2011

Alonzo Cahoon v. Hinckley Town Appeal Authority, and Hinckley Town : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ALONZO CAHOON,

Petitioner and Appellant,

vs.

HINCKLEY TOWN APPEAL AUTHORITY, and HINCKLEY TOWN,

Respondents and Appellees.

Court of Appeals No. 20110043 CA
Trial Court No. 090700068

BRIEF OF APPELLANT

Appeal from Decision of the Fourth Judicial District Court, Millard County
The Honorable James Brady

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JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to UTAH CODE ANN. § 78A-4-103(2)(j).

ISSUES PRESENTED AND STANDARD OF REVIEW

1. Did the trial court err in using a Recital, which the Hinckley Town failed to properly post or codify, to interpret the ordinances of the town and to affirm the decision of the Hinckley Town Appeal Authority, thereby finding that Mr. Cahoon's fence is in violation of Hinckley Town's ordinances?

a. Standard of Review: An appellate court reviews a district court's determination of a land use decision made by a municipal appeal authority under an arbitrary, capricious and illegal standard. Mr. Cahoon has brought forth his arguments on the basis of illegality. "Because a determination of illegality is based on the land use authority's interpretation of zoning ordinances, we review such determinations for correctness, but we also afford some level of non-binding deference to the interpretation advanced by the land use authority." *Fox v. Park City*, 2008 UT 85, ¶ 11, 200 P.3d 182; *See also, Carrier v. Salt Lake County*, 2004 UT 98, ¶ 28, 104 P.3d 1208.

b. Preservation: This issue was raised and preserved before the Hinckley Town Appeal Authority at the hearing, and in Mr. Cahoon's opening Memorandum and his Reply Memorandum in support of his Motion for Partial Summary Judgment. (See, Appeal Authority Hearing Transcript (hereinafter "AA Hearing"), Record

(hereinafter "R.") p. 216-220; Memorandum and Reply Memorandum, R. 268-298, 326-338).[1]

2. Did the trial court err in failing to strictly construe Hinckley Town's zoning ordinances in favor of Mr. Cahoon?

a. Standard of Review: An appellate court reviews a district court's determination of a land use decision made by a municipal appeal authority under an arbitrary, capricious and illegal standard. Mr. Cahoon has brought forth his arguments on the basis of illegality. "Because a determination of illegality is based on the land use authority's interpretation of zoning ordinances, we review such determinations for correctness, but we also afford some level of non-binding deference to the interpretation advanced by the land use authority." *Fox*, 2008 UT 85, ¶ 11; *See also, Carrier*, 2004 UT 98, ¶ 28.

b. Preservation: This issue was raised and preserved in Mr. Cahoon's opening Memorandum and his Reply Memorandum in support of his Motion for Partial Summary Judgment. (See, AA Hearing, R. 216-220; Memorandum and Reply Memorandum, R. 268-298, 326-338).

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[1] The pagination of the Record in this matter is somewhat confused. Normally, the Record is stamped sequentially in reverse order. UTAH R. APP. P., Rule 11(b)(2)(A). However, it appears in this matter that the trial court stamped each document with a beginning number, and then stamped each page in each document in descending order. Hence, the pages in the record begin at page 13 proceeding through to page 1, then to page 14, then to page 17 through 15, and so on. At one point the pagination jumps from page 33 to page 259. In order to reduce confusion, this brief will refer to the title of the document being referenced, along with the Record page number.

3. Did the trial court err in failing to follow the vested rights doctrine and grant Mr. Cahoon's fence building permit when such permit complied with all of Hinckley Town's zoning ordinances at the time of his application?

a. Standard of Review: An appellate court reviews a district court's determination of a land use decision made by a municipal appeal authority under an arbitrary, capricious and illegal standard. Mr. Cahoon has brought forth his arguments on the basis of illegality. "Because a determination of illegality is based on the land use authority's interpretation of zoning ordinances, we review such determinations for correctness, but we also afford some level of non-binding deference to the interpretation advanced by the land use authority." *Fox*, 2008 UT 85, ¶ 11; *See also, Carrier*, 2004 UT 98, ¶ 28.

b. Preservation: This issue was preserved at the Hinckley Town Appeal Authority hearing and in the trial court at oral arguments for Mr. Cahoon's Motion for Partial Summary Judgment. (See Appeal Authority Hearing Documentation, R. 98-106; Trial Court Oral Arguments, R. 381, Transcript p. 30, lines 13-20.)

STATUTES AND ORDINANCES WHOSE INTERPRETATION IS OF CENTRAL IMPORTANCE TO THE APPEAL

UTAH CODE ANN. §§ 10-3-711(1), -713, -715.

Hinckley Town Code 10-4-8(A) and 10-4-13(G).

STATEMENT OF THE CASE

In 2006, Appellant Alonzo Cahoon built a home on a lot he owned in Hinckley Town, Millard County, Utah. (Building Permit, R. 45-6.) In early 2008 Mr. Cahoon contacted Hinckley Town in regards to the construction of a fence around his home. (Town Council Minutes, R. 47-56) Mr. Cahoon had various discussions and meetings with the Hinckley Town Council and its Mayor in which Mr. Cahoon was given mixed messages regarding whether he could move forward in building his fence. (Town Council Minutes, R. 47-56; Town Council Transcript, R. 57-86; AA Hearing, R. 153-54, 234.) Ultimately, Mr. Cahoon built the fence in compliance with Hinckley Town's published zoning ordinances. Specifically, Hinckley Town ordinances provide that any solid fence built within the 30 foot front yard setback requirement cannot exceed 36 inches. (Addendum: Hinckley Town Code 10-4-13G; R. 138.) Due to the building permit granted to Mr. Cahoon for the construction of his home, it was unclear which portion of Mr. Cahoon's lot would be considered the front yard. (R. 45-6.) Although, Mr. Cahoon built portions of his molded concrete fence to exceed 36 inches in height he ensured that the fence was set back more than 30 feet from his lot or parcel line. (AA Hearing, R. 154, 162.)

After Mr. Cahoon constructed his fence, Hinckley Town asserted that the fence was in violation of Town ordinances and attempted to charge Mr. Cahoon criminally. (AA Hearing, R. 232.) However, Hinckely Town had never issued a written denial of his fence permit. Therefore, Hinckley Town was forced to drop the criminal charges and

issued a written denial, which Mr. Cahoon appealed pursuant to UTAH CODE ANN. § 10-9a-704. On March 4, 2009 the Hinckley Town Appeal Authority convened a hearing to address Mr. Cahoon's appeal. (AA Hearing, R. 142.)

As is common in many rural communities, the street which fronts Mr. Cahoon's home is not dedicated to the city, but rather Mr. Cahoon's title line extends to the middle of the road. (AA Hearing, R. 154, 162, 189-192.) The Town therefore only has a right-of-way along the road fronting Mr. Cahoon's property and his lot or title line extends half way through the road. Id. At the hearing Mr. Cahoon presented undisputed evidence that the fence is set back 35 feet 8 inches from his property line, well within the 30 foot set back requirement. *Id.* Based on the undisputed evidence of the distance between the fence and the title line, Mr. Cahoon argued that, regardless of which part of his lot is his side yard or front yard, the fence complies with Hinckley Town's zoning requirements because it is set back more than 30 feet from his lot or parcel line. *Id.*

In response to Mr. Cahoon's argument, Hinckley Town produced at the hearing a previously unknown and undisclosed Ordinance Amendment and Recital, dated June 2, 2005 (hereinafter "Recital"), which states that in the areas of Hinckley Town where the roads are not Town property and where lot lines extend to the center of the road with public rights of way, the set back is measured from the edge of the road. (Recital, R. 40; AA Hearing, R. 185-188.) Mr. Cahoon objected to this Recital as not having been properly posted, certified and incorporated in the Hinckley Town Code in compliance with Utah statutes and as not having been provided to him when he requested copies of all zoning ordinances. (AA Hearing, R. 216-219.) Previously, Mr. Cahoon had

requested copies of all applicable zoning ordinances and regulation, including the entire municipal code of Hinckley Town. (AA Hearing, R. 218; Memorandum, R. 272.) Mr. Cahoon was given copies of what was represented to be the complete Town Code, which did not include this Recital. *Id.*

Mr. Cahoon also made arguments and presented evidence regarding his building permit yard designations and the orientation of his home toward an un-built but platted road, his conversation with council members and the mayor indicating he could build the fence, and the fact that Hinckley Town had permitted other fences to be built without complying with the Recital. (AA Hearing, R. 151-170; Memorandum, R. 272-287.)

Sometime after the March 4, 2009 hearing the Hinckley Town Appeal Authority issued a decision directly relying on the Recital and denying Mr. Cahoon's appeal. (Appeal Authority Decision, R. 38-40.)

In response, Mr. Cahoon filed a Petition for Review and Complaint appealing the decision of the Hinckley Town Appeal Authority. (Petition and Complaint, R. 1-13.) During briefing and oral arguments Mr. Cahoon presented authority that the Recital was not the law and could not properly form the basis for the Appeal Authority's decision, because it had not been properly posted, certified or codified, and argued that the vested rights doctrine and the rules for ordinance interpretation required that the Appeal Authority's decision be overturned. (Memorandum, R. 272-283; Reply Memorandum, R. 331-36; Oral Arguments Transcript, R. 381.) On March 8, 2010, the trial court issued a Ruling upholding the decision of the Hinckley Town Appeal Authority and finding that the Recital, although not the law, could be used to enforce Hinckley Town's ordinances

against Mr. Cahoon. (Ruling, R. 342-352.) On December 8, 2010 the trial court issued its Findings of Fact, Conclusions of Law, and Order Denying Petitioner's Motion for Partial Summary Judgment and Affirming the Decision of the Hinckley Town Appeal Authority. (Findings, Conclusions and Order, R. 363-371.) Mr. Cahoon filed a Notice of Appeal on January 3, 2011. (Notice of Appeal, R. 372-373.)

SUMMARY OF ARGUMENTS

The primary issue in this case is whether or not Mr. Cahoon built a fence which complies with Hinckley Town's zoning ordinances. Mr. Cahoon's fence facially complies with the requirements of Hinckley Town's published ordinances, because his fence is set back more than 35 feet from his lot line, but Hinckley Town has sought to enforce against Mr. Cahoon a Recital which would alter the measuring line for Mr. Cahoon's property. This Recital has never been posted, certified or incorporated into Hinckley Town's code and, therefore, has not taken the effect of law and cannot be enforced against Mr. Cahoon. Moreover, according to long standing rules of statutory construction for zoning ordinances, Utah law requires that zoning ordinances be strictly construed in favor of the private property owner's proposed use. Thus even if Hinckley Town's ordinances are ambiguous in regards to the line for measuring set back requirements, such ambiguity must be resolved in favor of Mr. Cahoon's proposed use. It was improper of the trial court to use the Recital as a measuring stick for reasonable land use restrictions, thereby enforcing the Recital against Mr. Cahoon in spite of the fact that it is not enforceable law. This Court should reverse the decision of the Hinckley Town Appeal Authority and reverse the decision of the trial court. Mr. Cahoon's fence

complies with Hinckley Town's published ordinances and he is entitled to a grant of his fence permit.

ARGUMENT

I. UTAH LAW REQUIRES THAT ZONING ORDINANCES BE CONSTRUED IN FAVOR OF THE PRIVATE PROPERTY OWNER, AND MR. CAHOON'S FENCE FACIALLY COMPLIES WITH HINCKLEY TOWN'S PUBLISHED SET BACK AND FENCING ORDINANCES.

It is black letter law in Utah that zoning ordinances must be strictly construed in favor of the private property owner. "Since zoning ordinances are in derogation of a property owners use of land, we are also cognizant that any ordinance prohibiting a proposed use should be strictly construed in favor of allowing the use." *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 31, 104 P.3d 1208; *see also, Rogers v. West Valley City*, 2006 UT App 302, ¶ 15, 142 P.3d 554; *Brown v. Sandy City Bd. of Adjustment*, 957 P.2d 207, 210 (Utah App. 1998); *Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602, 606 (Utah App. 1995).

The policy reason for this rule is that, under the common law, private property owners have the right to unrestricted use of their property. In light of these fundamental rights, zoning ordinances must be narrowly tailored to a legitimate health, safety or welfare concern and must be strictly construed in favor of the common law property rights they restrict. "Because zoning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed, and provisions permitting property uses should

be liberally construed in favor of the property owner." *Rogers*, 2006 UT App 302, ¶ 15; *see also, Brown*, 957 P.2d at 210; *Patterson*, 893 P.2d at 606.

In *Brown v. Sandy City Bd. of Adjustment*, this Court determined that the purposes and broad goals of a particular ordinance were insufficient to prohibit a particular use that was not expressly prohibited, even when such a use was inconsistent with the codified purposes and broad goals of the ordinance. "[W]e will not find a violation of law simply because the permitted use may appear inconsistent with the general intent statement when the use is in compliance with the substantive provisions of the ordinance." *Brown*, 957 P.2d at 212. Thus, when "the use of the propert[y] has met the legal requirements of [the ordinance]" the proposed use must be permitted. *Id.*

Furthermore, it is noteworthy that Mr. Cahoon is entitled to rely upon Hinckely Town's published ordinances at the time that he first made his application for a fence permit. This principle, called the vested rights doctrine, was first articulated by the Utah Supreme Court in *Western Land Equities v. City of Logan*, 617 P.2d 388 (Utah 1980). The vested rights doctrine has now been codified by the Utah Legislature: "[A]n applicant is entitled to approval of a land use application if the application conforms to the requirements of the municipality's land use maps, zoning map, and applicable land use ordinance in effect when a complete application is submitted and all application fees have been paid." UTAH CODE ANN. § 10-9a-509(1)(a). Based on this doctrine, Mr. Cahoon was entitled to a grant of his fence building permit at the time he made application for it, if his application complied with the ordinance "in effect" at the time of his application.

In the present case, Mr. Cahoon's fence complies with Hinckley Town's published ordinances. The Hinckley Town code requires that a solid fence which is placed within the front yard set back of the lot cannot exceed a height of 36 inches. (Addendum: Hinckley Town Code 10-4-13(G); R. 138.) Although the ordinance repeatedly mentions the thirty foot front yard set back, the ordinance only articulates once the manner in which the line for measuring the front yard set back is determined. "Front yard. Each lot or parcel in the R Zone shall have a front yard of not less than thirty (30) feet." (Addendum: Hinckley Town Code 10-4-8(A); R. 135.) The ordinance directly references the "lot" as the reference point for determining set back measurements. 'Lot' is defined as, "A tract of land, esp. one having specific boundaries." BLACK'S LAW DICTIONARY, 966 (8th ed. 2004). By referencing the lot, and thereby the boundaries of a particular portion of property, the ordinance implies that the set back is measured on the basis of the lot or title line. Mr. Cahoon's lot, as well as those of his neighbors, goes to the center of the road fronting their property. (AA Hearing, R. 154, 162, 189-192.) Thus, per Hinckley Town's own ordinances, Mr. Cahoon is required to build his fence (which is solid and does exceed 36 inches in height) at least 30 feet back from the edge of his property, from his lot line. (Addendum: Hinckley Town Code 10-4-8(A) and 10-4-13(G); R. 138, 135.) It is undisputed by the parties that Mr. Cahoon's fence is set back 35 feet, 8 inches from the edge of his property. (AA Hearing, R. 154, 162.) Because the fence is set back more than thirty feet from his lot or title line, his fence complies with Hinckley Town's zoning ordinances.

Inasmuch as there is any ambiguity in the Hinckley Town Ordinances in regards to whether the front yard set back is measured from the lot line, Mr. Cahoon is entitled to have that ambiguity resolved in his favor. Ambiguities in zoning ordinances must be "strictly construed" against the proposed prohibited use "and provisions permitting property uses should be liberally construed in favor of the property owner." *Rogers*, 2006 UT App 302, ¶ 15. Thus, if Hinckley Town's ordinances are unclear where the line for the front yard set back should be measured, such lack of clarity must fall in favor of Mr. Cahoon. Hinckley Town Code 10-4-8(A) seems to indicate that the front yard set back is measured on the basis of the lot line. Mr. Cahoon is entitled to have the ordinance construed in a manner favorable to his proposed use. *Rogers*, 2006 UT App 302, ¶ 15. Therefore, Mr. Cahoon's fence complies with the facial requirements of Hinckley Town's ordinances, and Hinckley Town is not permitted to allege a zoning violation based on the premise that his fence is not within the front yard set back.

Mr. Cahoon relied on Hinckley Town's published ordinances and came to the March 4, 2009 hearing before the Hinckley Town Appeal Authority prepared to argue that his fence complies with the town ordinances and that there had been no violation. (AA Hearing, R. 154, 162, 218.) However, to Mr. Cahoon's surprise, officials from Hinckley Town produced a Recital, which purported to change the set back measuring line applicable to his property. (Recital, R. 40; AA Hearing, R. 185-188.) This Recital had never been encoded or made public, and Mr. Cahoon had never been provided a copy of it, or informed about it. (AA Hearing, R. 185, 193, 216-219, 253.) Based on this

Recital, the Hinckley Town Appeal Authority determined that Mr. Cahoon's fence was in violation of Hinckley Town's zoning ordinances. (Appeal Authority Decision, R. 38-40.)

This decision violated not only of Mr. Cahoon's right to have the zoning ordinances construed in his favor, but the decision also violated Mr. Cahoon's right as a citizen to notice of the laws and ordinances that apply to him.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE RECITAL INTRODUCED BY HINCKLEY TOWN IS NOT LAW, BUT ERRONEOUSLY ENFORCED THE RECITAL AGAINST MR. CAHOON ANYWAY.

The constitutional protection of due process of law requires, among many other things, that citizens have adequate notice of the laws that govern them. In a municipal setting, it is well established that due process requires that municipal bodies maintain a compilation of the laws in effect that the public has access to. *Salina City v. Lewis*, 172 P. 286, 289 (Utah 1918). This can take the form of a physical book or looseleaf, or ordinances can be made available online. Moreover, when changes to this body of law are made, due process requires that adequate notice be given that changes are contemplated, and that once changes are made, the public be notified so that objections can be made or referenda sought. *Low v. City of Monticello*, 2004 UT 90, ¶ 13, 103 P.3d 130. In contemplation of these due process requirements Utah has enacted several publication statutes which clearly outline the proper procedure for publication and notice necessary before any passed ordinance can take effect. See UTAH CODE ANN. § 10-3-711(1). Before an ordinance, which has been passed by appropriate legislative action, may take effect, either a short summary must be published in a local newspaper or it must

be posted in its entirety in three separate public areas in the municipality. *Id.* "[T]he statutory requirement that the ordinance must be posted is mandatory, and that an ordinance will not become effective until posted in accordance therewith." *Salina City*, 172 P. at 289; *see also, Low*, 2004 UT 90, ¶ 13; *Logan City v. Steadman*, 155 P. 445, 445 (Utah 1916); *Naples City v. Mecham*, 709 P.2d 359 (Utah 1985). The municipal recorder is then required to certify the passage and posting of the ordinance (UTAH CODE ANN. § 10-3-713) and then incorporate the new ordinance into the municipality's published code (UTAH CODE ANN. § 10-3-715). These are simple requirements that satisfy a fairly "low threshold" of notice and due process. *Low*, 2004 UT 90, ¶ 15.

In this particular case, Hinckley Town failed to satisfy these basic requirements for the Recital. Specifically, at the hearing before the Hinckley Town Appeal Authority, Mr. Cahoon argued that his fence was in compliance with Hinckley Town's existing ordinances and, therefore, that there was no basis for Hinckley Town to deny his fence permit application. (AA Hearing, R. 154, 162, 216-219.) In response, Hinckley Town produced, for the first time, a copy of the Recital. (AA Hearing, R. 185-188.) Hinckley Town's failure to produce the Recital until that time is significant because, if valid, the Recital would directly apply to Mr. Cahoon's fence. The Recital specifically provides that, in portions of Hinckley Town where the roads are not dedicated and the Town only has a right-of-way along the road, the set back is measured from the edge of the road and not from the lot line. (R. 40.) Mr. Cahoon's fence is set back 35 feet, 8 inches from his lot line, but only about 25 feet back from the edge of the road. (AA Hearing, R. 154, 162.)

Being a very small town (population of less than 1,000), Hinckley does not keep its ordinances online and they can only be accessed by the public through a visit to the Town Recorder's Office. Mr. Cahoon and his wife made two such visits for the specific purpose of obtaining all applicable ordinances. (R. 218, 272.) On the first visit, Mrs. Cahoon requested a complete copy of Hinckley Town's zoning and land use ordinances. At that time she was furnished with a copy of Title 10 of the Town Code. No copy of the Recital was provided to her. On the second visit, Mr. Cahoon requested a copy of the entirety of Hinckley Town's Code. An entire copy of the code was provided to Mr. Cahoon. Again, no copy of the Recital was ever produced or included.

Mr. Cahoon challenged the validity of the Recital on the basis that he had never been provided a copy when he asked for all of Hinckley Town's ordinances, and that it appeared that the Recital had not been posted, published, or codified, as there was no attached certification and it was clearly not part of the codified ordinances. In response, a member of the Town Council admitted that they had tried "to find out where it was encoded, and apparently we did not get that accomplished." (AA Hearing, R. 185.) At another point, this same council member stated that the Recital "was supposed to be incorporated in title form and it did not get added, physically added I mean." (AA Hearing, R. 193.) Finally, near the end of the hearing, another council member stated that the Recital "was to be put in to the newly accepted ordinance, it was missed, it wasn't put in. That was probably part of my responsibility to get that put in to the ordinance, it was not." (AA Hearing, R. 253.)

However, in its written decision, the Hinckley Town Appeal Authority directly relied upon the Recital as its primary reason for upholding the denial of Mr. Cahoon's fence permit application and goes so far as to attach the Recital as the sole exhibit to their written decision. (Appeal Authority Decision, R. 38-40.) "The AA used this amendment to determine that set back measurements are made from where the public right of way ends." *Id.* The Appeal Authority goes on to state: "It is our finding that Mr. Cahoon's fence does not comply with the Fencing Ordinance. It obstructs vision above the thirty six (36) inch limit within the set back." *Id.*

Because the Recital was never posted, certified, or incorporated into the code, Mr. Cahoon never obtained a copy of it, was never told about it, and was never otherwise made aware of it when he built his fence. Based on the admissions of Hinckley Town officials at the Appeal Authority hearing, the trial court properly found that "[t]he Recital was not properly posted, certified, or incorporated into the municipal code" (Ruling, R. 345) and that "a Recital that was not properly certified or codified can, therefore, not be enforceable as law." (Ruling, R. 348.) However, in spite of these findings, the trial court went on to enforce the Recital against Mr. Cahoon anyway. The trial court reached this result because it concluded that the Recital was a "reasonable" interpretation of the published ordinances, and that the standard of review in this matter was whether the Hinckley Town Appeal Authority's interpretation of its ordinances was "reasonable".

III. CORRECTNESS IS THE APPROPRIATE STANDARD OF REVIEW AND UTAH LAW BARS ENFORCEMENT OF THE RECITAL IN ANY FASHION.

The trial courts adoption of the standard of review as one of reasonableness, rather than correctness and legality, was error. The standard of review for a land use decision depends upon the basis of the dispute. If the dispute is legal in nature, then both the trial court and the appellate court review the determination for 'correctness'. If the dispute is factual and evidentiary in nature, then a land use decision is upheld as long as there is 'substantial evidence' in the record to support it.

This standard of review on a petition for review from the decision of a municipal land use appeal authority is clearly outlined in UTAH CODE ANN. § 10-9a-801(3)(c), "A final decision of a land use authority or an appeal authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal." Several cases have specifically interpreted the meaning of this statute:

> "Like the review of the district court, our review is limited to whether a land use authority's decision is arbitrary, capricious, or illegal. A land use authority's decision is arbitrary or capricious only if it is not supported by substantial evidence in the record. A land use authority's decision is illegal if it violates a law, statute, or ordinance in effect at the time the decision was made. Because a determination of illegality is based on the land use authority's interpretation of zoning ordinances, we review such determinations for correctness, but we also afford some level of non-binding deference to the interpretation advanced by the land use authority."

Fox v. Park City, 2008 UT 85, ¶ 11, 200 P.3d 182 (emphasis added); *See also, Carrier*, 2004 UT 98, ¶ 28. "If there is a record, the district court's review is limited to the record

provided by the land use authority or appeal authority, as the case may be." UTAH CODE ANN. § 10-9a-801(8)(a)(i).

The primary dispute between the parties is whether Mr. Cahoon's fence properly complies with the published ordinances of Hinckley Town. This constitutes a determination of illegality, which is reviewed for correctness, with a small level of non-binding deference, and is only dependent on the record inasmuch as it is necessary to establish the underlying undisputed facts. In addressing this question, the trial court determined that Mr. Cahoon's fence was in violation of Hinckley Town's ordinances—not because his fence violates the actual language of the ordinances—but because the Recital was an unpublished policy of enforcement which the trial court found reasonable. In reaching this conclusion, the trial court failed to observe the key tenant of zoning ordinance interpretation: that zoning ordinances must be construed in favor of the private property owner. *Carrier*, 2004 UT 98, ¶ 31; *see also, Rogers*, 2006 UT App 302, ¶ 15; *Brown*, 957 P.2d at 210; *Patterson*, 893 P.2d at 606.

As has been shown previously, Mr. Cahoon is entitled to have Hinckley Town's published ordinances liberally construed in his favor, and strictly construed against Hinckley Town. In holding that the provisions and restrictions of the Recital, although not enforceable law, were still "reasonable" and thereby enforcing the provisions against Mr. Cahoon, the trial court failed to follow this rule. This holding was legal error.

By relying on the Recital, the trial court, and the Hinckley Town Appeal Authority, made the implied finding that the published Hinckley Town ordinances were ambiguous in regards to where the measuring line is for the front yard set back. Both the

Hinckley Town Appeal Authority and the trial court then reached outside of the published ordinances to resolve this ambiguity and relied upon the Recital. (Ruling, R. 348-350.) In other words, the trial court found that the Recital was a good source for determining the intent and purpose of the set back ordinances, and that if the proposed prohibition fit within the general purpose of the ordinance, then it could be properly prohibited. Such a decision is in direct violation of Utah law. The case of *Brown v. Sandy City Bd. of Adjustment* is directly on point. In that case the city admitted that the use they were attempting to prohibit through enforcement was not literally prohibited under their ordinances. However, the city argued that the proposed use was clearly contrary to the broad statement of intent included in the zoning ordinance at issue. This Court determined that a statement of intent was not adequate enough to qualify as a prohibition. "[W]e will not find a violation of law simply because the permitted use may appear inconsistent with the general intent statement when the use is in compliance with the substantive provisions of the ordinance." *Brown*, 957 P.2d at 212.

The same principles apply to Mr. Cahoon's fence. The zoning ordinance indicates, or at least implies, that the fence set back is thirty feet from his lot line. Mr. Cahoon's fence can only be prohibited if the ordinance is clear on its face that Mr. Cahoon's fence somehow violates it. Statements of intent or general purpose are unavailing. A plain reading of the ordinance, construing all ambiguities in favor of Mr. Cahoon, leads to the conclusion that his fence is in compliance with Hinckley Town's ordinances. A Recital, which is not and cannot be enforceable law, cannot be found enforceable anyway through semantic machinations.

In addition, the vested rights doctrine grants Mr. Cahoon the right to rely on the "ordinance in effect" at the time of his fence permit application, and "entitle[s]" him to approval of his fence permit application per the facial requirements of the ordinance. UTAH CODE ANN. § 10-9a-509(1)(a). The Recital cannot be used as a means to deny his application, because, by the clear terms of UTAH CODE ANN. § 10-3-711 et seq., the Recital had not taken "effect" because it had not been published, certified or incorporated in the town code. Any reliance upon or use of the Recital is error. Mr. Cahoon is entitled to the ordinances in effect at the time of his application and any ambiguity in the ordinance must be resolved in his favor.

Because both the decision of the Hinckley Town Appeal Authority and the decision of the trial court are reviewed for correctness, and because they incorrectly determined that the Recital could be enforced against Mr. Cahoon, this Court should reverse the decision of the trial court and the Hinckley Town Appeal Authority and hold that Mr. Cahoon's fence complies with Hinckley Town's zoning ordinances.

CONCLUSION

For the aforementioned reasons, this Court should hold that Mr. Cahoon's fence complies with Hinckley Town's ordinances and thereby reverse the decision of the Hinckley Town Appeal Authority and the decision of the trial court.

DATED and SIGNED this 15th day of June, 2011.

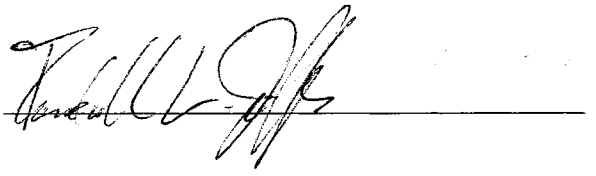
JEFFS & JEFFS, P.C.

Randall L. Jeffs

CERTIFICATE OF SERVICE

I hereby certify that the original Brief of Petitioner and Appellant Alonzo Cahoon, together with required copies, was hand delivered to the Clerk of the Court, in the Utah Court of Appeals and two copies mailed to the below named parties by placing the same in the United States mail, postage prepaid, this 15th day of June, 2011, addressed as follows:

Kaela Jackson
Waddingham & Associates, P.C.
362 West Main St
Delta, UT 84624



ADDENDUM

CHAPTER 4

RESIDENTIAL ZONE

R

10-4--1 PURPOSE

The Residential Zone (R) is established to provide areas for the encouragement and promotion of an environment for family life by providing for the establishment of one-family detached dwellings on individual lots. Multiple-family dwellings under certain restrictions. This zone is typically characterized by landscaped lots and open spaces with lawns, shrubs, small gardens and the keeping of farm animals, fowl and non-dangerous exotic animals. It is recognized that agriculture and the raising of poultry and livestock is desired by some property owners and is acceptable with appropriate safeguards for nearby residences.

10-4--2 PERMITTED USES

Those uses or categories of uses as listed herein, and no others, are permitted in the R zone.

A. Permitted principal uses. The following principal uses and structures, and no others, are permitted in the R zone.

Accessory buildings and uses clearly incidental and commonly associated with the operation of the permitted use such as private garages, carports, greenhouses, swimming pools etc., but not including residential occupancy.

Animals.

Barns.

Cemeteries.

Communication Systems.

Corrals.

Churches and similar places of worship.

Community Centers that are privately-owned and operated on a nonprofit basis.

Domestic Livestock

Double Wide Mobile Homes as limited herein.

Esseintial public utility and public service installations. Such use shall not include business offices, repair, sales or storage facilities.

Family foster homes which receive a maximum of four (4) children for regular full-time care.

Fences, hedges and walls.

Fire Station.

Gardens, fruit trees, and field crops.

Home occupations.

Identification signs, provided such signs shall not exceed one (1) per lot, and shall not exceed three (3) square feet in area, and describe the lot upon which they are located.

Libraries.

Manufactured Homes

Multiple-Family Dwelling, including condominiums and cooperatives.

Nursing or convalescent homes.

Parades.

Personal & Family Agricultural uses only for dairying, poultry and livestock raising; provided, that buildings used for housing fowl or animals, storing grain or feed shall not be located closer than fifty (50) feet from any inhabitated family dwelling.

Private Country Clubs, golf courses, swimming pools, park areas, private greenhouses and private nurseries.

Privately-owned community centers operated on a nonprofit basis.

Privately-operated day nurseries, pre-schools, and kindergartens; provided, that any play area is enclosed on all four (4) sides to a height of six (6) feet.

Public Parks, playgrounds, community buildings and similar public service facilities serving residential areas.

Public or Private schools, churches and church schools, provided such uses do not include residence facilities therein and are located at least forty (40) feet from all property lines.

PUD.

Religious Activities.

Rodeos.

Single-family dwellings. Single-family dwelling, may include the rooming and/or boarding of up to two (2) persons, provided no separate kitchen is involved. (Including double-wide mobile homes.)

Townhouses.

1. Animal Keeping: Limitations on the keeping and maintenance of animals and fowl permitted in the R zone.
   a. At any time the keeping of animals becomes a nuisance, as to be determined by the Town Council, the Town shall have the authority to force the violator to remedy the nuisance situation within thirty (30) days of official notification..
   b. Upon failure to remedy a nuisance situation, after proper notification, the Town shall have the authority to force the violator to cease such operations.
   c. Nothing herein shall be construed as authorizing the keeping of animals capable of inflicting harm or endangering the health and safety of any person or property.
2. Limitations on double wide mobile homes permitted in the R zone:
   a. Axles must be removed.
   b. Mobile homes must be completely skirted with materials approved by the Commission.
3. Limitations of the development of Multiple-family dwellings permitted in the R zone.
   a. Multiple-family dwellings to a maximum of two (2) units per structure may be placed on a single ½ acre lot.
   b. Maximum density created by development of duplex structure (s) shall be four (4) duplex units per acre.
   c. Permitted Accessory Uses. Accessory uses and structures are permitted in the R zone, provided they are incidental to, and do not substantially alter the character of the permitted principal use or structure. Such permitted accessory uses and structures include, but are not limited to, the following:
      1. Accessory buildings such as garages, carports, bath houses, greenhouses, gardening sheds, recreation rooms, and similar structures which are customarily used in conjunction with and incidental to a principal use or structure.
      2. Swimming pools

3. Storage of materials used for the construction of a building, including a temporary contractor's office and/or tool shed, provided that such uses are on the building site or immediately adjacent thereto, and provided further that such shall be for only the period of construction and thirty (30) days thereafter.
4. Storage of potentially useable materials for personal use may be kept; if storage of said material does not pose a safety or fire hazard. Also storage must be kept in an orderly and organized manner as far from public view as possible.
5. Buildings or structures required for the housing, nurture, confinement or storage of animals permitted in this zone, or equipment required for the care and keeping thereof.
6. Home occupations, subject to the conditions of Chapter 14 of This Title.

B. Conditional Uses. Uses and structures are permitted in the R zone only after a Conditional Use Permit has been obtained and subject to the terms and conditions thereof.

10-4--3 LOT AREA

The minimum area for any lot or parcel of land in the R zone shall be 1/4 acre (10,890 square feet).

10-4--4 LOT WIDTH

Each lot or parcel of land in the R zone, except corner lots, shall have a width of not less than seventy-five (75) feet. Each corner lot or parcel in the R zone shall be ten (10) feet wider than the minimum required for interior lots.

10-4--5 LOT FRONTAGE

Each lot or parcel of land in the R zone shall abut a public street for a minimum distance of seventy-five (75) feet, or thirty-five (35) feet along the circumference of a cul-de-sac improved to Town standards. Frontage on a street end which does not have a cul-de-sac improved to Town standards shall not be counted in meeting this requirement.

10-4--6 PRIOR CREATED LOTS

Lots or parcels of land which were created prior to the application of the zone, shall not be denied a building permit solely for reason of non-conformance with the parcel requirements of this chapter.

10-4--7 LOT AREA PER DWELLING

Not more than one single-family dwelling, or multiple-family structure(i.e.), a duplex, to a maximum of two (2) units may be placed on a lot area (see 10-4--3).

10-4--8 YARD REQUIREMENT

The following minimum yard requirements shall apply in the R Zone.

A. Front yard. Each lot or parcel in the R Zone shall have a front yard of not less than thirty (30) feet.

B. Side yard. Except as provided in sub-section "C", each lot or parcel of land in the R Zone shall have a side yard of not less than ten (10) feet, and the combined sum of the two side yards shall not be less than twenty (20) feet.

C. Side yard - Corner lots. On corner lots the side yard contigious to the street shall not be less than twenty-four (24) feet and shall not be used for vehicle parking except such portion as is devoted to driveway use for access to a garage or carport.

D. Side yard - Driveway. When used for access to a garage, carport, or parking area, a side yard shall be wide enough to provide an unobstructed ten (10) foot driveway.

E. Side yard - Accessory building. An accessory building may be located on the property line if, and only if, all of the following conditions are met:

1. The accessory building is located more than six (6) feet to the rear of any main building on the same lot or the lot adjacent to the property line on which said building is being placed.
2. It has no openings on the side which is contiguous to the property line of an adjacent lot.
3. It has one hour fire resistant construction in the wall adjacent to said property line.
4. It provides for all roof drainage to be retained on the subject lot or parcel.

An accessory building which does not meet the above conditions shall be at least five (5) feet from the side property line.

F. Rear Yard. Each lot or parcel shall have a rear yard of no less than thirty (30) feet.

G. Rear yard - accessory building. An accessory building may be located on the property line so long as:

1. It has no openings on the side which is contiguous to the rear property line

2. It has one hour fire resistant construction in the wall adjacent to said property line.
3. It provides for all roof drainage to be retained on the subject lot or parcel.
4. A double frontage or through lot shall have a front yard as required by the respective zone on each street on which it abuts.

An accessory building which does not meet the above conditions shall be at least five (5) feet from the rear property line.

10-4--9 PROJECTIONS INTO YARDS

A. The following structures may be erected on or projected into any required yard.

1. Fences and walls in conformance with Town codes or ordinances.
2. Landscape elements, including trees, shrubs, agriculture crops and other plants.
3. Necessary appurtenances for utility services.
4. Front steps.

B. The structures listed below may not project into a minimum front yard.

1. Porches
2. Fireplace structures and bays.
3. Stairways, balconies, decks, fire escapes, and awnings.

10-4--10 BUILDING HEIGHT

No lot or parcel of land in the R Zone shall have a building or structure used for dwelling or public assembly which exceeds a height of three (3) stories or thirty-five (35) feet, whichever is higher. Roofs above the square of the building, chimneys, flagpoles, church towers and similar structures not used for human occupancy are excluded in determining height.

10-4--11 PARKING, LOADING AND ACCESS

Each lot or parcel in the R Zone shall have on the same lot or parcel off street parking sufficient to comply with Chapter 13 of this title. Required parking spaces shall not be provided within a required front yard.

10-4--12 SITE PLAN APPROVAL

As required by the Uniform Building Code and the requirements of the Hinckley Town building permit.

10-4--13 OTHER REQUIREMENTS

A. Signs. Refer to Chapter 15 Sign Ordinance.

B. Landscaping. All open areas between the front lot line and the rear line of the main building, except driveways, parking areas, walkways, utility area, improved decks, patios, porches, etc., shall be maintained with suitable landscaping.

C. Junk & Trash Storage. No trash, junk, or unusable materials shall be stored in an open area. All such materials must be screened from public streets and adjacent properties, or must be stored within an enclosed building. Such materials must be stored in such a manner that it cannot be carried off the premises by natural forces, causes, or animals. Any such storage shall not present an objectionable odor or health hazard. Violators will be given twenty one (21) days to be in compliance. No Grandfather clause shall apply to this provision.

D. Wrecked Vehicles. Wrecked vehicles cannot be parked on public streets for more than seventy two (72) hours. They may not be kept on private property more than thirty (30) days unless screened from public streets and adjacent properties, or stored within an enclosed building. No more that six (6) vehicles shall be allowed at anytime. Proper rodent and weed control must be adhered to for public safety. No Grandfather clause shall apply to this provision.

E. In-operable/Non-salvageable Vehicles. Such vehicles cannot be parked on public streets. Only two (2) such vehicles may be stored within a minimum of one hundred (100) feet from the front property line. All other such vehicles must be screened from public streets and adjacent properties, or stored within an enclosed building. No more than six (6) vehicles shall be allowed at anytime. Proper rodent and weed control must be adhered to for public safety. Violators will be given thirty (30) days to be in compliance. No Grandfather clause will apply to this provision.

F. In-operable Farm Implements. In-operable farm implements may be kept as long as they are in a neat and orderly fashion. Proper rodent and weed control must be adhered to for public safety. They may be kept, if being used as a landscaping or decorative item in the front yard. Violators will be given thirty (30) days to be in compliance. No Grandfather clause will apply to this provision.

10-4-136.1

G. Walls and Fences.

1. A Front Yard Fence that does not obstruct the view (e.g. chain link fence) may be erected to a height of five (5) feet in any front yard abutting a street within the set back area. The fence shall in no way be closed in with adjacent plant material or strips of materials inserted into the fence so as to obstruct vision. Any portion of a composite fence above thirty six (36) inches shall not obstruct vision.
2. Side Fences not abutting a street shall not exceed six (6) feet in height. This side fence shall not extend into the thirty (30) feet front yard set back.
3. Side Fences in the front yard thirty (30) feet front set back shall not be over thirty six (36) inches in height. These fences shall be made of materials that shall not obstruct vision (for example, chain link, field fence, spaced picket, ect.)
4. Side and Rear Fences abutting a street shall not exceed six (6) feet in height. This side fence shall not extend into the thirty (30) foot front yard set back.