1984

Gary J. Xanthos v. Board of Adjustment of Salt Lake City : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

GARY J. XANTHOS, Plaintiff and Respondent, vs. BOARD OF ADJUSTMENT OF SALT LAKE CITY, Defendant and Appellant.	)	PETITION FOR REHEARING AND RESPONDENT'S BRIEF IN SUPPORT OF PETITION FOR REHEARING No. 18333

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TABLE OF CONTENTS

AUTHORITIES CITED

STATUTES CITED

U.C.A. §10-9-15

ORDINANCES CITED

Revised Ordinances of Salt Lake City, Utah §5-8-2(e)

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Gary J. Xanthos hereby petitions the Court for a rehearing of its decision filed May 1, 1984 in the above-captioned matter, on the following grounds.

I.

A.

THE TRIAL COURT'S DECISION THAT THE BOARD OF ADJUSTMENT'S ACTION WAS UNREASONABLE, ARBITRARY AND CAPRICIOUS IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AND THE SUPREME COURT SHOULD NOT REVERSE THAT FINDING AND SUBSTITUTE ITS OWN FINDINGS.

B.

THE FINDINGS OF THE SUPREME COURT IN ITS MAY 1, 1984 DECISION ARE NOT SUPPORTED BY THE RECORD.

The trial court's decision had two basic components. The first component was to conduct a de novo review of the application for a variance. Based on that review, the trial court concluded that a variance should have been granted. The Supreme Court, in its May 1, 1984 Decision, held that the "plenary action for relief" of U.C.A. §10-9-15 was not intended to permit the trial court to make a de novo decision concerning a variance.

The second component of the trial court's decision involved a finding that the Decision of the Board of Adjustment was unreasonable, arbitrary and capricious. Finding of Fact No. 22 and Conclusion of Law No. 1 (R. 86 and 87). The findings of fact of the trial court should be upheld if there is evidence in the record to support them.

The accepted standard of review is that the Supreme Court will sustain a decision by a trial court if the trial court's findings are supported by substantial evidence. Strand v. Cranney, 607 P.2d 295 (Utah 1980); Leon Glazier & Sons, Inc. v. Larsen, 26 Utah 2d 429, 491 P.2d 226 (1971); Gibbons & Reed Co. v. Guthrie, 123 Utah 172, 256 P.2d 706 (1953); and Dansak v. Deluke, 12 Utah 2d 302, 366 P.2d 67 (1961). Furthermore, the evidence is to be viewed in the light most favorable to the prevailing party. Strand v. Cranney, supra; Toomer's Estate v. Union Pacific R. Co., 121 Utah 37, 239 P.2d 163 (1951); Child v. Child, 8 Utah 2d 261, 332 P.2d 981 (1958); and Dansak v. Deluke, supra. There was in fact ample evidence in the record to support the trial court's decision. It

was not based solely on the fact that the perceived economic impact on Xanthos should override zoning considerations.

In this case, there are special circumstances which are unique. First of all, the City had approved the configuration for the duplexes and had issued certificates of occupancy (April 23, 1978) more than three years prior to the issuance of its December 1978 order. Second, the physical changes and lot layout were barely affected by the construction of the new duplexes.

This Court's Decision of May 1, 1984 states, "Further, the record is replete with indications that the City was not made aware at any time during the application and approval process that the structure on the lot, prior to building the duplexes, was a dwelling." This conclusion is contrary to the record and the evidence. First, the application had the plat plan attached to it. Second, anyone looking at the entire application, including the attached plat plan, would have seen that a structure was there.

The May 1, 1984 Decision further states, "Also, testimony indicated that, during inspections after building commenced, City inspectors had no reason to believe that the structure on the property was a dwelling." There is in fact no admissible evidence in support of that proposition. The testimony from Mark Peguillian cites hearsay which was without a foundation. Mr. Peguillian testified, "He told me that the building that was over in the corner, which looked like an old building was going to be torn down. I never asked him anymore about it. I said okay. Fine." There was an objection made to that hearsay testimony (R. 387) to which counsel for Salt Lake City responded, "Your Honor, we'll offer what we're going to proffer under the res jestae (sic) exception to the hearsay rule, and offer it not for the truth of the matter, but for the fact that it was said and that his action was based and relies on that statement." [Emphasis added] (R. 388) Nonetheless, the Supreme Court relied on that out of court statement to say that the city inspectors had no reason to believe that the structure on the property was a dwelling.

The undisputed evidence and the trial court's findings contradict the findings of the Supreme Court. The only evidence which comes close to supporting them is the ambiguous hearsay statement attributed to a City inspector who did not testify. And that statement did not say that it wasn't a dwelling; that statement was that he thought it was going to be torn down. Not even the hearsay statement explained who supposedly told the City inspector that it was going to be torn down.

Further, the undisputed facts in the case do not support the Supreme Court's factual conclusion that the premises in question were not occupied during the time of construction. The City inspector indicated that, when he was there on May 1, 1975, the duplexes were 90% complete (R. 384 and R. 386). The construction was commenced the prior year, in 1974. The testimony of Neysa Jenkins indicated that the premises were remodeled in 1974, that a woman, Wanda Johnson, lived there for almost a year, and that Gary Xanthos moved in after Wanda Johnson (R. 364). Gary Xanthos moved out in July of 1975. Gary Xanthos indicated that he lived there from March or April, 1975 to July of 1975 (R. 129).

The certificates of occupancy are dated April 23, 1975. One would therefore presume that the duplexes had been completely inspected at that time or the City would not have issued the certificates of occupancy. It would also indicate that the City inspector's testimony, at least as to the dates, was incorrect. Nonetheless, the Supreme Court has obviously drawn the wrong conclusion that the premises were vacant during a good deal of the time that construction was going on. The inspector's own testimony was that, on May 1, 1975, the premises were at least 90% completed. It is admittedly hard to reconcile this testimony with the fact that the certificates of occupancy before the buildings were complete. But since construction had begun in 1974, and since the premises were occupied all during that period of time, through and including July of 1975, without any question or dispute, it would appear that the court's conclusion that the premises were basically empty, and that the City therefore couldn't know that there

was a dwelling, is contrary to the evidence. Rather, the record supports the trial court's finding that there were at least five inspections made. (Finding No. 17, R. 86).

The Supreme Court's determination that the structure was never listed as a residence with the City is also contrary to the evidence. There are numerous water bills, electrical bills and tax notices during the period of time where the only residence on the property was the one in question.

There is no question that the land upon which the duplexes were constructed contained no other dwelling. They were built on vacant land. The City has an ordinance that requires certain notification if the dwelling is being demolished for the construction of a new dwelling. City Ordinance §5-8-2(e). At best, the application is ambiguous. To think that someone was planning to be able to fool the City, when the City was going to be making regular inspections of the property, and that one could hide a building and the fact that people were living in it, is pure speculation. The trial court correctly found that there was no believable evidence of proof or intent to defraud or mislead the City. (Finding No. 19 R. 86).

It should also be noted that the City was unable to find the actual building documents. Mr. Hafey said it would not find them (R. 254). Because the City could not find the actual plans and specifications which would have been presented, we do not know whether the actual plans had further information on it concerning this other dwelling.

Respondent respectfully submits that the Supreme Court failed to follow the basic doctrine of upholding the findings of the trier of fact. This record is replete with evidence to support the trial court's findings. The Supreme Court has made its own findings of fact, which respondent respectfully submits are contrary to the evidence in the case.

It is undisputed that there was an issue of law of first impression with regard to the scope of review granted to the trial court. The Supreme Court decided that issue adverse to the respondent. However, the Supreme Court went on to make its own

findings of fact which conflict with the record, rather than following the well established rule of law that findings of fact of the trial court be sustained unless there is a no substantial evidence to support them.

II.

IN THE ALTERNATIVE, THE CASE SHOULD BE REMANDED TO THE TRIAL COURT TO APPLY THE STANDARD SET FORTH BY THE SUPREME COURT IN ITS MAY 1, 1984 DECISION.

If the Supreme Court is concerned that the trial court, because it indicated it was viewing the case de novo, did not apply the appropriate standard in its review and in its findings that the Board of Adjustment's action was arbitrary, capricious and unreasonable, the case should be remanded to the trial court, which did heard all the evidence, to enter findings in accordance with the rule of law set forth in the May 1, 1984 decision.

CONCLUSION

The trial court's decision should be affirmed because it determined that the Board of Adjustment's decision was unreasonable, arbitrary, and capricious, and there is substantial evidence to support that decision, or in the alternative, the case should be remanded for the trial court to be given an opportunity to make that decision.

DATED this 22nd day of May, 1984.

Richard A. Rappaport
Attorney for Plaintiff and Respondent

MAILING CERTIFICATE

The undersigned hereby certifies that a true and correct copy of the foregoing Petition for Rehearing and Respondent's Brief in Support of Petition for Rehearing was mailed, postage fully prepaid, on the 22 day of May, 1984, to:

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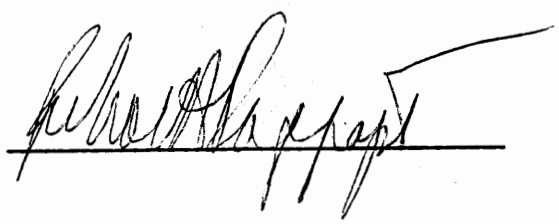

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