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

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

REPLY BRIEF OF APPELLANT

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

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RESPONSE TO APPELLEE'S STATEMENT OF THE FACTS

Petitioner and Appellant Alonzo Cahoon (hereinafter "Mr. Cahoon") takes issue with the accuracy of several statements made by Hinckley Town and Hinckley Town Appeal Authority (hereinafter "Hinckley Town") in their Statement of the Facts. One statement requires particular attention. Hinckley Town asserts that Mr. Cahoon's fence is built within the 30 foot setback. (See Appellee's Brief, page 6.) This is a legal conclusion, and is the primary issue of dispute in this case. It is not an undisputed fact.

ARGUMENT

I. HINCKLEY TOWN'S ARGUMENTS IN FAVOR OF 'GENERAL PURPOSE' AND 'COMMON MEANING' INTERPRETATION FAIL TO OVERCOME THE PRESUMPTION THAT ZONING ORDINANCES MUST BE CONSTRUED IN FAVOR OF THE PRIVATE PROPERTY OWNER; THE LANGUAGE IN THE ORDINANCE ITSELF SUPPORTS REVERSAL OF THE TRIAL COURT'S DECISION.

It bears repeating that, "zoning ordinances . . . restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner." *Rogers v. West Valley City*, 2006 UT App 302, ¶ 15, 142 P.3d 554; *see also, 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). This legal doctrine is dispositive of the present case. It is noteworthy that throughout its brief, Hinckley Town has failed to respond to, cite to, or appropriately address this legal principle. Instead, Hinckley Town has argued that the Recital should serve as a general purpose statement for Hinckley Town's ordinances, and that this Court should find that the intent and purpose as set forth in the Recital, and the common meaning of the term

'front yard', should control the outcome in this case. However, such a position contradicts Utah case law, and also contradicts the meaning and implication of Hinckley Town's own ordinances. *Brown v. Sandy City Bd. of Adjustment* is directly on point. "[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.*

By arguing that the Recital can serve as a general purpose statement, Hinckley Town has forgotten, again, that unpublished and uncodified ordinance amendments cannot take effect or be enforceable law. In order for a general purpose statement regarding an ordinance to be enforceable, it must be included in the regularly passed ordinances. See UTAH CODE ANN. §§ 10-3-711, -713, -715. Thus, the Recital cannot serve as an enforceable general purpose statement any more than it can serve as a specific amendment to the fencing ordinance. The trial court found, and Hinckley Town has conceded, that the Recital is not enforceable law. The Recital's unenforceability is undisputed. The Recital cannot be considered in any manner (as a general purpose statement or otherwise) when deciding whether Mr. Cahoon's fence complies with Hinckley Town's ordinances, because it is not the law.

Viewing the ordinance in the complete absence of the Recital, it is equally clear that the 'common meaning' approach advocated by Hinckley Town is also unavailing. The ordinance contains within it definitions of the different yard requirements, including

a definition for "Front Yard." (Addendum: Hinckley Town Code 10-4-8(A); R. 135.) The only indication in that definition regarding set back measurements refers to the "lot or parcel" of the property in question. *Id.* '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 parcel of property, the ordinance implies that the set back is measured on the basis of the boundaries of the property. Mr. Cahoon is entitled, per *Rogers, Brown, Patterson,* and others, to have this ordinance construed in favor of his proposed use.

With few other options, Hinckley Town now asserts that this Court should simply adopt a 'common meaning' definition of the term 'front yard' and rule against Mr. Cahoon. In other words, in the face of an actual statutory definition for the term 'front yard' in Hinckley Town's ordinances, Hinckley Town asks this Court to somehow take notice of the 'common meaning' of the term 'front yard'. Hinckley Town does this without any evidence regarding what the common meaning actually is, and without any citation to the record. Hinckley Town's statutory definition of the term 'front yard' references the boundaries of the property. This Court is bound to give that definition meaning and value, and to not depart from its implications. Indeed, Mr. Cahoon is entitled to have that definition "liberally construed in [his] favor". *Rogers*, 2006 UT App 302, ¶ 15. Thus, this Court should reject Hinckley Town's argument that the 'common meaning' of the term 'front yard' can supersede the actual language of the statutory definition.

Hinckley Town has another problem with its 'common meaning' argument: it was not preserved below. Hinckley Town raises this 'common meaning' argument for the first time on appeal. This matter has been through multiple iterations: before the Hinckley Town Council, through planning and zoning, through the Hinckley Town Appeal Authority, and through the district court. Not until now has Hinckley Town asserted that the proper interpretation of the term 'front yard' should depart from the language of the ordinance and follow a 'common meaning' not supported by evidence in the record. By not preserving this argument below, Hinckley Town has waived its ability to raise this issue now.

In support of its 'common meaning' argument, Hinckley Town relies upon the case of *M&S Cox Investments, LLC v. Provo City Corp.*, 2007 UT App 315, 169 P.3d 789. Hinckley Town argues that Mr. Cahoon's proposed interpretation would render Hinckley Town's ordinances meaningless and therefore his interpretation cannot be adopted. This argument mischaracterizes the present case, and mischaracterizes the holding in *M&S Cox*.

In *M&S Cox*, Provo City had passed an ordinance requiring certain pre-existing non-conforming uses to terminate over a number of years. *M&S Cox,* 2007 UT App 315, ¶¶ 4-5. Those landowners who had invested money into a particular property were allowed an amortization period before the non-conforming use would terminate, to allow the landowner to recover his investment. *Id.* at ¶ 5. One landowner, M&S Cox Investments, LLC, challenged the ordinance language, arguing that the amortization language was ambiguous and would allow for an infinite amortization period, thereby

eviscerating the enforceability of the entire new statutory scheme. *Id.* at ¶¶ 6-17. Both the trial court and this Court rejected the landowner's proposed interpretation on the basis of strong evidence that the language contained within the ordinance, and even the definition of the word 'amortization' itself, weighed heavily in favor of Provo City's proposed interpretation. *Id.* at ¶¶ 32-35 In other words, reviewing the ordinance as a complete statutory scheme, the alleged ambiguity was non-existent. *Id.* When viewing the ordinance together, and giving meaning to all its parts, it was clear by the language of the ordinance itself that an infinite amortization schedule was not encompassed within the plain language of the ordinance. *Id.* Thus, in *M&S Cox,* interpreting the Provo City ordinance strictly against the city and in favor of the landowner, the language of the ordinance was still clear and enforceable in the manner proposed by the City. *Id.*

The present case presents substantially different facts from *M&S Cox*, which lead to a different result. First, Hinckley Town has not presented any evidence regarding the language of the ordinance itself which supports their proposed interpretation. Hinckley Town fails to present such evidence because there is none. All the ordinance language itself is consistent with Mr. Cahoon's proposed interpretation. Instead, Hinckley Town has argued that this Court should adopt the Recital as a general purpose statement, and thereby show inconsistency with the plain language of the ordinance. As shown above, the Recital is not law. Fundamental principles of due process would be violated if a municipality were able to pass and enforce rules that are unpublished, un-codified, and unavailable to the public. Moreover, Hinckley Town's failure to present any evidence of the 'common meaning' of the term 'front yard', together with its failure to raise this

issue below, does not rise to the level of evidence sufficient to overturn the presumption that a landowner is entitled to have a zoning ordinance construed in his favor. Hinckley Town's statutory definition of 'front yard' implies that the measuring line for setback requirements is from the boundary of the property, the 'lot or parcel' line. Mr. Cahoon is entitled to have that definition construed in his favor, especially when Hinckley Town has been unable to produce hard evidence in favor of a different interpretation.

Finally, Hinckley Town argues that Mr. Cahoon's proposed interpretation would render the ordinance meaningless and unenforceable. This assertion is false. Mr. Cahoon's fence still has to be set back thirty (30) feet from his property line, and still has to comply with the actual language of the ordinance. Thus, the present scenario is markedly distinct from *M&S Cox* in this regard. In *M&S Cox*, this Court rejected the proposed interpretation, in part, because it would render the entire statutory scheme meaningless and unenforceable. *Id.* at ¶¶ 32-35. By contrast, Hinckley Town has the benefit of the ability to enforce all of its ordinances as they are written. Mr. Cahoon's fence is set back 35 feet, 8 inches from his property line, and thereby complies with Hinckley Town's ordinances as they are written.

Hinckley Town argues that Mr. Cahoon's fence is a safety hazard because it obstructs the view. However, this argument is pretextual and misleading. As was presented to the Appeal Authority, Mr. Cahoon's house borders on Hinckley's Center Street and on another un-built, but dedicated and platted road. (AA Hearing, R. 219-220.) If Mr. Cahoon were to change his address so that he was addressed off of the other platted road, then the yard in question would become a side yard, and his set back

requirement would only be 24 feet. (AA Hearing, R. 219-220; Addendum: Hinckley Town Code 10-4-8(C), R. 135.) Thus, same house, same streets, same yards, same fence, and depending on the address, different set back requirements. Mr. Cahoon's fence is set back 25 feet, 8 inches from the edge of the road, and addressed differently, would even comply with Hinckley Town's proposed interpretation. (AA Hearing, R. 219-220.) The Hinckley Town Appeal Authority recognized the pretextual and unproductive nature of this safety issue argument in its own written decision. The Appeal Authority stated:

> The AA cannot change Ordinances, but we may make recommendations.
> Extensive discussion and testimony was devoted to Safety Issues in regards to this Appeal. The AA regrets this waste of time and resources. If only the address of this property were changed, and nothing else, this discussion would be mute. The fence in question would be in compliance.
> The AA recommends Hinckley Town find a way to treat side fences with regards to safety issues and also to grant leniency to home owners for front yard fences when needed and justified.

(AA Decision, R. 39.)

Mr. Cahoon's fence does not obstruct view, anymore than it would as a side fence if his house were addressed on the other street which borders his home. Hinckley Town's arguments that the fence is an obstruction and a safety hazard is pretextual, and not consistent with their own ordinance requirements. The meaning, efficacy and enforceability of Hinckley Town's ordinances are not thwarted by the facial interpretation of the ordinance proposed by Mr. Cahoon.

Thus, this Court should follow the binding precedent in *Rogers, Brown, Patterson,* and others, and strictly construe Hinckley Town's ordinances in favor of Mr. Cahoon's

proposed use. *Rogers,* 2006 UT App 302, ¶ 15. Mr. Cahoon is legally entitled to have the zoning ordinance liberally construed in his favor. *Id.* Because Mr. Cahoon's "use of the propert[y] has met the legal requirements of [the ordinance]" his fence permit must be granted and he should be allowed the freedom to enjoy and use his property. *Brown*, 957 P.2d at 212.

II. UTAH CODE ANN. § 10-9a-707(2) PROVIDES THAT MR. CAHOON WAS ENTITLED TO A HEARING DE NOVO BEFORE THE APPEAL AUTHORITY AND HIS PRIOR STATEMENTS REGARDING HIS LAYMAN'S UNDERSTANDING OF COMPLIANCE WITH THE ORDINANCE ARE IRRELEVANT.

Finally, it must be noted that Hinckley Town has attempted to use Mr. Cahoon's prior statements regarding his layman's understanding of the ordinance against him. In the process of seeking his fence permit, and well before retaining legal counsel, Mr. Cahoon had several meetings with the Hinckley Town Council and several private conversations with the Mayor and individual council members about his proposed fence. During these conversations Mr. Cahoon was repeatedly given false information about the requirements of the ordinance.[1] Understandably, therefore, Mr. Cahoon at certain times made comments in reliance on these representations indicating at that his fence may not have complied.

Now, Hinckley Town seeks to take advantage of Mr. Cahoon's statements, made before he retained counsel and became informed of his legal rights, as though they are

[1] Mr. Cahoon does not assert that these misrepresentations were knowing or intentional, but only that the Town Council and the Mayor were likewise mistaken about what the ordinances required.

legally conclusive against him. A lay person's momentary statement of what they understand to be the law, as represented to them by persons in political power who are legally adverse to them, cannot in fairness be held as legally binding against him. The question is what the law is, not what Mr. Cahoon thought the law was at some intermediate step in this process.

Moreover, once the Town Council had rejected Mr. Cahoon's fence permit application, Mr. Cahoon sought review through the Hinckley Town Appeal Authority. Utah law provides that appeal authority review of land use decisions is held *de novo*. UTAH CODE ANN. § 10-9a-707(2). Thus, prior legal positions and prior statements become irrelevant to what can be presented and what actually is presented at the appeal authority hearing. At Mr. Cahoon's appeal authority hearing, he repeatedly asserted, through counsel, that his fence facially and legally complies with Hinckley Town's published and codified ordinances. (AA Hearing, R. 154, 162, 189-192.)

CONCLUSION

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

DATED and SIGNED this 5th day of September, 2011.

JEFFS & JEFFS, P.C.

Randall L. Jeffs

CERTIFICATE OF SERVICE

I hereby certify that the original Reply 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 5th day of September, 2011, addressed as follows:

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