

2000

Julian Dean Hatch and Lynn Mitchell v. The Boulder Town Council, The Boulder Excavating Company, Sam Stout and Rhea Thompson : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JULIAN DEAN HATCH and, LYNN MITCHELL)	BRIEF OF THE APPELLANTS
)	
Petitioners and Appellants,)	
vs.)	
)	Appellate Case No. 20000189 -CA
THE BOULDER TOWN COUNCIL, TOWN OF BOULDER PLANNING COMMISSION and/or BOARD OF ADJUSTMENT, THE BOULDER EXCAVATING COMPANY, SAM STOUT AND RHEA THOMPSON)	Trial Court No. 990600022
)	
Respondents and Appellees.)	Priority of Argument: 29(b)(15)

THIS IS AN APPEAL FROM THE JUDGMENTS RENDERED IN THE
SIXTH DISTRICT COURT BY JUDGE DAVID L. MOWER.

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STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction to hear this matter pursuant to Section 78-2-2(3)(j), Utah Code Annotated (1953, as amended). This appeal, however, is subject to assignment to the Utah Court of Appeals, and has been transferred to the Utah Court of Appeals, pursuant to Section 78-2-2(4), Utah Code Annotated (1953, as amended).

STATEMENT OF ISSUES FOR REVIEW

1. Did the Town of Boulder strictly comply with Utah's statutory requirements, which enable municipalities to enact zoning ordinances? Strict compliance with Utah's enabling statutes is required. This is reviewed for correctness. Springville Citizens v. City of Springville, 972 P.2d 332 (Utah 1999).

2. Is the zoning Ordinance vague, ambiguous and unconstitutional, making it illegal under due process standards; and/or will it inevitably result in arbitrary and capricious enforcement? The appellate court's interpretation of an ordinance is a question of law, reviewed for correctness. Town of Alta v. Ben Hame Corp., 836 P.2d 797, 800 (Ut.App. 1992). Is the term "commercial" vague and ambiguous as used in the Ordinance? No extrinsic evidence was presented on this issue; therefore, it is also a legal question, reviewed for correctness. Buehner Block Co. v. UWC Assoc., 752 P.2d 892, 895 (Utah 1988).

3. Did the Town of Boulder violate the terms and conditions of its own zoning Ordinance in granting the conditional use permits for the Respondents? Municipal

zoning authorities are bound by the terms and standards of their own zoning ordinances and are not at liberty to make land use decisions in derogation thereof. This is reviewed for correctness. Springville Citizens, *supra*.

4. Was there substantial evidence presented to the trial court to support the granting of the conditional use permits, or was the Town's decision arbitrary and capricious? Since there was no evidence presented on behalf of the Town, this should be reviewed for correctness. Springville Citizens, *supra*.

5. Did the trial court abuse its discretion in consolidating the preliminary injunction hearing with a full fledged trial on the merits, without prior notice to counsel, and after the close of evidence at the preliminary injunction hearing? Did the trial court err in presuming that it had heard all of the evidence in the case that could be presented at trial? This is reviewed under an abuse of discretion standard. Lessona Corp. v. Varta Batteries, Inc., 522 F.Supp. 1304 (D.C.N.Y. 1981).

6. Did the trial court err in accepting the oral argument of Respondent's counsel as evidence in the case? This should be reviewed for correctness. State v. Diaz, 859 P.2d 19, 23 (Ut.App. 1993), cert. denied 878 P.2d 1154 (Utah 1994).

7. Does the admissible evidence when marshaled support the findings of fact entered by the trial court? Specifically:

- (1) That there was an officially adopted map to correspond with the zoning Ordinance; (Findings ¶ 4; Record 318-319).

- (2) That the parties agreed regarding the location of the properties at issue, within the specified districts of the zoning Ordinance; (Findings ¶ 4; Record 318-319).
- (3) That there is substantial evidence to support the granting of the conditional use permits, when there was no evidence presented to the trial court. (Findings ¶s 6, 7 and 8; Record 319).
- (4) That the Stout residence is designated by the Ordinance as “District 6, Medium Density Residential;” and the Thompson Ranch property is designated by the Ordinance as “District 2, Green belt/Multiple Use Lands;” when there was no official zoning map introduced at the hearing, identifying the nine (9) zoning districts of the Ordinance. (Findings ¶s 9 & 10; and ¶s 28 & 29; Record 320 and 323).
- (5) That the Respondent, Boulder Excavating Company, appeared at a Town Council meeting and stated its reasons why the decision of the Planning Commission should be affirmed, when there is no evidence of this at the hearing. (Findings ¶ 13; Record 321).
- (6) That Boulder Excavating prior to the hearing, caused a garage, authorized by the Conditional Use Permit for the Stout property,

to be largely constructed, up to and including a roof and roofing. Installation of siding of some finish work remained; that the garage and related landscaping and screening were the only physical improvements authorized or required by the Conditional Use Permits. (Findings ¶ 18; Record 321). No one testified to this.

- (7) That the uses for which the Conditional Use Permits were granted are compatible with other uses authorized and existing in the same districts. (Findings ¶ 25; Record 322). No one testified to this. The only testimony was of Hatch and Mitchell that they were not compatible.
- (8) That the Ordinance by its terms authorizes the issuance of the Conditional Use Permits granted to Boulder Excavating Company. (Finding ¶ 27; Record 323). The only testimony was of Hatch and Mitchell that the issuance was in direct violation of the Ordinance.
- (9) That Petitioners failed to show that they were irreparably harmed by the issuance of the Conditional Use Permits, or that any harm could be avoided by issuance of a preliminary injunction. (Conclusion ¶ 6; Record 324).

(10) That the Petitioners acted in bad faith without an honest belief in their claims, but with the sole intent to take unconscionable advantage of Boulder Excavating Company and the Town of Boulder. (Conclusion on Atty's Fees, ¶s 5 & 7; Record 362).

To overturn these factual findings, the appellant must marshal all the evidence in support of the finding and show that it is legally insufficient. Heber City Corp. v. Simpson, 942 P.2d 307 (Utah 1997). Since the Respondents did not present any evidence at the hearing, there is no evidence to marshal.

8. Did the trial court err in failing to consider all of the evidence, and exhibits entered into evidence by Petitioners, before making its ruling dismissing the Petition? This is a legal issue subject to full review. State v. Pena, 869 P.2d 932, 936 (Utah 1994).

9. Did the trial court err in reaching the legal conclusion that the matter was brought "without merit"? This is a legal question, subject to de novo review. Pennington v. Allstate Ins. Co., 973 P.2d 932 (Utah 1998).

STANDARD FOR REVIEW

The standard of review for each of the above-numbered issues, is set forth above, following the statement of each issue.

PRESERVATION FOR REVIEW

The issues presented above were preserved for review, in Petitioners' memoranda filed with the trial court. (Record 73-153; 240-249; 297-316); the objections to findings filed with the trial court. (Record 250-261; 337-343); and during the preliminary injunction hearing. (Record 388).

STATEMENT OF THE CASE

Nature of the Proceedings

On July 15, 1999, a Petition was filed in the Sixth District Court for judicial review of the Town of Boulder's enactment of a zoning ordinance and the subsequent approval of conditional use permits for the Respondents, Boulder Excavating Company, Sam Stout, and Rhea Thompson, to operate a commercial business in the Town of Boulder next to Petitioner's property. (Petition, Record 1). An Answer to the Petition was filed by the Town of Boulder on August 16, 1999. (Answer, Record 64).

The Petition also sought injunctive relief and the Petitioners moved the court for a preliminary injunction to stop further construction and operation of the business, pending a determination by the court at the conclusion of trial. (Motion for Preliminary Injunction, Record 71). The Petitioners' Motion, Memorandum in Support, and Affidavits of Hatch and Mitchell were filed and served on the Respondents. (Record 160-173) Respondents filed memoranda in opposition before the hearing. (Record 174 & 212)

The preliminary injunction hearing was scheduled for August 31, 1999, by the trial court, with counsel for the parties. A Notice of Hearing was served by mail on counsel for the Town of Boulder, (Record 162) who had already filed an Answer in the case (Record 64-70); and was personally served on counsel for Boulder Excavating Company on August 24, 1999. (Record 171-173). No objections, or requests for additional time were filed by either of the opposing parties.

At the hearing, both Hatch and Mitchell took the stand and testified concerning the enactment of the zoning ordinance; that they were present before the Planning Commission and in Town meetings, and that the Town failed to comply with Utah's statutory procedures in adopting the zoning Ordinance; e.g., there was no official map adopted with the zoning Ordinance, with nine (9) corresponding districts as designated in the zoning Ordinance. They also testified that they expressed their concerns about the term "commercial" and how it was used in the Ordinance, that it made the Ordinance contradictory, vague and unconstitutional. (Hearing Transcript, Record 388, p. 64).

Hatch and Mitchell also testified about the Town's improper procedure in granting the conditional use permits to the Respondents, which was done in total disregard to the provisions in the zoning Ordinance the Town had tried to enact, and that it was done in an arbitrary and capricious fashion, without any substantial evidence to support the Town's decision. (Record 388, pp. 57-62).

During their testimony, Hatch and Mitchell attempted to read from written statements, which had been previously prepared and read to the Town in Town meetings. These letters contained the Petitioners' concerns with the Ordinance and the conditional use permits. These letters were admitted into evidence, and contained, among other things, the specific violations that were made under the terms of the Ordinance, and the lack of substantial evidence, which the Town needed in order to grant the conditional use permits. The court however, would not allow these letters to be read, but indicated that it would read them later. (Record 388, p. 62).

Hatch and Mitchell testified as to how they had been prejudiced in the enjoyment of their property as a result of the illegal Ordinance, and they further testified about the irreparable damage occurring to their property, and the potential damage they would suffer. (Record 388, pp. 65-68).

No one testified on behalf of the Town. No evidence was presented by the Town, and no evidence was presented to the court to substantiate the Town's enactment of the zoning ordinance, or the Town's decision in granting the conditional use permits. No evidence or record was presented to the court, of the enactment of the zoning Ordinance, or the factors considered by the Town in granting the conditional use permits. (Record 221).

At the end of the hearing, and after the close of evidence, the trial court then thought that the matter should be consolidated with a full trial. The court then presumed that it had heard all of the Petitioner's evidence that would be presented at the time of trial and

dismissed the Petition. This was done without any advance notice to counsel. (Record 388, pp. 203-204).

The Petitioners never had the opportunity to put on all of their evidence; and the Town didn't put on any evidence. The court prematurely dismissed the Petitioner's claims, while accepting the oral argument of Respondent's counsel as evidence for the Town. As a result the Petitioners never had an opportunity to object to the admissibility of the evidence or to cross-examine the Town's witnesses.

Based upon the court's premature dismissal, the Respondents sought their attorney's fees, but were not prepared to give any legitimate reason or legal basis for the fees. The court therefore, left the issue of attorney's fees open for further determination. (Record 388, p. 205). The court eventually granted attorney's fees based on Utah's Bad Faith Statute, § 78-27-56 U.C.A. (1953, as amended) (Record 362), although the court made no factual findings at the end of the hearing that the matter was brought in bad faith or "without merit." The Findings of Fact and Conclusions of Law on the injunction hearing, were signed on November 10, 1999. (Record 317-326).

The court entered its final Findings of Fact, Conclusions and Order on Motion for Attorneys Fees on February 8, 2000, finding that the Petition was in bad faith and without merit in conclusory terms, while failing to cite to any specific supporting facts that were actually introduced in evidence. (Record 358-364). The Petitioners filed their Notice of Appeal on February 28, 2000. (Record 367-370).

Statement of the Facts

1. The Town of Boulder is a political subdivision of the State of Utah, located in Garfield County. (Petition ¶ 1, Record 2). The Petitioners and Appellants, Julian Dean Hatch and Lynne Mitchell (hereinafter “Hatch”) are residents of the Town of Boulder. (Petition ¶ 4, Record 2).

2. The two (2) properties at issue in this case are located at 195 North 300 East, belonging to Sam Stout (“Stout Site”); the other is located at 4270 North Highway 12, (“Thompson Ranch”) owned by former Boulder Town Council member, Rhea Thompson. (Petition ¶ 5, Record 2).

3. On or about May 29, 1998, the Town of Boulder passed Ordinance No. 39 (Record 13-60 and Addendum B), which was then amended on or about January 12, 1999. Ordinance 39 was designed and enacted to implement the goals and objectives of the Boulder Town 1997 General Plan, which was to preserve the quite rural/agricultural quality of life enjoyed by the residents of the Town of Boulder. (Petition ¶s 9 & 10, Record 3-4).

4. Ordinance 39 contains a provision in PART III entitled “Conditional Uses.” Part III(B) provides:

B. PERMIT REQUIRED

A conditional use permit is required for all uses listed as conditional uses in the district regulations or elsewhere in this ordinance. No building permit or other permit or license shall be issued for a conditional use without first being reviewed and approved by the Town Planning Commission, or on appeal, by the Town Council. (Ord. p. 7, Record 20).

5. Ordinance No. 39, Subparagraph (E), provides PUBLIC HEARING REQUIRED; and subparagraph (F) lists the SITE DEVELOPMENT PLAN REQUIREMENTS for a conditional use permit as follows:

1. Name, address, and phone number of applicant;
and,
2. Location and dimension of the property and of
any buildings or other structures on the property; and,
3. Location and dimension of any proposed
structures, parking facilities, etc. that are associated with the
proposed use; and,
4. Location of roads and utilities that are now
serving or will be required to serve the property; and,
5. Percentages that existing and proposed structures
(to include roads, parking, etc.) will cover said parcel; and,
6. A topographical map at 2 ft. contours showing
existing drainage patterns as well as other environmentally
sensitive areas; and,
7. A drainage map that reflects drainage patterns
after the use is applied to the property; and,
8. A landscape plan overlaying all areas of the
property not covered by existing or proposed structures.
Landscape is herein defined to include, naturally occurring or
human created existing features such as water courses, rivers,
irrigation works, wetlands, historic sites, critical meadow lands,
important vistas, and other irreplaceable assets shall be
preserved. All significant trees shall be preserved where
possible and where necessary shall be welled and protected
against change of grade;

9. Written explanation of the proposed use, detailing how and when the use requested will be implemented. List of all permits necessary for the proposed use.

10. Assessment and resolution of impacts generated by the proposed use shall be addressed in writing, and may include but is not limited to:

- a. Culinary and waste water systems
- b. Traffic volume, noise and access
- c. Visual impacts
- d. Others deemed prudent by the Planning Commission
- e. Professional evaluation will require a fee.

11. All signs must conform to the Boulder Sign Ordinance. An application for all signs needs to be included with the development plan.

Assessments are to include impacts to adjacent properties, to the neighborhood, and/or to the community at large. Professional analysis of complex issues may be required, if in the opinion of the Planning Commission or their designee, such expertise is necessary for clear and comprehensive understanding of potential impacts that may arise from the proposed use. (Ord. p. 7-8, Record 20-21).

6. The conditional use provision further provides under subparagraph (G)

DETERMINATION that to protect adjacent properties and the public welfare, the Planning Commission shall not authorize a conditional use permit unless evidence is presented to establish:

1. That such use will not, under the circumstances of the particular case, be detrimental to the health, safety, or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity, and

that the proposed use of the particular location is necessary or desirable and that provides a service or facility which will contribute to the general well being of the neighborhood and the town.

2. That the proposed use will comply with regulations and conditions specified in this ordinance for such use.

3. The Planning Commission shall itemize, describe, or justify, then have recorded and filed in writing the conditions imposed on the use. (Ord. p. 9, Record 22).

7. On or about January 27, 1999, after May 29, 1998, when the zoning Ordinance was passed, an existing conditional use map of the Town of Boulder was prepared by the Five County Associations of Governments. However, this was not the official zoning map of the Town of Boulder. There was no official zoning map, or corresponding map, formally adopted by the Town of Boulder to coincide with the Ordinance, as set forth in PART IV, Section B, of the Ordinance. (Petition ¶ 14, Record 7 and 22). This is admitted by the Town of Boulder. (Answer ¶s 14 & 15, Record 14-15).

8. As further evidence of this, the existing use map has six (6) different existing uses (See Existing Land Use Map, Trial Ex. "1" and Addendum A), while Ordinance 39 designates nine (9) separate zoning district to be established. (Ord. p. 45, Table I, Record 58).

9. Under each separate district, as designated in the Ordinance, it limits the conditional uses than can be granted under each district; and then the allowable conditional uses are specifically listed. The conditional uses for Greenbelt/Multiple Use

District are: (1) Churches; (2) Publicly funded schools (nursery, primary and secondary schools); (3) Parks and public buildings; (4) Public utilities; (5) Living quarters for hired hands, seasonal laborers, or others receiving compensation for work performed on site; (6) Bed and breakfast establishments; (7) Riding academies, schools and accompanying stables; (8) Dude/guest ranch; (9) Commercial. (Ord. pp. 21-22, Record 34-35).

10. The conditional uses for Medium Density Residential are listed as: (1) child day care or nursery; (2) park or playground; (3) public utilities, essential services; (4) public buildings; (5) commercial. (Ord. p. 24, Record 37).

11. In the existing use map, the Stout Site is designated as Medium Density; and the Thompson Ranch, is designated as Greenbelt/Multiple use. (Trial Ex. "1"). Although the existing use map, is not the official zoning map, and does not have the appropriate identification of the nine (9) zoning districts designated under the zoning Ordinance; under the zoning Ordinance neither the Greenbelt/Multiple Use District, nor the Medium Density District, provide for the conditional use of a contractor's construction business, as relied upon by the Respondents. (Petition ¶ 20, Record 8).

12. "Contract construction" is only provided for in Commercial District No. 9, under the zoning Ordinance. (Ord. p. 27, Record 40). Commercial District No. 9, also has its own Commercial Design Criteria (Ord. p. 28, Record 41). This criteria was never complied with or even addressed in granting the conditional use permits.

13. On or about December 3, 1998, Boulder Excavating Company (“BEC”) tried to apply for a conditional use permit to use the above properties for a commercial construction business. This was never filed with the Town Clerk, so a supplemental application had to be filed, on or about January 12, 1999. (Petition ¶ 21, Record 8).

14. A Planning Commission meeting took place on or about January 27, 1999. Several issues were raised at this meeting by Hatch and other neighbors, including the following: (Record 388, pp.113-114) Hatch also read a letter to the Town (see letter of June 27, 1999; Trial Ex. “8”, Addendum C).

1. BEC was given a business license without a conditional use permit.

2. BEC’s request conflicted with the General Plan of the Town of Boulder, as well as, the Objective set forth in Ordinance No. 39.

3. The conditional use, which BEC sought on the property, was not for any of the conditional uses listed and permitted in the district as designated in the Ordinance and required under Utah Statute. § 10-9-407, U.C.A. (1953, as amended).

4. The conditional use could not be established so as not to be detrimental to others as required under the Ordinance.

5. No evidence had been presented to show that the conditional use would not be detrimental to others.

6. No evidence was presented as required under the Ordinance for the site development plan and these requirements were not met.

7. No evidence was presented regarding the sensitive natural areas, including the wetlands located nearby, and drainage.

8. No topographical maps were provided as required under statute. (The Thompson Ranch drains into the town and the Stout Site drains into nearby wet lands).

9. A request to inspect the site with adjacent landowners and neighbors to express their concerns was denied.

10. No appeal or justification was provided by BEC to the Planning Commission to allow waiver of the Site Development Requirements.

15. In September 1998, the Planning Commission recommended that the term “commercial” be taken out of the zoning ordinance. (Record 388, pp. 64, 95, 120-122; Trial Ex. “12”, Addendum G).

16. On or about February 10, 1999, the conditional use permits were approved for both locations, without any significant, competent or sufficiently legal evidence; and in direct transgression of the term and conditions of the zoning Ordinance. (Petition ¶ 24, Record 10).

17. In accordance with the Ordinance, an appeal was made to the Boulder Town Council, who upheld the granting of the conditional use permits. (Petition ¶ 25, Record 10).

18. On July 15, 1999, Hatch timely filed a Petition in the Sixth District Court regarding the actions taken by the Town of Boulder in enacting the zoning Ordinance

and in granting conditional use permits to the Boulder Excavating Company, Sam Stout and Rhea Thompson, for a construction business in the Town of Boulder. (Record 1-61).

19. The Petition asserts that passage of the Ordinance was illegal and not in compliance with state law, §10-9-402 U.C.A., because no official map was adopted with the Ordinance, setting forth the nine (9) districts as designated in the Ordinance. (Petition ¶ 26(1), Record 10). The existing use map was attached to the Petition as Exhibit “B,” but it was not an official zoning map. (Record 61).

20. The Petition asserts that granting a conditional use permit for a contractor’s construction site was improper, since under the Ordinance the term “contract construction” is listed, and thus allowed, only under Commercial District No. 9 as designated in the Ordinance. The properties are not located in Commercial District No. 9 as designated in the Ordinance, and therefore, cannot be used for a “contract construction” business.¹ §10-9-407 U.C.A. (Petition ¶ 26(2), Record at 10).

21. The Petition asserts that use of the term “commercial” in various places throughout the Ordinance without any meaning, definition, or parameters is too vague and ambiguous, making the Ordinance illegal, or at a minimum, resulting in the arbitrary, capricious and illegal enforcement of the Ordinance. (Petition ¶ 17, Record 7-8).

22. The Petition asserts that subparagraph (F) of the Ordinance, which lists the Site Development Plan Requirements for a conditional use permit were never followed

¹There is no official zoning map, however, under the existing use map the properties are designated as Medium Density Residential and Greenbelt/Multiple Use.

or complied with in granting the conditional use permits. (Petition ¶s 12 and 24, Record 5 and 10).

23. The Petition asserts that all of the above issues, plus additional problems and concerns set forth in paragraph 12 above, were raised before the Planning Commission at their meeting on January 27, 1999. (Petition ¶ 22, Record 9).

24. The Petition asserts that the conditional use permits were granted in violation of the terms in the Town's own Ordinance, and without any significant, competent, or legal evidence to support the permits. (Petition ¶ 24, Record 10).

25. The Petition seeks judicial review of the Town's actions and further injunctive relief to enjoin any further building or construction, pending a final determination of the proceeding. (Petition p. 11, Record 11).

26. The Petition was served on the Town of Boulder (Record 62-63) and the Town of Boulder filed an Answer to the Petition on August 16, 1999. (Record 64-70). In its Answer, the Town of Boulder admits that the existing use map, which was attached to the Petition, was not an official zoning map of the Town of Boulder. (Answer ¶s 14 & 15, Record 66-67).

27. Although the Answer admits that the properties are designated as Medium Density Residential and Greenbelt/Multiple Use, the location in these districts is alleged only according to the existing use map, attached to the Petition, which is not an official map of the Town, or the corresponding map to the zoning ordinance. (Petition ¶s 14 & 20, Record at 7 & 8) (Answer ¶s 14 & 15, Record 66-67).

28. Hatch was told by the mayor of Boulder that there would not be any building permits issued to BEC until after the appeal in District Court was decided. (Record 388, p. 73). However, this promise was not kept, so after filing the Petition, Hatch filed a Motion for a Preliminary Injunction, with accompanying affidavits and memoranda. (Record 71-159).

29. The Petition, Motion for Preliminary Injunction, Affidavits and Memorandum in Support of Preliminary Injunction were served on the Respondents, pursuant to the Utah Rules of Civil Procedure. (Record 160-173).

30. On or before August 18, 1999, the trial court called counsel and scheduled a Preliminary Injunction hearing for August 31, 1999 at 10:00 a.m. A Notice of Hearing was then sent out on August 18, 1999. (Record at 162-163). BEC was personally served on August 24, 1999. (Record 171-173). No objection, or request for continuance was filed by either Respondent. Before the hearing commenced, Mr. Bagley, counsel for the Town of Boulder, indicated that he was ready to proceed, (Record 388, p. 6) and, Mr. Bird, counsel for BEC, Sam Stout, and Rhea Thompson, also indicated that he was ready to proceed. (Record at 388, p. 7).

31. The Memorandum in Opposition filed by BEC, Sam Stout and Rhea Thompson, was not filed until the day before the hearing on August 30, 1999. (Record 174). The Town's Memorandum in Opposition to the Motion for Preliminary Injunction was not filed until the morning of the hearing. (Record 388, p. 7). This is the first time any mention was made to consolidate the hearing with a full fledged trial. (Record 183-184).

32. At the hearing, Hatch testified that he was a resident of the Town of Boulder, (Record 388, p. 35) that Boulder was a very rural area and that the rural atmosphere was very important to him. (Record 388, p. 37). The General Plan for the Town of Boulder was also admitted into evidence, although the court would not give Hatch time to read the goals and general policies of the Plan. (Record 388, p. 40; Trial Ex. "2"). The court indicated that it would read it later. (Record 388, p. 41).

33. At the hearing the existing use map, prepared by the Five County Association of Governments on Jan. 27, 1999, was also received into evidence. (Record 388, p. 44; Trial Ex. "1"). This was the only map introduced into evidence, and it was agreed by counsel that this map was not an official map of the Town of Boulder. (Record 388, p. 43).

34. Hatch testified that he went to Town meetings when a land use ordinance was discussed and that there was never an official map at these meetings, (Record 388, p 55); and that members of the Town Planning Commission, i.e., Chairperson, Donna Jean Wilson, told him that the Town did not have an official map. (Record 388, pp. 57-58).

35. Mitchell was present at the meeting on May 29, 1998, when the zoning Ordinance was adopted and she testified that an official map was not done yet and was not adopted with the zoning ordinance.² (Record 388, pp. 144, 150-151).

²In the Minutes of May 29, 1998 (Trial Ex. "14, Addendum E) there is no presentation or adoption of an official base map to correspond with the OFFICIAL MAP ADOPTED in PART IV of the Ordinance. (Record 22). As late as June 17, 1999, Hatch asked for a copy of the official map, but there was no map available. (Record 380, pp. 116-117; Trial Ex. "10", Addendum F).

36. The Boulder Town Zoning Ordinance, Ordinance No. 39, was admitted into evidence without any objection. (Record 388, p. 45).

37. Hatch testified that BEC began its business at the property in early summer and at least by August of 1998, (Record 388, p. 50); that the Town improperly issued BEC a business license in November of 1998, (Record 388, p. 52); and that he complained to the Town, but the Town didn't take any action. (Record 388, p. 53).

38. Hatch testified that he was present when BEC's conditional use application was discussed at public meetings, and that he raised numerous objections, problems, and other issues, as to why the conditional use permits should not be granted, including: (1) the business license was improperly issued, i.e., according to the ordinance BEC can't have a business license until a conditional use permit is granted; (2) that the construction contract business applied for was not one of the conditional uses permitted in the pertinent areas; (3) there was no compliance with the site plan requirements and other conditions listed in the zoning Ordinance, which were never fulfilled or even discussed; and (4) that there was no official map to correspond with the Ordinance to know where the Commercial District 9 is located. (Record 388, pp. 54-57).

39. Hatch also wrote a letter, dated January 27, 1999, concerning the conditional use permits. This letter was admitted into evidence. (Record 388, p. 114; Trial Ex. "8", Addendum C).

40. After the approval of the conditional use permits, Hatch and Mitchell appealed. The Notice of Appeal forms filled out by Hatch and Mitchell were admitted into

evidence, as well as, the letter dated March 5, 1999, which was attached, which detailed the issues raised by Hatch. (Record 388, pp. 51, 58-60; Trial Ex. "5", Addendum D).

41. Hatch was not allowed to read the March 5, 1999 letter (Record 388, p. 62); however, this letter contained specific concerns about the conditional use permits; such as (1) issuance of business license before conditional use permits were granted, in violation of business license ordinance; (2) failure to address the mandatory Section F, Site Development Plan Requirements, listed under Conditional Uses Part III of the Ordinance, and the lack of any appeal and justification to waive the requirements; (3) the assessment of the existing land use and a determination under Section G of the Ordinance, that the conditional use will not be detrimental to the general welfare of the persons residing or working in the area; and (4) that the commercial use of a construction business is not provided for as a conditional use for the existing land use of Medium Density and Greenbelt/Multiple Use Districts as provided under the zoning ordinance. (See Trial Ex. "5", Addendum D). The court indicated that it would read the letter at a later time. (Record 388, p. 62).

42. Hatch also testified about the problem with the term "commercial" used in the Ordinance, and that its use in different parts of the Ordinance, e.g., with the specific uses allowed as conditional uses, in the Greenbelt and Medium Density District; as well as in the general Commercial District, was contradictory. (Record 388, pp. 64 & 127). Hatch was told by the Planning Commission that such use was contradictory and that the Planning Commission would take care of the problem. (Record 388, p. 94). The Planning

Commission did ask for its deletion from the Residential District, (See Trial Ex. "12", Addendum G) but the Town Council refused. (Record 388, p. 93).

43. Hatch also raised his concern with the term "commercial" before the Town Council. The Town Council told Hatch that they would take care of the problem, but they never did. (Record 388, p. 94). In fact, at one point, councilman Tim Clark told Hatch that they would continue to apply the general Commercial District definition anywhere they wanted throughout the other districts.³ (Record 388, p. 70).

44. Hatch, who was present at the meetings, testified that there wasn't any evidence presented to support the conditional use permits; that the conditions required by the Ordinance were never met; and that no evidence was presented to justify the waiver of these requirements. (Record 388, p 69-70).

45. When Hatch was known to be out of town, on June 2, 1999, there was a meeting held where Hatch's appeal was discussed; however, Hatch did not have the opportunity to attend this meeting. (Record 388, p. 85). Since Hatch was not in attendance, no evidence was presented to the court about this meeting and no evidence was introduced to overcome Hatch's concerns or to substantiate the granting of the conditional use permits. (Record 388, p. 85).

³See Minutes of June 17, 1999, second page, middle paragraph, "Tim clarified that "commercial" can apply to any district. We didn't want to be told we can have businesses only in certain places." (Trial Ex. "10", Addendum F).

46. Hatch finally testified concerning the irreparable harm being done to his property. He testified of the noise problem; and the damage to the wetlands, pastures, lake and trees, (Record 388, p. 66). He also testified of the interference with the public right-of-way. (Record 388, pp. 67-68).

47. Mitchell also testified of the noise, the closure of the public right-of-way that is the access to the southern end of her property, and the removal of most of the trees. (Record 388, pp. 137-140). She further told the court about the noise and sight problems that were created by the construction business. (Record 388, pp. 154-158).

ARGUMENT

I. THE ZONING ORDINANCE IS ILLEGAL BECAUSE THE TOWN FAILED TO COMPLY WITH UTAH'S ENABLING STATUTES.

A. An Official Map was never presented as part of the Zoning Ordinance. When enacting zoning ordinances, statutory procedures must be strictly complied with, or the action is illegal and void. Call v. City of West Jordan, 727 P.2d 180 (Utah 1986) (failure to strictly follow the statutory requirements in enacting an ordinance renders it invalid). This well established rule is followed by the great majority of jurisdictions. Cf. NcCushey v. Canyon County, 851 P.2d 953 (Id. 1993); Levitz v. State, 613 P.2d 1259 (Ariz. 1980); and Petty v. Flathead County, 754 P.2d 496 (Mont. 1988); and Stockwell v. City of Ritzville, 663 P.2d 151 (Wash.App. 1983) (zoning ordinance was invalid by reason of city council's failure to comply strictly with statutory requirement that zoning maps be included with ordinance).

Utah's statutory procedure for enacting zoning ordinances, requires the recommendation of both the full text of the ordinance, as well as, maps for all parts of the area within the municipality. §10-9-402 U.C.A. (1953, as amended). Thus, the proposed "zoning ordinance recommendation," referred to in § 10-9-402 is to include the "full text of the zoning ordinance **and maps**." §10-9-402(1) U.C.A. (emphasis added). Furthermore, the map is to cover all of the area in the municipality to be zoned. *Id.*

In this case, there was no official map recommended with the zoning Ordinance. No map was presented covering all of the parts of the proposed zoning districts within the Town of Boulder, or containing all of the districts designated under the zoning Ordinance. (Record 388, p.55-57, 144, 150-151). The only map presented in evidence was an existing use map, which was prepared on January 21, 1999, long after the adoption of the zoning Ordinance on May 29, 1998. This existing use was not an official map of the Town. This existing use map does not contain all nine (9) districts designated in the Ordinance and does correspond to the zoning Ordinance. (Record 66-67, & 388, p. 55-57, 144, 150-151). Since there was no map recommended with the Ordinance at the public hearing, covering all of the proposed zoning districts in the Town, and corresponding with the zoning Ordinance, as required under Utah statute; the passage of the zoning Ordinance was an illegal act and the Ordinance is void and illegal. Call v. City of West Jordan, 727 P.2d 180 (Utah 1986); Stockwell v. City of Ritzville, 663 P.2d 151 (Wash.App. 1983).

Utah Statute, §10-9-1001 U.C.A. (1953, as amended), allows a resident to challenge a municipality's land use decision made under Chapter 9. (The enactment of a

zoning ordinance is covered under Part 4 of Chapter 9, Municipal Land Use Development and Management.) Utah Statute provides that judicial review can be sought in the district court, to determine “whether or not the decision is arbitrary, capricious or **illegal**.” §10-9-1001(3)(b) (emphasis added).

Based upon the evidence presented at the hearing, there was no official zoning map with the proposed zoning Ordinance; therefore, the action is illegal and the trial court should have made this determination at the end of the hearing under § 10-9-1001(3)(b). Call v. City of West Jordan, *supra*. At a minimum, issues requiring further determination on this issue were presented to the trial court, and the Petition should not have been dismissed.

Furthermore, Petitioners have been unfairly prejudiced by such non-compliance and illegal action. As they testified they are property owners in the area, with property adjacent to the construction business; and their property has been irreparably damaged by the Respondents. They are further prejudiced as they have no map to know exactly what areas fall under what zoning districts in the Town, according to the zoning Ordinance. They cannot utilize their property to its highest potential, which they are entitled to do. Town of Alta v. Ben Hame Corp., 836 P.2d 797 (Ut.App. 1992)

B. An Official Zoning Map was never presented to the citizens at a Public Hearing. The zoning Ordinance must also fail, because an official zoning map was never presented to the citizens at a public hearing. When there is a proposed zoning change, Utah Statute requires the legislative body to provide reasonable notice of a public hearing at least 14 days before the date of the hearing. §10-9-402(b) U.C.A. (1953, as amended). Since the

passage of a new zoning ordinance would affect all of the residents in the Town, notice should have been given to all of the residents, before passing a new zoning ordinance. Since the statute calls for a public hearing, our legislature contemplated something more than a regular city council meeting. Call v. City of West Jordan, *supra*, at 183. The argument that a map was prepared, but not available; or was too large to present at the public hearing, does not meet this requirement.

Since the Town of Boulder failed to present an official zoning map at the public hearing with the proposed zoning ordinance, the Town could not have legally adopted the Ordinance; and the Ordinance is illegal. The trial court should have made this determination in its review under §10-9-1001(3) and held the Ordinance void ab initio.⁴ Call v. West Jordan, *supra*, at 183.

II. THE ZONING ORDINANCE IS TOO VAGUE, THUS SUBJECT TO ARBITRARY AND CAPRICIOUS ENFORCEMENT.

A. Without an Official Zoning Map the Ordinance is too vague; and thus, subject to arbitrary and capricious enforcement. Although a zoning ordinance does not have to meet impossible standards of specificity, it must set forth specific guidelines so that its interpretation is not left solely to the discretion of administrative bodies or officials. Thurston v. Cache County, 626 P.2d 440 (Utah 1981) (where zoning ordinance permits

⁴Although the statute requires the courts to “presume that land use decision and regulations are valid; the presumption is not absolute. If a municipality’s land use decision is arbitrary, capricious or illegal, it will not be upheld. Springville Citizens, 979 P.2d 332, 336 (Utah 1999).

officials to grant or refuse permits without the guidance of any standard, but according to their own ideas it does not afford equal protection); Indian Trail Property Owners Ass'n v. City of Spokane, 886 P.2d 209 (Wash.App. 1994). See also Sherman v. City of Colo. Springs Planning Comm'n, 763 P.2d 292 (Colo. 1988) (ordinance which lacks sufficient definition of terms against which zoning authorities actions may be measured vests unreviewable discretion in zoning authority and is void for vagueness).

The zoning Ordinance in this case contains nine (9) separate districts, each defined with its own purpose and conditions, from High Density Residential to Commercial. Without a zoning map to correspond to these districts, the Ordinance lacks a sufficient definition of terms, and does not afford due process, as citizens do not know what district their property falls under and what specific conditions may apply to their property. This gives the Boulder Town Council unreviewable discretion and power to enforce the conditions of whatever district they chose on any particular land owner. Without a corresponding map the zoning Ordinance is void for vagueness. Thurston v. Cache County, 626 P.2d 440 (Utah 1981); Sherman v. City of Colo. Springs Planning Comm'n, 763 P.2d 292 (Colo. 1988)

B. Use of the term “commercial” throughout the Ordinance, makes the Ordinance vague and subject to arbitrary and capricious enforcement. The Ordinance is also vague due to the improper use of the term “commercial” in various places throughout the Ordinance, without further definition or clarification. For example the term “commercial” is used in the Ordinance in the Greenbelt District, and in the Medium Density Residential District, as well

as, in the General Commercial District. The Ordinance does not allow sufficient definition for the term “commercial” when it is used in all these different places of the Ordinance. See Burien Bark Supply v. King County, 725 P.2d 994 (Wash. 1986) (prohibition of processing beyond a “limited degree” in zoning ordinance outside a commercial zone is unconstitutionally vague); Atlanta Attractions, Inc. v. Massell, 330 F.Supp. 865 (N.D.Ga. 1971) Aff’d 463 F.2d 449 (5th Cir. 1972) (use of term “due cause” in ordinance was too broad and therefore unconstitutional); State v. Jones, 865 P.2d 138 (Ariz.App. 1993) (ordinance requiring special permit for “topless or bottomless dancers, go-go dancers, exotic dancers, strippers or similar entertainers,” was unconstitutionally vague. Terms were imprecise, subjective and undefined); Anderson v. City of Issaquah, 851 P.2d 744 (Wash.App. 1993) (ordinance must contain workable guidelines in order to satisfy constitutional vagueness concerns; discretion which is too broad, permits determination based upon whim, caprice or subjective considerations).

The use of the term “commercial” in the different districts also results in a contradiction in the different districts. Why have different districts when the term “commercial,” as defined in Commercial District No. 9, can be applied to all the other districts. (Record 388, p. 70). The Town Planning Commission also saw this contradiction and promised to take care of the problem and in fact recommended that the Town Council delete the general term “commercial” from the other districts. (Record 388, pp. 64) The Town Council, however, refused to make this change. (Record 388, p. 65).

This gives the Town the unlimited authority and discretion it wants to put any commercial businesses, in any district they want. (See Minutes June 17, 1999, Trial Ex. “10”, Addendum G). This is exactly what happened in this case. The Town allowed the construction business in an existing Greenbelt and Medium Density Residential area, because the term “contract construction” business was listed as commercial under the Ordinance’s General Commercial District. This is the exact argument that was made by the Respondents at the hearing. (Record 388, p. 170). The Town did this even though the other requirements listed in Commercial District No. 9, such as the Commercial Design Criteria, were never complied with or even addressed in granting the conditional use permits. Thus, the Town elected to take parts of Commercial District No. 9, the allowed uses under subsection B, and apply it to the conditional use applications, while totally disregarding the other parts.

Furthermore, this general and liberal interpretation of commercial is too broad. Zoning ordinances are in derogation of the common-law right to use property so as to realize its highest utility. Town of Alta v. Ben Hame Corp., 836 P.2d 797 (Ut.App. 1992). Zoning laws must be given strict construction and the provisions thereof may not be extended by implication. Id.

Moreover, the application of the commercial uses listed in the General Commercial District, to the term “commercial,” listed as a conditional use under the other zoning districts does not make sense, and does not give meaning to all of the other terms in the Ordinance. For example, under the conditional use permits allowed in the other districts

there are specific items mentioned such as “living quarters for hired hands; seasonal laborers, or others receiving compensation for work on site; bed and breakfast establishments; riding academies; schools and accompanying stables; dude/guest ranch; public riding stables, child day care and nurseries.” (Record 34, 35, and 37). Most of these businesses are also listed under the General Commercial District. (Record 40). Why specifically list these as conditional uses, under the other districts if the intent was to apply the commercial uses listed in the General Commercial District, as the conditional uses, allowed in all the other districts? The **Restatement (Second) of Contracts § 203(c)** provides that “Specific terms and exact terms are given greater weight than general language.” The general rule of contract interpretation, *ejusdem generis*, requires that specific terms control over more general terms. Swenson v. Erickson, 998 P.2d 807, 812 (Utah 2000); Arizona Biltmore Estates Ass’n v. Tezak, 868 P.2d 1030 (Ariz.App. 1993). Cf. Mayer v. Pierce County Medical Bureau, Inc., 909 P.2d 1323 (Wash.App. 1995) (when there is an inconsistency between general and specific provisions of a contract, specific provisions ordinarily qualifies meaning of general provision); United California Bank v. Prudential Ins. Co. of America, 681 P.2d 390 (Ariz.App. 1983) (where contract contains both general and specific provisions relating to same matter, specific and more exact terms are given greater weight than general language) and finally, Droz v. Paul Revere Life Ins. Co., 405 P.2d 833 (Ariz.App. 1965) (the usual rule of contract interpretation is that general words used after specific terms will be restricted to the things specifically identified). Since the businesses allowed for a conditional use under each district are specifically listed, the

term commercial should be limited to those businesses listed, and not the general provision for commercial listed under Commercial District No. 9. Allowing the expansive reading put forth by the Town would render the clear and explicit limitations listed under each district meaningless. Swenson v. Erickson, supra, at 812.

Finally, even the term “contract construction” listed under the Commercial District is vague and ambiguous in its definition and the extent of the business allowed, e.g., is it limited to hiring a contractor to come in and improve a lot in the district? (Record 388, p. 175) or does it mean operating a major construction business.

The Ordinance is too vague and is subject to arbitrary and capricious enforcement without a corresponding zoning map; and by use of the term “commercial” throughout the Ordinance in various places without further definition or clarification.

III. THE TERMS AND CONDITIONS OF THE ZONING ORDINANCE WERE VIOLATED IN GRANTING THE CONDITIONAL USE PERMITS.

A. There wasn't any compliance with the criteria required before a conditional use permit can be granted for commercial purposes, as set forth in the Ordinance. If the Ordinance is found valid, the Ordinance has numerous criteria that must be met, before a conditional use permit can be granted for commercial purposes. As set forth by the testimony at the hearing, none of these conditions were complied with before granting the conditional use permits. For example, the Site Development Plan Requirements, explicitly required by the Ordinance before a conditional use can be allowed, were never complied with; and although the Town argues that the construction business is allowed under

Commercial District No. 9, the requirements contained under Commercial District No. 9 for a business, i.e., Commercial Design Criteria, (Record 41) were also never complied with or even addressed in granting the conditional use permits.

Municipal zoning authorities are bound by the terms and conditions of their own zoning ordinances and are not at liberty to make land use decisions in derogation thereof. Springville Citizens v. City of Springville, 979 P.2d 332 (Utah 1999), citing Thurston v. Cache County, 626 P.2d 440 (Utah 1981). There was no evidence presented at the hearing that these conditions were met. Since the Town in this case did not comply with the terms and conditions of its own zoning Ordinance, the decision granting the conditional use permits is illegal under §10-9-1001(3)(b). Springville Citizens, *supra*.

B. The Boulder Town Council and Planning Commission improperly waived requirements for granting a conditional use for commercial purposes, as set forth in the Ordinance. At the hearing, Hatch testified that after he finally received a copy of the conditional use permit, he saw a claim that some of the requirements for granting a conditional use permit, had been waived. (Record 388, p. 69). However, Hatch was present at the planning commission meeting when they discussed the conditional use permit and when he raised his concerns about the site requirements. (Record 388, p. 68). Hatch testified that there was no discussion of waiving the requirements and no request was made to waive the requirements. (Record 388, p. 69). There was no evidence at the hearing that an appeal was made for waiving the requirements, or evidence presented to justify a waiver.

The Ordinance provides that only certain requirements can be waived and this can only be done only upon justification and appeal. This never occurred according to the testimony before the trial court. Since the Town must comply with the terms and conditions of its own Ordinance, failure to do so, makes granting the conditional use permits illegal. Springville Citizens v. City of Springville, 979 P.2d 332 (Utah 1999), citing Thurston v. Cache County, 626 P.2d 440 (Utah 1981).

Furthermore, the waiver provision contained in the Ordinance makes the Ordinance too vague and gives the zoning authority too much unreviewable discretion. The waiver provision will inevitably lead to arbitrary and discretionary enforcement, as there is no standard or conditions set to determine when a requirement is to be waived. This will leave too much discretion with the zoning authority. Indian Trail Property Owners Ass'n v. City of Spokane, 886 P.2d 209 (Wash.App. 1994). See also Sherman v. City of Colo. Springs Planning Comm'n, 763 P.2d 292 (Colo. 1988)

**IV. THERE WASN'T ANY SUBSTANTIAL EVIDENCE
GIVEN TO THE TRIAL COURT TO SUPPORT THE
GRANTING OF THE CONDITIONAL USE PERMITS.**

A. There wasn't any substantial evidence given to support the granting of the conditional use permits; therefore, their issuance was arbitrary and capricious. Although the statute that provides for the appeal of land use decisions requires the court to “presume that land use decisions and regulations are valid,” §10-9-1001(3)(a); this presumption is not absolute and if a municipality’s land use decision is arbitrary, capricious, or illegal, it should not be upheld. Springville Citizens v. City of Springville, 979 P.2d 332 (Utah 1999).

A municipality's land use decision is arbitrary and capricious if it is not supported by substantial evidence. Springville Citizens, supra, citing Patterson v. Utah County Bd. Of Adjustment, 893 P.2d 602, 604 (Ut.App. 1995). In evaluating a municipality's decision under this standard there should be sufficient evidence in the record to ensure that the municipality proceeded within the limits of fairness and acted in good faith; and that in light of the evidence presented, a reasonable mind could reach the same conclusion as the municipality. Id.

The granting of the conditional use permits, after the zoning Ordinance was passed, should have been treated as an administrative/adjudicative action by the trial court. Thus, the trial court should have determined whether there was sufficient evidence to support the Town's decision. The trial court failed to do this. See Harmon City v. Draper City, 388 U.A.R. 24 (Ut.App. 2000); Xanthos v. Board of Adjustment of Salt Lake City, 685 P.2d 1032, at 1035; and finally Davis County v. Clearfield City, 756 P.2d 704, 708 n.5, 711 (Ut.App. 1988) (where city council sits as board of adjustment, decision to deny conditional use permit is arbitrary where reasons for denial lack sufficient factual basis). There was no evidence presented to the trial court to support the Town's decision to grant the conditional use permits. There certainly wasn't enough evidence presented to the trial court, for the court to find that a reasonable person would have reached the same decision based on the factual evidence presented. Therefore, the land use decision was arbitrary and capricious due to the total lack of any evidence. Springville Citizens, supra.

V. THE TRIAL COURT ABUSED ITS DISCRETION BY CONSOLIDATING THE PRELIMINARY INJUNCTION HEARING WITH A TRIAL ON THE MERITS, AFTER THE CLOSE OF EVIDENCE AND WITHOUT PRIOR NOTICE TO COUNSEL.

A. The Petitioners were never afforded due process or their “day in court,” because the trial court, without any prior notice, and after the close of evidence decided to consolidate the matter with a trial. Rule 65A(a)(2) of the Utah Rules of Civil Procedure, providing for consolidation is fashioned after the Federal Rule. **Rule 65A Advisory Committee Notes.** Under the Federal Rule, notice that the preliminary injunction hearing may be consolidated with a trial on the merits is required prior to the hearing. University of Texas v. Comenisch, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). This is also true in the Tenth Circuit. See Holly Sugar Corp. v. Goshen County Co-op Beet Growers Ass’n, 725 F.2d 564 (10th Cir. 1984) (when preliminary injunction hearing is combined with trial on the merits, parties must be given adequate notice of consolidation, so that they may be given full opportunity to present their evidence); Penn v. San Juan Hosp. Inc., 528 F.2d 1181, 1187 (10th Cir. 1975); see also Paris v. U.S. Dept. of Housing and Urban Development, 713 F.2d 1341 (7th Cir. 1983) (parties were prejudiced by district court’s sudden consolidation of hearing on preliminary injunction with trial on the merits, at very last minute in court). There must be clear and unambiguous notice to the parties, of the court’s intent to consolidate. U.S. v. Owens, 54 F.3d 271 (6th Cir. 1995) cert. denied 516 U.S. 983.

In this case adequate notice was never given that the preliminary injunction hearing may be consolidated with a trial on the merits. In fact, the request to consolidate wasn't even made, until the morning of the preliminary injunction hearing. (Record 388, pp. 7 and 29).

The court abused its discretion by consolidating the matter, without any prior notice to counsel, and after the close of evidence at the hearing. The court further improperly presumed that it had heard of all the Petitioner's evidence that could be presented at the time of trial. (Record 388, pp. 203-204). As a result, the Petitioners were never afforded due process and never had their day in court. The trial court's order consolidating the matter and dismissing the Petition should be reversed.

VI. THE TRIAL COURT IMPROPERLY CONSIDERED THE ORAL ARGUMENT OF COUNSEL AS EVIDENCE ON BEHALF OF THE RESPONDENTS.

A. The trial court made findings of fact, based upon the oral argument of Respondent's counsel and not based upon sworn testimony. The sworn testimony by Hatch and Mitchell (the only ones that testified) was that there was no official map presented or adopted to correspond with the zoning Ordinance. The allegation that there is a map and that it has been adopted by the Town, is simply the oral argument of Respondent's counsel.⁵ (Record 388, pp. 19-20). Counsel, however, doesn't state when it was adopted whether it

⁵Counsel is not a witness. Any representation of fact made by him in the argument, must not be an assertion made upon his own credit; it must be based solely upon those matters of fact of which evidence has already been introduced. **Wigmore on Evidence, Vol. 6, § 1806 (1976).**

was presented at a public hearing, as required, or whether it was adopted with the zoning Ordinance at issue in this case. No one testified that an official map was adopted and when; and an official map was never introduced into evidence. The trial court improperly relied on counsel's argument in finding that, "while no map was introduced..., the evidence establishes that such map exists." (Record 319).

Furthermore, since there was no official map introduced the court could not find that the parties' had agreed that the property at issue in this case was located in District 2 and District 6 as designated by the zoning Ordinance. (Record 320). The Petitioners agreed to this as far as the existing use map was concerned, but not the zoning Ordinance. The Petitioners couldn't agree to this as far as the zoning Ordinance is concerned, because they had never seen an official zoning map. (Record 388, pp. 97-99). All parties agreed that the existing use map, discussed at the hearing, was not the official zoning map. (Record 66-67, and 388, p. 43).

Moreover, the purpose for the conditional use permits and the intended use of the property by the applicants, was not presented as evidence to the trial court through sworn witnesses, where Petitioner's would be given an opportunity to ask questions and to cross-examine witnesses, but again this was simply the oral argument of counsel. (Record 388, pp. 22-24).

B. The evidence testified to at trial, when marshaled does not support the findings of fact entered by the trial court. Again, since the court improperly considered the oral argument of Respondent's counsel as evidence, and the Respondents did not put on any

evidence to the court, by sworn testimony; the evidence testified to a trial, when marshaled cannot support the findings of fact entered by the court, as listed above in Statement of Issues for Review ¶ 7 (1)-(10).

VII. THE MATTER WAS NOT BROUGHT IN BAD FAITH AND PETITIONERS' CLAIMS ARE NOT WITHOUT MERIT.

A. Since there is a specific statute that provides for judicial review of land use decisions, the Petition for Review is not without merit or in bad faith. In order to obtain attorney's fees under Utah's Bad Faith Statute, a party must prove that the claim is both "without merit"; and that it was brought in "bad faith". Jeschke v. Willis, 811 P.2d 202 (Ut.App. 1991).

"Without merit" under the statute means that the party asserting an award of fees must first demonstrate that the claim is "frivolous" or "of little weight or importance, having no basis in law or fact." Cody v. Johnson, 671 P.2d 149, 151 (Utah 1983). A frivolous appeal is one that is not grounded in fact, not warranted by existing law, or not based in a good faith argument to extend, modify, or reverse existing law. Hamilton v. Hamilton, 869 P.2d 971, 232 U.A.R. 27 (Ut.App. 1994). This has further been defined as "one in which no justiciable question has been presented and . . . is readily recognized as devoid of merit in that there is little prospect that it can ever succeed. Farrell v. Porter, 830 P.2d 299, 302 (Ut.App. 1992); Hunt v. Hunt, 785 P.2d 414, 416 (Utah 1990). The court merely states in its findings that, "Petitioners presented a weak factual basis and legal position." (Record 360). Justiciable claims were raised in this case as set forth above. The

trial court erred in failing to consider all of the evidence and exhibits that were entered into evidence at the hearing, before making its ruling. The court simply concludes that the Petitioners presented a weak factual basis without addressing all of the problems and issues that were raised by the Petitioners. This is further aggravated by the court's consolidation and ruling at the end of the hearing, when the court earlier stated it would read the documents entered as exhibits. The trial court simply failed to set forth specific factual findings to uphold a finding that all of the issues raised by the Petitioners were "without merit."

In order to find that a party lacked "good faith," the asserting party must prove, and the court must find, facts sufficient to support the finding that one of the following existed: (1) that the party lacked an honest belief in the propriety of the activities in question; (2) that the party intended to take unconscionable advantage of others; or (3) the party intended to or acted with the knowledge that the activities in question would hinder, delay or defraud others. Id.; Chipman v. Miller, 934 P.2d 1158 (Ut.App. 1997). The trial court must make a factual finding of a party's subjective intent. Pennington, supra. The trial court failed to make the necessary factual findings in this case but simply stated that the "Petitioners presented a weak factual basis and legal position." (Record 360). This is insufficient for a finding of bad faith.

In fact, the testimony at trial, was that the Planning Commission expressed some of the same concerns, as those expressed by the Petitioners regarding use of the term "commercial" i.e., that its use created a contradiction. (Record 388, p. 94) and the Planning

Commission recommended that the term “commercial” be deleted. (Record 388, pp. 64, 95, 120-122). If the Planning Commission thought the use of the term “commercial” created a conflict in the zoning Ordinance, how can the Petitioners’ claim of the same problem be considered in bad faith or without merit?

B. The fact that the Petitioners exhausted their administrative remedies before the Town Council and Planning Commission does not mean that the Petition is without merit or in bad faith. The statute that provides for the appeal of a land use decision requires that the parties exhaust their administrative remedies. §10-9-1001(1) U.C.A. Therefore the fact that the Petitioners raised their claims before the Town Planning Commission and again before the Town Council should not be viewed as an act of bad faith in this case as viewed by the district court. (Record 359, ¶ 3). This fact should not constitute bad faith, when a party is required to exhaust his or her administrative remedies before seeking judicial review, as in the present case.

The court improperly ruled against the Petitioners on the basis that the Petitioners had previously, gone through the mechanics of being heard and presenting their case to the Town, and that because the decision went against them, “they must now live with it, because they had their chance to speak.” (Record 388, p. 171). This standard cannot be allowed to remain for the review of land use decisions, under § 10-9-1001 U.C.A., particularly when there is a requirement to exhaust administrative remedies before seeking judicial review. Under this standard, neither the Petitioners, nor anyone else would be able to obtain judicial review of land use decisions.

C. Since the Petitioners raised issues for review as set forth above, the Petition is not without merit or brought in bad faith. The court in its findings found that the Petitioners failed to introduce evidence about whether or not there was compliance with the site plan requirements as contained in the zoning Ordinance. (Record 361). This is simply not the case. The zoning Ordinance with the site plan requirements was entered into evidence. (Record 388, p. 44-45). Petitioners testified that they raised issues with the site plan requirements; and that there had been no compliance with the site plan requirements, as contained in the Ordinance. (Record 388, p. 55). Therefore, the Petitioners did introduce evidence of non-compliance. It was the Town who failed to introduce evidence of compliance. Petitioners testified that there was no compliance with the requirements as contained in the Ordinance; and that the requirements in the zoning Ordinance were not properly discussed or waived, and that no evidence was presented to substantiate any waiver of the requirements in the Ordinance. (Record 388, p. 68-69). Again, it was the Town that failed to introduce evidence to substantiate the waiver of these requirements.

Furthermore, the court made a finding that the Petitioners took unconscionable advantage of the Respondents. (Record 362) However, there was no factual evidence presented to the court of any unconscionable advantage that was gained by the Petitioners in filing the Petition. The statute allows for injunctive relief, during the appeal of land use decision. Such relief should not be deemed as an act of bad faith. Moreover, there was no evidence presented to show how the action hindered or delayed the Respondents, particularly the Town of Boulder. It is hard to imagine how seeking review of the land use

decision in this case would hinder or delay a municipality. Finally, Hatch testified that the Town Mayor told him that there would not be any building permits issued to BEC until after the appeal in district court was decided. However, the Town did not keep its promise, so Hatch had to seek injunctive relief. Even the Respondent Boulder Excavating Company was not hindered or delayed in any way because there was never an injunction issued prohibiting their business. In short, there was no evidence presented to the court regarding any hindrance or delay suffered by the Respondents, in order for the court to make such a finding.

As far as the timing of the hearing and notice, both parties were served more than a week before the hearing, in accordance to the Utah Rules of Civil Procedure. No one requested additional time or objected before the hearing. In fact, at the beginning of the hearing counsel for both parties stated that they were prepared to proceed. (Record 388, pp. 6-7). The court should have allowed additional time if necessary for the parties to prepare for the hearing, if the court felt it was necessary rather than allowing the hearing to proceed and then afterwards use this as a basis for finding bad faith.

CONCLUSION

Evidence was presented to the trial court to establish that the zoning Ordinance was not passed in accordance to Utah's enabling statutes; and that the Ordinance, by its own terms, and without a corresponding zoning map, is subject to arbitrary and capricious enforcement and is illegal; and thus should have been declared invalid.

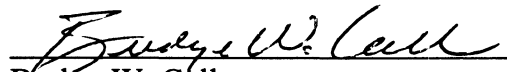
Evidence was also presented that the Town failed to comply with the terms of its own zoning Ordinance in granting the conditional use permits; and that the conditional use permits were not supported by sufficient evidence.

The Petitioners did present this evidence, which the court failed to consider. The court, however, improperly accepted the oral argument of Respondent's counsel as evidence in the case. The evidence, when marshaled in favor of the Respondents, does not support the court's findings against the Petitioners.

In addition, the court improperly consolidated the matter with a trial on the merits without adequate notice to counsel. There are no facts to support, or adequate findings made, to support the court's ruling that the claims raised were without merit, or brought in bad faith.

This Court should find that the Ordinance invalid, that the conditional use permits were not properly granted; and reverse the trial court's ruling, dismissing the Petition, and award of attorneys fees.

DATED this 29 day of June, 2000.



Budge W. Call
Attorney for Petitioners and Appellants

CERTIFICATE OF MAILING

I hereby certify on the 29 day of June, 2000, two (2) copies of the
foregoing **BRIEF OF THE APPELLANTS** ^{and APPELLANTS ADDENDUM} were mailed, postage prepaid, to the
following:

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