

1989

Morris W. Told and Elaine Told v. Salt Lake City Board of Adjustments : Brief in Opposition to Certiorari

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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OF THE STATE OF UTAH

MORRIS W. TOLD and ELAINE)	
TOLD,)	
)	Case No. 890174
Petitioners and Appellants,)	
)	Priority Category 13
vs.)	
)	
SALT LAKE CITY BOARD OF)	
ADJUSTMENTS,)	
)	
Respondent.)	
)	

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE
UTAH COURT OF APPEALS

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)	OF APPEALS
SALT LAKE CITY BOARD OF)	
ADJUSTMENTS,)	Case No. 890174
)	Priority Category 13
Respondent.)	
_____)	

QUESTIONS PRESENTED FOR REVIEW

1. Should this Court grant a Writ of Certiorari to review issues not presented for decision to the Court of Appeals?

2. Should this Court consider reviewing the denial of a zoning variance when the petitioner has never even attempted to meet the statutory grounds for the granting of a variance?

3. Should this Court grant a Writ of Certiorari to review factual issues concerning the denial of a zoning variance?

4. Should sanctions pursuant to Rule 40(a) and Rule 33(a), Rules of the Utah Supreme Court, be granted for the petitioner's frivolous, harassing and delaying petition?

COURT OF APPEALS DECISION

The Court of Appeals determined to review the District Court's grant of Summary Judgment in favor of the City Board

of Adjustment under its Rule 31, R. Utah Ct. App., procedure and affirmed the trial court's decision without opinion on February 24, 1989.

JURISDICTIONAL GROUNDS

The Petition fails to comply with Rule 46(a)(6)(D) in that it fails to specify the statutory provisions conferring jurisdiction on this Court to grant the Writ of Certiorari. Further, nowhere in the Petition is there any citation or reference to any of the "special and important reasons" provided in Rule 43, R.U.S.C., for the grant of certiorari.¹

CONTROLLING STATUTES

A Board of Adjustment's power to grant variances is established pursuant to Section 10-9-12(3), U.C.A.:

10-9-12. Powers of board on appeal -
Granting of and showing to be entitled to
variance.

The board of adjustment shall have the
following powers:

. . .

(3) to authorize upon appeal such variance from the terms of the ordinance as will not be contrary to the public interest, where owing to special conditions a literal enforcement of the provisions of the ordinance will result in unnecessary hardship; provided, that the spirit of the ordinance shall be observed and substantial justice done. Before any variance may be authorized, however, it shall be shown that:

¹ It is barely possible to ascertain from the maundering argument of the Petition shadowy outlines of reliance on Rule 43(1), (3) and (4).

(a) The variance will not substantially affect the comprehensive plan of zoning in the city and that adherence to the strict letter of the ordinance will cause difficulties and hardships, the imposition of which upon the petitioner is unnecessary in order to carry out the general purpose of the plan.

(b) Special circumstances attached to the property covered by the application which do not generally apply to the other property in the same district.

(c) That because of said special circumstances, property covered by application is deprived of privileges possessed by other properties in the same district; and that the granting of the variance is essential to the enjoyment of a substantial property right possessed by other property in the same district.

STATEMENT OF THE CASE

A.

NATURE OF THE CASE

This action arose from the Salt Lake City Board of Adjustment ("the Board") denying the petitioners ("the Tolds") a variance for an illegal carport. The petitioners have never even attempted to meet any of the standards for the grant of a variance as required by Section 10-9-12(3), U.C.A.

B.

COURSE OF PROCEEDINGS BELOW

After the Tolds' variance request was denied by the Board the Tolds appealed the decision to the Third Judicial District Court pursuant to Section 10-9-15, U.C.A. The

parties made cross motions for Summary Judgment. In support of its Motion, the Board included the Affidavit of Merrill L. Nelson, a zoning official for the City's Building and Housing Department. No objection was made to the Affidavit and none of the facts in the Affidavit were controverted by the Tolds.

The trial court granted the City's Motion for Summary Judgment making extensive Findings of Fact and Conclusions of Law based on the undisputed facts.

C.

FACTS OF THE CASE²

1. The Tolds own a residence at 1665 Laird Avenue in Salt Lake City zoned Residential "R-2." Over the course of years the Tolds repeatedly constructed garages and other **buildings** on their property without ever bothering to obtain the required City building permits. (R. 78-79, Findings of Fact Nos. 1, 2, 5 and 6.)

2. Only once during this series of illegal buildings did the Tolds take out a building permit and on that permit they fraudulently omitted one of their other illegal buildings. (R. 78, Findings Nos. 5 & 6.)

3. Only after constructing the three illegal structures did the Tolds seek a legalization variance for

² Throughout the entire Petition for the Writ of Certiorari, in violation of Rule 46(a)(8), there is not a single citation to the record.

their illegal carport from the Board which was denied by the Board on March 1, 1987. (R. 79, Findings No. 9.)

4. The Tolds again petitioned the Board relying on Salt Lake County v. Kartchner, 552 P.2d 136 (Utah 1976) and presented a list of allegedly similar violations near their property. (R. 79, Findings No. 10.)

5. Never, throughout the entire course of the proceeding below (including the District Court and the Court of Appeals), have the Tolds submitted evidence of any "special circumstance" attached to their property not generally applicable to other properties in their same zoning district as required by Section 10-9-12(3)(b). Nor have they ever submitted any evidence why the nonexistent special circumstances "deprived" them of any privileges possessed by other properties in the same district denying them the "enjoyment of a substantial property right," as required by Section 10-9-12(3)(c). Further the record is devoid of any evidence of any attempt to show any "difficulties and hardships" (except the Tolds obvious disregard of the law) as required for a variance by Section 10-9-12(3)(a). (See entire record and the City's Brief to the Court of Appeals, p. 11.)

6. Because of an absolute and total failure to meet any of the standards for a variance required by Section 10-9-12(3) the Board again denied the requested variance holding, in part, that the Board, "could find no unusual

condition attached to [the Tolds] 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." (R. 79, Finding No. 10.)

7. Upon being presented with the Told's list of alleged nearby violations the City promptly and thoroughly investigated the alleged violations. The City took immediate action against those properties which were determined to be, in fact, in violation of the ordinance. (R. 79-80, Findings No. 11-19.)³

8. The City's zoning enforcement personnel usually become 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.

³ Throughout the Petition for Writ there are numerous insinuations that the City is in some way lying about its enforcement efforts. For example on page 5 the Petition twice intimates that only "allegedly" were some of the other violations ordered to comply. On page 6 a similar insinuation uses the word "supposedly." This Court is not the grounds for factual dispute which have long since been settled against the Tolds' arguments. The City's counsel takes personal umbrage at the insulting phraseology of the Petition. The City has done precisely what it claimed in its Affidavits to have done without any weasely qualifications. This factual quibbling and insulting is yet another reasons that sanctions should be granted against the Tolds as more fully specified in Point II, below.

This City's financial resources are not sufficient to hire enough building inspectors to catch every violation before construction is completed. Thus, the City relies heavily on being informed of violations by citizens. This is especially true where, as here, the illegal construction was done without a permit. (R. 78, Findings No. 3 and 4.)

POINT I

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI.

A. INTRODUCTION

The Petition should be denied for several reasons. First, fifty percent of the Petition is an attempt to raise issues which were never raised at the Court of Appeals. Second, even though the Tolds and their counsel have now taken four bites at the apple of a variance they have totally failed to even attempt compliance with the statutory grounds for issuing a variance. Third, there is no special and important reason, and certainly none of those listed in Rule 43, R.U.S.C., for the Writ to issue. Fourth, none of the various "throw everything against the kitchen wall and hope some of it sticks" allegations of error below are correct.

B. THIS COURT SHOULD NOT REVIEW ISSUES NOT RAISED BELOW.

The Board can find no reported cases arising under Rule 42, R.U.S.C., concerning this Court's scope of review of

decisions from the Court of Appeals on certiorari. The general principle of law is that a higher appellate court will not review matters not raised in the intermediate court of appeals. Singleton v. Wulff, 428 U.S. 106 (1976); Youakim v. Miller, 425 U.S. 231 (1976); Walters v. City of St. Louis, 347 U.S. 231 (1954); Murrow v. Daniels, 364 S.E.2d 392 (N.C. 1988); Personnel Board v. Heck, 725 S.W.2d 13 (Ky.App. 1986); L & H Transport, Inc. v. Drew Agency, Inc., 403 N.W.2d 223 (Minn. 1987); Morgan v. Compugraphic Corp., 675 S.W.2d 729 (Tex. 1984); Settlemyer v. Wilmington Veterans Post No. 49, American Legion, Inc., 464 N.E.2d 521 (Ohio 1984); Parrell v. Keenan, 452 N.E.2d 506 (Mass. 1983); Hammond v. North American Asbestos Corp., 454 N.E.2d 210 (Ill. 1983); Bender v. City of Seattle, 664 P.2d 492 (Wash. 1983); Centers v. Yehezkely, 706 P.2d 105 (Idaho App. 1985). The logic behind this rule is the same as this Court's refusal to consider issues on appeal not raised by the trial court. That is, this Court is entitled to the benefit of informed opinions below to frame the issues for decision. Absent such preservation of issues below, this Court will generally not consider an issue for the first time. Buehner Block Company v. U.W.C. Associates, 752 P.2d 892 (Utah 1988); Zions First National Bank, N.A. v. North American Title Insurance Company, 749 P.2d 651 (Utah 1988); Mascaro v. Davis, 741 P.2d 938 (Utah 1987).

More than half of the Petition for Writ consists of matters not raised at the Court of Appeals. The Petition's "third and final reason" alleged for this Court to issue the Writ of Certiorari (Petition p. 12-14) paints a bizarre Orwellian nightmare world where citizens are forced, against their will and in their complete innocence, to rat on their neighbors for their own protection. The illogic of this argument is pointed out in Section I.E.(4) of this Brief below. For now, the Board simply points out that this screed was never raised in the Court of Appeals.

Further, the Petition's argument (Petition p. 6-8) that the District Court's consideration of the Board's Affidavit in support of its Motion for Summary Judgment somehow violated Xanthos v. Board of Adjustment of Salt Lake City, 685 P.2d 1032 (Utah 1984) was also never raised below. Finally, the Petition's contention that somehow the City was "intentionally" discriminating in its enforcement against the petitioner (Petition p. 8-9) has never been properly raised. There has never been a shred of evidence of any "intent" to discriminate against the Tolds. The Tolds are simply repeated offenders who were caught and now try to excuse their hands being in the cookie jar by pointing to others with chocolate chip fingerprints. (The absurdity of the intentional discrimination argument will be further shown in Section I.E.(3) of this Brief below.)

C. THIS COURT SHOULD NOT CONSIDER
OVERTURNING THE TWO LOWER COURTS
AND GRANTING A VARIANCE WHEN THERE
HAS BEEN NO ATTEMPT TO COMPLY WITH
THE STATUTORY STANDARDS.

The standards for granting a variance are set out in
Section 10-9-12(3), (a)-(c), U.C.A. This Court expounded on
the standards in Xanthos, supra at 1036-37:

What must be shown by the applicant for the
variance is that the property itself
contained some special circumstances that
relate to the hardship complained of and that
granting a variance to take this into account
would not substantially affect the zoning
plan.

* * *

Hardship is not demonstrated by economic loss
alone. It must be tied to the special
circumstances, none of which have been proven
here. Every person requesting a variance can
indicate some economic loss. To allow
variance any time any economic loss is
alleged would make a mockery of the zoning
program. Further, the [plaintiffs] brought
their losses upon themselves. The applica-
tion [for building permit] affirmatively
alleged to the City that no dwelling existed
on the land upon which he proposed to build
duplexes, and the City relied on those
allegations.

(Emphasis added.)

Before the Board, before the District Court, before the
Court of Appeals and in this Petition, the Tolds have not
even attempted to meet the requirements of the statute. The
Tolds have never shown any "special circumstances attached
to [their property]." They have never shown how these
nonexistent "special circumstances" are "essential to the

enjoyment of a substantial property right possessed by others in the district."

All the Tolds have said before the Board, the District Court, the Court of Appeals and in this Petition is that because some of their neighbors have constructed similar illegal structures the Tolds must then, ipso facto, be allowed to construct their own illegal structure. The argument of the Tolds, in their Petition, can be summarized as "fourteen wrongs make a right." They do not. There is no provision in the statutory grant of authority to the Board for the issuance of variances to consider that other similar illegalities may exist.⁴ At each level of this proceeding the Board had pointed out to the Tolds their failure to meet the statutory requirements. Despite three bites at the apple they continue before this Court to not even bother attempting to comply with the statute. As their repeated illegal buildings are subject to zoning sanctions so their repeated failure to brief the controlling issue of this case should also be the subject of sanctions as discussed more fully in Point II below.

⁴ It might be argued that the existence of other similar violations goes to meet part 3(a) of the test for granting a variance (that the variance will not "substantially affect the comprehensive plan"). But this Court held in Xanthos that the tests of Section 10-9-12(3) are cumulative and written in the conjunctive. All the tests must be met before the variance can legally be issued.

D. THERE ARE NOT "SERIOUS AND
IMPORTANT" REASONS FOR THIS COURT
TO REVIEW THE COURT OF APPEALS'
DECISION.

The Court of Appeals found the Tolds' contentions to be so unmeritorious as to warrant Rule 31, no-opinion, consideration. The trial court considered the matter on cross Motions for Summary Judgment and issued detailed Findings and Conclusions thoroughly supported by unchallenged evidence. In essence, the case boils down to a repeated lawbreaker seeking an indulgence simply because others have broken the same law. There is no way, despite the plaintive Jeremiad of the Petition, for this Court to find "serious and important" reasons to give comfort and solace to an unrepentant recidivist.

E. NONE OF THE ALLEGED ERRORS BELOW
ARE GROUNDS FOR REVIEW.

(1) THE PETITION'S ATTEMPT TO RAISE
FACTUAL ISSUES IS INAPPROPRIATE.

The Petition brings up at least two factual issues never considered below and totally unsupported by the record. First, the Petition pulls from the air an allegation of intentional discrimination. (Petition, p. 8.) As noted above and below there is absolutely no evidence of any intentional discrimination against the Tolds.

The petitioners also now ask this Court to reverse the trial court's Summary Judgment (on cross-motions) to make a factual determination as to whether or not an evidentiary

hearing should have been held on issues of arbitrariness and capriciousness. (Petition p. 11.) Again, this issue was never raised in the Court of Appeals and there is nothing in the record before this Court, the Court of Appeals or the District Court indicating any dispute about the evidence. This is not a Sixth Amendment denial of effective counsel argument. At some point the finality of review should drive a stake through the heart of the petitioner's vampirous failure to give up their meritless arguments.

(2) EVIDENCE OF ENFORCEMENT ACTIONS
CONSIDERED BY THE TRIAL COURT WAS
NOT IMPROPER.

The Tolds' only objection to the Board's evidence before the District Court of enforcement on other violations can be found in one sentence on page 5 of the petitioners' Memorandum to the District Court in opposition to defendant's Motion for Summary Judgment:

The defendant's enforcement of the ordinance against the fourteen other residents is not relevant to this case and should not be considered when deciding this matter.

(R. 56.)

That is the sum total of their objection to the evidence. The objection is both legally and factually wrong. It is legally wrong because it is clear from Kartchner that this Court considered the lack of enforcement evidence to be relevant and controlling on the issue of estoppel:

Witnesses for the County conceded at least six similar violations of the setback ordinance within the vicinity of defendant's property, and there was no evidence to indicate any attempt to enforce the zoning law in these other instances.

Kartchner, supra at 140. (Emphasis added.)

The Tolds' argument is also factually wrong because enforcement actions are factually relevant. It is not possible for the City to hire enough building inspectors to catch every violator before their building is completed. This is especially true where the illegal construction is done without a permit such as in this case. (R. 78, Findings No. 4.) The City's zoning enforcement personnel usually become aware of zoning violations either when the plans are submitted, when neighbors complain or, occasionally, when a zoning inspector fortuitously catching construction activity in progress. (R. 78, Findings No. 3.)

In this case it would have been impossible to catch the Tolds' violations by plans because they failed to obtain a permit. In any event, the Tolds had a past history of filing improper and distorted plans concealing the true facts. (R. 78, Findings Nos. 5-8.) As for the neighboring violations they were caught due to the Tolds' complaint.

The Tolds somehow argue that since they pointed out the neighboring violations to the Board not only are the Tolds immune from enforcement but so are the neighbors. (See Tolds' Brief pp. 17-18.) The argument that one violator can

insulate himself, and other violators, from any enforcement by merely pointing out the other violations is so lacking in logic and inherently absurd that it does not deserve a reply. Such a rule of law would eviscerate the City's zoning enforcement.

(3) THERE WAS NO IMPROPER
DISCRIMINATION

The Petition's argument analogizing the City's actions to an excuse for racial discrimination is absurd and insulting. First, there is no evidence of any intent on behalf of the City to discriminate at all. Second, the City is unaware of any cases holding scofflaws to be a protected class. Third, discrimination in enforcement of zoning ordinances, by the mere fact that it is impossible to catch every violator, is expected, accepted and approved. In Cook v. City of Price, 566 F.2d 699, 701 (10th Cir. 1977) the United States Court of Appeals for the Tenth Circuit considered an argument similar to that raised by this Petition:

Rather, appellant merely claims discrimination in that the ordinance was not enforced against other known violators. . . . For ninety years it has been established that a law fair on its face may be applied so arbitrarily and unfairly as to amount to a violation of constitutional rights. . . . However, when the discrimination is not aimed at a "suspect class" a plaintiff must show intentional or purposeful discrimination.
. . .

Mere failure to prosecute other offenders is no basis for a finding of denial of equal

protection. "[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." . . . Selective enforcement without malicious intent may be justified when a test case is needed to clarify doubtful law, . . . or when officials seek to prosecute a particularly egregious violation and thereby deter other violators. . . .

(Citations omitted, emphasis added.)^{5 6}

(4) THERE ARE NO ORWELLIAN CONSEQUENCES
TO THE CITY'S ACTIONS.

The Tolds' hysterical charge that the City's practice is a fatal threat to American Democracy (Petition p. 13) is ludicrous. There is no requirement that neighbors rat on each other about zoning violations. However, if a zoning violator chooses to rely on an estoppel defense based on neighboring violations what would the Tolds have the City do? Would the petitioner merely have to come in and say: "There are other violations in my neighborhood but I'm not going to tell you where they are." This Court cannot sanction such an Easter egg hunt system of zoning. To the

⁵ Before the Court of Appeals the petitioners deliberately attempted to mislead that Court by citing only the one sentence in the above quotation of basic law barely favorable to their position. The petitioners totally failed to cite or point out to the Court the fact that the entire quote destroys their argument.

⁶ The Tenth Circuit also took note that the appellee in Cook informed the Court that the deterrent effect of enforcement worked, as other violators ceased their illegal practices. Cook, supra at 701. In the instant case the successful deterrent and corrective effects are already a matter of record. (R. 79-80, Findings No. 11-19.)

extent a repeat offender chooses to point fingers at other violators the City should at least be entitled to know where the finger is pointing.

POINT II.

THE CITY SHOULD BE AWARDED SANCTIONS
AGAINST THE PETITIONERS AND PETITIONERS'
COUNSEL FOR THIS FRIVOLOUS, HARASSING
AND DELAYING APPEAL.

As noted in Point I above, the Petition fails in numerous respects to comply with the Rules of this Court. There is no proper statement for the basis of jurisdiction; there is no quotation of controlling statutes; there is no citation to the record; and, there is no statement of any "special and important reason" for the grant of the Writ.

Further, in violation of all basic precepts of appellate review, the Petition asks this Court to review numerous arguments not presented to the trial Court or the Court of Appeals. (The most egregious example is the Tolds asking this Court to send the matter back for a factual determination at the District Court when the issue was decided below on cross Motions for Summary Judgments and this supposed factual dispute was never raised to the Court of Appeals.) Thirdly, for the fourth time the Tolds have failed absolutely to even attempt compliance with the statutory grounds for the grant of a variance. Despite the City's repeated pointing out of this omission the Petition glaringly fails to make any attempt at compliance. Further,

none of the alleged errors of the Court of Appeals are argued with any logic or proper citations to cases or the record. A mere whining hysterical lamentation is not sufficient grounds for the issuance of a Writ.

Finally, the petitioners' cynical attempt to take advantage of this Court's backlog and delay, to extend the time for compliance with the City's zoning ordinances, makes a mockery of justice. As noted in this Brief, and in the District Court's Order, a number of the other violators pointed out by the Tolds have complied with the City's ordinances. Other who refused have been prosecuted. Only the Tolds have obstinately maintained their violation of the law. To allow the Tolds continuing bad faith tactics to prevail without sanctions would be an insult to those who have complied.

This Petition violates Rule 33(a) in that it is clearly frivolous and for the purpose of delay. It also violates Rule 40(a) in that there could be no good faith grounds formed after reasonable inquiry for this Court to grant the Writ.

As in Eames v. Eames, 735 P.2d 39 (Utah 1987), the Tolds' mischaracterization of the record, failure to follow the rules, abuse of appellate process and other transgressions warrants the imposition of sanctions. See also, O'Brien v. Rush, 744 P.2d 306 (Utah Ct. App. 1987); Taylor v. Estate of Taylor, 770 P.2d 163 (Utah Ct. App.

1989); Backstrom Family Ltd. Partnership v. Hall, 751 P.2d 1157 (Utah Ct. App. 1988); Brigham City v. Mantua Town, 754 P.2d 1230 (Utah Ct. App. 1988); Porco v. Porco, 752 P.2d 365 (Utah Ct. App. 1988); Barber v. Emporium Partnership, 750 P.2d 202 (Utah Ct. App. 1988).

CONCLUSION

There are no special and important reasons to grant the Petition for Writ of Certiorari. The Petition should be dismissed and the City should be awarded sanctions against the Tolds and the Tolds' counsel for violations of rules 33(a) and 40(a), R.U.S.C.

DATED this 31st day of May, 1989.



BRUCE R. BAIRD
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CERTIFICATE OF MAILING

I hereby certify that I mailed four copies of the foregoing Brief to J. Bruce Reading, MORGAN, SCALLEY & READING, 261 East 300 South, No. 200, Salt Lake City, Utah 84111, by depositing the same in the U.S. mail, postage prepaid, this _____ day of May, 1989.

BRB:cc