

2000

Woods Cross City v. Douglas R. Smith dba Ralph Smith Trucking Company : Brief of Appellant

Utah Court of Appeals

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Randy B. Birch; Attorney for Appellant.

Michael Z. Hayes; Todd J. Godfrey; Mazuran & Hayes, P.C.; Attorneys for Appellee.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

WOODS CROSS CITY, A Utah
municipal corporation,

Plaintiff / Appellee,

vs.

DOUGLAS R. SMITH, dba RALPH
SMITH TRUCKING COMPANY,

Defendants / Appellant.

APPELLANT'S BRIEF

Court of Appeals No. 20001024-CA

Priority No. /5

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FILED
Utah Court of Appeals

JUL 06 2001

Paulette Stagg
Clerk of the Court

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STATEMENT OF JURISDICTION

The Utah Supreme Court had jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j). It subsequently assigned the appeal to the Utah Court of Appeals, which has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j).

ISSUE ON APPEAL AND STANDARD OF REVIEW

Issues

A. Whether the trial court failed to properly consider Appellant's arguments regarding spot zoning, discrimination and unlawful taking. (Record, page 91 - 94.)

B. Whether the trial court failed to properly allow the Defendant to continue its use of lot 14, Newport Subdivision as a preexisting use pursuant to §12-22-101, Woods Cross Ordinances. (R. at page 151, p.9)

C. Whether the trial court failed to properly allow the Defendant to use the property as an accessory use to that of its legal use of property in Woods Cross and West Bountiful, pursuant to §12-14-104, Woods Cross Ordinances. (R. at page 151, p.8)

Standard of Review

These issues were resolved by Motion For Summary Judgment, therefore the appellate court reviews them for correctness. *West v. Thomson Newspapers*, 872 P.2d 999, 1004 (Utah 1994).

DETERMINATIVE STATUTES AND RULES

Utah Code Annotated, §10-9-408

- (1)(a) Except as provided in this section, a nonconforming use or structure may be continued.
- (b) a nonconforming use may be extended through the same building, provided no structural alteration of the building is proposed or made for the purpose of the extension.

Rule 56(f), Utah Rules of Civil Procedure

(f) Should it appear from the affidavits of a party opposing the motion that he cannot for t reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or it may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Woods Cross City Ordinances, §12-14-104

Accessory uses and buildings customarily incidental to the permitted uses and conditional uses provided herein may be approved by the city in accordance with the provisions of this title.

Woods Cross City Ordinances, §12-22-101

This Chapter shall apply to the existing use of a building, structure or land lawfully established at the time of passage fo the zoning ordinance or any amendments thereto which does not conform to the present regulations of the zone in which it is located. Because Woods Cross is a community which has developed over a long period of time, the regulations of this Chapter are to allow continued use of such property or structure, while at the same time protecting existing conforming development and further orderly development and improvement of the community.

STATEMENT OF THE CASE

I. Nature of the Proceeding

This appeal is from an order granting Woods Cross City motion for Summary judgment entered by Judge Darwin C. Hansen, Second District Court, Davis County on October 16, 2000.

II Course of Proceedings & Disposition in the Trial Court

On August 15, 1999, Woods Cross City filed a complaint in the Second District Court claiming that Douglas Smith was in violation of Woods Cross City's zoning laws with respect to the use of certain lots located in the Newport Subdivision in Woods Cross City. On or about June 5, 2000, Woods Cross City filed a Motion for Summary Judgment which was granted by the trial court on October 16, 2000.

II Statement of Relevant Facts

Defendant/Appellant Douglas R. Smith is the owner of real property at issue herein and located in the Newport Subdivision in Woods Cross City. [R. at 30] It adjoins his property located within West Bountiful City . [R. at 33] Defendant Douglas Smith leases all the property to Ralph Smith Company, a trucking company, which has continuously used the property located inside and outside the Newport Subdivision since before 1991 to run its trucking business. The trucking company's office and repair buildings are legally operating and are within West Bountiful. [R. at 33] The property in Woods Cross is used to park and store trucks and equipment. [R. at 30] Woods Cross sued Douglas Smith to

restrict his use of that portion of his property located in Woods Cross and within the Newport Subdivision. [R. at 4]

Prior to purchasing said Newport subdivision property, continuously since 1986, Ralph Smith Co. had leased and used and continues to lease and use lot 14 of the Newport subdivision as part of its tucking business. [R. at 111]

Most, if not all of the property around Defendant's site does not comply with the city's stated zoning classification. [R. at 111] The property located directly east of lot 5 of said subdivision is owned by Defendant or Phillips 66 Company (Phillips 66 uses said property as a buffer zone for possible pressure explosion). The property along the eastern edge of Defendant's property is a rail road track. Plaintiff, Woods Cross City owns lot 6 of said subdivision and upon information and belief plan to dig a flood-water catch-pond on said site. Other Newport subdivision lots are used as a contractor's open storage lot, steel fabrication plant, paint manufacturing plant, battery company's warehouse and truck parking, insulation company's truck yard, fiberglass fabrication shop, cargo trailers storage lot, open storage lots, and green concrete, shipping containers and equipment storage. There are high voltage power lines and towers which cross the Newport subdivision property, including the property of Defendant. The use of Defendant's property is consistent with other property uses in the area, especially the Newport subdivision lots. [R. at 111 - 112.]

The current zoning ordinance covering this property was enacted in December 17, 1991. Prior to December 17, 1991, the property in question was zoned as M-1 which permitted any use permitted in a C-2 zone. C-2 zones, at all relevant times allowed for the operation of transfer companies. [R. at 96 and 106]

Defendant Douglas R. Smith believes that he should be allowed to continuing the property as a preexisting use on lot 14, and other lots as an “accessory use” pursuant to §12-14-104, Woods Cross Ordinances.

SUMMARY OF ARGUMENTS

The trial court incorrectly failed to consider Defendant’s defenses of spot zoning, discrimination, and unlawful taking of property without just compensation. Defendant put Plaintiff on notice of Defendant’s intent to raise affirmative defenses in his answer, reiterated that notice in his Motion for Rule 56(f) Continuance and made a motion to amend his answer if the trial court deemed it necessary. Defendant further adequately raised those affirmative defenses in his Memorandum in Opposition to Summary Judgment by specifically naming each affirmative defense and providing supporting evidence and relevant legal authority. Said defenses raised material questions of fact which would have precluded summary judgment.

Further the trial court incorrectly failed to find a valid non-conforming use as to lot 14 of the Newport subdivision which has been used as part of the trucking business since 1986. Last, the trial court incorrectly failed to consider and find that Defendant was

entitled to use the property as an accessory use pursuant to Woods Cross Ordinance §12-14-104.

ARGUMENT

I. The Trial Court Incorrectly Refused to Consider Appellant's Arguments Regarding Spot Zoning, Discrimination, and Unlawful Taking of Property Without Just Compensation.

In its order granting Summary Judgment to Appellee, Woods Cross City, the trial court stated:

Defendant's claims of spot zoning, discrimination and an unlawful taking of property without just compensation have not been properly raised through pleadings or affidavits and therefore may not be considered by the court.

No further statement or consideration regarding these issues was given by the court. Nor did the court even comment on Defendant's claim of an accessory use which was brought up in oral arguments on the Summary Judgment Motion. Defendant submits that these arguments were brought before and submitted to the trial court and should have been considered.

A. Affirmative Defenses Were Raised in Defendant's Rule 56(f) Motion

In Defendant's Answer, Defendant put Plaintiff on notice and reserved the right to claim any affirmative defenses that were found to exist through discovery. [R. at 11.] When Plaintiff, Woods Cross City filed its motion for Summary Judgment, Defendant filed a motion under Utah Rules of Civil Procedure 56(f) to get time for discovery.

Defendant specifically noted that the discovery was needed in order to identify possible affirmative defenses. [R. at 63] Plaintiff's Memorandum in Opposition to the Rule 56(f) motion argued that as no affirmative defenses had been raised in Defendant's answer, they were too late. [R. at 59-60] Defendant's Reply Memorandum argued that the affirmative defenses were adequately raised under the liberalized notice pleading practice, but in the alternative included a Motion to Amend Answer if the court were to disagree that the affirmative defenses could be raised.¹ [R. at 65]. The Court granted Defendants Rule 56(f) motion to continue and made no ruling regarding Defendants Motion to Amend Answer. [R. at 80] Defendant submits that the Court's granting of Defendant's Rule 56(f) motion and ignoring the Motion to Amend Answer included an implied ruling that Defendant could raise its affirmative defenses and they would be considered for summary judgment. If such is not the case, then the trial court improperly considered the summary judgment motion without first ruling on Defendant's Motion to Amend Answer.

B. The Specific Affirmative Defenses Were Properly Raised in Defendant's Memorandum In Opposition to Summary Judgment.

In Badger v. Brooklyn Canal Co., 996 P.2d 884, (Utah 1998), the court set forth the three prong test of whether an issue had been adequately raised to be considered in summary judgment and thus could be considered on appeal. Specifically, the court stated:

¹Though Defendant did not name what affirmative defenses it was considering, both the memorandum and supporting affidavit made it clear that the affirmative defenses would be based on other land usage in the area.

That is, a trial court must be offered an opportunity to rule on an issue. A trial court has the opportunity to rule if the following three requirements are met: (1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) a party must introduce supporting evidence or relevant legal authority. The purpose of such requirements is to put the Judge on notice of the asserted error and allow the opportunity for correction at that time in the course of the proceeding. (Citations and Quotations omitted)

Defendant submits that this same test is what a trial court must use to determine whether an issue has been adequately raised so that the trial court should consider it. Further, Defendant submits that the issues of spot zoning, discrimination and unlawful taking of property without just compensation were in fact adequately raised and should have been considered by the trial court.

1. Issues were raised in a timely fashion.

As was shown above by raising the affirmative defenses in its Rule 56(f) motion and Motion to Amend Answer, Defendant put Plaintiff and the court on notice as soon as practicable that it intended to raise affirmative defenses discovered in discovery and made a Motion to Amend Answer so that proper procedure could be followed. The court by granting the Rule 56(f) motion and not ruling on the Motion to Amend, by implication held that any affirmative defenses raised in Defendant's Memorandum in Opposition to Summary Judgment would be timely.

2. Issues Were Specifically Raised

Defendant in its Memorandum in Opposition to Motion for Summary Judgment specifically raised the issues of spot zoning, discrimination, and taking of property without just compensation. In fact each such issue had its own heading and at least one paragraph devoted solely to that specific issue. [R. at 90-94]

3. Defendant introduced supporting evidence or relevant legal authority for each issue.

Again in Defendant's Memorandum in Opposition to Motion for Summary Judgment each issue raised was supported by the affidavit testimony of the property owner Douglas Smith. In said affidavit Douglas Smith indicated that his property is virtually surrounded by property which does not conform to the zoning classification which supports his spot zoning claim and discrimination. He also indicated that considering the non-conforming uses of the other property around him, and the current zoning classification, he would be left with no other viable use for his property which supports his claim of a taking of property with just compensation. [R. 110-112]

Defendant also cited relevant legal authority for each issue. He cited *Crestview-Holladay Homeowners Association, v. Engh Floral Company* 545 P.2d 1150 (Utah 1976) which outlines what creates an illegal spot zone. He cited *Marshall v. Salt Lake City*, 105 Utah 111, 141 P.2d 704, (1943) which holds that courts may set aside zoning that is confiscatory or discriminatory in support of his claims of discrimination and

taking of property without just compensation. He also cited *Smith Investment Company v. Sandy City*, 958 P.2d 245 (Utah Court of Appeals 1998) which states that, “a statute regulating the uses that can be made of property effects a taking if it denies an owner economically viable use of his land.” [R. at 90-94]

Defendant submits that the issues, evidence and authority presented in his memorandum raised sufficient questions of material fact that summary judgment should have been denied. Clearly it was raised sufficiently that it should have been at least considered by the court.

C. Defendant Raised Genuine Issues of Material Fact Which Should Preclude Summary Judgment.

1. Plaintiff has created an illegal “spot zone”

The remaining lots owned by Defendant in the Newport subdivision are virtually the only lots in the entire subdivision to which the I-1 zoning applies.² It would seem that Plaintiff’s plan was and is to reclassify an existing area (one almost surrounded by industrial uses) and then through time and attrition phase out the non conforming uses. This apparent plan has created an ordinance which has the effect of creating a spot zone

² This subdivision was apparently platted prior to Plaintiff’s zoning change in 1991. Therefore virtually all of lots in the subdivision are now valid nonconforming uses under the current zoning ordinance.

that leaves Defendants lots bordered on at least three sides by lots and property whose uses are consistent if not almost equivalent with the use Plaintiff is trying to prohibit here.

Spot zoning is defined in *Crestview-Holladay Homeowners Association, v. Engh Floral Company* 545 P.2d. 1150, (Utah 1976), as follows:

Spot zoning results in the creation of two types of "islands." One type results when the zoning authority improperly limits the use which may be made of a small parcel located in the center of an unrestricted area. The second type of "island" results when most of a large district is devoted to a limited or restricted use, but additional uses are permitted in one or more spots in the district.

The spot zoning effect which the Plaintiff has created in this case is the first type listed above. The Plaintiff has created a situation in which virtually the only lots in this subdivision owned by Defendant are subject to the zoning ordinance and thus a spot zone is created.

Defendant concedes that courts give broad discretion to cities legislative zoning actions and will uphold legislative zoning actions as long as they, "could promote the general welfare; or even if it is reasonably debatable that it is in the interest of the general welfare", *Smith Investment Company v. Sandy City*, 958 P.2d 245 (Utah Court of Appeals 1998) quoting *Marshall v. Salt Lake City*, 105 Utah 111, 141 P.2d 704, (1943). However, as indicated in Marshall, courts may set aside zoning that is confiscatory, discriminatory or arbitrary.

2. The Effect of Plaintiff's Zoning is Discriminatory

The effect of the zoning as applied is discriminatory against Defendant since it treats him differently than virtually all other persons who own property in the Newport subdivision. It effectually forbids Defendant from using his property in same way others in the subdivision and surrounding area are allowed to use their property. In fact it forbids Defendant from using his property for a use which he is allowed to use other property he owns which adjoins the property in question.

3. The Effect of the Zoning Law Is a Taking by Plaintiff Without Just Compensation

Should this court allow Plaintiff to enforce its stated zoning, it will effect a taking for which Defendant has not been justly compensated. Defendants property is located in an area that is primarily if not entirely made up of industrial uses. In fact, as has been show above, said property is virtually surrounded by industrial type business equivalent to Defendant. In spite of this reality the only private permitted uses of the property under the I-1 zoning classification is a professional office building³. Considering the surrounding uses of the area, a professional office building would be economically unfeasible for the

³ The permitted uses for I-1 include professional office building and public parks, utilities and buildings. All other uses are conditional uses. Woods Cross has made clear that they have not intention of working with plaintiff, having even refused to consider Defendant's conditional use application citing this appeal.

property. It would be surrounded by the current industrial park. Simply, Defendant is left without any viable use for said property.

In *Smith Investment Company, supra*, the court stated: “A statute regulating the uses that can be made of property effects a taking if it denies an owner economically viable use of his land.” This is clearly the case here. By attempting to enforce their stated zoning, Plaintiff is in reality depriving Defendant of any economically viable use of his land without just compensation.

Defendant understands the broad deference given to municipalities to effect zoning as they see best. Defendant also submits that when, as in this instance, the effect of such zoning and the enforcement thereof apparently applies to only one property owner in an area to his detriment, the municipality has exceeded the limits of such deference. This is especially true when, as here, there is a history of the municipality and the landowner being at loggerheads.

II. The trial court failed to properly allow the Defendant to continue its use of lot 14, Newport Subdivision as a preexisting use pursuant to §12-22-101, Woods Cross Ordinances.

In the trial courts order granting summary judgment, the court found that:

Currently lot fourteen of the property is being used for the parking of personal vehicles and recreational vehicles such as jet skis, trailers and campers. [R. at 139]

and based on that finding, concluded that:

to the extent Defendant ever used lot 14 in its trucking business, said use has ceased for a period in excess of three months, and therefore may not be reinitiated under the provisions of the Woods Cross Zoning Ordinance. [R. at 140]

However, the trial court did not seem to consider whether the “personal vehicles” stored were being stored on a private basis separate from the trucking company or whether they were being stored as part of the trucking business as an employee benefit or other trucking business related use. The court must have made this finding and conclusion based on the affidavit of Plaintiff’s employee, Tim Stephens, who stated that as long as he can remember this personal vehicles had been stored on this lot. [R. at 129.] Again, however, the Affidavit of Tim Stephens does not indicate whether the vehicles stored on lot 14 were being stored by and as part of the trucking business.

The only competent evidence on this matter was provided in the second affidavit of Defendant Douglas Smith.⁴ In that affidavit, Douglas Smith stated that lot 14 was being used by the trucking business and had been so used since 1986. [R. at 111]. Not only has lot 14 been used prior to zoning enactment, said use is a preexisting non-conforming use and is legally entitled to continue. Utah courts have made clear the fact that local governments cannot, through zoning changes, require property owners to discontinue preexisting nonconforming uses. See *Gibbons & Reed Company v. North Salt Lake City*, 481 P.2d 559 (1967). The *Gibbons* court held that a "zoning ordinance which

⁴ Douglas Smith is the owner of the property and also the Vice President of the trucking Company which leases the property. [R. at 32]

requires the discontinuance ... of a nonconforming use would be a deprivation of property without due process of law." *Id.* at 563. This unequivocal holding is echoed in § 10-9-408 of the Utah Code which provides with certain exceptions (none of which are applicable here) that "a nonconforming use may be continued." Similarly, the City's own zoning ordinances recognize that nonconforming uses may continue at the discretion of the landowner, not the City. Section 12-22-101 on Prior Non Conforming Uses provides:

This Chapter shall apply to the existing use of a building, structure or land lawfully established at the time of passage of the zoning ordinance or any amendments thereto which does not conform to the present regulations of the zone in which it is located. Because Woods Cross is a community which has developed over a long period of time, the regulations of this Chapter are to allow continued use of such property or structure, while at the same time protecting existing conforming development and further orderly development and improvement of the community.

There is no question that Defendant has a valid non-conforming use right with respect to lot 14. Said lot has been used and is continues to be used to park vehicles as a part of the trucking business.

The only real issue is whether Woods Cross City, can differentiate between vehicles on the basis of size, type, color or any other factors. Defendant submits that a prior existing use as a parking lot is exactly that and that Defendant may continue to park vehicles of all kinds on lot 14.

III. The trial court failed to properly allow the Defendant to use the property as an accessory use pursuant to §12-14-104, Woods Cross Ordinances.

At the oral arguments on the Plaintiff's Motion for Summary Judgment, Defendant raised the issue of whether property in question should be allowed to be used as an accessory use to the lawful non-conforming use. [R. at 151, p. 8] Woods Cross Ordinances §12-14-104 states:

Accessory uses and buildings customarily incidental to the permitted uses and conditional uses provided herein may be approved by the city in accordance with the provisions of this title.

In the case at bar, Defendant has a lawful use for the property which is not in the Newport subdivision, but contiguous to the Newport Subdivision property. As such, Defendant's use of the property located in the Newport subdivision should qualify as a valid accessory use to. The trial court incorrectly failed to address the issue of accessory use.

CONCLUSION

The trial court was in clear error when it failed to consider the affirmative defenses of spot zoning, discrimination and taking of property without just compensation, raised by Defendant. Said defenses were adequately pled and created factual issues which would preclude summary judgment. Further, the trial court again erred in not finding a valid non-conforming use with respect to lot 14 of the Newport subdivision. Finally the trial court erred in not considering and finding a valid accessory to Defendants lawful use of adjoining property as to the remaining lots in question. Accordingly Defendant's request

that the trial court's order granting Summary Judgment be reversed and the case be remanded for the above issues to be considered.

Dated this 5th day of July, 2001.



Randy B. Birch

CERTIFICATE OF SERVICE

I hereby certify that on this July 6, 2001, I caused two true and correct copies for the foregoing Appellant's brief to be served via United States Mail, postage prepaid, addressed to:

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Todd J. Godfrey
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2118 East 3900 South, Suite 300
Salt Lake City, UT 84124-1725

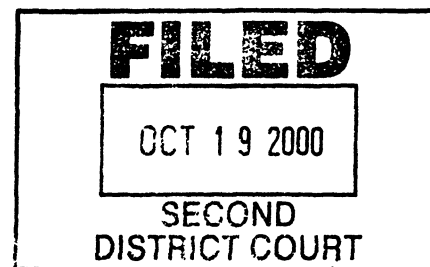


ADDENDUM

- A. Order Granting Summary Judgment
- B. Transcript of oral argument on Motion for Summary Judgment
- C. Affidavit of Douglas Smith
- D. Second Affidavit of Douglas R. Smith

Tab A

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Attorneys for Plaintiff

**IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
DAVIS COUNTY, STATE OF UTAH**

---0000000---

WOODS CROSS CITY, a Utah municipal
corporation,

Plaintiff,

vs.

DOUGLAS R. SMITH, dba RALPH
SMITH TRUCKING COMPANY,

Defendant.

ORDER

Case No. 990700317

Judge Darwin C. Hansen

---0000000---

Plaintiff's Motion for Summary Judgment came on for hearing before the court on September 21, 2000, at 3:00 p.m., before the Honorable Darwin C. Hansen. Plaintiff was represented by Todd J. Godfrey and Michael Z. Hayes. Defendant was represented by Randy B. Birch. The court being duly advised in the premises, and good cause appearing therefor, the court hereby enters its order granting Plaintiff's Motion for Summary Judgment as follows:

STATEMENT OF UNDISPUTED FACTS

1. Defendant is the owner of property located within Woods Cross City, which property is more particularly described in Plaintiff's Memoranda in Support of its Motion for Summary Judgment and in the Complaint on file in this matter, (the "Property").
2. The Property is zoned I-1, light industrial.
3. Defendant is currently using Lot 5 and Lots 7 - 13 of the Property to park large trucks and other equipment used in its trucking business.
4. Currently, Lot 14 of the Property is being used for the parking of personal vehicles and other recreational vehicles such as jet skis, trailers and campers.
5. Defendant's use of Lot 5 and Lots 7 - 13 of the Property is neither a permitted use nor a conditional use within the I-1 zone.
6. Defendant has never applied for nor received conditional use approval or site plan approval for the operation of a trucking company on the Property.
7. Plaintiff has requested that Defendant cease its unauthorized use of its Property.
8. Defendant has failed to comply with the request of the City.

CONCLUSIONS OF LAW

Based upon the foregoing undisputed facts, the court HEREBY CONCLUDES AS FOLLOWS:

1. Defendants current use of lot 5 and lot 7 through 13 of the Property violates the Woods Cross City Zoning Ordinance.

2. Based upon the violation of the City Zoning Ordinance, the City is entitled, as a matter of law, to an injunction, enjoining any further use in violation of the City Zoning Ordinance.

3. To the extent Defendant ever used lot 14 in its trucking business, said use has ceased for a period in excess of three months, and therefore may not be reinitiated under the provisions of the Woods Cross City Zoning Ordinance.

4. Defendant's claims of spot zoning, discrimination and an unlawful taking of property without just compensation have not been properly raised through pleadings or affidavits and therefor may not be considered by the court.


ORDER AND JUDGMENT

Based upon the foregoing undisputed facts and conclusions of law, it is HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Plaintiff's Motion for Summary Judgment is granted.
2. Defendant is hereby permanently enjoined from any further use of Lot 5 and Lots 7-14 of the Newport Subdivision in Woods Cross City which violates the City's Zoning Ordinances and is hereby ordered to cease the use of Lot 5 and Lots 7-14 of the Newport Subdivision in Woods Cross City for its trucking operations.

DATED this 2 day of Oct, 2000.

BY THE COURT:


The Honorable Darwin C. Hansen


APPROVED AS TO FORM:

By: _____
Randy B. Birch
Bertch & Birch - East

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 2000, I caused to be mailed, first-class United States mail, postage pre-paid, a true and correct copy of the foregoing **ORDER** to the following:

Randy B. Birch
Bertch & Birch - East
114 South 200 West
P.O. Box 763
Heber City, UT 84032



Tab B

SECOND JUDICIAL DISTRICT COURT
DAVIS COUNTY, STATE OF UTAH

SECOND DISTRICT COURT

2001 MAR 21 P 1:47

| | | |
|--|---|----------------------------------|
| WOODS CROSS CITY, a municipal corporation, | : | Case No. 990700317 |
| | : | |
| Plaintiff, | : | Appellant Case No. 20001024 - SC |
| | : | |
| | : | |
| v | : | |
| | : | |
| DOUGLAS R. SMITH dba RALPH SMITH TRUCKING COMPANY, | : | |
| | : | |
| | : | |
| Defendant. | : | |

HEARING HELD SEPTEMBER 21, 2000

BEFORE

HONORABLE DARWIN C. HANSEN

ORIGINAL

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 Ellen Way
Sandy, Utah 84092
801-523-1186

APPEARANCES

For the Plaintiff:

**TODD J. GODFREY
MAZURAN & HAYES**

For the Defendant:

**RANDY B. BIRCH
ATTORNEY AT LAW**

*** * ***

1 FARMINGTON, UTAH - SEPTEMBER 21, 2000

2 HONORABLE DARWIN C. HANSEN PRESIDING

3 P R O C E E D I N G S

4 THE COURT: The next matter is the case of Woods
5 Cross City against Douglas R. Smith. This is case number
6 990700317. This is the time set for the motion for summary
7 judgment by Woods Cross City in this matter.

8 And counsel, may I have you, for the record, make
9 your appearances please?

10 MR. GODFREY: Your Honor, Todd Godfrey with Michael
11 Hayes for Woods Cross City.

12 THE COURT: Thank you.

13 MR. BIRCH: Randy Birch and Doug (inaudible) on
14 behalf of Doug Smith, Your Honor.

15 THE COURT: All right. Thank you.

16 MR. ?: Just to clarify, Randy Birch is the attorney,
17 Doug Smith is [inaudible].

18 THE COURT: I understand.

19 UNKNOWN: Okay.

20 THE COURT: I understand. And I thank you very much
21 for [inaudible].

22 Gentlemen, I have reviewed the written memorandum
23 filed on this case and most of the cases that you have
24 submitted. And I know Woods Cross has submitted copies of
25 cases that have been highlighted and I have reviewed those

1 matters.

2 With that in mind, Mr. Godfrey, you may proceed, if
3 you wish.

4 MR. GODFREY: Thank you, Your Honor.

5 THE COURT: Do you need a easel of some kind?

6 MR. GODFREY: If we had one that would be helpful. I
7 understand we don't and we'll have to make use of some chairs,
8 I guess.

9 Randy, can you see okay?

10 MR. BIRCH: Actually, no. But I'll make due.

11 MR. GODFREY: I'll move out here for just a moment
12 [inaudible], Your Honor.

13 THE COURT: You have filed -

14 MR. GODFREY: Similar math.

15 THE COURT: Yes. And let me just - I'm with you. Go
16 ahead.

17 MR. GODFREY: Okay. Your Honor, this - generally
18 this shows the property that's at issue. If you'll note
19 there's kind of a heavy cross line right here. This is the
20 boundary between West Bountiful City and Woods Cross City.
21 Ralph Smith Trucking generally occupies this property and a
22 portion of this property below.

23 This property here that is outlined in green on the
24 map is property that is not at issue in this case. The city
25 recognizes that Smith Trucking has been using this property for

1 an extended period of time. We believe they have a valid non-
2 conforming use on all the property that's shown as marked in
3 green. And, you know, that's not at issue at all in this
4 matter.

5 THE COURT: And that is property within the
6 boundaries of Woods Cross City?

7 MR. GODFREY: From here down it is.

8 THE COURT: I see.

9 MR. GODFREY: From the line up it's in West
10 Bountiful.

11 THE COURT: Okay, thank you.

12 MR. GODFREY: The property that's outlined in yellow
13 is property that's within the New Port subdivision. Mr. Smith
14 essentially owns lot five and lot seven through 14 of the New
15 Port Subdivision. And that's the property that is an issue in
16 this matter.

17 The property down here below the New Port Subdivision
18 - it's not really shown on the map, it's just shown as a vacant
19 parcel is a newly approved residential subdivision in the city.
20 Just currently homes are being constructed within that area.

21 By way of orientation I think that sort of describes
22 the property we're talking about.

23 THE COURT: And I have found -

24 MR. GODFREY: Good.

25 THE COURT: Do you have a copy of this, Mr. Birch?

1 MR. BIRCH: I don't believe I've seen it.

2 MR. GODFREY: It actually is attached to his
3 memorandum, not to the city's.

4 MR. BIRCH: Yeah - oh - yeah. All right. The colors
5 there are different but that could have happened in the copies.

6 THE COURT: All right. I understand.

7 MR. GODFREY: Your Honor, this property - the
8 property at issue, outlined in yellow on the map that I've just
9 shown the Court, is zoned I-1. It's a light industrial zone.
10 The use that's currently taking place on that property is not
11 an allowed use under the city's zoning statutes. State law
12 provides that the city has the right to an injunction.
13 Essentially estoppel may be used that's in violation of the
14 zoning ordinances. That statute set forth in Utah code
15 annotated section 10-9-1002.

16 Case law also supports the city's right to an
17 injunction. Case law specifically provides that the city
18 doesn't have to show any kind of irreparable injury to be
19 entitled to that injunctive relief.

20 In their brief, the defendants have attempted to
21 raise an issue as to the use of lot 14 of the subdivision.
22 That's outlined in blue on the map as you can see right here.
23 In that respect I would refer the Court to the second affidavit
24 of Tim Stevens which is attached to our reply memorandum. With
25 that affidavit are pictures which are authenticated by Mr.

1 Stevens as being true and accurate representations of the
2 property on a day he viewed that early this month. And those
3 pictures show the current use of that property. There are no
4 trucks of Ralph Smith Trucking parked on that property. That
5 property is fenced in. It's separated from the rest of the
6 property and it's currently being used to park normal passenger
7 type vehicles and some small recreational vehicles, campers and
8 other things, but there are no large trucks on that property.

9 In addition, Mr. Stevens states in his capacity as a
10 zoning administrator, he's familiar with the property and that
11 it hasn't been used to park large trucks, in his memory, for an
12 extended period of time. City ordinances provide that if a use
13 has ceased for a period in excess of three months, that use is
14 essentially abandoned and a property can't again be applied to
15 a non-conforming use.

16 We think that's the status of this property. We
17 don't believe that Smith Trucking has any right to park their
18 large trucks on lot 14 in the New Port Subdivision.

19 In summary, I actually really truly believe this is a
20 very, very simple matter. It was either late '96 or early '97
21 when Smith Trucking began to expand their operations from the
22 permitted where I guess the allowed property in West Bountiful
23 down into this property in Woods Cross City, where the zoning
24 is not appropriate for that use and where they don't have any
25 valid non-conforming use rights.

1 In early '97 the city contacted the owners and told
2 them their use was unlawful. They have ignored the orders from
3 the city to cease that use. They're defiant in their disregard
4 of the city's regulations and I don't believe there's any
5 genuine issue of material fact as to any of the use of those
6 properties.

7 And on that matter we'd submit. I would like to
8 reserve some time for rebuttal on this.

9 THE COURT: You may. Thank you Mr. Godfrey.
10 Mr. Birch, please?

11 MR. BIRCH: Thank you, Your Honor.

12 I realize the Court hasn't had opportunity to view
13 the property like counsel has, but it does change your
14 perspective.

15 I've been to the site. And I've looked at the
16 property. And then as this came closer to briefing and what
17 not, I went back out and looked at the property and I think
18 it's - a couple of points that I want to make.

19 First of all, that this property is only - the only
20 permitted use is a public park or utility, I think it says.
21 Right? Or an office building.

22 Your Honor, right here we have a railroad track.
23 Right here - admittedly, this is West Bountiful, okay, it's not
24 Woods Cross. It's a - it's a huge refinery. As a matter of
25 fact there are some large silver, [inaudible] what they're

1 called. Some sort of a - that Phillips owns, and they have
2 purchased this huge - this large lot as a buffer. It's a
3 vacant trailer court. Now are you - are we really going to put
4 office buildings in an area that Phillips has determined is
5 worth buying to create a buffer in case of an explosion? I
6 don't think so, Your Honor. In fact, I'll guarantee it.

7 THE COURT: Are you arguing that the zoning is wrong
8 and the city shouldn't have passed that zone?

9 MR. BIRCH: That is an argument. It's not what I'm
10 trying to argue right now. I'm trying to - I just want you to-

11 THE COURT: If that's [inaudible] -

12 MR. BIRCH: - understand a picture.

13 THE COURT: That standard is an awfully tough
14 standard [inaudible].

15 MR. BIRCH: I've not filed suit for that.

16 THE COURT: Okay.

17 MR. BIRCH: May in the future, I guess. But that's
18 not where we're at. I'm just trying to paint a picture of this
19 area, Your Honor. Okay?

20 There's another set of railroad tracks right here.
21 So you've got railroad tracks to the west, railroad tracks to
22 the east and my client owns most - well, between him and
23 Phillips probably half of the land in between.

24 I also think it's important, note, and maybe I get
25 caught up in - I know I get caught up in my cases. But Ralph

1 Smith Trucking uses this area that they do not dispute. His
2 offices are here. His trucking service bays are here. All
3 that is occurring back here is the parking of vehicles. And I
4 would note that the I-1 zone calls for office buildings, yadda
5 yadda. We obviously don't have an office building. But
6 conditional uses are automotive service centers. Well, we
7 don't even have an automotive service center in that area.
8 Although, I would represent that we were applying and have
9 applied for a conditional use permit. We keep being told that
10 it's not worth the (inaudible) time we're not going to give it
11 to you. But at my insistence my client have applied, Your
12 Honor.

13 But I think it's also important to note that 1214-104
14 talks about accessory uses. Access - and this is not part of
15 my brief, as I got the statutes I started to review them again.
16 Accessory uses, incidental to permitted use and conditional
17 uses provided herein may be approved by the city in accordance
18 with the provisions as titled. I guess that means that
19 incidental uses can be conditional. I'm not sure quite what
20 that language says. But my point is only this, their actual
21 bays and shops are in West Bountiful. Their offices are in
22 West Bountiful. Any parking that goes on in this space is
23 incidental to what activity is actually occurring in West
24 Bountiful. And I think that's important for the Court to know.

25 We would dispute their categorization of not parking

1 here. I don't see how the size of the truck that you're
2 parking in an area means you can or can't park it there or it's
3 a change of use. At least I've not distinguished as I perused
4 - and I'll be the first to admit I haven't digested this volume
5 -but as I pursued these ordinances I did not see a distinction
6 between the size of vehicles you're parking. And indeed, most
7 of the vehicles and some of the accessories counsel has
8 referenced, are parked there for - on behalf of employees.
9 They're actually employees things that are parked there.
10 Employee parking for lack of a better statement.

11 So my point that I'm trying to make is that the
12 business is in West Bountiful. There is parking going on back
13 here. Absolutely, we're not trying to deny that. Look at the
14 photos that have been provided. You can sort of see the area,
15 weeds and photos. My client has talked to some of the
16 neighbors that are building here to the south. That was a
17 little bit of a concern. And they'd rather have him there
18 parking his vehicles than other options. Not necessarily
19 relevant but I think it is important for the Court to
20 understand that they've in essence done, is created a zone
21 where Doug Smith owns most of the property and then tell him he
22 can't use it.

23 I think I've addressed the lot 14 issue, Your Honor.
24 Like I said, I think it's important to look at this zoning
25 picture as a whole and evaluate whether or not this is a, like

1 I say, I think it's an accessory use.

2 Do you have any questions, Your Honor?

3 THE COURT: I don't. Thank you.

4 MR. GODFREY: Your Honor, as to the argument that
5 this is an accessory use to a primary use, Mr. Birch's own
6 statement is that that requires approval from the city. The
7 city never gave him that approval and there's never been an
8 application made for that.

9 Additionally, this is completely different parcel and
10 parcels of property. Accessory use on a different parcel would
11 certainly require the city's approval or at least review and
12 the city hasn't even had the opportunity to do that.

13 Mr. Smith has known that the city objects to this use
14 of the property since that lease in 1997 and he's made no
15 effort, at all, to come into compliance with the city's
16 regulations.

17 As to the issues about lot 14, I would simply
18 indicate that I think as a matter of law the Court can
19 distinguish between the parking of passenger vehicles and
20 campers without the truck, from the parking of huge double
21 belly dump trucks and trailers. There's a significant
22 difference in terms of the impact on the property and the
23 impact on the adjoining uses, one of which, I would point out,
24 is a residential subdivision.

25 As to Mr. Birch's arguments regarding the zoning, the

1 time to challenge the wisdom of Wood Cross City zoning
2 decisions passed, at the very latest, in early 1992. These
3 regulations have been on the books for a significant amount of
4 time.

5 He indicates that the city has zoned Mr. Smith's
6 property. Mr. Smith didn't purchase this property until four
7 or five years after the zoning went into effect. He owned the
8 property here. Most of these lots were purchased by him in '96
9 or '97 - or '95 excuse me.

10 Finally, as to lot 14, I think it's very important to
11 note that there is absolutely no issue of fact whatsoever that
12 would indicate that the use of these lots, five and seven
13 through 13, have in any way gained any rights or any - I guess
14 approvals - for use. There are no defenses as to those lots
15 other than those in the brief regarding spot zoning and
16 discriminatory zoning and takings which aren't properly before
17 the Court. They aren't brought forth in any proper pleading;
18 there's been no motion to admit a complaint. They simply
19 aren't before the Court and they don't - they don't pass any
20 test on the merits that's set forth in our brief.

21 I think, again, the issues in this case are very
22 simple. It's cut and dried that it is a summary judgment case.
23 I think the city is entitled to the injunction and I would ask
24 the Court to so rule.

25 THE COURT: All right. Thank you.

1 Gentlemen I have reviewed the case law which you have
2 submitted to me and I've also reviewed the written memorandum.
3 And it seems to me the relevant facts in this case, that are
4 uncontroverted are those relevant facts set forth in the moving
5 papers filed by Woods Cross. And now Mr. Smith has raised some
6 issues in his further statement of facts, but I do not see
7 those issues to be a statement of material fact that gives rise
8 to an issue relative to the legal principles that need to be
9 applied in this case.

10 I think the motion for summary judgment should be
11 granted and I'm going to grant the injunction based upon the
12 summary judgment motion.

13 I'm going to request, Mr. Godfrey, that you prepare
14 an appropriate order. And that order should set forth the
15 uncontroverted facts as I've indicated in your moving papers
16 and that order also set forth conclusions of law consistent
17 with your moving paper and also with respect to the reply.

18 The Court believes that the issue of spot zoning
19 discrimination or a taking without just compensation doesn't
20 give rise to a material issue of fact in this case because they
21 are not listed as an affirmative defense and I think it's
22 improper for me to consider those matters as creating an issue
23 of fact.

24 For those reasons I'm going to grant the motion and
25 proceed on that basis.

1 And Mr. Godfrey, submit the proposed paper to the
2 other side for their review and then submit it to me.

3 MR. BIRCH: Your Honor, could we get a certification
4 of the final decision on that.

5 THE COURT: Pardon?

6 MR. BIRCH: Certification 60-40 or 50-40 or whatever
7 [inaudible].

8 THE COURT: Any objection?

9 MR. GODFREY: No.

10 THE COURT: I - this then - this resolves the
11 litigation in full, does it not?

12 MR. GODFREY: It does, Your Honor.

13 THE COURT: Well, then I don't know that you need a
14 certification then if it's a final order.

15 The claim of the city goes for an injunction. I've
16 granted that, that is the final order. And if you wish to
17 appeal then of course you may do so.

18 Anything further, counsel?

19 MR. GODFREY: Nothing further.

20 MR. BIRCH: No, Your Honor.

21 THE COURT: Thank you very much.

22 [Whereupon the proceedings were concluded]
23
24
25

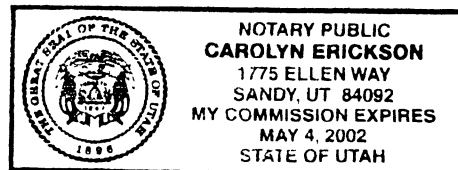
CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearings held before Judge Darwin C. Hansen was transcribed by me from an videotape and is a full, true, and correct transcription of the proceedings as set forth in the preceding pages to the best of my ability.

Signed this 19th day of March, 2001 in
Sandy, Utah.

Carolyn Erickson
Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2002



Tab C

SECOND JUDICIAL DISTRICT COURT

2000 JUN 23 P 1:17

Randy Birch (#4197)
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Heber City, Utah 84032
Telephone: (801) 654-4300

**SECOND JUDICIAL DISTRICT COURT
DAVIS COUNTY, STATE OF UTAH**

WOODS CROSS CITY, a Utah municipal
corporation,

Plaintiff,

v.

DOUGLAS R. SMITH, dba RALPH SMITH
TRUCKING COMPANY,

Defendants.

AFFIDAVIT OF DOUGLAS SMITH

Civil No.990700317

Judge Darwin C. Hansen

STATE OF UTAH)
 :
COUNTY OF SALT LAKE)

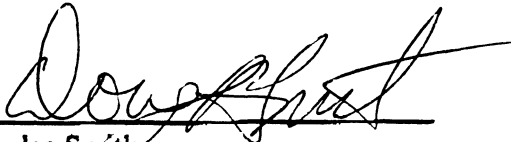
Affiant, DOUGLAS SMITH, being first duly sworn, under oath, deposes and states as follows:

1. Affiant is over the age of twenty one (21) years or age, a resident of the state of Utah, competent to testify, and that the statements made herein are based on personal knowledge or where so stated on information and belief.
2. Affiant is the owner of the real property which is the subject of this action.
3. Affiant leases said property to Ralph Smith Co.
4. Ralph Smith Co. has continuously used the site in question since 1991 as a truck yard.

5. To the best of affiant's knowledge, most of the property around Defendants site does not comply with the city's stated zoning classification.
6. Plaintiff approached affiant requesting to purchase a portion of said site and their request was refused.
7. Affiant does not have the letters claimed sent by Plaintiff and has not received copies of said letters as a part of this lawsuit.
8. All of the other information which affiant needs to defend against this action is in the control and or possession of Plaintiff.
9. Said information includes dates and changes of zoning; compliance and/or grants of variances or conditional use permits to surrounding property; enforcement proceedings regarding zoning against other nearby property owners; Plaintiff's desire to acquire said site; and prior court decisions.

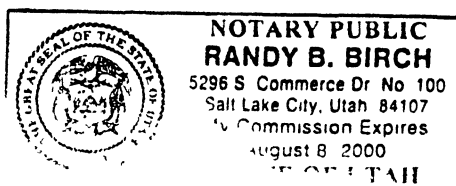
Further Affiant Sayeth Not:


Dated this 12 Day of June 2000.



Douglas Smith
Affiant

Subscribed and sworn to before me this 12 Day of June, 2000.





Notary Public.

SERVICE CERTIFICATE

I hereby certify than on 6-13 _____, 2000, I:

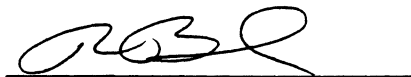
☒ mailed postage prepaid

☐ faxed to No. _____

☐ hand delivered

a true and correct copy of the Foregoing Affidavit of Douglas Smith, to the following:

Michael Z. Hays
Todd J. Godfrey
Mazuran & Hayes, P.C.
2118 East 3900 South, Suite 300
Salt Lake City, UT 84124-1725



Tab D

✓
SECOND DISTRICT COURT

2000 SEP 11 10 5:08

Randy B. Birch, #4197
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Attorneys for Defendant

**SECOND JUDICIAL DISTRICT COURT
DAVIS COUNTY, STATE OF UTAH**

WOODS CROSS CITY, a Utah municipal
corporation,

Plaintiff,

v.

DOUGLAS R. SMITH, dba RALPH
SMITH TRUCKING COMPANY,

Defendants.

SECOND AFFIDAVIT OF
DOUGLAS R. SMITH

Civil No.990700317

Judge Darwin C. Hansen

STATE OF UTAH)
 :
COUNTY OF SALT LAKE)

Affiant, DOUGLAS SMITH, being first duly sworn, under oath, deposes and states as follows:

1. Affiant is over the age of twenty one (21) years or age, a resident of the state of Utah, competent to testify, and that the statements made herein are based on personal knowledge or where so stated, on information and belief.
2. Affiant is the owner of the real property located in Woods Cross City.
3. Part of said property is located in the Newport subdivision.
4. The remaining property, though contiguous to affiant's Newport subdivision property, is

not part of the Newport subdivision. See the attached Exhibit A.

5. Affiant leases all of said property to Ralph Smith Co.
6. Ralph Smith Co. has continuously used the property located outside the Newport Subdivision since before 1991 to run it's trucking business.
7. Regarding the property inside the subdivision, Affiant is the owner of lots 5 and 7-14 of the Newport subdivision. See Exhibit A.
8. Prior to Affiant purchasing said Newport subdivision property, Ralph Smith Co. had already leased and used lot 14 of the Newport subdivision as part of its trucking business continuously since 1986.
9. To the best of affiant's knowledge, most, if not all of the property around Defendants site does not comply with the city's stated zoning classification.
10. Lots 3 and 4 of the Newport subdivision are used as a steel fabrication plant and paint manufacturing plant respectively. See Exhibit A.
11. The property located directly east of lot 5 of said subdivision is owned by Affiant or Phillips 66 company (Phillips 66 uses said property as a buffer zone for possible pressure explosion). See Exhibit A.
12. Plaintiff owns lot 6 of said subdivision, and based upon information and belief, plans to dig a flood-water catch-pond on said site. See Exhibit A.
13. The property along the eastern edge of Affiant's property is a rail road track. See Exhibit A.

14. Other Newport subdivision lots are used as follows:

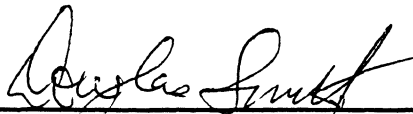
- Lot 1 -- Contractors open storage lot
- Lot 2 -- Interstate battery, storage and distribution/trucking
- Lot 20 -- Hansen Insulation, storage and distribution/trucking
- Lot 15 -- Fiberglass fabrication and distribution shop
- Lot 16 -- Cargo Trailers storage lot
- Lot 17 -- Open storage lot
- Lot 18 & 22 -- Hawk open storage lot
- Lot 23 -- Green concrete containers and equipment storage

See Exhibit A.

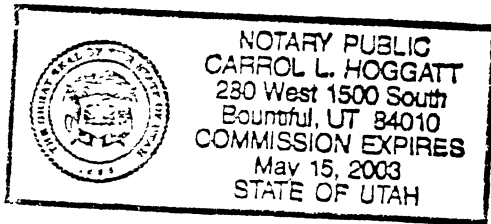
15. There are high voltage power lines and towers which cross the Newport subdivision property, including the property owned by Affiant.
16. The use of affiant's property is consistent with other uses in the area, especially the Newport subdivision.
17. Affiant sees no economical viable uses of said property considering the surrounding uses and the permitted uses under the I-1 zoning classification.
18. Prior to this action, Plaintiff approached Affiant requesting to purchase a portion of his property to use as part of Woods Cross's flood control plan, and Affiant declined to sell.
19. Woods Cross then asked Affiant for a site plan. Affiant said he would provide the same once a flood control plan was provided so as to avoid reworking the site. No flood control plan was ever provided to Affiant, and indeed, to this day, uncontrolled storm water flows across Affiant's property.
20. Affiant believes this lawsuit may have been motivated in retaliation for Affiant's unwillingness to sell.

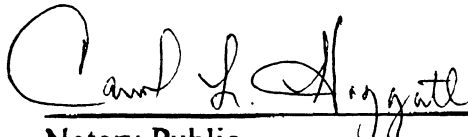
Further Affiant sayeth not:

Dated this 5 day of September 2000.


Douglas Smith, Affiant

Subscribed and sworn to before me this 5 day of September, 2000.




Notary Public

SERVICE CERTIFICATE

I hereby certify than on September 5, 2000, I:


☒ mailed postage prepaid

☒ faxed to No. 801 272-1551

☐ hand delivered

a true and correct copy of the Foregoing Second Affidavit of Douglas Smith, to the following:

Michael Z: Hays
Todd J. Godfrey
Mazuran & Hayes, P.C.
2118 East 3900 South, Suite 300
Salt Lake City, UT 84124-1725



Key for Exhibit A

- ☐ Defendant's existing non conforming use property
- ☒ Rail Road Tracks
- ☒ Phillips 66 pressure buffer zone

Newport Subdivision Lots

- ☒ Lot 14 Nonconforming prior use
- ☒ Lot 1 -- Contractors open storage lot
- ☒ Lot 3 -- Steel fabrication plant
- ☒ Lot 4 -- Paint manufacturing plant
- ☒ Lot 2 -- Interstate battery warehouse and truck parking
- ☒ Lot 20 -- Hansen Insulation truck yard
- ☒ Lot 15 -- Fiberglass fabrication shop
- ☒ Lot 16 -- Cargo Trailers storage lot
- ☒ Lot 17 -- Open storage lot
- ☒ Lot 18 & 22 -- Hawk open storage lot
- ☒ Lot 23 -- Green concrete, shipping containers and equipment storage
- ☐ Property at issue
- ☒ Prior Use property at issue

