

2000

Julian Dean Hatch and Lynn Mitchell v. The
Boulder Town Concil, Town of Boulder Planning
Commission and/or Board of Adjustment, The
Boulder Excavating Company, Sam Stout and Rhea
Thompson : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JULIAN DEAN HATCH and, LYNN MITCHELL)	REPLY BRIEF OF THE APPELLANTS
Petitioners and Appellants,)	
vs.)	
THE BOULDER TOWN COUNCIL, TOWN OF BOULDER PLANNING COMMISSION and/or BOARD OF ADJUSTMENT, THE BOULDER EXCAVATING COMPANY, SAM STOUT AND RHEA THOMPSON)	Appellate Case No. 20000189 -CA 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 FACTS

The Statement of Facts in the Boulder Town Brief merely cite to the formal Findings of Fact and Conclusions of Law entered by the trial court, rather than to the transcript or actual evidence presented to support such Findings. The majority of facts in the Brief submitted by Boulder Excavating Company (“BEC”) have no citations at all, or also fail to cite to any actual evidence presented to support the trial court’s Findings.

In reply, the Petitioners wish to clarify the following facts:

1. The Petition does assert that the passage of the Ordinance was illegal and not in compliance with state law, because no official map was adopted with the Ordinance, §10-9-402, U.C.A.; and that there is no official map available setting forth the nine districts designated in the Ordinance. (Petition ¶ 26(1), Record 10). The Town admits that there is no such map available and “no timetable for producing it.” (See Town Meeting minutes, June 17, 1999; Addendum F). Although Part IV B of the Land Use Ordinance refers to an “official base map” there was no “official base map” adopted with the Ordinance. (Record 388, 55-57) There is no evidence that an official base map was adopted with the Ordinance. It is admitted that no official map was introduced into evidence. (Town’s Brief p. 5, ¶ 4) The Town merely claims, through the argument of counsel, that such a map exists. (Record 388, 19-20). The Town’s cite to the Record 318-19 in support of this fact, is merely to the formal Findings entered by the court; and not to any actual evidence presented in court. BEC also makes this claim, but makes no citation to the record. (BEC Brief p. 5, ¶ 4).

2. The parties never agreed to the location of the properties under the specific districts as designated in the zoning Ordinance. The parties could not have agreed to this because, as admitted, an official map was never presented or introduced into evidence. (Town's Brief p. 5, ¶ 4).

3. The only map introduced into evidence was the existing use map, prepared by the Five County Associations of Governments in January 1999, more than six months after the Ordinance was adopted in May 1998. Moreover, this same map was attached to the Petition, and the Town denied it was an official map. (Answer ¶s 14 & 15, Record 66-67). Further, this existing use map shows six different uses (Addendum A), while the Ordinance designates nine separate zoning districts. (Ord. p. 45, Table I, Record 58).

4. The allegations of Hatch in the Petition and in his Notice of Appeal regarding the location of the properties within certain districts, i.e., Greenbelt/Multiple Use and Medium Density Residential, is not based upon any "official zoning map," but rather upon the existing use map, attached to the Petition. (See Petition, ¶s 19 & 20, Record 8). The same map, the Town denied was an official map. (Answer ¶s 14 & 15, Record 66-67).

5. Hatch could not have testified concerning the location of these properties under the nine separate zoning districts in the Ordinance, because he had never seen an official zoning map for the Ordinance. (Record 388, p. 74; Question: "[Mr. Hatch] have you, to this day, ever seen an official zoning map corresponding to the zoning ordinance? Answer: No). Therefore, the trial court could not find, based solely upon

Hatch's testimony, that the properties were located in any of the specific districts, as designated under the Ordinance.

6. The trial court in its Findings indicates that the Thompson Ranch Property is designated by the Land Use Ordinance as "District 2" and "green belt/multiple use lands;" and the Stout Property is designated by the Land Use Ordinance as "District 6" and "medium density residential." (Record 320) The Land Use Ordinance does not make any such designation; and there was no official map introduced for the trial court to make such findings. To support this claim, the Town merely cites to the trial court's formal Findings, and no evidence to support the Findings. The only evidence cited by BEC is the Town Council minutes of June 17, 1999, more than a year after the Ordinance was adopted, where it is recorded that Mr. Hatch was still asking for a copy of the map, but was told that Five Counties is preparing it, "but it is not ready, and there is not a timetable for producing it." This evidence is not enough to support the trial court's Findings.

7. The Petitioners submitted substantial evidence through testimony and letters, which were admitted into evidence, regarding their concerns and objections to the granting of the conditional use permits. These are the same objections contained in the Petition, and are set forth in Appellants' Opening Brief. [See Brief of Appellant's ¶ 14 (1)-(10)]. There was evidence presented regarding Petitioners' objections and concerns, yet the trial court in its Findings simply states in one sentence that, "Petitioners appeared at the public hearing and presented and read written objections to issuance of the permits."

(Findings ¶ 7, Record 319). There is no finding made as to what the objections and concerns were, or how they were dealt with by the Town in a reasonable and good faith manner.

8. There was also no evidence presented to the trial court to support the Town's approval of the conditional use permits. The trial court again simply states in one sentence that, "the Town Council affirmed issuance of the Conditional Use Permits to Boulder Excavating." (Findings ¶ 15, Record 321) There is no finding of the issues raised by the Petitioners. No finding that these issues were considered and dealt with by the Town. No evidence or finding to support the conditional use permits, despite the objections and concerns raised by the Petitioners. The Town still fails to point to any substantial evidence to support the conditional use permits, but merely cites to the trial court's formal Findings. BEC can only cite to two sentences in the Town minutes of June 17, 1999, as follows, "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." This statement in the Town minutes does not show substantial evidence to support the conditional use permits; but rather shows that the Town did not act in good faith and did not provided a fair hearing on the issues.

9. The Ordinance has specific Site Development Plan Requirements that must be met before conditional uses are approved. §10-2-407 U.C.A. These are set forth in PART III Conditional Uses, paragraph F, Site Development Plan Requirements. (Ord. p. 7-8, Record 20-21). These Site Plan Requirements were raised by the Petitioners and were presented as evidence to the trial court, both in testimony (Record 388 pp. 54-55) and in

letters. (Addendum, Exhibits D & F). Compliance with these Site Plan Requirements, however, was never addressed by the Town, at the hearing, or by the court in its Findings.

10. The Ordinance also limits the conditional uses allowable under each separate district. These allowable uses are specifically listed. For example, the conditional uses for the Greenbelt/Multiple Use District are listed as: (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). The conditional uses allowed for Medium Density Residential are also specifically listed. (Ord. p. 24, Record 37). These commercial uses are specifically listed as conditional uses under each districts, although they are also listed as commercial, under Commercial District No. 9. (Ord. p. 27, Record 40).

11. The Petition asserts that granting the conditional use permits for a commercial contract construction business was improper, since under the Ordinance “contract construction” is only allowed under Commercial District No. 9, and is not listed as one of the conditional uses allowed in the other districts. (Petition ¶ 26(2), Record at 10).

12. The Petition further asserts that the term “commercial” listed as a conditional use under the other districts, 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).

The Planning Commission earlier realized this problem and recommended that the term “commercial” be deleted from the conditional use provisions of these other districts. (Record 388, pp. 64, 95, 120-122; Trial Ex. “12”, Addendum G).

13. The Petition further asserts that the Commercial Design Criteria of Commercial District No. 9, was never complied with in granting the “contract construction” business, which itself, is listed in Commercial District No. 9. (Petition ¶s 12 & 24, Record 5 & 10). The Commercial Design Criteria was also never addressed by the Town at the hearing, or by the court in its Findings.

14. The conditional use permits were approved, without substantial evidence; and in direct violation of the terms and conditions of the zoning Ordinance. (Petition ¶ 24, Record 10). There is no evidence on the record or any finding by the trial court, regarding the Town’s compliance with these terms and conditions, which are set forth in the Ordinance.

15. The trial court in one sentence, found that, “the uses for which the Conditional Use Permits were granted are compatible with other uses authorized and existing in the same districts.” (Record 322). There is no evidence to support this finding. The Town again, merely cites to the formal Findings of Fact and no supporting evidence. BEC refers to the transcript, (pp. 64-65, 140) claiming that Appellants operate a business from their property; however, pages 64-65 of the transcript doesn’t say anything about the Appellants operating a business on their property, and the testimony on pages 140-141 of the transcript, merely indicates that Hatch has a business office and Mitchell sells some stone carvings.

There is also mention of some farm equipment in the area, but nothing close to the operation of a construction business; and nothing to support the trial courts finding that there are compatible businesses in the same district.¹

16. The Petition seeks judicial review of the Town's actions in adopting the Ordinance and in granting the conditional use permits; and further seeks injunctive relief to enjoin any further building or construction on the properties, pending a final determination of the proceeding. (Petition p. 11, Record 11).

17. The Petitioners not only sought to enjoin further construction of any buildings on the properties, but also the continued operation of a contract construction business next to their property. (Record 72-82) The Petitioners put on evidence of irreparable harm and how their property was being forever changed, as a result of the continuing operation of a construction business next door. (Record 388, pp. 67-68; 137-140). In regards to the operation of the business, the trial court, during the hearing, found that the Petitioners' had a legitimate complaint. "I can sure see where things like that would start to get under your skin. And if that's what's goin' on here, you can see where Ms. Mitchell has something to complain about. If the diesel engine runs and runs and runs and runs and the fumes are noxious and she doesn't like 'em, then that could be a problem." (Trans. p. 173-174, Record 388).

¹The court does not even know the boundary of this district, because there is no map.

18. The trial court then later found that Petitioners claims were without merit; and that they acted in bad faith without an honest belief in their claims, but solely with the intent to hinder, delay and/or take unconscionable advantage of BEC and the Town of Boulder. (Record 362). The court made this finding without ruling on the issues raised by the Petitioners; and by failing to state exactly how the Petition was in any way a hinderence to BEC or the Town; or how the Petition allowed the Petitioners to take any unconscionable advantage over BEC or the Town.

19. A Notice of Hearing was sent out for the Preliminary Injunction hearing; and no objection, or request for continuance was made by either Respondent. In fact, before the hearing commenced, counsel for both parties indicated that they were ready to proceed. (Record 388, pp. 6-7).

20. The Memorandum in Opposition filed by BEC, was not filed until the day before the hearing on August 30, 1999. (Record 174). The Town's Memorandum in Opposition to the Motion was not filed until the morning of the hearing. (Record 388, p. 7).

SUMMARY OF ARGUMENT

The zoning Ordinance as adopted, is arbitrary, capricious and illegal, because there is no official map, and if there was, there was no official map adopted with the Ordinance. Call v. City of West Jordan, 727 P.2d 180 (Utah 1986). There is no presumption of validity in this regard. Springville Citizens v. City of Springville, 972 P.2d 332 (Utah 1999). The term "commercial" used in the Ordinance, without any meaning, definition or

parameters makes the Ordinance too vague, and subject to arbitrary and capricious enforcement. Thurston v. Cache County, 626 P.2d 440 (Utah 1981).

The conditional use permits were granted without any substantial evidence and in disregard of the evidence against the issuance of the permits presented by the Petitioners, making the decision arbitrary and capricious. Ralph L. Wadsworth Constr. Inc. v. West Jordan City, 999 P.2d 1240 (Ut.App. 2000). The Town also failed to comply with the terms and conditions set forth in the Town's own Ordinance, i.e., the Site Development Plans required for conditional uses, and the Commercial Design Criteria required under Commercial District No. 9 for contract construction in issuing the permits, making the action illegal. Springville Citizens, *supra*.

The granting of the conditional use permits is an administrative/adjudicative act, which requires the support of substantial evidence from the record. There is no evidence in the record to support the granting of the conditional use permits in this case. This is admitted by the Town and by BEC. (Town's Brief pp. 13-14; BEC Brief p. 24). The Town and BEC do not rely on any evidence in the record to support the permits, but instead they rely solely on the presumption of validity. (Town's Brief pp 13-14; BEC Brief p. 16)

However, the presumption of validity is not so absolute. The arbitrary, capricious and illegal standard in reviewing land use decisions is not a one-size-fits-all standard. Harmon City v. Draper City, 388 U.A.R 24, 26 (Ut.App. 2000). There is an important distinction between administrative and legislative functions for the purpose of

judicial review. Id. at 26. The trial court, in this case, did not make this distinction and did not apply the proper standard of review for each function.

Granting conditional use permits is an administrative function. Ralph L. Wadsworth Const., Inc. v. West Jordan City, 999 P.2d 1240 (Ut.App. 2000). Therefore, the city's land use decision, when performing this function, is arbitrary and capricious if it is not supported by substantial evidence. Id.; Springville Citizens v. City of Springville, 972 P.2d 332 (Utah 1999). In evaluating the city's decision under this standard, the evidence in the record is reviewed to ensure that the city proceeded within the limits of fairness and in good faith. The reviewing court is also to determine whether, in light of the evidence before the city, a reasonable mind could reach the same conclusion. Id.

The trial court in this case did not make such a determination, but simply relied on a presumption of validity, in refusing to review the evidence. The court stated that, "it was a political decision, not one to be reviewed by me." (Trans. p 204, Record 388).

Since the Town is acting in an administrative/adjudicative capacity, its action has to be supported by substantial evidence on the record. The burden to show such evidence thus rests with the municipality. Ralph L. Wadsworth Constr. v. West Valley City, 999 P.2d 1240 (Ut.App. 2000). The Town's citation to Harmon City v. Draper City, 997 P.2d 321, (Ut.App. 2000) to argue that it is somehow the Petitioners' burden to show substantial evidence to issue the permits is in error. In Harmon City v. Draper City, *supra*, this Court was applying the higher "reasonably debatable" standard for legislative functions, not the substantial evidence standard for administrative/adjudicative functions. In fact, in

Ralph L. Wadsworth, where the substantial evidence standard was applied, the burden to show substantial evidence to support the land use decision was properly placed on the city. This Court found against the city, because there was no substantial evidence on the record to support the city's decision on the conditional use permit, stating "the record does not reveal whether the Commission's staff actually investigated the concerns raised at the public hearing." Id. In this case, legitimate concerns were likewise raised, with no substantial evidence in the record to support the Town's decision in regards to these concerns or the issuance of the permits. Moreover, even if this burden was the Petitioners initially, they have claimed all along, that there is no substantial evidence to support the conditional use permits, thereby placing the burden to show otherwise on the Town. To hold otherwise, the Petitioners are, in effect, being penalized for establishing their claim, i.e., that there is no substantial evidence to support the issuance of the permits.

Finally, regardless of the presumptions, the trial court never determined whether or not the Town violated its own Ordinance in granting the conditional use permits. If the Town violated its own Ordinance in granting the conditional use permits, then its action is illegal, regardless of any presumption of validity, or whether or not, there may be substantial evidence. Call v. City of West Jordan, 727 P.2d 180 (Utah 1986); Springville Citizens v. City of Springville, 972 P.2d 332 (Utah 1999).

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

A. There was no Official Map adopted with 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). Moreover, since the presentation of the map is a statutory requirement, it should be strictly complied with, and there should be no presumption of validity in this regard. Springville Citizens v. City of Springville, 972 P.2d 332 (Utah 1999).

Utah statute requires 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).

In this case, there is no evidence that an official map was recommended with the zoning Ordinance. No map was presented into evidence covering all of the parts of the proposed zoning districts, or containing all of the districts designated under the zoning Ordinance. (Record 388, p.55-57, 144, 150-151). The only map presented was the existing use map, which the Town denied was an official map. Since there was no official map recommended with the Ordinance at a public hearing, as required under Utah statute; the passage of the zoning Ordinance was an illegal act and the Ordinance is 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).

The evidence, even when marshaled in favor of the Town on this issue, is that no official map was introduced into evidence. [The Town admits that there was no official map introduced. (Town's Brief p. 5, ¶ 4)] The Town merely claims, through the argument of counsel, that such a map exists. (Record 388, 19-20). However, there is no evidence in the record to support this. The Town's cite to the Record (318-19) in support of this claim, is merely to the formal Findings of Fact entered by the trial court; and not to any evidence actually presented to support this Finding.

Furthermore, the trial court's finding that, "such a map exists," (Record 319) does not sufficiently satisfy the statute, which requires that the "recommendation", including both the full text of the ordinance, as well as, maps for all parts of the area within the municipality, be presented at a public hearing. Not that it merely exists. §10-9-402 U.C.A. (1953, as amended). The trial court did not make any finding that this happened; and the evidence presented shows that this never occurred.

The testimony of Mitchell, cited by the Town (Trans. 142-144, Record 388) is that the only map presented was the existing use map and that the official map was not done yet. (Trans. 144, Record 388). The minutes of June 17, 1999, more than a year after the Ordinance was adopted, shows that Hatch was still asking for a copy of the official map, but was told, "it is not ready and there is not a timetable for producing it." This evidence even when marshaled in the Town's favor is not enough to support the trial court's Findings.

Moreover, if there wasn't any map and the Ordinance is declared illegal and void, then the Petitioners have prevailed on that part of their Petition; and although other parts of the Petition, may be viewed in a sense moot, to the extent there is no more Ordinance to review the conditional use permits; the Petitioners are still prevailing parties on part of their Petition, and they no longer have to worry about the illegal, arbitrary and capricious enforcement of an illegal zoning ordinance in their Town.

In addition, because there was no map, Hatch could not have testified concerning the location of the properties under the zoning Ordinance. Hatch had never seen an official zoning map for the Ordinance. (Record 388, p. 74). Based upon Hatch's testimony alone, without an official zoning map, the trial court could not find that the relevant properties were located in any specific districts of the zoning Ordinance.

Finally, as far as prejudice to the Petitioners, the evidence shows that they have continually requested a copy of the official map, and one has never been presented to them. They have been prejudiced by this. They have been unable to find out how their land is currently zoned. This prevents them from enjoying their property to its fullest potential. Furthermore, the conditional use permits were granted to allow a construction business next to their property without substantial evidence, and without any compliance to the terms and conditions set forth in the Ordinance, which were put in place to protect the landowners in the area from exactly this type of abuse.

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; thus, subject to arbitrary and capricious enforcement. Without an official zoning map, the designation of the zoning districts is improperly left solely to the interpretation of administrative officials. Thurston v. Cache County, 626 P.2d 440 (Utah 1981); Indian Trail Property Owners Ass'n v. City of Spokane, 886 P.2d 209 (Wash.App. 1994).

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 how their property is zoned and what specific conditions may apply to their property. This gives the Town 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” as a conditional use, without definition, makes the Ordinance vague and subject to arbitrary and capricious enforcement. The Ordinance is also vague due to the use of the term “commercial” as a conditional use, without further definition or clarification. Burien Bark Supply v. King County, 725 P.2d 994

(Wash. 1986); Atlanta Attractions, Inc. v. Massell, 330 F.Supp. 865 (N.D.Ga. 1971) Aff'd 463 F.2d 449 (5th Cir. 1972); State v. Jones, 865 P.2d 138 (Ariz.App. 1993); Anderson v. City of Issaquah, 851 P.2d 744 (Wash.App. 1993).

Use of the term “commercial” as a conditional use, when there is a list of specific commercial uses allowed under each district, also results in a contradiction in the Ordinance and fails to give meaning to more specific terms in the Ordinance. The Town Planning Commission tried to remedy this problem, recommending that the general term “commercial” be deleted as a conditional use in these other districts. The Town, however, refused to make this change. (Record 388, p.64-65). Simply because the Town Council refused to make this change, in order to have unreviewable power and discretion, does not make it right or the Petitioners’ request for review, under the statute, in bad faith.

The Town argues that the term “commercial” used in some of the districts, as a conditional use, automatically means all of the other commercial businesses listed under Commercial District No. 9. However, the Ordinance does not provide for such a generous assumption, and this interpretation dramatically changes the whole Ordinance, and the extent of any conditional use. This assumption gives the Town unlimited authority and discretion to put any commercial business, in any district it desires.

Moreover, the application of the commercial uses listed in General Commercial District No. 9, to the term “commercial,” used as a conditional use under the other zoning districts does not give meaning to all of the other terms in the Ordinance, or the more specific terms of the Ordinance. Under the conditional uses allowed in the other

districts there are specific commercial businesses already listed, 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 items as conditional uses, under each districts, if the intent is to apply all of the commercial uses listed under the General Commercial District, as conditional uses in these districts?

The more specific terms listed under each district should prevail over the more general term, “commercial”. **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). Since the businesses allowed for a conditional use under each district are specifically listed, these specific terms should control and the more general term “commercial” should be limited to those specific businesses listed, and not the general provision for commercial listed under a totally different district. Allowing such as expansive reading would render the clear and explicit limitations listed under each district meaningless. Swenson v. Erickson, *supra*, at 812.

Furthermore, 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. The conditional use of contract construction is not clearly provided for in the Ordinance under these other districts, so it should not be allowed. Brown v. Sandy City Bd. of Adjustment, 957 P.2d 207 (Ut.App. 1998).

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 Site Plan Requirements for Conditional Uses; or with the Commercial Design Criteria for Contract Construction.

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).

Even if the Ordinance is found to be valid, and Town's interpretation of the term "commercial" is accepted; the Ordinance still has numerous requirements that must be met, before a conditional use permit can be granted, such as Site Plan Requirements for conditional uses and Commercial Design Criteria for the business of contract construction. These requirements were never complied with before the conditional use permits were granted. The Town argues that a contract construction business is allowable because it is listed under Commercial District No. 9, however, the Commercial Design Criteria, also a part of Commercial District No. 9 was never complied with or even addressed by the Town.

There is no evidence that any of these conditions were met; and moreover, these requirements were never addressed by the trial court in its findings.

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.

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

A municipality's decision in granting a conditional use permit is not a legislative, but an administrative function. Therefore, a municipality's land use decision [in granting or denying a conditional use permit] is arbitrary and capricious if it is not supported by substantial evidence. Ralph L. Wadsworth Const., Inc. v. West Jordan City, 999 P.2d 1240 (Ut.App. 2000); 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. The burden to provide this record is on the municipality, which is relying on it, to make its decision. Id.

The granting of the conditional use permits, should have been treated as an administrative/adjudicative action by the trial court. Thus, the trial court should have determined from the record, whether or not there was sufficient evidence to support the

Town's decision. The trial court failed to do this. Ralph L. Wadsworth Const., Inc. v. West Jordan City, 999 P.2d 1240 (Ut.App. 2000); Harmon City v. Draper City, 997 P.2d 321 (Ut.App. 2000).

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 upon the factual evidence presented. Therefore, the land use decision was arbitrary and capricious due to the total lack of substantial evidence. Springville Citizens, *supra*.

V. THE TRIAL COURT ABUSED ITS DISCRETION BY CONSOLIDATING THE PRELIMINARY INJUNCTION HEARING WITH A TRIAL ON THE MERITS.

A. Petitioners was never afforded an opportunity to respond to the court's decision to consolidate. There was no written motion to consolidate filed with the court. The memorandum sent to Petitioner's counsel on August 27, 1999, which was a Friday, did not arrive before the hearing. Petitioner's counsel did not have an opportunity to respond to the court's decision to consolidate, as it was not made, until after the close of evidence and after the final argument of counsel. Petitioner's counsel did not get adequate notice that the court intended to consolidate the matter prior to the hearing. University of Texas v. Comenisch, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). 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 waiver should not apply, because adequate notice was never given that the preliminary injunction hearing would 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). The court never asked counsel for the Petitioners if there was any additional evidence that would be presented at trial. The trial court's order consolidating the matter and dismissing the Petition should be reversed.

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

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).

A. The claims were not brought without merit. "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). 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).

The Appellees claim the matter is without merit simply because courts are to presume that land use decisions are valid. However, as stated above this is not an absolute presumption. If action is arbitrary, capricious or illegal, it will not be upheld. Springville Citizens v. City of Springville, 972 P.2d 332 (Utah 1999). Furthermore, this presumption differs when reviewing an administrative action. The review of an administrative/adjudicative action focuses on whether it is supported by substantial evidence.

Ralph L. Wadsworth Const. v. West Valley City, 999 P.2d 1240 (Ut.App. 2000); Harmon City Inc., v. Draper City, 997 P.2d 321 (Ut.App. 2000).

In the passage of the Ordinance, justiciable questions were raised by the Petitioners. Evidence was given that there was no official zoning map presented with the Ordinance at a public hearing, or formally adopted by the Town. Even the trial court concedes that there is a valid question as to whether or not such a map exists. Furthermore, the claim that the language in the Ordinance is too vague, resulting in arbitrary enforcement, is not without merit. Even the Planning Commission thought the Ordinance was too vague as written, and recommended that this be changed.

There were justiciable questions raised regarding the granting of the conditional use permits and the lack of substantial evidence. Furthermore, issues were properly raised that the Town failed to comply with the terms of the Ordinance. 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.

B. The claims were not brought in bad faith. The court did not find facts sufficient to support any finding of bad faith. The court simply states that the “Petitioners presented a weak factual basis and legal position.” (Record 360). This is insufficient for a finding of bad faith.

There was no factual evidence presented to the court of any unconscionable advantage that was gained by the Petitioners in filing the Petition. Moreover, there was no evidence presented to show how the action hindered or delayed the Respondents in any way. Utah statute allows for injunctive relief, during the appeal of land use decision. Such relief should not be deemed as an act of bad faith. To do so would create a chilling effect contrary to the intent of the statute.

As far as the timing of the hearing, both Respondents were served 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 Respondents stated that they were prepared to proceed. The court should have allowed additional time, if necessary, for the parties to prepare for the hearing, rather than allow the hearing to proceed and then afterwards use this as a basis for finding bad faith.

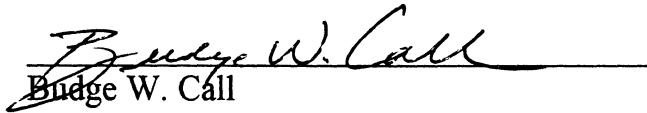
CONCLUSION

The zoning Ordinance was not passed in accordance to Utah’s enabling statutes with a corresponding zoning map. Furthermore, the Ordinance is void and ambiguous without a map and as written, making it subject to arbitrary and capricious enforcement. It should be declared void and illegal.

The Town failed to comply with the terms and conditions of its own zoning Ordinance in granting the conditional use permits; making the action illegal. The terms of the Ordinance should be strictly construed against the Town. Moreover, the conditional use permits are not supported by any substantial evidence. The decision granting the conditional use permits should be overturned. The trial court improperly consolidated the matter with a trial on the merits without adequate notice to counsel. This decision should be reversed.

Finally, justifiable claims were made in this case, and there were no facts presented, or adequate findings made, to support the court's ruling that the claims in this matter were without merit and brought in bad faith. Therefore, the trial courts ruling on attorneys fees should also be reversed.

DATED this 4 day of October, 2000.

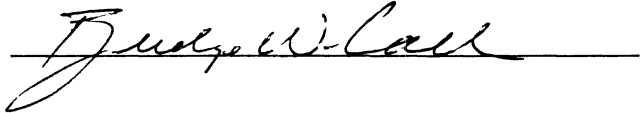

Budge W. Call
Attorney for Petitioners and Appellants

CERTIFICATE OF MAILING

I hereby certify on the 4 day of October, 2000, two (2) copies of the foregoing **REPLY BRIEF OF THE APPELLANTS** were mailed, postage prepaid, to the following:

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Marvin D. Bagley
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A handwritten signature in cursive script, appearing to read "Judge W. Call", is written over a horizontal line.

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