

2000

Julian Dean Hatch and Lynne Mitchell v. Boulder
Town Council, Town of Boulder Planning
Commission and/or Board of Adjustment, and the
Boulder Excavating Company : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

**JULIAN DEAN HATCH and
LYNNE MITCHELL,**

Petitioners and Appellants,

vs.

**THE BOULDER TOWN COUNCIL,
TOWN OF BOULDER PLANNING
COMMISSION and/or BOARD OF
ADJUSTMENT, AND THE BOULDER
EXCAVATING COMPANY**

Respondents and Appellees.

Case No. 20000189-CA

Priority Number 29(b)(15)

BRIEF OF APPELLEE BOULDER EXCAVATING COMPANY

Appeal from Judgments rendered in the Sixth District Court of
Garfield County, Utah, the Honorable David L. Mower Presiding

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii
Statement Regarding Jurisdiction of the Appellate Court	1
Statement of the Issues	1
Determinative Statutes, Ordinance, Rules	2
Statement of the Case	3
Facts	4
Summary of Argument	15
Argument	18
POINT I THE TRIAL COURT’S FINDINGS OF FACT SHOULD NOT BE DISTURBED ON APPEAL	18
A. Appellants Fail to Marshal the Evidence Supporting the Findings of Fact	18
B. There is Sufficient Evidence Supporting the Trial Court’s Determinations	20
POINT II APPELLANTS FAILED TO ESTABLISH ANY ARBITRARY OR CAPRICIOUS ACTION IN GRANTING THE CONDITIONAL USE PERMITS	21
A. Appellants Failed to Present Evidence Sufficient to Over- come the Presumption of Validity and to Carry Their Burden of Proof	21
B. Giving the Planning Commission Discretion to Approve Commercial Uses As a Conditional Use Does Not Make Its Action in Approving the Conditional Use Permits Arbitrary or Capricious	24
(1) The Proposed Use for BEC Is a Commercial Use	

	Allowed as a Conditional Use Under the Land Use Ordinance	25
	(2) The Land Use Ordinance Provides Adequate Guidelines For Granting Conditional Use Permits	27
POINT III	APPROVAL OF THE CONDITIONAL USE PERMITS WAS NOT ILLEGAL	30
POINT IV	CLAIMS NOT RAISED BY THE PETITION OR PRESERVED BY BEING RAISED IN THE TRIAL COURT SHOULD NOT BE CONSIDERED ON APPEAL	31
	A. The Petition Made No Claim That the Land Use Ordinance is Unconstitutional or is Itself Illegal	31
	B. Appellants Never Objected to Consolidation of the Hearing for Preliminary Injunction with the Trial of the Merits of the Petition	32
	C. Appellants Never Claimed That the Trial Court Didn't Consider Evidence, or That It Relied on the Arguments of Counsel	34
POINT V	THE AWARD OF ATTORNEYS FEES TO BEC UNDER U.C.A. § 78-27-56 WAS NOT ERROR AND SHOULD BE AUGMENTED	34
	A. Appellants' Petition Was Without Merit	35
	B. The Trial Court's Determination That the Petition Was Not Asserted in Good Faith Was Not Error	36
	C. This Matter Should Be Remanded to the Trial Court to Give BEC an Additional Award for Its Attorneys Fees and Costs on Appeal	39
Conclusion	39
Certificate of Service	40

TABLE OF AUTHORITIES

Cases Cited

	<u>Page</u>
<i>Bunch v. Englehorn</i> , 906 P.2d 918 (Utah App. 1995)	32
<i>Butler, Crockett, & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co.</i> , 909 P.2d 225 (Utah 1995)	21
<i>Cady v. Johnson</i> , 671 P.2d 149 (Utah 1983)	36
<i>Child v. Gonda</i> , 972 P.2d 732 (Utah 1998)	20
<i>Heber City Corp. v. Simpson</i> , 942 P.2d 307 (Utah 1997)	20
<i>Imbergamo v. Barclay</i> , 77 Misc.2d 188, 352 N.Y.S.2d 337 (1973)	25
<i>Indian Trail Property Owners Ass’n v. City of Spokane</i> , 886 P.2d 209 (Wash. App. 1994)	29
<i>Jeschke v. Willis</i> , 811 P.2d 202 (Utah Ct. App. 1991)	2, 34, 35, 36
<i>Johnson v. Bell</i> , 666 P.2d 308 (Utah 1983)	19
<i>Johnson v. Higley</i> , 977 P.2d 1209 (Utah Ct. App. 1999)	20
<i>Joufflas v. Fox Television Stations, Inc.</i> , 927 P.2d 170 (Utah 1996)	21
<i>Lamb v. B & B Amusements Corp.</i> , 869 P.2d 926 (Utah 1993)	32
<i>Lemon v. Coates</i> , 735 P.2d 58 (Utah 1987)	19
<i>Marshall v. Salt Lake City</i> , 105 Utah 111, 125 141 P.2d 704 (1943)	28
<i>Nixon v. Salt Lake City Corp.</i> , 898 P.2d 265 (Utah 1995)	25
<i>Pennington v. Allstate Ins. Co.</i> , 973 P.2d 932 (Utah 1998)	1
<i>Phi Kappa Iota Fraternity v. Salt lake City</i> , 1116 Utah 536, 212 P.2d 177 (1949)	35

<i>Radcliffe v. Akhavan</i> , 875 P.2d 608 (Utah Ct. App. 1994)	2
<i>Reid v. Mutual of Omaha Ins. Co.</i> , 776 P.2d 896 (Utah 1989)	20
<i>Rushton v. Salt Lake County</i> , 977 P.2d 1201 (Utah 1999)	26
<i>Savage Industries, Inc. v. Utah State Tax Commission</i> , 811 P.2d 664 (Utah 1991)	25, 26
<i>Sherman v. City of Colorado Springs Planning Commission</i> , 763 P.2d 292 (1988)	29
<i>Southern Title Guar. Co. v. Bethers</i> , 751 P.2d 951 (Utah Ct. App. 1988)	21
<i>Springville Citizens for a Better Community v. City of Springville</i> , 979 P.2d 332 (Utah 1999)	1, 23
<i>State v. Benvenuto</i> , 372 Utah Adv. Rep. 3, 4 (Utah 2000)	20
<i>State v. Larsen</i> , 828 P.2d 487 (Utah Ct. App. 1992), <i>aff'd</i> 865 P.2d 1355 (Utah 1993)	20
<i>State v. Whittle</i> , 780 P.2d 819 (Utah 1989)	32
<i>Thurston v. Cache County</i> , 626 P.2d 440 (Utah 1981)	28, 29, 35
<i>Valcarce v. Fitzgerald</i> , 961 P.2d 305 (Utah 1998)	2, 35
<i>Walker Drug Co. v. La Sal Oil Co.</i> , 972 P.2d 1238 (Utah 1998)	2
<i>Williamson v. Opsahl</i> , 416 N.E.2d 783 (Ill. App. Ct. 1981)	20
<i>Young v. Young</i> , 979 P.2d 338 (Utah 1999)	20

Statutes Cited

U.C.A. § 10-9-407	28
U.C.A. § 10-9-1001	2, 3, 21, 23, 31, 35
U.C.A. § 78-2a-3(2)(j)	1

U.C.A. § 78-27-56	2, 4, 18, 34, 39, 40
-----------------------------	----------------------

Other Authorities Cited

2 Anderson, <i>American Law of Zoning</i> §11.01	25
Utah Rules of Civil Procedure, Rule 41 (a)(2)(b)	19
Utah Rules of Civil Procedure, Rule 42	16
Utah Rules of Civil Procedure, Rule 52	14
Utah Rules of Civil Procedure, Rule 52(a)	19, 20
Utah Rules of Civil Procedure, Rule 65(A)(a)(2)	4, 15, 33
<i>Webster’s Ninth New Collegiate Dictionary</i> (Merriam-Webster, Inc. 1986)	25

STATEMENT REGARDING JURISDICTION OF THE APPELLATE COURT

The Court of Appeals has jurisdiction over this appeal pursuant to U.C.A. § 78-2a-3(2)(j), as a case transferred to the Court of Appeals from the Supreme Court.

STATEMENT OF THE ISSUES

1. Have Appellants established any basis to overturn any of the Trial Court's Findings of Fact? Factual findings will be overturned if the appellants show they are clearly erroneous, i.e., against the clear weight of the evidence. *Pennington v. Allstate Ins. Co.*, 973 P.2d 932, 936 (Utah 1998)

2. Did the Trial Court err in ruling that Appellants failed to establish a right to relief and that issuance of conditional use permits to Boulder Excavating Company by the Town of Boulder was not arbitrary, capricious, or illegal? A municipality's land use decision is arbitrary and capricious if it is not supported by substantial evidence. On appeal the evidence is reviewed to ensure that the City proceeded within the limits of fairness and acted in good faith and whether, in light of the evidence before the City, a reasonable mind could reach the same conclusion as the City. However, the appellate court does not weigh the evidence anew or substitute its judgment for that of the municipality. *Springville Citizens v. City of Springville*, 979 P.2d 332, 336-337 (Utah 1999). The determination of whether a land use decision is illegal is reviewed for correctness as a legal conclusion. *Id.*, at 336.

3. Have Appellants established reversible error by the Trial Court in consolidating the preliminary injunction hearing with the trial of the merits? This is

reviewed under an abuse of discretion standard. *Radcliffe v. Akhavan*, 875 P.2d 608, 610 (Utah Ct. App. 1994) (decision to deny motion to continue trial reviewed under abuse of discretion standard); *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1244 (Utah 1998) (decision to bifurcate a trial reviewed under abuse of discretion standard).

4. Did the Trial Court err in awarding attorneys fees under U.C.A. §78-27-56 and ruling that the petition was without merit and not brought or asserted in good faith? The determination of whether the action was without merit is a question of law and is therefore reviewed for correctness. *Jeschke v. Willis*, 811 P.2d 202, 203 (Utah Ct. App. 1991). Whether a party acted in bad faith is a mixed question of law and fact as to which the trial court is granted “relatively broad discretion”. *Valcarce v. Fitzgerald*, 961 P.2d 305, 315-16 (Utah 1998).

DETERMINATIVE STATUES, ORDINANCE, RULES

U.C.A. § 10-9-1001 provides in relevant part as follows:

(2)(a) Any person adversely affected by any decision made in the exercise of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local decision is rendered. . . .

(3) The courts shall:

- (a) presume that land use decisions and regulations are valid; and
- (b) determine only whether or not the decision is arbitrary, capricious, or illegal.

With regard to the award of attorneys fees and costs, U.C.A. § 78-27-56 provides in relevant part as follows:

In civil actions, the court shall award reasonable attorney’s fees to a prevailing party if the court determines that the action or defense

to the action was without merit and not brought or asserted in good faith, except under subsection (2).

STATEMENT OF THE CASE

In December, 1998, Respondent Boulder Excavating Company (“BEC”) filed applications for conditional use permits with the Town of Boulder Planning Commission under its recently enacted Land Use Ordinance, Ordinance 39 of 1998 (“Land Use Ordinance”). One application was to allow BEC to construct a garage for its backhoe, and to park the backhoe and a limited amount of additional equipment on the property where one of its members, Sam Stout lives, located at 195 North 300 East, Boulder, Utah (the “Stout Property”). The second application was to allow BEC to park equipment near the agricultural equipment used at the ranch of another member, C. Rhea Thompson (the “Thompson Ranch”) and to store construction materials, and to utilize existing improvements at the Thompson Ranch for an office for BEC. Town residents Julian Hatch and Lynne Mitchell (“Appellants”) objected, and appeared and voiced their objections before the Boulder Planning Commission (“Planning Commission”) and, after the Planning Commission approved the conditional use permits, Appellants filed an appeal to the town council as allowed by the Land Use Ordinance. The Town Council upheld the issuance of the conditional use permits (“Conditional Use Permits”) to BEC.

Appellants then filed a petition in the 6th Judicial District Court in Panguitch seeking judicial review pursuant to U.C.A. § 10-9-1001 of the granting of the Conditional Use Permits, and for injunctive relief to enjoin the uses authorized by the Conditional Use

Permits¹. A hearing on the Appellants' motion for preliminary injunction was held on August 31, 1999. The Trial Court ordered the consolidation of the hearing with the trial of the action on the merits pursuant to Rule 65(A)(a)(2) of the Utah Rules of Civil Procedure, denied injunctive relief and granted a motion to dismiss after the close of Appellants' case. Findings of Fact and Conclusions of Law were entered and a Judgment of Dismissal and Order Denying Preliminary Injunction were entered. The Trial Court reserved for later decision, then granted the motions of respondents Town of Boulder and BEC for an award of attorneys pursuant to U.C.A. § 78-27-56. This appeal followed.

FACTS

The Findings of Fact entered in support of the Judgment of Dismissal and Order Denying Preliminary Injunction (R. 317-326; Appellants' Addendum H) are as follows, with citations to the record supporting the findings which are challenged on appeal by the Appellants:

1. Appellants are individuals, landowners and residents of Boulder Town, Garfield County, State of Utah.
2. Respondents the Boulder Town Council and the Town of Boulder Planning Commission are entities consisting of elected or/and appointed officials of the Town of Boulder, Garfield County, which is a political subdivision of the State of Utah.

¹The petition named Sam Stout and Rhea Thompson as Respondents in addition to the Town of Boulder entities and BEC. However, neither of those individuals was served and neither ever entered an appearance in this case. Therefore, they are not parties to this case, either below or on appeal, contrary to statements of Appellants in their brief.

3. Respondent BEC is a Utah limited liability company with its primary place of business in the Town of Boulder, Utah. Two of its members are Rhea Thompson and Sam Stout.

4. On May 30, 1998, the Boulder Town Council enacted Boulder Town Ordinance No. 39 (Exhibit 3, Appellant's Addendum B, hereinafter Land Use Ordinance"), which zones land use within the Town of Boulder. The Land Use Ordinance was amended on January 12, 1999. The Land Use Ordinance establishes nine (9) districts with specified allowed uses and conditional uses in each district. Part IV B of the Land Use Ordinance adopts an official base map as part of the Land Use Ordinance, which maps and defines the location of different districts within Boulder Town. The parties agreed regarding the location of the districts within which the properties subject to the Conditional Use Permits were located. No copy of the official base map was introduced. However, the evidence sufficiently establishes that such map exists.

Appellants challenge this finding as to its determination that there was an official base map and that the parties agreed regarding the districts in which the properties at issue are located. The support in the Record for these parts of the finding is as follows:

a. Plaintiff's Exhibit 5 are Mr. Hatch's and Ms. Mitchell's Notices of Appeal of the issuance of the Conditional Use Permits. Mr. Hatch's seek denial of the Conditional Use Permits because the one for the Stout Property "DOES NOT CONFORM TO MEDIUM DENSITY RESIDENTIAL DISTRICT OF LAND USE ORD", and the one for the Thompson Ranch because it "DOES NOT

CONFORM TO LAND USE ORDINANCE FOR GREENBELT.” Ms. Mitchell’s appeals state “Commercial use in residential area is in conflict with local zoning law” as to the Stout Property, and “is in conflict with our land use ord & general plan.” The attached document prepared by Appellants, page 3, refers to the applicable districts as Medium Density Residential and Greenbelt/Multiple Use.

b. Exhibit 8, a written document submitted by Appellants at the Planning Commission meeting January 27, 1999, p. 2 refers to the applications for the Conditional Use Permits. “One is located at the Thompson Ranch (4270 N. Highway 12) within the Greenbelt area and the other is at the Stout Family Home (195 North 300 East) within a Medium Density Residential area.”

c. In his testimony, Julian Hatch acknowledged the Stout Property is in District 6, medium density residential. He also acknowledged that the Thompson Ranch is in District 2, Green Belt/Multiple Use. He testified there never really was an issue about that. (R. 388, Tr. 75).

d. Exhibit 10 is minutes of Boulder Town Council’s June 17, 1999 meeting to consider Appellants’ appeal of the Conditional Use Permits. “Julian asked for an official copy of the Land-use Ordinance and a copy of the map and for answers to his concerns. We do not have copies of the map. Marvin said the appeals do not address the issue of boundaries. There is no dispute over the actual boundaries of districts or of which districts the conditional-use permits were issued for. Five Counties is preparing a reproducible map, but it is not yet ready and

there is not a timetable for producing it.”

5. The Land Use Ordinance originated as a recommendation from the Boulder Town Planning Commission and was submitted to the Boulder Town Council for adoption. Prior to the adoption of the Land Use Ordinance, various meetings open to the public were held in which provisions of the Land Use Ordinance were considered. Appellants appeared at several of the meetings and exercised their opportunity to participate in the hearings regarding the Land Use Ordinance.

6. In December, 1998, BEC filed applications for Conditional Use Permits. Prior to issuance of the two Conditional Use Permits to BEC, the Boulder Planning Commission held a public hearing to obtain public input regarding and to consider issuance of the permits.

7. Appellants appeared at the public hearing and presented and read written objections to issuance of the permits.

8. At that hearing, in accordance with the Land Use Ordinance, the Boulder Planning Commission voted to grant the applications of BEC for two (2) Conditional Use Permits, subject to conditions stated in the Conditional Use Permits, and those permits were thereafter issued. The Conditional Use Permits allowed BEC to use two (2) parcels of property within the town limits of Boulder in connection with BEC’s construction business.

9. One of the Conditional Use Permits was issued for the Stout Property, which property is designated by the Land Use Ordinance as “District 6” and “medium

density residential”. That permit allowed BEC to construct a garage for its backhoe, to park the backhoe and a limited amount of additional equipment on the property, and to temporarily store construction materials on that property.

Appellants dispute this finding as to districts within which the properties at issue were located. See the evidence supporting that determination listed under Finding 4, above.

10. The other Conditional Use Permit was issued for the Thompson Ranch, which property is designated by the Land Use Ordinance as “District 2” and “Green Belt/Multiple use lands”. That permit allows BEC to park equipment near the agricultural equipment used at the ranch and to store construction materials, and to utilize existing improvements for an office for BEC.

Appellants dispute this finding as to districts within which the properties at issue were located. See the evidence supporting that determination listed under Finding 4, above.

11. On March 6, 1999, Appellants appealed to the Boulder Town Council the decision of the Planning Commission issuing the Conditional Use Permits to BEC.

12. The appeals were placed on the agenda of the Town Council and discussed at two Town Council meetings. Appellants were sent notice of both meetings but, because they were out of town, did not receive notice of the first meeting and did not appear at that meeting.

13. Respondent BEC appeared at one meeting and stated its reasons why the decision of the Planning Commission should be affirmed.

Appellants challenge this finding. Their Exhibit 9 is their statement given to the Town Council on June 17, 1999. It states in part: "A few days ago the minutes of the June 3, 1999 meeting were posted and we were shocked to find the Council had allowed BEC and their attorney to present a defense of our appeals." And Exhibit 10, the Town Council minutes of June 17, 1999 state in part: "The appeals made by Lynne and Julian to the conditional-use permits issued to Boulder Excavating Company were discussed. There was a lengthy discussion at the last meeting, but they were not in attendance."

14. Appellants appeared at the second Town Council meeting on June 17, 1999, and read to the Council written statements of objections to issuance of the permits.

15. On June 17, 1999, the Town Council affirmed issuance of the Conditional Use Permits to BEC.

16. On or about July 12, 1999, Appellants filed the Petition for Judicial Review that is the subject of this action.

17. Respondent BEC was served a Summons, a copy of the Petition, a Motion for Preliminary Injunction and a Notice of Hearing on August 24, 1999. The hearing on Appellants' Motion for Preliminary Injunction was set seven (7) days thereafter, on August 31, 1999.

18. After the Boulder Town Council affirmed issuance of the Conditional Use Permits to BEC and prior to the hearing on Appellants' Motion for Preliminary

Injunction, BEC caused a garage, which was 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 and some finish work remained. The garage and related landscaping and screening were the only physical improvements authorized or required by the Conditional Use Permits.

Appellants challenge this finding, stating no one testified to this. To the contrary, Mr. Hatch testified at the hearing that at that time the garage at the Stout Property had a metal roof and looks like it's complete, basically closed in. (R. 388, Tr. 106). He testified the building was mostly built (R. 388, Tr. 110). Ms. Mitchell identified that the Conditional Use Permit for the Stout Property required screening (R. 388, Tr. 138-39).

19. The Town of Boulder has historically been and remains a largely agricultural community. There are, operating within the Town of Boulder, many farm implements, including tractors and backhoes.

20. Petitioner Mitchell owns property that is approximately 500 feet away, and Petitioner Hatch owns property that is approximately 500 feet to 600 feet from the Stout residence property. Neither petitioner owns property or resides within five miles of the Thompson Ranch property.

21. The Land Use Ordinance by its terms expressly allows "commercial" uses as conditional uses in both District 2 and District 6.

22. The Land Use Ordinance designates District 9 as "commercial". It requires a Conditional Use Permit for all commercial business and construction and lists among

other allowed commercial development “building material, hardware” and “contract construction”.

23. The uses for which the Conditional Use Permits were granted are for operation of a contract construction business.

24. The uses for which the Conditional Use Permits were granted to BEC are commercial uses within the meaning of the Land Use Ordinance.

25. The uses for which the Conditional Use Permits were granted are compatible with other uses authorized and existing in the same districts.

Appellants challenge this finding, stating no one testified to this. However, the record shows the following support for this finding:

a. There are other existing commercial uses of properties in the neighborhood of the Stout Property. In fact, each of the Appellants operates a business from the property they each own. (R. 388, Tr. 64-65, 140).

b. There are backhoes and other similar equipment used in town. (*Id.*, Tr. 77, 102, 149, 156, 163).

c. The garage which was built as allowed by the Conditional Use Permit for the Stout Property could be used in connection with residential uses under the Land Use Ordinance. (*Id.*, Tr. 107). There are other sheds where farm equipment is parked. (*Id.*, Tr. 77).

26. The designation of “commercial” as conditional uses in the Land Use Ordinance is neither vague nor ambiguous.

27. The Land Use Ordinance by its terms authorizes the issuance of the Conditional Use Permits granted to BEC by the Planning Commission.

Appellants question this finding, stating that the only testimony was of appellants that the issuance was in violation of the Land Use Ordinance. Although this finding is undoubtedly a mixed finding of law and fact, Appellants ignore that the Land Use Ordinance itself allows “commercial” as a conditional use in both the Greenbelt\Multiple Use Lands (District 2), where the Thompson Ranch is located, and in the Medium Density Residential (District 6) where the Stout Property is located. (Land Use Ordinance, Plaintiff’s Exhibit 3 and Appellants’ Addendum B, Part VII C.9., p. 21 and Part XI C.5, p. 24).

28. At all times relevant hereto all parties understood that the Stout Property is designated “District 6” and “medium density residential” by the Land Use Ordinance.

29. At all times relevant hereto all parties understood that the Thompson Ranch is designated “District 2” and “green belt/multiple use lands” by the Land Use Ordinance.

30. Appellants were well acquainted with the Land Use Ordinance and knew that it listed commercial as a conditional use at the properties involved in the Conditional Use Permits. They also knew that the provisions of the Land Use Ordinance allowing commercial as a conditional use had been brought to the attention of the Boulder Town Council after the Land Use Ordinance was originally passed and that the Town Council had decided to make no change to the provisions which allowed commercial as a

conditional use. They nonetheless contended at the hearing the inclusion of the broad term “commercial” as a conditional use in the Land Use Ordinance was a mistake.

31. The evidence presented by the Appellants at the hearing adequately addressed all of the issues raised in their Petition for Review. In the interests of judicial economy, the trial on the merits should be consolidated with the hearing on the Motion for Preliminary Injunction.

In connection with the award of attorney’s fees, the Trial Court made the following additional findings of fact (R. 358, Appellants’ Addendum I), with citations to the record supporting the findings which are challenged on appeal by the Appellants:

32. Appellants sought review of Boulder Town’s decision to affirm the granting of Conditional Use Permits to BEC. (Finding # 2).

33. Appellants argued that the term “commercial” has no meaning and therefore that any decision allowing a commercial use is arbitrary. However, Appellants ignored the provisions of the Land Use Ordinance governing a commercial district, which includes a list of commercial uses and includes in that list “contract construction.” (Finding # 4).

34. BEC’s proposed use was a commercial use for contract construction. (Finding # 5).

35. Appellants made a claim that no official map was attached or adopted with the Land Use Ordinance. (Finding # 6).

36. Appellants presented a weak factual basis and legal position in their attempt to meet the heavy burden of establishing that Boulder Town's actions were arbitrary, capricious, or illegal. (Finding # 7).

37. Although they filed their Petition on July 12, Appellants failed to serve BEC until August 24, at which time they served a Summons, the Petition, the Motion for Preliminary Injunction, and a Notice of Hearing on the Motion for Preliminary Injunction setting the hearing for seven (7) days after service, August 31, 1999. Appellants waited forty-three (43) days after filing their Petition to serve BEC, choosing to give BEC only seven days to prepare to meet their Motion for Preliminary Injunction. In addition, while they failed to prosecute their Petition or to seek a prompt hearing on their Motion for Preliminary Injunction, BEC almost completed construction on the only improvement authorized by the Conditional Use Permits, the garage on the Stout residence property. By the time of the hearing on the Motion for Preliminary Injunction, the only tangible and permanent harm which could have been avoided by an injunction had already occurred. Yet Appellants joined BEC in this action by claiming a right to a preliminary injunction nonetheless. (Finding # 8).

38. BEC's reasonable attorney's fees and costs are \$5,276.70. (Finding # 9).

39. The Town of Boulder's reasonable attorney's fees and costs are \$4,400.00. (Finding # 10).

Rule 52 of the Utah Rules of Civil Procedure clarifies that the evidence to be considered on this appeal is the testimony and exhibits submitted at the hearing of

Appellants' motion for preliminary injunction, which the Trial Court consolidated with a hearing on the merits pursuant to Rule 65A(a)(2) of the Utah Rules of Civil Procedure. Except as relevant to procedural matters, other statements made or documents in the file should not be considered because they are not evidence submitted at the hearing of this matter. Therefore, all references by Appellants to the petition or other documents not evidence at the hearing are improper and should be disregarded. This includes the reliance on their petition in support of the facts stated in paragraphs 13, 16, and 27 of their statement of facts, each stating assertions contested by BEC and not found by the Trial Court.² BEC relies on evidence at the hearing in support of the Findings of Fact.

SUMMARY OF ARGUMENT

Appellants are disgruntled residents of the Town of Boulder, unhappy that the town's Land Use Ordinance, which imposed zoning on the town for the first time in 1998, is not more restrictive. Although they recognize that the Land Use Ordinance contains provisions allowing "commercial" as a conditional use at both the Stout Property and the Thompson Ranch, they have argued in the Trial Court and again on appeal that commercial uses should not be allowed, either because their inclusion was a mistake or because the term "commercial" itself is undefined and too vague to have any meaning,

²If the court should for any reason be willing to consider everything in the trial court's case file in connection with the trial court's findings and conclusions, then the court should review the copies of the Applications for conditional use permits and Conditional Use Permits attached to BEC's Memorandum in Opposition to Motion for Preliminary Injunction as Exhibits A-F (R. 187-205).

making approval of any commercial use arbitrary and capricious.

Appellants ignore the Trial Court's Findings of Fact, stating instead in voluminous fashion their own view of the facts. Contrary to established law under Rule 42 of the Utah Rules of Civil Procedure, they claim exemption from the obligation to marshal the evidence in support of the Findings as found by the Trial Court on the basis that the Trial Court granted a Motion to Dismiss at the close of Plaintiffs' case. In addition, there is sufficient evidence supporting the Findings of Fact which are challenged by Appellants, as set forth above in the Statement of Facts.

Land use decisions are presumed valid on a petition for review. Appellants presented to the Trial Court insufficient evidence to overcome that presumption of validity. They failed to introduce in evidence the applications and site development plan required for conditional use permit applications by the Land Use Ordinance and, most importantly, they failed to introduce the Conditional Use Permits themselves in the matter before the Trial Court. They have completely failed to carry their burden to show that the actions of the Boulder Town Planning Commission and Town Council in approving the Conditional Use Permits was arbitrary and capricious.

Appellants argue that allowing commercial uses as conditional uses necessarily makes approval of the uses in this case arbitrary and capricious. However, the term "commercial" has a recognized meaning and the ordinance itself functionally defines commercial uses by its listing of such uses in its commercial district. Finally, the ordinance imposes appropriate and adequate guidelines for the granting of Conditional

Use Permits for commercial uses. Under well-established case law, Appellants completely failed to show that the approval of the Conditional Use Permits was arbitrary or capricious.

Appellants claim that approval of the Conditional Use Permits was illegal because, they claim, there was no map adopted to impose particular districts on particular parts of the Town of Boulder. Ignoring that the Trial Court found to the contrary and the evidence in support of that finding, Appellants claim that granting the Conditional Use Permits was illegal because of the lack of such a map. Even if there were no map (and the record contains support for the finding that there is such a map), without a map there would be no zoning to apply and therefore the granting of the Conditional Use Permits is not illegal but merely meaningless, since no approval whatsoever would be required for the uses proposed by BEC in that event.

Appellants assert on appeal that the Land Use Ordinance is unconstitutional or itself illegal and that the Trial Court erred by consolidating the hearings on Appellants' Motion for Preliminary Injunction with the trial of the merits of the Petition. None of these claims were raised in the Trial Court. The Petition does not make any assertion that the Land Use Ordinance is unconstitutional or illegal. Appellants failed to raise any objection in the Trial Court to the consolidation of the trial of the merits of the Petition with the hearing on the Motion for Preliminary Injunction. This Court should not consider these claims on appeal because they were not raised in the court below.

The Trial Court found that Appellants' Petition was without merit and was not

asserted in good faith, and awarded BEC and the Town of Boulder their attorney's fees pursuant to U.C.A. § 78-27-56. The Trial Court properly found that the Petition was without merit and that the Appellants brought and pursued the Petition without good faith, in view of the Appellants' twisted legal arguments, lack of factual support, and the fact that, during the forty-three days after their Petition was filed and before BEC was even served, they allowed BEC to substantially complete the garage on the Stout Property, which was the only improvement authorized by the Conditional Use Permits, making their claim for a preliminary injunction against BEC implementing the Conditional Use Permits an ineffective, useless, and unavailable remedy. Appellants dragged BEC into this lawsuit, causing BEC to incur thousands and thousands of dollars of attorney's fees without having even the possibility of further harm irreparably inflicted upon them as a result of the Conditional Use Permits.

With bull-headed insistence, Appellants prosecute this appeal, although well-established case law and the Trial Court's own determination of facts establish that they have no basis on which they could prevail. Their appeal is also without merit and is not prosecuted in good faith and BEC should be awarded its attorney's fees on appeal.

ARGUMENT

POINT I

THE TRIAL COURT'S FINDINGS OF FACT SHOULD NOT BE DISTURBED ON APPEAL

A. Appellants Fail to Marshal the Evidence Supporting the Findings of Fact.

Appellants admit they do not marshal the evidence, instead claiming in one blanket

statement that all evidence favors their position because it came in during presentation of their case. (Appellants' Brief at 5). The fact that the court granted a motion to dismiss at the close of Appellants' evidence doesn't mean there is no evidence in favor of the result the court reached. Rule 41 (a)(2)(b) of the Utah Rules of Civil Procedure states in relevant part as follows:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff. . . . If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

Pursuant to this rule, the Trial Court sitting as finder of the facts is entitled at the end of plaintiff's presentation of evidence to weigh that evidence, and if it is found to be unbelievable or insufficient in some regard, to make a ruling on the merits of the evidence and dismiss the complaint. *Johnson v. Bell*, 666 P.2d 308 (Utah 1983). Subdivision (b) of this rule is appropriately applied either when the trial judge finds that the claimant has failed to make out a prima facie case or when the trial judge is not persuaded by the evidence presented by the claimant. *Lemon v. Coates*, 735 P.2d 58 (Utah 1987).

It is the Appellants' burden to cite the appellate court to all the evidence in the record that would support the determination reached and then demonstrate why, even when viewed in the light most favorable to the court below, it is insufficient to support

the finding under attack. *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896 (Utah 1989). When a party fails to marshal the evidence in support of a challenged finding, the appellate court will “assume[] that the record supports the finding of the trial court and proceed to a review of the accuracy of the lower court’s conclusions of law and the application of that law in the case. [cites].” *Heber City Corp. v. Simpson*, 942 P.2d 307, 312 (Utah 1997).

Appellate courts will not address a challenge to findings of fact unless the appellant has properly “marshaled the evidence.” *See State v. Benvenuto*, 372 Utah Adv. Rep.3, 4 (Utah 2000); *Child v. Gonda*, 972 P.2d 732, 739 (Utah 1998). The Court assumed the findings correct where appellant failed to marshal evidence in *Benvenuto*, in *Young v. Young*, 979 P.2d 338, 345 (Utah 1999), and in *Johnson v. Higley*, 977 P.2d 1209, 1218 (Utah Ct. App. 1999). “[A] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research.” *State v. Larsen*, 828 P.2d 487, 491, (Utah Ct. App. 1992), *aff’d* 865 P.2d 1355 (Utah 1993) (quoting *Williamson v. Opsahl*, 416 N.E.2d 783, 784 (Ill. App. Ct. 1981)).

Because Appellants have completely failed in their obligation to marshal the evidence supporting the Findings of Fact of the Trial Court, this Court should accept those findings as correct and move on to consider the legal issues in this case.

B. There is Sufficient Evidence Supporting the Trial Court’s Determinations.

Rule 52(a) of the Utah Rules of Civil Procedure provides in relevant part as

follows: “Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” If, viewing the evidence in the light most favorable to the trial court’s determination, a factual finding is based on sufficient evidence, the finding is not clearly erroneous. *Joufflas v. Fox Television Stations, Inc.*, 927 P.2d 170, 174 (Utah 1996); *Butler, Crockett, & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co.*, 909 P.2d 225, 228 (Utah 1995). This is also true where, as in this case, the trial court grants a motion to dismiss at the close of plaintiff’s case. In reviewing involuntary dismissals, the appellate court must give great weight to the findings made and the inferences drawn by the trial judge, but must reject his findings if they are clearly erroneous. *Southern Title Guar. Co. v. Bethers*, 751 P.2d 951 (Utah Ct. App. 1988).

The evidence at the hearing does support the Findings of Fact. As noted in the Statement of Facts, *supra.*, each of the findings which is challenged by Appellants is based on sufficient evidence contained in the record and is not clearly erroneous.

POINT II
APPELLANTS FAILED TO ESTABLISH ANY ARBITRARY OR CAPRICIOUS
ACTION IN GRANTING THE CONDITIONAL USE PERMITS

A. Appellants Failed to Present Evidence Sufficient to Overcome the Presumption of Validity and to Carry Their Burden of Proof.

The petition below was brought pursuant to U.C.A. § 10-9-1001, which creates the presumption that the actions of the Boulder Town Planning Commission and Town

Council are valid. Appellants failed to carry their burden of proof to establish improper action, or even the nature of the action which was taken. Although the Land Use Ordinance requires an application for a conditional use permit (Land Use Ordinance, Exhibit 3, Appellants' Addendum B, Part III C, p. 7) and a Site Development Plan (*Id.*, Part III F., pp. 7-8), and allows the Planning Commission to "waive any or all of the site plan requirements upon appeal and justification" (*Id.*, Part III F., p. 8), Appellants didn't put the Conditional Use Permits in evidence. They had copies of the Conditional Use Permits. (R. 388, Tr. 69). They didn't introduce the applications or Site Development Plans or any other documents submitted by BEC or otherwise considered by the Planning Commission in connection with BEC's applications for Conditional Use Permits. In fact, except for their own statements, conclusions and comments made with regard to the applications, they failed to put in evidence anything to show what was considered by and what actions were taken by the Planning Commission.³ In particular, Appellants put on

³What Appellants did put in evidence were the documents they submitted in opposition to the applications for conditional use permits and their own views about the important or operative facts about those applications. In this as in many other of the statements and claims they have made and now make on appeal, they confuse their right to tell the Planning Commission about their views and concerns before it makes a decision on an application as giving them some further right to control or dictate the exercise of discretion by the Planning Commission which is granted by the Land Use Ordinance. Nobody elected Appellants to be in a position of authority and responsibility to make those decisions. They also assert they knew what was considered by the Planning Commission because they attended the public hearing regarding the application for conditional use permits. They are mistaken in treating that public hearing as if it were a trial. It is a chance for public input about an application. The hearing is not the only relevant aspect of the process of acting on an application for a conditional use permit.

no evidence that the Planning Commission did not properly consider or review the Site Development Plan Requirements or that information required by the Site Development Plan Requirements was not submitted or improperly waived.⁴ They can't overcome the presumption of validity without showing what the Planning Commission did, what documents were submitted to and considered by the Planning Commission, and what the Conditional Use Permits say.

The Utah Supreme Court recently discussed the review of a municipality's land use decisions in *Springville Citizens for a Better Community v. City of Springville*, 979 P.2d332 (Utah 1999). The Court in that case stated the following with regard to U.C.A. §10-9-1001, the statute at issue in this case:

A municipality's land use decisions are entitled to a great deal of deference. [cites] Therefore, "the courts generally will not so interfere with the actions of a city council unless its action is outside of its authority or is so wholly discordant to reason and justice that its action must be deemed capricious and arbitrary and thus in violation of the complainant's rights." [cite] Indeed, the statute that forms the basis of this appeal requires the courts to "presume that land use decisions and regulations are valid." Utah Code Ann. § 10-9-1001(3)(a). However, this discretion is not completely unfettered, and the presumption is not absolute. If a municipality's land use decision is arbitrary, capricious, or illegal, it will not be upheld. *See id.* § 10-9-1001(3)(b).

. . . A municipality's land use decision is arbitrary and capricious if it is not supported by substantial evidence. [cite]. In evaluating the City's decision under this standard, we review the evidence in the record to ensure

⁴Appellants also state in paragraph 12 of the Statement of Facts in their brief that the Commercial Design Criteria found in Part XIV C. on p. 28 of the Land Use Ordinance were never complied with or even addressed in granting the Conditional Use Permits. They submitted no evidence at the hearing which would support this assertion.

that the City proceeded within the limits of fairness and acted in good faith. [cite]. We also determine whether, in light of the evidence before the City, a reasonable mind could reach the same conclusion as the City. [cite]. . . . We do not, however, weigh the evidence anew or substitute our judgment for that of the municipality. [cites].

Id., at 336-37. Appellants failed to show that the Planning Commission’s approval of the Conditional Use Permits at issue was arbitrary and capricious because they completely failed to show what the Planning Commission and the Town Council did, and what evidence and documents they considered. Because of the presumption of validity accorded to the town’s decision, Appellants were required in the Trial Court to demonstrate that the decision to grant the Conditional Use Permits was not supported by substantial evidence. They completely failed to carry that burden. The Trial Court correctly dismissed Appellants’ petition after they completed introduction of their evidence because they did not produce evidence sufficient to overcome the presumption of validity accorded to the Town’s action.

B. Giving the Planning Commission Discretion to Approve Commercial Uses As a Conditional Use Does Not Make Its Action in Approving the Conditional Use Permits Arbitrary or Capricious.

Appellants claim that the provisions allowing “commercial” as a conditional use either do not include the use for BEC or are so vague that any decision allowing a “commercial” use is arbitrary and capricious. They thus dispute the Trial Court’s Conclusions of Law that the designation of commercial uses as conditional uses is not ambiguous but is a valid and legal designation, that issuance of the Conditional Use Permits was not arbitrary, capricious or illegal, and that Appellants failed to show any

right to relief on their Petition. (Conclusions of Law 3, 4, 5 and 7, R. 324-25, Appellants' Addendum H)

(1) The Proposed Use for BEC Is a Commercial Use Allowed as a Conditional Use Under the Land Use Ordinance.

It is undisputed that the Land Use Ordinance expressly allows “commercial” uses as conditional uses in the districts at issue. Appellants claim that the term is so vague that any decision allowing a commercial use is arbitrary and capricious. Although there is no definition of “Commercial” within the Land Use Ordinance, the various commercial uses allowed as conditional uses in a commercial district (District 9) include contract construction. A statute should be construed as a whole, with all of its provisions construed to be harmonious with each other and with the overall legislative objective of the statute, especially where the statute is ambiguous. *Nixon v. Salt Lake City Corp.*, 898 P.2d 265 (Utah 1995). This functionally defines “Commercial” to include such a business.

In addition, the term “commercial” has a recognized meaning. *Webster's Ninth New Collegiate Dictionary* (Merriam-Webster, Inc. 1986) states the primary definition of “commercial” as “occupied with or engaged in commerce or work intended for commerce.” The word “Commercial” as used in the law of zoning denotes a use for profit. *Imbergamo v. Barclay*, 77 Misc.2d 188, ___, 352 N.Y.S.2d 337, 341 (1973) (quoting 2 Anderson, *American Law of Zoning* §11.01). The terms of a statute (or ordinance) should be interpreted in accord with usually accepted meanings. *Savage*

Industries, Inc. v. Utah State Tax Commission, 811 P.2d 664, 670 (Utah 1991). There can be no question that the use proposed by BEC for these two properties is a commercial use. A trial court's interpretation of ordinances is a question of law reviewed for correctness. *Rushton v. Salt Lake County*, 977 P.2d 1201, 1203 (Utah 1999). The Trial Court correctly interpreted the Land Use Ordinance as authorizing the commercial use proposed by BEC as a conditional use.

Appellants argue that, since the Land Use Ordinance designates some specific commercial uses as conditional uses followed by the general designation "commercial", then the allowed commercial uses are limited to those specifically listed. But the evidence shows that the Boulder Town Council intentionally decided to leave "commercial" as a conditional use even after the Planning Commission recommended it be removed. The intent and understanding of the Town Council and Planning Commission was that commercial is an allowed conditional use, that commercial can apply to any district. "We didn't want to be told we can have businesses only in certain places." (Town Council minutes for June 17, 1999, Exhibit 7 and Appellants' Addendum F). A court's primary rule of statutory interpretation is to give effect to the intent of the legislature. *Savage Industries, Inc. v. Utah State Tax Commission, supra.*, at 671. The evidence clearly shows that the limitations claimed by Appellants are contrary to the intent of the Town Council, which purposely made the broad category "commercial" a conditional use in all districts, allowing the Planning Commission discretion to allow and place appropriate conditions on commercial uses in the districts.

(2) The Land Use Ordinance Provides Adequate Guidelines For Granting Conditional Use Permits.

Contrary to Appellants' claim, allowing "commercial" as a conditional use in the districts at issue does not make approval of a commercial use arbitrary and capricious. The Land Use Ordinance states several requirements and standards to be applied. The Site Development Plan Requirements of Part III F of the Land Use Ordinance (beginning on page 7) state all the items to be submitted with an application for conditional use permit, and allow the site development plan requirements to be waived upon "appeal and justification." Although the Conditional Use Permits are not in evidence, Mr. Hatch testified that the permits "claimed that they had waived--some things had been waived." (R. 388, Tr. 69).

In addition, the Land Use Ordinance directs the exercise of discretion by the Planning Commission. Part III G of the Land Use Ordinance (Exhibit 3, Appellants' Addendum B, beginning at p. 8) governs the determination of the Planning Commission on an application for conditional use permit. It states:

The Planning Commission may permit a conditional use to be located within any district in which a particular conditional use is permitted by this ordinance. In authorizing any conditional use the Planning Commission shall impose such requirements and conditions as are necessary for the protection of adjacent properties and the public welfare. The Planning Commission shall not authorize a conditional use permit unless evidence presented is such 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.

This adequately delineates the matters to be considered by the Planning Commission in determining whether to grant an application for a conditional use permit.

As to what restrictions and limitations should be imposed upon property, and what uses thereof should be permitted, has been by the legislature, committed to the judgment and discretion of the governing body of the city. As long as that body stays within the grant, and purposes fixed by the legislature, the courts will not gainsay (its) judgment.

Marshall v. Salt Lake City, 105 Utah 111, 125, 141 P.2d 704, 710 (1943). Utah statute allows a city to designate conditional uses. U.C.A. § 10-9-407. It was a matter for the judgment and discretion of the Town Council to determine to allow commercial uses as conditional uses within the town of Boulder.

Thurston v. Cache County, 626 P.2d 440 (Utah 1981) was an appeal of the county's denial of plaintiff's request for conditional use permits. As in this case, the plaintiffs claimed that the ordinance provided insufficient guidelines or standards for the issuance or denial of conditional use permits. The Supreme Court stated:

While it is true that a zoning ordinance must set some ascertainable boundaries on the exercise of discretion by a zoning authority, such

boundaries are not required to be unduly rigid or detailed. A generalized exposition of overall standards or policy goals suffices to direct the inquiry and deliberation of the zoning authority, and to permit appellate review of its decision. Thus, courts have upheld ordinances which permit conditional use permits “where the use will be in keeping with the uses authorized in the district,” where the zoning authority was required to consider harmony with the neighborhood and the district, or where the zoning authority was required to consider the suitability of the property, character of the neighborhood, and economic or aesthetic effects of the proposed use.

Id., at 443-44. The Court went on to find that the ordinance at issue there, which provided that the proposed use “not be detrimental to the health, safety, or general welfare of persons residing in the vicinity, or injurious to property in the vicinity” set forth sufficient standards. As well established by the *Thurston* case, the Land Use Ordinance in this case, which allows commercial as a conditional use under very similar standards, does not make every decision granting a conditional use permit for a commercial use arbitrary or capricious.

The Washington and Colorado cases cited by Appellants in support of their argument on this point are not contrary. The court in *Indian Trail Property Owners Ass’n v. City of Spokane*, 886 P.2d 209 (Wash. App. 1994) found that the ordinance there had sufficient guidelines so that the application of the zoning ordinance to allow expansion of a grocery store and shopping center were not arbitrary and capricious, in view of the enumeration of specific uses and site development requirements in the ordinance. In *Sherman v. City of Colorado Springs Planning Commission*, 763 P.2d 292 (1988), the court held that an ordinance which required a site development plan but contained no standards regarding the exercise of discretion in reviewing that plan made the City’s

action in denying a permit invalid. Here, as discussed above, there are adequate standards to guide discretion.

The Town Council determined to allow “commercial” as a conditional use. That decision has been committed by the legislature to the discretion of the Town Council, and the Land Use Ordinance provides sufficient guidance to the Planning Commission in exercise of that discretion. The requirement for a conditional use permit for commercial uses allows the Planning Commission to review the intended use and set limitations so that the business is compatible to the area. That is exactly what occurred in this case. Approval of the conditional use permits to BEC was not arbitrary and capricious.

POINT III

APPROVAL OF THE CONDITIONAL USE PERMITS WAS NOT ILLEGAL

Appellants repeatedly argue that there was no map to establish what parts of Boulder Town are in what Districts. Although there is evidence that a map exists and that the parties knew and agreed upon the districts involved in this case (See Statement of Facts, ¶4, *supra.*), their claim could accomplish nothing for them. As the District Court correctly stated: “If the Appellants were correct that there was no map, then there was no zoning to be enforced, and therefore no Conditional Use Permits could be required for the land uses intended by BEC. The lack of a map could not provide a basis for challenging the Conditional Use Permits issued pursuant to the zoning ordinance.” (Conclusion of Law 3, Addendum I). If there is no zoning, then there was nothing to be permitted and therefore, issuance of the Conditional Use Permits would simply be a

meaningless act not subject to attack. At the hearing, Appellants' counsel agreed that if the Land Use Ordinance was void when the Conditional Use Permits were issued, then "this petition would be moot." (R. 388, Tr. 17).

POINT IV
CLAIMS NOT RAISED BY THE PETITION OR
PRESERVED BY BEING RAISED IN THE TRIAL COURT
SHOULD NOT BE CONSIDERED ON APPEAL

A. The Petition Made No Claim That the Land Use Ordinance is Unconstitutional or is Itself Illegal.

Issues 1 and 2 listed by Appellants in their brief include claims that the Land Use Ordinance is unconstitutional and that the Land Use Ordinance itself is illegal and therefore void. These claims were not raised by the petition in the court below, as an examination of that petition (R. 1-61) will show. The Petition's first paragraph states that Appellants: "petition this Court, as provided under statute, for a judicial review of the granting of conditional use permits approved by the Town of Boulder's Planning Commission and/or Board of Adjustment, and upheld by the Boulder Town Council; and for injunctive relief to prevent, enjoin, prohibit, or remove the unlawful building, use or act, which may or are about to occur on the properties at issue." Paragraph 8 of the Petition states: "The Appellants have exhausted their administrative remedies and are now seeking judicial review in this Court, pursuant to Utah Statute, § 10-9-1001, U.C.A. (1953, as amended), for a determination that the granting of the conditional use permits, under the facts and circumstances of this case, was arbitrary, capricious, or illegal." Paragraph 17 of the Petition alleges that provisions allowing "commercial" as a

conditional use without meaning, definition, or parameters has allowed the Planning Commission to proceed in land use decisions in an arbitrary, capricious, and illegal manner, such as in this case. The prayer for relief requests judicial review finding that the granting of the conditional use permits under the facts and circumstances of this case was arbitrary, capricious, or illegal, and therefore void and of no consequence. The petition raised the issue whether granting of the Conditional Use Permits was proper. It did not assert that the Land Use Ordinance was itself unconstitutional or illegal. To assert constitutional claims on appeal, parties generally must assert them first in the trial court. *Bunch v. Englehorn*, 906 P.2d 918, 921 (Utah App. 1995). Having failed to raise these claims in their petition, these claims cannot be asserted for the first time on appeal.

B. Appellants Never Objected to Consolidation of the Hearing for Preliminary Injunction with the Trial of the Merits of the Petition.

One who fails to make a necessary objection or who fails to insure that it is on the record is deemed to have waived the issue. *Lamb v. B & B Amusements Corp.*, 869 P.2d 926 (Utah 1993). Specific and timely objections and motions must be made before the lower tribunal, then identified for the appellate court. *State v. Whittle*, 780 P.2d 819, 820-21 (Utah 1989). Utah Rule of Appellate Procedure 24(a)(5) requires counsel to cite to the record in briefs showing preservation in the trial court of each issue raised or appealed. Issue 5 and Argument V of Appellants' brief make the claim that the Trial Court abused its discretion by consolidating the preliminary injunction hearing with the trial of the merits. However, that claim was waived for failure to object to the

consolidation in the Trial Court.

The Trial Court granted a motion by BEC and the Boulder Town defendants that the trial on the merits of the action be consolidated with the hearing on the application for preliminary injunction. Rule 65A(a)(2) of the Utah Rules of Civil Procedure allows the Court to do exactly that. It provides in relevant part:

Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.

Appellants intimate that they had inadequate notice of the potential for consolidation. The intent to make such a motion was disclosed by BEC's Memorandum in Opposition to Motion for Preliminary Injunction, Argument II (R. 184-185), mailed to their attorney on August 27, four days before the hearing on the motion for preliminary injunction, and three days after the Summons, Petition, and Notice of the Hearing were served on BEC. At the hearing, counsel for BEC requested that the court consolidate the hearing with a trial on the merits during opening statement. (R. 188, Tr. 29).

Neither during the hearing or at anytime after the hearing did Appellants ever raise any objection to the consolidation of the preliminary injunction hearing with the trial of the merits or make any statement of any additional evidence which could only be produced at a later trial. They claim for the first time on appeal that the consolidation was an abuse of discretion. Having failed to raise this issue in the Trial Court or to

suggest to the Trial Court any reason which would mitigate against the consolidation in the interest of judicial economy, this court should not consider their objection to the consolidation on appeal.

C. Appellants Never Claimed That the Trial Court Didn't Consider Evidence, or That It Relied on the Arguments of Counsel.

Appellants' brief raises claims by Issues 6 and 8 of their Statement of Issues for Review that the Trial Court didn't consider evidence or that it relied on the arguments of counsel as evidence. These claims were never raised in the Trial Court and should therefore not be considered on appeal. However, in any event, there is nothing to indicate that the Trial Court didn't consider evidence or did not base its decision on the evidence rather than on arguments of counsel. BEC believes that the evidence supports the Trial Court's Findings, Conclusions, and Orders.

**POINT V
THE AWARD OF ATTORNEYS FEES TO BEC UNDER U.C.A. § 78-27-56
WAS NOT ERROR AND SHOULD BE AUGMENTED**

The Trial Court awarded BEC and Boulder Town their attorneys fees under U.C.A. § 78-27-56. That statute provides in relevant part as follows:

In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under subsection (2).

When reviewing an award of attorneys fees under this statute, the determination of whether the action was without merit is a question of law and is therefore reviewed for correctness. *Jeschke v. Willis*, 811 P.2d 202 (Utah Ct. App. 1991). Whether a party

acted in bad faith is a mixed question of law and fact as to which the trial court is granted “relatively broad discretion”. *Valcarce v. Fitzgerald*, 961 P.2d 305, 315-16 (Utah 1998).

A. Appellants’ Petition Was Without Merit.

To qualify for an award of fees, the party asserting the right to that award must first demonstrate that the claim is “frivolous” or “of little weight or importance having no basis in law or fact.” *Jeschke v. Willis*, 811 P.2d 202, 203 (Utah Ct. App. 1991). Under the applicable statute, U.C.A. §10-9-1001, courts presume that land use decisions and regulations are valid and determine on review only whether the decision of the town is arbitrary, capricious, or illegal. Fifty years ago the Utah Supreme Court determined that the exercise of a city’s discretionary power to district and zone for various purposes that are to the public interest will not be interfered with by a court unless the discretion is abused. *Phi Kappa Iota Fraternity v. Salt Lake City*, 116 Utah 536, 212 P.2d 177 (1949). In 1981, the Utah Supreme Court ruled that standards of decision virtually identical to those in the Land Use Ordinance are sufficient to prevent discretionary decisions from being arbitrary and capricious, in *Thurston v. Cache County*, *supra*. The applicable principles of law are well-settled and show the complete lack of merit of the claims made by Appellants.

Appellants testified that they knew the Boulder Town Land Use Ordinance allowed “commercial” uses as a conditional use. They also testified that they knew that these provisions had been brought to the attention of the Town Council after the Land Use Ordinance was passed, and that the Town Council determined not to revise those

provisions. Yet Appellants still claimed that the inclusion of a “commercial” use as a conditional use was a mistake which should be ignored by the Court. They also argued that the term “commercial” has no meaning and therefore that any decision allowing a commercial use is arbitrary. However, Appellants ignored the accepted meaning of the term “commercial” as well as provisions of the Land Use Ordinance governing a commercial district, which includes a list of commercial uses and includes in that list “contract construction,” and failed to provide the Court any case law or other support for the claim that a commercial use could not have a sufficiently definite meaning to be applied. The Court is clearly justified in determining that the action brought by Appellants was without merit.

B. The Trial Court’s Determination That the Petition Was Not Asserted in Good Faith Was Not Error.

The second element required for an award of attorneys fees under U.C.A. § 78-27-56 is that the party’s conduct in bringing the suit was lacking in good faith. *Jeschke v. Willis*, 811 P.2d 202, 203 (Utah Ct. App. 1991). An action is asserted in good faith if there is an honest belief that it is appropriate and as long as there is no intent to hinder, delay, defraud or take advantage of another. *Cady v. Johnson*, 671 P.2d 149 (Utah 1983).

Establishing the bad faith of an action requires examination of facts indicative of the Appellants’ mental state in bringing the action. Reflection on the circumstances as well as the claims made should convince the Court that the Petition for Review and the

Motion for Preliminary Injunction, particularly as against BEC, were brought in bad faith with the intent to hinder, delay, and cause expense to BEC.

The first indication of lack of good faith is the very weak factual basis and legal positions taken by Appellants in their attempt to meet the heavy burden of establishing that Boulder Town's actions were arbitrary, capricious, or illegal. Appellants merely repeated in the Trial Court the comments and objections they had made to the Planning Commission and the Town Council. Directly contrary to the contentions of Appellants, the Trial Court correctly found that "there is nothing vague or ambiguous in allowing a commercial use as a conditional use in a zoning district. Appellants' arguments about the interpretation and meaning of commercial uses as conditional uses was without merit."

One of Appellants' main arguments, both at the Trial Court and on appeal, is that there was no official map adopted with the Land Use Ordinance. However, without a map there is no zoning and no reason why BEC could not use its property for the very purposes it intended without any permit from Boulder Town.

The Trial Court also relied on the fact that Appellants presented no evidence of whether or not there was compliance with site plan requirements found in the zoning ordinance. They failed to introduce the Conditional Use Permits in evidence. They failed to introduce any evidence of whether the site plan requirements had been addressed, met or properly waived, as is allowed by the Land Use Ordinance. Both Appellants testified that they had never been to or seen the Thompson Ranch property dealt with in one of the Conditional Use Permits. In addition, although not specifically relied on by the Trial

Court, both Appellants complained about the commercial uses allowed by the Conditional Use Permits when they each use their own properties for commercial purposes preexisting the passage of the Land Use Ordinance.

The Trial Court also correctly considered Appellants' tactics and actions in pursuing the Petition as indicating their lack of good faith. Although they filed their Petition on July 12, they failed to serve BEC until August 24, at which time they served a Summons, the Petition, the Motion for Preliminary Injunction, and a Notice of Hearing on the Motion for Preliminary Injunction setting the hearing for seven (7) days after service, August 31, 1999.⁵ Appellants waited forty-three (43) days after filing their Petition to serve BEC, choosing to give BEC only seven days to prepare to meet their Motion for Preliminary Injunction. In addition, while they failed to prosecute their Petition or to seek a prompt hearing on their Motion for Preliminary Injunction, BEC almost completed construction on the only improvement authorized by the Conditional Use Permits, the garage on the Stout Property. By the time of the hearing on the Motion for Preliminary Injunction, the only tangible and permanent harm which could possibly have been avoided by an injunction had already occurred. Yet Appellants sought to drag BEC into their battle with the Town of Boulder by claiming a right to a preliminary injunction nonetheless.

⁵Contrary to the intimation in Appellants Statement of Fact # 30, Neither BEC nor its counsel had any involvement in or notice of the setting of the hearing on the motion for preliminary injunction until BEC was served with process on August 24, 1999.

These facts about the Petition of the Appellants and the prosecution of this action show their lack of good faith and that BEC was properly awarded its reasonable attorney's fees pursuant to U.C.A. §78-27-56.

C. This Matter Should Be Remanded to the Trial Court to Give BEC an Additional Award for Its Attorneys Fees and Costs on Appeal.

Appellants' petition was brought and pursued in the Trial Court without merit and without good faith. The same is even more true of this appeal, which has required BEC to spend thousands and thousands of additional dollars to deal with an appeal which does not address the facts as found by the Trial Court, does not marshal the evidence in support of the many findings of fact Appellants challenge or ignore, claims the term "commercial" is too vague to allow as a conditional use when the Land Use Ordinance itself treats the very use involved here as a commercial use, and assert that there is no map adopted to affix zoning districts to particular land, when even their counsel admitted that without zoning, Appellants' Petition would be moot. This court should award BEC its attorneys fees and costs on appeal under U.C.A. § 78-27-56 and remand this matter to the Trial Court to fix those fees and costs.

CONCLUSION

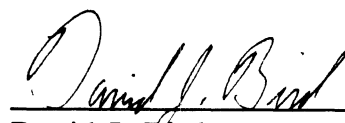
For all the reasons stated here, Appellee Boulder Excavating Company requests that this Court affirm the Trial Court's Judgment of Dismissal and Order Denying Preliminary Injunction and its Findings, Conclusions and Order on Motion for Attorney's Fees, that this Court award BEC its attorney's fees and costs in prosecuting this appeal

pursuant to U.C.A. § 78-27-56, and that this matter be remanded to the Trial Court to augment the award of attorney's fees and costs by those incurred in connection with this appeal.

DATED this 17th day of August, 2000.

Respectfully submitted,

RICHARDS, BIRD & KUMP, a P.C.



David J. Bird

Attorneys for Appellee Boulder Excavating
Company

MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing **BRIEF OF APPELLEE BOULDER EXCAVATING COMPANY** via United States Mail with postage prepaid thereon this 17th day of August, 2000, to the following:

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