone: (81) 535-7788

JAN 11 1988

H. Dixon Hindsley, Clerk 3rd Dist. Court  
By R. G. [Signature]  
Deputy Clerk

IN THE THIRD JUDICIAL COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

MORRIS W. TOLD and ELAINE	)	
TOLD,	)	
	)	ORDER GRANTING DEFENDANT'S
Plaintiffs,	)	MOTION FOR SUMMARY JUDGMENT
	)	
vs.	)	
	)	Civil No. C87-4050
SALT LAKE CITY BOARD OF	)	
ADJUSTMENT,	)	Judge Richard H. Moffat
	)	
Defendant.	)	

This matter having come before the Honorable Judge Richard H. Moffat at 9:00 a.m. on Friday, October 23, 1987, pursuant to cross-motions for summary judgment filed by the plaintiffs and the defendant, and the plaintiffs having been represented by J. Bruce Reading, Morgan, Scalley & Reading, and defendant having been represented by Bruce R. Baird, Assistant Salt Lake City Attorney; and the Court having reviewed the file in the matter, the Findings of the Board of Adjustment, and having received, for good cause shown on motion, the plaintiffs' Answers to the defendant's Interrogatories, and having heard the arguments of counsel, the Court hereby enters the following:

Undisputed Material Facts:

1. The Tolds own a residence at 1665 Laird Avenue in Salt Lake City.

2. The Tolds' property is zoned Residential "R-2" and the standards for construction are set by Salt Lake City Ordinance Section 51-14-1, et seq.

3. The City's zoning enforcement usually becomes aware of zoning violations in three ways: (a) when plans are submitted; (b) when neighbors complain; and (c) occasionally by a zoning inspector viewing a construction activity not in compliance with the zoning.

4. The City's resources are not sufficient to hire enough building inspectors to catch every violation before it is completed, and thus, the City relies heavily on being informed of violations by citizens. This is especially true where the illegal construction is done without a permit.

5. The Tolds' garage at 1665 Laird Avenue was constructed without a building permit.

6. The Tolds obtained a building permit for a two-story addition to their house by submitting plans to the Building Department which failed to show the garage which they had previously constructed without a permit.

7. The Tolds built the carport which is the subject of this complaint without a building permit.

8. The Tolds' property and structures at 1665 Laird Avenue violate the sideyard setback requirements of Section 51-14-3, Revised Ordinances of Salt Lake City, by the carport being attached to the garage and the house.

9. After constructing the three improper structures, the Tolds sought a legalization variance from the Board of Adjustment which was initially denied on March 1, 1987.

10. Apparently after seeking advice of counsel, plaintiffs again petitioned the Board of Adjustment for legalization, this time relying on Salt Lake County v. Kartchner, 552 P.2d 136 (Utah 1976), and presented a list of allegedly similar violations near the plaintiffs' property. (See Findings and Order, Case No. 478-B, submitted as Exhibit A with the plaintiffs' complaint ("Findings").) The Board again denied the variance, holding:

From the evidence before it and after further consideration, it is the opinion of the Board that the granting of the requested variance would be inimical to the best interest of the district and contrary to the spirit and intent of the Zoning Ordinance, since the Board could find no unusual condition attached to this property which would deprive the owner of a substantial property right or use of his property which would justify the granting of the requested variance. (Findings, p.2.)

11. In support of the Kartchner defense, the Tolds submitted a list and photographs of other homes within the Told area which were allegedly in violation.

12. The City's Building and Housing Department investigated all of the alleged violations and determined that twenty-one of the addresses did not have any violations because Section 51-13-1, Revised Ordinances of Salt Lake City, allowed a detached accessory building properly located in the rear yard.

13. Of the twenty-one remaining addresses on the Told list, two were simple duplications.

14. Of the remaining nineteen addresses with similar violations, research showed that four of the addresses had received prior variances from the Board of Adjustment and one address was found to have a non-conforming use which had been in existence prior to 1927.

15. After completion of the research, the City caused notices to be served on fourteen properties with violations.

16. As a result of these enforcement notices, three of the properties immediately complied by removing the illegal structures.

17. Eight of the properties applied for variances, all of which have been denied.

18. Of these eight, six have been ordered to remove the illegal structure within ninety days, while the other two have been put on administrative hold while the City Council considers whether the ordinance should be amended to take into consideration the length of time for which the illegal condition has existed and the innocent nature of the owner of the property (i.e., if the violating structure was created by a prior owner).

19. The three properties which did not even bother to apply for a variance are being turned over to the City Prosecutor for future legal action.

From the foregoing undisputed facts, the Court enters the following:

### CONCLUSIONS OF LAW

1. It is not within the province of the trial court to review the rationale of the Board of Adjustment, the policy grounds on which the Board's decision was based, nor for the Court to substitute its judgment for that of the Board where the record discloses a reasonable basis for the Board's decision. Xanthos v. Board of Adjustment of Salt Lake City, 685 P.2d 1032 (Utah 1984).

2. The burden on the petitioners, recognizing that each piece of property is unique, is to show that the property itself contains some special circumstance that relates to the hardship complained of and that granting a variance to take this into account would not substantially affect the zoning plan. Xanthos, supra, at 1036.

3. The record of the Board of Adjustment proceedings and plaintiffs' Answers to defendant's Interrogatories fail to disclose any evidence which would even suggest that the Board's finding of lack of special circumstances and absence of hardship was arbitrary and capricious.

4. The mere fact that other similar violations exist within the same neighborhood or that some of the similar violations may have been granted variances in the past does not render the Board's decision arbitrary and capricious.

5. Further, the City's immediate enforcement upon notification of these other alleged violations takes this case out from under the decision in Salt Lake County v. Kartchner, 552 P.2d 136 (Utah 1976), in that the City did

not ignore the alleged inconsistency in its enforcement and, instead, immediately brought all possible actions to maintain a consistent enforcement.

6. Further, even if the facts of this case were within Kartchner, plaintiffs are not entitled to rely on Kartchner because:

To invoke the doctrine [of equitable estoppel] the [city] must have committed an act or omission upon which the [petitioner] could rely in good faith in making substantial changes in position or incurring extensive expenses. The action upon which the developer claims reliance must be of a clear, definite and affirmative nature. If the claim be based on omission of the local zoning authority, omission means a negligent or culpable omission where the party failing to act was under a duty to do so. Silence or inaction will not operate to work in estoppel. Finally, and most importantly, the landowner has a duty to inquire and confer with the local zoning authority regarding the uses of the property that would be permitted. Utah County v. Young, 615 P.2d 1265, 1267-68 (Utah 1980).

"Finally, estoppel may not be used as a defense by a person who has acted in bad faith, fraudulently or with knowledge." Xanthos, supra, at 1038. (Footnote omitted.)

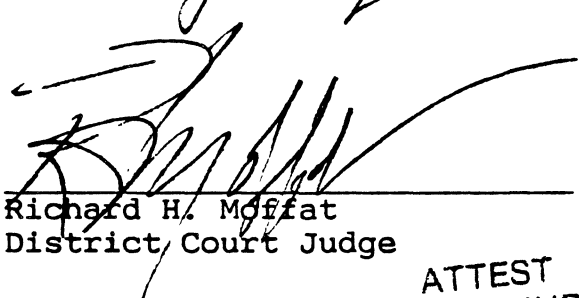
From the foregoing Findings of Fact and Conclusions of Law, the Court enters the following Order Granting Summary Judgment for defendants:

#### ORDER

There being no genuine dispute as to any material fact and the defendant being entitled to judgment as a matter of law, the Court hereby grants summary judgment to the defendant dismissing the action of the plaintiffs with prejudice, the plaintiffs taking nothing thereby and

upholding the Findings, Conclusions and Order of the Board of Adjustment. Pursuant to a Stipulation entered in open court between the plaintiffs and the defendant, the plaintiffs will not be required to immediately comply with the Order of the Board to remedy the zoning violations pending the timely filing of an appeal by the plaintiffs and the posting of a cash bond in an amount and form reasonably satisfactory to the defendant to insure that the Order of the Board upheld by this Court is complied with immediately upon the determination of any appeal.

MADE AND ENTERED this 6 day of January, 1987.

  
Richard H. Moffat  
District Court Judge

Approved as to form:

ATTEST  
H. DIXON HINDLEY  
CLERK  
By K. Grotas  
Deputy Clerk

J. Bruce Reading, Attorney  
for Plaintiffs

BRB:pp

This was handed to the Court on 12/18/83 on the hearing on the objection to this Order; specifically the its objection to #6 of the Conclusions of Law. The Rule 2.9 time on this order has long expired.

Bruce R. Baird  
1/5/88

ORDER



IN THE UTAH COURT OF APPEALS

-----oo0oo-----

Morris W. Told and Elaine Told,	)	
	)	
Plaintiffs and Appellants,	)	ORDER
	)	
v.	)	Case No. 880106-CA
	)	
Salt Lake City Board of	)	
Adjustments,	)	
	)	
Defendant and Respondent.	)	

Before Judges Bench, Garff and Dee, Senior Judge sitting  
by special assignment (On Rule 31 Hearing).

-----

This matter is before the court pursuant to Rule 31,  
Rules of the Utah Court of Appeals.

IT IS HEREBY ORDERED THAT the judgment of the  
district court is affirmed.

DATED this 24<sup>th</sup> day of February, 1989.

FOR THE COURT:

Russell W. Bench  
Russell W. Bench, Judge

CERTIFICATE OF MAILING

I hereby certify that on 24, February 1989 I mailed a true and correct copy of the foregoing ORDER by depositing the same with the United States Mail, postage prepaid to the following:

J. Bruce Reading  
Morgan, Scalley & Reading  
Attorneys for Plaintiffs and Appellants  
261 East 300 South, Suite 200  
Salt Lake City, UT 84111

Roger F. Cutler  
Salt Lake City Attorney  
Bruce R. Baird  
Assistant City Attorney  
Attorney for Defendant and Respondent  
324 South State Street, Suite 510  
Salt Lake City, UT 84111

DATED this 24th day of February, 1989.

By Kathleen Flynn  
Kathleen Flynn  
Case Management Clerk