

2000

James and Carol Busche v. Salt Lake County,
Wallnet Investment, RBSCU Realty, Regence
Bluecross Blueshield of Utah, Mill Pointe
Associates, 2825 E Cottonwood Parkway, 2755 E
Cottonwood Parkway, and 2855 E Cottonwood
Parkway : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JAMES AND CAROL BUSCHE. :

Plaintiffs and Appellants. :

vs. :

SALT LAKE COUNTY, an incorpo- :
rated Utah county; WALLNET :

INVESTMENT, L.L.C., a Utah limited :
liability company; RBCSU REALTY, :

L.L.C., a Utah limited liability corpora- :
tion; REGENCE BLUECROSS BLUE- :
SHIELD OF UTAH, a Utah corporation. :

MILL POINTE ASSOCIATES, L.L.C., :
a Utah limited liability corporation: :

2825 E COTTONWOOD PARKWAY, :
L.C., a Utah limited liability corpora- :

tion; 2755 E COTTONWOOD PARK- :
WAY, LC, Utah limited liability :

corporation; 2855 E COTTONWOOD :
PARKWAY, LC, a Utah limited :

liability corporation. :

Defendants and Appellees. :

Case No. 20000073-CA

Priority No. 13

BRIEF OF APPELLEE SALT LAKE COUNTY

APPEAL FROM AN ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS OF THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE FRANK G. NOEL, PRESIDING

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Case No. 20000073-CA

Priority No. 13

JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction to hear this appeal pursuant to U.C.A.,

78-2a-3(2)(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Is Salt Lake County legally required to give public notice and hold a public hearing prior to amending the site plan for the Cottonwood Corporate Center conditional use permit?

May the County planning commission legally delegate to the development services division director and other planning commission staff the administrative authority to approve, deny, or modify conditional use permits?

Does the County board of adjustment have jurisdiction to consider the Busches' appeal of the conditional use permit in this case?

Standard of Review. This appeal is from an order of the District Court granting defendants' motions to dismiss under Rule 12 (b)(6), Utah Rules of Civil Procedure. Accordingly, the District Court's decision is subject to review for correctness by the appellate courts. *Sperry v. Sperry*, 1999 UT 101, 381 Utah Adv. Rep. 27; *Barber v. Farmers Insurance Exchange*, 751 P.2d 248 (Utah App. 1988).

DETERMINATIVE STATUTES AND ORDINANCES

The following statutes and ordinances are determinative or of central importance to the appeal:

1. The County Land Use Development and Management Act, U.C.A., 17-27-101, *et seq.* (see appellants' addendum, exhibit A).

2. The Uniform Zoning Ordinance of Salt Lake County, Title 19 (see appellants' addendum, exhibit B).

STATEMENT OF THE CASE

A. NATURE OF THE CASE

The plaintiffs in this case, James and Carol Busche (the "Busches"), own residential property adjacent to the Cottonwood Corporate Center (the "Corporate Center"), an office development located in unincorporated Salt Lake County (the "County"). The Busches contend in this lawsuit that the site plan for the Corporate Center was improperly modified without public notice or public hearing and without properly delegated authority. The Busches seek injunctive and declaratory relief against the owners and developers of the Corporate Center and also against the County, collectively the defendants in this case.

B. COURSE OF PROCEEDINGS

In response to the complaint, defendants filed motions to dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), Utah Rules of Civil Procedure. After briefing and submission to the District Court for a decision, the Court issued its minute entry which was subsequently made into an order dismissing plaintiffs' complaint. Plaintiffs then filed this appeal.

C. DISPOSITION IN THE COURT BELOW

The District Court entered its order granting defendants' motion to dismiss plaintiffs' complaint with prejudice on December 20, 1999.

D. STATEMENT OF RELEVANT FACTS

When reviewing a judgment entered on a motion to dismiss under Rule 12(b)(6), an appellate court must accept the material allegations of the complaint as true and is obliged to construe the complaint in the light most favorable to the plaintiff. *Colman v. Utah State Land Board*, 795 P.2d 622 (Utah 1990); *Heiner v. S.J. Groves & Sons*, 790 P.2d 107 (Utah Ct. App. 1990). In the present case, the Busches' complaint is contained in the record on appeal (R. 1 through 14).

SUMMARY OF ARGUMENTS

Contrary to the Busches' allegations, there is no legal requirement under either state law or county ordinances that requires the giving of public notice and the holding of a public hearing prior to amending a site plan for a conditional use permit.

Similarly, there is no legal prohibition on the delegation of administrative authority to the director of the County's development services division and his staff to amend a site plan for a conditional use permit, where the legislative body has enacted reasonable ordinances which contain adequate standards and criteria to guide the director and his staff in administering the ordinances.

The attempt by the Busches to appeal the conditional use permit to the County board of adjustment was properly refused, because the board of adjustment has no authority or jurisdiction to consider appeals of conditional use decisions; and, even if the board had such authority, the attempted appeal in this case was barred as untimely under the sixty-day appeal limitations provision.

ARGUMENT

POINT I

THE PROCEDURES FOLLOWED BY SALT LAKE COUNTY IN THIS CASE TO GRANT THE CONDITIONAL USE PERMIT FOR THE COTTONWOOD CORPORATE CENTER, INCLUDING ANY SITE PLAN AMENDMENTS, DID NOT VIOLATE APPLICABLE STATE STATUTES OR COUNTY ORDINANCES.

In ruling on defendants' motion to dismiss, the District Court correctly determined, as a matter of law, that the Busches' complaint failed to state a claim against defendants upon which relief can be granted on the following grounds: (1) the law does not require that a public hearing be held prior to the approval, denial, or modification of a conditional use permit, and (2) the law does not prohibit the delegation of administrative authority to approve, deny, or modify conditional use permits.

- A. No public hearing was required by law to approve, deny, or modify the conditional use permit in this case.**

The Busches' ultimate contention in this case is that the original site plan for the Corporate Center's conditional use permit was illegally amended by the failure to give public notice of the proposed site plan modifications and by the failure to hold a public hearing to allow the neighbors to be heard. (see Complaint, R. 6 at paragraph 42).

As the District Court correctly determined, this contention is without any legal support. Neither state statutes nor county ordinances require that public hearings be held prior to approving or amending conditional use permits.

While some zoning approvals do require public notice and hearing before the planning commission and/or board of county commissioners, conditional use permits do not. Under the provisions of the County Land Use Development and Management Act, U.C.A., 17-27-101, *et seq.* (see appellants' addendum, exhibit A), some examples of zoning matters which require public notice and hearing include: preparation and adoption of a county general plan (17-27-303); amendment of a county general plan (17-27-303); preparation and adoption of a zoning ordinance (17-27-402); amendment of a zoning ordinance (17-27-403); preparation and adoption of a subdivision ordinance (17-27-802); and amendment of a subdivision ordinance (17-27-803). On the other hand, some examples of zoning matters which do not require public notice and hearing include: preparation and adoption of temporary zoning regulations (17-27-404); approval of subdivisions and subdivision plats (17-27-805); issuing or withholding building permits (17-27-1002(2)); and approving or denying conditional uses (17-27-406).

Section 19.84.040 of the Uniform Zoning Ordinance of Salt Lake County (see appellants' addendum, exhibit B), specifically provides that no public hearing need be held to approve or deny a conditional use permit. The ordinance further provides that the planning commission has discretion to hold a hearing when the commission "shall deem such a hearing to be necessary in the public interest."

In their brief, the Busches cite no legal authority in support of their contention that either they, or other adjoining landowners, have any due process right to require a public hearing on a conditional use application made by another landowner.

B. The planning commission may legally delegate to the development services division director and other planning commission staff the administrative authority to approve, deny, or modify conditional use permits.

The Busches concede in their brief that the board of county commissioners may delegate to the planning commission authority to decide conditional use applications, pursuant to U.C.A., 17-27-204(1)(g). However, the Busches contend that the planning commission may not further delegate to the development services division director or to the director's employees (who serve as the planning commission's staff) any administrative authority concerning conditional use permits.

The District Court correctly noted that, pursuant to county ordinance, "The planning commission may delegate to the development services division director the authority to approve, modify or deny all or part of the conditional uses set forth in this

title." Section 19.84.060, Uniform Zoning Ordinance of Salt Lake County. The Court further noted that the Busches had failed to provide any persuasive authority for their position that the director could not further delegate his administrative authority to modify conditional use permits to his own senior planner within his office (see Minute Entry, R. 90 through 93).

Pursuant to section 19.84.095, Uniform Zoning Ordinance of Salt Lake County, it is the practice in Salt Lake County that the development services director is authorized to grant final approval of all conditional use applications after all of the conditions and requirements of the preliminary approval which are necessary for the final approval have been met, unless the planning commission has required as a condition of preliminary approval that a conditional use application be brought before the planning commission for consideration of final approval. In the present case, there is no allegation in the Busches' complaint that the planning commission, after granting preliminary conditional use approval for the Cottonwood Corporate Center, required that the conditional use application be brought back before the planning commission for consideration of final approval.

With regard to the issue of delegation of authority to public servants, courts have generally held that, although "legislative" or "governmental" powers of a county cannot be delegated by the governing body to others, a governing body can delegate to county officials and employees those powers that are described as "administrative," "executive,"

or "ministerial," so long as there are reasonable ordinances and standards to guide the county officials and employees. "Once the legislative function has been performed by the local legislature, the administration of the legislation can be delegated. So, after adequate standards and guides have been provided by the legislative body, the granting or denial of licenses can be implemented by local officials." Stevenson, *Antieau on Local Government Law*, 2nd Ed., Vol. 2, section 25.19; see also sections 26.01, 26.02, and 27.07; see also, *Thurston v. Cache County*, 626 P.2d 440, 446 (Utah 1981) (board of county commissioners is at liberty to delegate the issuance of permits, without regard to type or label, to a county building inspector or other administrative official).

With regard to the standards and criteria for granting or denying conditional uses, U.C.A., 17-27-406, provides: "A zoning ordinance may contain provisions for conditional uses that may be allowed, allowed with conditions, or denied in designated zoning districts, *based on compliance with standards and criteria set forth in the zoning ordinance for those uses.*" (Emphasis added).

In the present case, both the conditional use permit and amended site plan are subject to the zoning standards and criteria set forth in the zoning ordinance for developments in the O-R-D zone (see chapter 19.45, O-R-D Office, Research Park and Development Zone, appellants' addendum, exhibit B). These standards and criteria include provisions governing: hours of operation; prohibitions on outside storage; project area; building set-back requirements for front, side and rear yards; building height

area; building set-back requirements for front, side and rear yards; building height limitations; building coverage restrictions; perimeter wall requirements; landscaping and lighting requirements; nuisances and hazards; screening of equipment and utilities; access and parking; pedestrian walkways; design considerations; and consistency with the county master plan.

The County respectfully submits that these standards and criteria are more than adequate to sustain the delegation of administrative authority to issue conditional use permits under the provisions of the county zoning ordinance.

POINT II

THE COUNTY BOARD OF ADJUSTMENT DID NOT HAVE JURISDICTION TO CONSIDER PLAINTIFFS' APPEAL OF THE CONDITIONAL USE PERMIT IN THIS CASE.

The Busches' argue in their brief that the County's refusal to allow them to challenge the conditional use permit by an appeal to the County board of adjustment "was inappropriate." The Busches' contend that the board of adjustment is authorized to hear appeals about "how zoning ordinances are administered or interpreted."

However, a review of the state statutes and county ordinances governing appeals to the board of adjustment establishes that the County board of adjustment is without jurisdiction to hear or consider any appeal of a conditional use decision.

U.C.A., 17-27-706, provides that the county legislative body "may provide that conditional use permits be treated as special exceptions in the zoning ordinance," and that the "board of adjustment may hear and decide special exceptions *only if authorized to do so by the zoning ordinance* and based only on the standards contained in the zoning ordinance." (Emphasis added).

In Salt Lake County, the legislative body has not provided that conditional use permits be treated as special exceptions and has specifically prohibited the County board of adjustment from hearing appeals or considering conditional use decisions. Section 19.92.050(C)(2) of the zoning ordinance provides that "A person may not appeal, and the board of adjustment may not consider, any zoning ordinance amendments or conditional use decisions."

Even if, for the sake of argument, the County board of adjustment did have jurisdiction over such an appeal as was attempted by the Busches in this case, the appeal would also have been barred as untimely under the provisions of section 19.92.050(E) of the zoning ordinance, which requires that an "appeal to the board of adjustment must be filed at the development services division of Salt Lake county within sixty days after the order, requirement, decision or determination administering or interpreting the zoning ordinance is made." Here, the Busches' attempt to appeal a decision made in April of 1996 was clearly untimely where the appeal was filed in July of 1999.

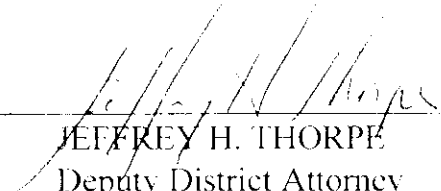
CONCLUSION

For the reasons stated above, defendant Salt Lake County respectfully requests that the Court of Appeals affirm the decision of the District Court below, dismissing plaintiffs' complaint for failure to state a claim upon which relief can be granted.

DATED this 7/1/00 day of August, 2000.

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Salt Lake District Attorney

By


JEFFREY H. THORPE

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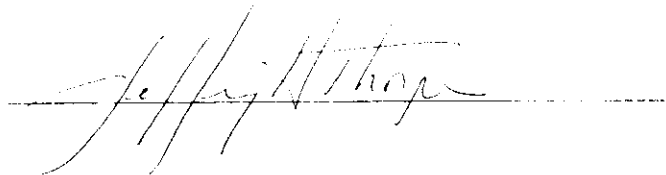
CERTIFICATE OF SERVICE

I hereby certify that I caused two (2) true and correct copies of the foregoing Brief of Appellee Salt Lake County to be mailed, postage prepaid, this 24 day of August, 2000, to the following:

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