2011

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

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	BRIEF OF APPELLEES *Court of Appeals No. 20110043 CA* *Trial Court No. 090700068*

BRIEF OF APPELLEES

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

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JURISDICTION

This is an appeal from a final order from the Fourth Judicial District Court, Millard County, State of Utah. The Utah Court of Appeals has jurisdiction over the appeal pursuant to UTAH CODE ANN. § 78A-4-103(2)(j).

ISSUES PRESENTED AND STANDARD OF REVIEW

1. Is the decision of the Hinckley Town Appeal Authority illegal because it interpreted the zoning ordinance to require that the set back be measured from the edge of the public right-of-way instead of the lot or parcel line?

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. Appellant has brought forth his arguments on the basis of illegality. Because a determination of illegality is based on the appeal authority's interpretation of zoning ordinances, the Court should review the local agency's interpretation for correctness, but also afford some level of non-binding deference to the interpretation advanced by the local agency. *Carrier v. Salt Lake County*, 2004 UT 98 ¶ 28, 104 P.3d 1208; *see also M&S Cox Investments, LLC., v. Provo City Corp.*, 2007 UT App 315, 169 P.3d 789 (Utah, 2007).

2. Based upon the plain language of the ordinance and the evidence presented to the Hinckley Town Appeal Authority regarding the purpose and the intent of the set back ordinance, was the Appeal Authority's interpretation correct?

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. Appellant has brought forth his arguments on the basis of illegality. Because a determination of illegality is based on the appeal authority's interpretation of zoning ordinances, the Court should review the local agency's interpretation for correctness, but also afford some level of non-binding deference to the interpretation advanced by the local agency. *Carrier v. Salt Lake County*, 2004 UT 98 ¶ 28, 104 P.3d 1208; *see also M&S Cox Investments, LLC., v. Provo City Corp.*, 2007 UT App 315, 169 P.3d 789 (Utah, 2007).

3. Does the vested rights doctrine apply where Appellant's proposed fence did not comply with the set back ordinances in existence at the time he requested a building permit and where he subsequently built his fence without having received a building permit?

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. Appellant has brought forth his arguments on the basis of illegality. Because a determination of illegality is based on the appeal authority's interpretation of zoning ordinances, the Court should review the local agency's interpretation for correctness, but also afford some level of non-binding deference to the interpretation advanced by the local agency. *Carrier v. Salt Lake County*, 2004 UT 98 ¶ 28, 104 P.3d 1208; *see also M&S Cox Investments, LLC., v. Provo City Corp.*, 2007 UT App 315, 169 P.3d 789 (Utah, 2007).

STATUTES AND ORDINANCES OF CENTRAL IMPORTANCE TO THE APPEAL

1. Pertinent statutes and ordinances are contained in Addendum 1 to this brief.

UTAH CODE ANN. § 10-9a-707(3)

Hinckley Town Code 10-4-8(A)

Hinckley Town Code 10-4-13(G)

STATEMENT OF THE CASE

Appellant constructed a fence on his property in violation of the Hinckley Town Code in that it encroached on the front yard set back requirement. Several months prior to building the fence, Appellant appeared before the Hinckley Town Planning and Zoning Commission (the Planning and Zoning Commission") to request a building permit. The Planning and Zoning Commission denied Appellant's verbal application for a building permit as the fence he proposed would violate the height and set back requirements of the zoning ordinances. Appellant then appeared before the Hinckley Town Council ("the Town Council") on two separate occasions to request a variance and the Town Council twice denied Appellant's requests for a variance. Appellant proceeded to build the fence without having received a building permit and Hinckley Town subsequently notified him that his fence was in violation of the zoning ordinance.

Appellant filed an appeal and requested a hearing before the Hinckley Town Appeal Authority ("the Appeal Authority"). After receiving evidence and argument from both parties, the Appeal Authority upheld the decision of the Planning and Zoning Commission. Appellant then filed a Petition for Judicial Review of the Appeal Authority's decision in the district court. At a scheduling hearing regarding Appellant's petition, the parties agreed to submit briefs on the issues before it. Appellant filed a Motion for Summary Judgment and Hinckley Town filed a Memorandum in Opposition to Appellant's Motion. Appellant

subsequently filed a reply memorandum. The court affirmed the Appeal Authority's decision and found that it was not arbitrary, capricious, or illegal.

Appellant filed a notice of appeal with the Supreme Court, which was subsequently transferred to this Court.

STATEMENT OF THE FACTS

In 2006, Appellant Alonzo Cahoon built a home on a lot he owns in Hinckley Town, Millard County, Utah. (Building Permit, R. 45-46[1].) Appellant's home faces west with Center Street running east and west to the south of Appellant's home. (County Plat Map, R. 43.) In June, 2007, the Town Council passed an ordinance requiring property owners to obtain a building permit prior to erecting a fence on their property. (AA Hearing, R. 197.) Appellant appeared before the Planning and Zoning Commission on February 20, 2008 to verbally request a building permit for a fence on his property. (AA Hearing, R. 221-222.) Appellant's application was denied because his proposal did not conform with the applicable height and set back ordinances. (AA Hearing, R. 196-197.)

On or about February 28, 2008, Appellant appeared before the Hinckley Town Council to verbally request a variance for the fence. (Town Council Meeting, R. 58.) Appellant indicated that the fence would be six feet in height (Town Council Meeting, R. 62) and acknowledged that he would be required to receive a variance in order to proceed with

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[1]As Appellant has noted, the pagination of the record was not stamped in sequential order. Hinckley Town has followed the formatting of the Appellant by providing the name of the document or title of each item cited to and the associated record page number.

construction of the fence as proposed. (Town Council Minutes, R. 47; Town Council Meeting, R. 58.) The Town Council denied the request. (Town Council Minutes, R. 47.) Members of the Town Council provided Appellant with information on how to appeal the Council's decision. *Id.* Appellant appeared before the Town Council a second time on or about May 8, 2008 to request that the Council reconsider his proposal. (Town Council Meeting, R. 71.) Appellant represented that he wished to work with the Council to ensure that his fence would be in compliance with the ordinances. (Town Council Meeting, R.73.) Because Appellant had not made any changes to his proposed fence, he was again denied a building permit. *Id.* Members of the Town Council made suggestions and recommendations to Appellant regarding changes that could be made to the fence to bring it into compliance with the zoning ordinances. *Id.* At no time did the Town Council make any assurances to Appellant that he would be able to proceed with construction of the fence as proposed, in fact he was warned not to begin any construction until a proposal which included the recommended changes was presented to the Town Council. (Town Council Meeting, R. 71-72.)

At the May 8, 2008 meeting, Appellant expressed a willingness to comply with the recommended changes to his fence and requested that his proposal be discussed at the next regularly scheduled Town Council meeting, which was held on or about May 22, 2008. *Id.* Appellant failed to appear at the May 22, 2008 meeting. (Town Council Meeting, R. 74) However, the Council addressed the issue of Appellant's fence as it was on the agenda and voted to deny the request for a building permit a third time. (Town Council Meeting, R. 74-

84.) In June 2008, Appellant erected his fence without first having received the required building permit and without making any changes to the original proposal. (AA Hearing, R. 173) Appellant's fence as constructed obstructs vision above the 36 inch limit within the 30 foot set back. (AA Hearing, R. 183.)

On or about June 13, 2008, the Hinckley Town Council sent Appellant notice via certified mail that his fence was built in violation of the Town's zoning ordinances. (Hinckley Town's Answer, R. 24.) Specifically, the notice stated that the fence violated the height and set back requirements of Section 10-4-13 of the Hinckley Town Code. (Hinckley Town's Answer, R. 25.) Appellant then requested a hearing before the Hinckley Town Appeal Authority to challenge the Town's decision that his fence was out of compliance. (AA Hearing, R. 142.)

At the hearing before the Appeal Authority on March 4, 2009, Appellant argued that the property adjacent to the south side of his home should be considered his side yard instead of his front yard based on the orientation of his home, and therefore, the 30 foot set back did not apply. However, based on the plain language of the ordinance both the Appeal Authority and trial court found that this interpretation was incorrect. (AA Decision, R. 38-39, Findings, Conclusions and Order 363-364.) Appellant also argued that the fence was in compliance with zoning ordinances as it was set back 35 feet from his property line, based on his own measurements. (AA Hearing, R. 154.) In response to Appellant's argument, Hinckley Town introduced evidence of a document entitled "Amendment No. 05-06-02. An Amendment to the Ordinance 10-14: Supplementary Regulations:, [sic] in the Hinckley Town Code of

Hinckley, Utah" ("the Amendment") adopted by the Town Council on June 2, 2005, which was intended to amend the set back ordinance to more clearly define set back requirements. (AA Hearing, R. 186-188.) The Amendment provides that all set backs shall be determined by measurement from where the public right of way ends. *Id.* The Hinckley Town Plat Map shows that in some parts of the Town, the lot or parcel boundary lies at the edge of the Town's right of way and in other areas, it lies in the middle of the roadway. (AA Hearing, R. 185.) The Amendment was addressed by the Town Council to clarify the Town's longstanding policy of measuring set backs from the edge of the right of way in situations where a property boundary extends to the middle of a public right of way. *Id.* Appellant objected to the Amendment on the basis that some time prior to the March 4, 2008 hearing, Appellant had requested copies of the Town Code and the Amendment was not included. (AA Hearing, R. 218.) Hinckley Town conceded that the Amendment was mistakenly not included in the codified ordinances (AA Hearing, R. 193: 6-7, 10-12) and offered evidence that the interpretation contained in the Amendment was consistent with the policy and intent of the ordinance. (AA Hearing 185-188, 205-215.) The Town argued that even absent an ordinance defining set back measurements, the set back should be measured from the edge of the public right-of-way so as to promote the health, safety, and welfare of the citizens, which is consistent with the purpose and intent of the ordinance. *Id.*

Appellant also made arguments that during conversations he had with the Hinckley Town Mayor and members of the Town Council he was led to believe that the building permit was going to be approved and that other fences in town were permitted to be built

without complying with the ordinances. (AA Hearing, R. 151-170.) However, Hinckley Town offered evidence and argument rebutting such assertions and the Appeal Authority ultimately determined that based on the evidence presented, Appellant's claims were without merit. (AA Decision, 322-323; AA Hearing, R. 176-205.)

After the Appeal Authority denied the appeal, Appellant filed a Petition for Review and Complaint of the Hinckley Town Appeal Authority's decision to the Fourth District Court. (Petition and Complaint, R. 1-13.) On March 8, 2010, the trial court issued its Ruling upholding the decision of the Appeal Authority and made findings that the plain language of the set back ordinance does not mandate that the measurement be made from the lot or parcel line and that the purpose and intent of the set back ordinance support the Appeal Authority's interpretation. (Findings, Conclusion, and Order, R. 368.) The court considered the June 2005 Amendment to the set back ordinance and reasoned that while the Amendment is not enforceable as law, it is meant to clarify the ordinance and protect the interest of maintaining safety and creating uniformity and that to measure the set back from the parcel line, as suggested by Appellant, would undermine both of these interests. *Id.* The trial court also found that the Appeal Authority's failure to provide the Amendment to Appellant was not negligent or culpable and that the decision of the Appeal Authority would have been reasonable without reference to the Amendment. (Findings, Conclusions and Order, R. 368-369). Ultimately, the trial court held that the Appeal Authority's decision was not arbitrary, capricious, or illegal. (Findings, Conclusions and Order, 370.) Appellant then filed a Notice of Appeal on January 3, 2011. (Notice of Appeal, R. 372-373).

SUMMARY OF ARGUMENTS

Appellant constructed a fence on his property in violation of the Hinckley Town Code ("the Code"). The fence violates the Code in that it does not meet the set back and height requirements of Code Sections 10-4-8(A) and 10-4-13(G) as it is a solid fence, exceeding the 36 inch height limit, constructed within the 30 foot set back. In his Brief of the Appellant ("Appellant's Brief"), Appellant argues that the fence complies with the ordinance because, if measured from the lot or parcel line, it is set back more that 35 feet from the lot line. Appellant argues that the plain language of the ordinance mandates a set back measurement from the lot or parcel line, even though in Appellant's case, the property line lies in the middle of a road way, or in the alternative, that the ordinance is ambiguous on its face and therefore should be strictly construed in favor of Appellant. However, the plain language of the ordinance requires a *front yard* of at least 30 feet. The common meaning of "front yard", especially in the context of a set back requirement, lends itself to an interpretation that the set back is measured from the edge of the roadway. Additionally, the purpose and intent of the ordinance, which is to promote safety and uniformity, support such a conclusion. An adoption of Appellant's interpretation of the ordinance would produce illogical results that would undermine the policy considerations of the ordinances. Thus even if the plain language of the ordinance does not include a definition for the terms "front yard" or "set back", a review of the purpose and intent of the ordinance clarifies its terms and the interpretation of the Appeal Authority is correct.

Finally, Appellant's argument that he is entitled to application of the "vested rights

doctrine" fails because, as illustrated above, the fence he proposed when he applied for a building permit, which was substantially similar to the one he ultimately constructed, did not comply with the zoning ordinances in effect at the time he applied for the permit. Additionally, Appellant did not comply with the procedural requirements of the ordinances because, ultimately, he built the fence without ever obtaining a building permit. The purpose of the vested rights doctrine is to prevent municipalities from changing zoning ordinances once time and expense have been incurred by a landowner in following the necessary procedural requirements. Appellant constructed his fence after being repeatedly told that the fence did not comply with the set back ordinance, which Appellant himself admitted on multiple occasions. The vested rights doctrine does not apply in this case. Appellant failed to follow the proper procedure prior to building his fence. He was well aware that his fence did not comply with set back requirements of the ordinance and proceeded to the build fence anyway, without a building permit.. Accordingly, the decision of the Hinckley Town Appeal Authority was neither arbitrary, capricious nor illegal and the decision of the trial court should be affirmed.

ARGUMENT

I. THE APPEAL AUTHORITY'S DECISION TO DENY APPELLANT'S BUILDING PERMIT IS CONSISTENT WITH A CORRECT READING OF THE PLAIN LANGUAGE OF THE ORDINANCE, IS CONGRUOUS WITH THE COMMONLY ACCEPTED MEANING OF FRONT YARD SET BACK, AND PROMOTES THE PURPOSE AND INTENT OF THE ORDINANCE.

The Appeal Authority's interpretation of the set back ordinance is correct because it is consistent with both the plain language and the purpose and intent of the ordinance . The

Municipal Land Use, Development, and Management Act ("MLUDMA") governs appeals from decisions of municipal land use authorities. UTAH CODE ANN. § 10-9a-703. MLUDMA provides that "[t]he appeal authority shall determine the correctness of a decision of the land use authority in its interpretation and application of a land use ordinance. UTAH CODE ANN. § 10-9a-707(3). Additionally, MLUDMA provides that any person adversely affected by a final decision of the appeal authority may file a petition for review in the district court and that the district court must "presume that a decision, ordinance, or regulation" made by the appeal authority is valid and "determine only whether or not the decision, ordinance or regulation is arbitrary, capricious or illegal." UTAH CODE ANN. § 10-9a-801(3)(a)(i-ii). "When a lower court reviews an order of an administrative agency and the appellate court exercises appellate review of the lower court's judgment, the appellate court acts as if it were reviewing the administrative agency decision directly and does not defer, or accord a presumption of correctness, to the lower court's decision." *Cowling v. Bd. of Oil, Gas & Mining*, 830 P.2d 220, 223 (Utah 1991); *see also, Carrier v. Salt Lake County,* 2004 UT 98, ¶ 17, 104 P.3d 1208. However, when reviewing a claim that a decision of the appeal authority is illegal, this Court "review[s] a local agency's interpretation of ordinances for correctness, but also afford[s] some level of non-binding deference to the interpretation advanced by the local agency." *M&S Cox Investments LLC. v. Provo City Corporation*, 2007 UT App 315 ¶ 29, *See also Carrier,* 2004 UT 98, ¶ 28, 104 P.3d 1208. Moreover, '"in close cases [the agency's] interpretation may be a determinative factor in choosing a particular interpretation over another." *Cox,* 2007 UT App 315 ¶ 29, *See also Carrier*, 2004 UT 98 ¶

39.

Appellant argues that the trial court erred by adopting an incorrect standard of review. (Appellant's Brief, P. 16.) While Appellee agrees that the appropriate standard of review regarding the issue of whether the Appeal Authority acted illegally is correctness, any error of the trial court regarding that issue is harmless as this Court's review of the matters on appeal is *de novo*, allowing no deference to the lower court's decision. Here, the Appeal Authority clearly used the appropriate standard of review when it found that "the Planning and Zoning *correctly* interpreted the ordinance." (AA Decision, R. 293), (emphasis added).

In the present case, the Appeal Authority determined that Appellant's fence is in violation of the Hinckley Town Code in that it obstructs vision, exceeds 36 inches in height and is constructed in violation of the front yard set back. (Addendum: Hinckley Town Code 10-4-13(G), AA Decision, R. 138.) The term "set back" is not specifically defined in the Code. However, under the heading "Front Yard", section 10-4-8(A) of the Code provides that "[e]ach 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), (emphasis added).) Appellant interprets that section to require that the set back be measured from the lot or parcel line. However, an adoption of Appellant's interpretation would result in a front yard which includes half of an oiled roadway in situations, such as Appellant's, where the property boundary extends into the Town's right of way. Such an interpretation is completely inconsistent with and contradictory to both the common sense meaning of "front yard" and the purpose and intent of the set back ordinance, which is to maintain safety and create

uniformity. Accordingly, the Appeal Authority's interpretation is consistent with the plain language of the ordinance.

To the extent that the set back ordinance is ambiguous with regard to where the set back should be measured, this Court may look to other modes of construction in reviewing whether the Appeal Authority's interpretation of the ordinance is correct. In *Carrier*, this Court stated that "[i]n interpreting the meaning of a[n] . . . ordinance, [the Court] begin[s] first by looking to the plain language of the ordinance." *Carrier,* 2004 UT 98, ¶ 30. "If the plain language of the ordinance is ambiguous, [the Court] may resort to other modes of construction." *Id.* at ¶ 31. In *Cox*, this Court determined that if the reviewing court needs to rely on other modes of construction, it "'must keep in mind that when interpreting an ordinance, it is axiomatic that this court's primary goal is to give effect to the [city's] intent in light of the purpose that the [ordinance] was meant to achieve.'" *Cox*, 2007 UT App 315 ¶ 30 (quoting *Biddle v. Washington Terrace City*, 1999 UT 110, ¶ 14, 993 P.2d 875); See also *Carrier* 2004 UT 98, ¶ 31. Hinckley Town's express policy consideration in 10-4-13(G) is unobstructed vision. (Addendum: Hinckley Town Code 10-4-13(G).) In other words, by requiring a sufficient front yard set back, passing motorists are able to view persons or vehicles exiting property abutting a road within Hinckley Town, which clearly promotes the health, safety and welfare of the community. Additionally, an overarching goal of zoning is to promote uniformity. Appellant's interpretation of where the setback should be measured from would result in varying setback requirements according to where the lot's boundary lies or according to the width of roads abutting property in Hinckley Town. Thus, Hinckley

Town's desire to promote safety and uniformity in zoning will be entirely undermined.

Moreover, in addition to the requirement that any interpretation be construed to give effect to the Town's intent in light of the purpose that the ordinance was meant to achieve, the common meaning of the term must be taken into consideration. *Cox,* 2007 UT App 315 ¶ 35. This Court stated in *Cox* that "ordinance terms should be interpreted and applied according to their commonly accepted meaning unless the ordinary meaning of the term results in an application that is either 'unreasonably confused, inoperable, or in blatant contradiction of the express purpose of the [ordinance].'" *Id. See also State v. Souza*, 846 P.2d 1313, 1317 (Utah Ct. App. 1993); (holding that "If there is doubt or uncertainty as to the meaning or application of the provisions of an [ordinance], it is appropriate to analyze the [ordinance] in its entirety, in light of its objective, and to harmonize its provisions in accordance with its intent and purpose." *Cox,* 2007 UT App 315 ¶ 35.); *Rogers v. West Valley City* 142 P.3d 554, 557, 2006 UT App 302 ¶ 20.

Appellant claims that based on the plain language of the ordinance, he believed he was in compliance with the set back requirement when he built the fence. However, his statements and admissions at the Town Council Meetings indicate that he agreed with the Town's interpretation of the ordinance with regard to the set back issue and his primary disagreement was with the Town Council's interpretation that the property abutting the south side of his home was his front yard instead of his side yard. Indeed, this was the main issue raised by Appellant at the Town Council Meetings and was one of four primary issues Appellant addressed before the Appeal Authority. (Town Council Meeting, R. 58-59, 61-68;

AA Hearing, R. 143-144, 153-154.) However, Appellant has waived the issue on appeal to this Court and the issue is only addressed by Hinckley Town to illustrate Appellant's understanding of the set back ordinance before he built the fence.

Appellant's home faces to the west and the fence at issue sits on property adjacent to the south side of his home, abutting Center Street in Hinckley Town. (County Plat Map, R. 46.) When Appellant originally approached the Hinckley Town Council, after having been denied a building permit for his fence by the Planning and Zoning Commission, he admitted that his fence would not comply with the fence ordinance if the town considered the property south of his home to be his frontage because it would not comply with the 30 foot set back requirement. (Town Council Transcript, R. 58.) He conceded that "[b]etween where I am proposing to put my fence on my property line there is twenty feet." *Id.* Appellant argued at length that the Council should grant him a variance because he did not understand when he built his home that the orientation of his home would dictate what type of fence he could build. (Town Council Transcript, R. 58, 64-65.) Instead of challenging the Town Council's interpretation of the set back ordinance, Appellant sought a variance to the existing ordinance on the basis that he believed the property abutting the west of his home was his front yard. (Town Council Transcript, R. 57.) This is significant because under the fence ordinance, if the property abutting Center Street to the south of Appellant's home were his side yard, the 30 foot set back requirement would not apply, except for to any portion of the fence that extends into the front yard set back. (Addendum: Hinckley Town Code 10-4-13(G)). He acknowledged that if he was wrong about the front yard issue, his fence would not be in

compliance. (Town Council Transcript, R. 58). At the hearing before the Appeal Authority, referring to his appearance at the February 2007 Town Council meeting, Appellant stated "...all I'm saying is that I come in here and said, okay, according to what their book says I'm wrong." (AA Transcript, R. 234.) It can only be assumed that Appellant made these admissions because the common meaning of a frontage set back would be a set back measured from the edge of the road way and that the commonly accepted meaning of a front yard does not include half of a road way. An acceptance of Appellant's interpretation of the ordinance would lead to the exact result this Court has sought to prevent; namely, an interpretation that is "unreasonably confused, inoperable, or in blatant contradiction to the express purpose of the ordinance." *See Cox*, 2007 UT App 315 ¶ 31.

Additionally, Appellant argues that the set back ordinance must be strictly construed in his favor because the issue of where the set back is measured from was not codified. However, as shown above, the plain language of the ordinance is clear, even absent a definition of "set back" or "front yard." Any ambiguity in the plain language is easily clarified by consideration of the common meaning of the terms as well as the purpose and intent of the ordinance. Taking those considerations into account, the Appeal Authority's interpretation of the ordinance was correct.

In *Cox*, this Court provided the appropriate analysis for interpretation of an ambiguous ordinance. *Id.* at ¶ 28. In that case, Provo City was forced to interpret a land use ordinance that failed to define the term "average monthly net rental income". *Cox*, 2007 UT App 315 ¶ 13. Provo City interpreted the term to require consideration of "fair market value" even

though that interpretation was not expressly contained within the applicable land use ordinance. *Id.* Cox demanded an interpretation allowing for an infinite amortization period, which would effectively create a result that would contravene the purpose of the ordinance. *Id.* at ¶32. This Court held that Provo City's interpretation was legal as it was consistent with the language in the ordinance, congruous with the meaning and purpose of an amortization period, and it harmonizes the ordinance's provisions in accordance with its intent and purposes. *Id.* at ¶ 35. Thus, Cox demonstrates that this Court must strictly construe the land use ordinance in favor of Appellant only if, after resorting to other modes of construction, the ordinance remains ambiguous. Because the Hinckley Town Appeal Authority's interpretation of a front set back was in accordance with the common meaning of the term, and also gave effect to Hinckley Town's intent in light of the purpose that the ordinance was meant to achieve, the interpretation is correct.

Therefore, as Appellant's interpretation would produce a result that would completely undermine the policy and intent of the zoning ordinance and would be contrary to the common meaning and application of the ordinance, this Court should find that the Appeal Authority's interpretation of the ordinance is correct, and therefore, their decision is not illegal. Accordingly, the decisions of the Hinckley Town Appeal Authority and the trial court should be affirmed.

II. THE TRIAL COURT'S AFFIRMATION OF THE APPEAL AUTHORITY'S DECISION WAS BASED ON BOTH THE PLAIN LANGUAGE AND THE PURPOSE OF THE SET BACK ORDINANCE.

At the hearing before the Appeal Authority, Appellant argued, for the first time, that

his fence was in compliance with the Town's zoning ordinances because, if measured from his lot line, which lies in the middle of the roadway, it was not constructed within the thirty foot set back. (AA Hearing, R. 154). In response, Hinckley Town presented evidence regarding the purpose and intent of the set back ordinance and offered a document entitled "An Amendment to Ordinance 10-14: Supplementary Regulations: in the Hinckley Town Code of Hinckley, Utah " ("the Amendment"). (AA Hearing, R. 186-187, 205-215.) Under the heading "Recitals", the document states that the purpose of the document is to "better define the property line for setback purposes." *Id.*

In reviewing the Appeal Authority's decision, the trial court made clear that its decision affirming the Appeal Authority's interpretation of the set back ordinance did not depend on the Amendment which was presented at the hearing before the Appeal Authority. (Findings, Conclusions, and Order, R. 368.) The court made clear that its decision was based on both the plain language and the purpose of the ordinance, which is to maintain safety and create uniformity. *Id.* The set back ordinances were enacted by Hinckley Town to promote safety and to maintain uniformity within the boundaries of Hinckley Town. Allowing Appellant to maintain his fence within the 30 foot set back would be completely contrary to the intent and purpose of the ordinances. As the trial court stated, "measuring the setback area from the parcel line when that line begins in the middle of a public right-of-way would undermine" the Town's interests in safety and uniformity. *Id.* The trial court went on to say that "The Court finds that the Recital is meant to clarify the ordinance and protect these interests in situations where a parcel extends into a public right-of-way. *Id.* Accordingly,

though the Recital may not be enforceable as law, it does lend itself to the reasonableness of the Appeal Authority's decision." *Id.* Ultimately, the trial court found that the Appeal Authority's interpretation of the set back ordinance would have been upheld regardless of the Amendment, as the court's decision was based upon the plain language and purpose and intent of the ordinance.

III. THE VESTED RIGHTS DOCTRINE DOES NOT APPLY WHERE APPELLANT'S PROPOSED FENCE WAS IN VIOLATION OF BOTH THE FENCE AND SET BACK ORDINANCES IN EXISTENCE AT THE TIME HE APPLIED FOR THE BUILDING PERMIT.

The vested rights doctrine only entitles an applicant to approval of a land use application if the application conforms to the requirements of the applicable land use ordinance in effect when the application is submitted and all fees have been paid. As illustrated above, at the time Appellant applied for a building permit for his fence, the proposed fence did not comply with the applicable zoning ordinance.

The vested rights doctrine is an equitable doctrine designed to prevent arbitrary zoning changes by municipalities *after* applicants have invested time and money after relying on existing ordinances. This doctrine was first discussed in *Western Land Equities Inc v. City of Logan*, 617 P.2d 388 (Utah, 1980) and is now codified in UTAH CODE ANN. § 10-9a-509. In *Western Land*, the court found that the Plaintiffs had acquired a vested development right because they had substantially complied with the procedural requirements of the city's land use ordinances. *See Western Land,* 617 P.2d at 391. The factual scenario in *Western Land* is clearly distinguishable from the facts in Appellant's case. Appellant first approached

the Planning and Zoning Commission to request a building permit and was told that his proposed fence would not comply with the set back requirements. (Findings, Conclusions and Order, R.364). Appellant then went to the Hinckley Town Council on two separate occasions to request a variance, and as no significant changes had been made to his proposed fence plan, he was again denied a building permit. (Town Council Minutes, R. 52.) Thereafter, Appellant proceeded to build his fence in violation of the ordinance, despite the fact that he was well aware that his fence did not comply and had agreed to wait until he had the final approval from the Town Council before he constructed those portions of the fence that were in violation. (Town Council Transcript, R. 72-73.) Appellant did not follow the proper procedures required to build a fence in Hinckley Town. The vested rights doctrine is not intended to aid those who are denied building permits for lack of compliance with existing ordinances but who decide to proceed with an unauthorized land use regardless. Thus, Appellant is not entitled to relief under the vested rights doctrine.

CONCLUSION

For the aforementioned reasons, this Court should hold that the Hinckley Town Appeal Authority's interpretation of the set back ordinance was correct, and therefore legal, and that the vested rights doctrine does not apply. Accordingly, the decisions of the Appeal Authority and the trial court should be affirmed.

DATED and SIGNED this 8th day of July, 2011.

WADDINGHAM & ASSOCIATES, P.C.

Kaela P. Jackson

CERTIFICATE OF MAILING

I hereby certify that eight true and accurate copies of the foregoing Brief of Appellees were mailed first-class, postage prepaid, to the Clerk of the court, in the Utah Court of Appeals, and two copies mailed to Randall L. Jeffs, attorney for Respondent and Appellant, Jeffs and Jeffs, P.O. Box 888, Provo, UT 84603, this 18th day of July, 2011.

Kaela P. Jackson

ADDENDUM
STATUTES AND ORDINANCES

10-9a-707. Standard of review for appeals.

(1) A municipality may, by ordinance, designate the standard of review for appeals of land use authority decisions.

(2) If the municipality fails to designate a standard of review of factual matters, the appeal authority shall review the matter de novo.

(3) The appeal authority shall determine the correctness of a decision of the land use authority in its interpretation and application of a land use ordinance.

(4) Only those decisions in which a land use authority has applied a land use ordinance to a particular application, person, or parcel may be appealed to an appeal authority.

History: C. 1953, 10-9a-707, enacted by L. 2005, ch. 254, § 67.

Effective Dates. - Laws 2005, ch. 254 became effective on May 2, 2005, pursuant to Utah Const., Art. VI, Sec. 25.

NOTES TO DECISIONS

Standard of review.

A board of adjustment was required to use a "correctness" standard rather than a "rational basis" test in reviewing staff interpretation of a zoning ordinance. (Decided under former § 10-9-704.) Brown v. Sandy City Bd. of Adjustment, 957 P.2d 207 (Utah Ct. App. 1998).

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 contigious 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.

10-4-13G.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.