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Gary J. Xanthos v. Board of Adjustment of Salt Lake City : Brief of Appellant Opposing Respondent's 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.	)	Case No. 18333

APPELLANT'S BRIEF OPPOSING RESPONDENT'S PETITION FOR REHEARING

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TABLE OF CONTENTS

AUTHORITIES CITED

CASES CITED

STATUTES CITED

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GARY J. XANTHOS, Plaintiff and Respondent, vs. BOARD OF ADJUSTMENT OF SALT LAKE CITY, Defendant and Appellant.	APPELLANT'S BRIEF OPPOSING RESPONDENT'S PETITION FOR REHEARING Case No. 18333

NATURE OF THE CASE

This appeal originated from a final judgment from the Third Judicial District Court, Judge Kenneth Rigtrup presiding. The district courts conducted a trial de novo on Respondent's request for plenary relief from a Board of Adjustment's decision declining to grant a variance for the continuance of a nonconforming building. The district court, after reweighing the evidence before the Board together over objection with evidence not before the Board, reversed the Board and granted the desired variance. The Respondent or "Board" appealed.

After briefing, argument, and deliberation, this Court issued its written opinion on May 1, 1984 reversing the district

court on the law and after applying that law to the facts, reversed and reinstated the Board's decision.

The Respondent now seeks the Court to reconsider its decision, not facially on the law, but on its application of the law to the record. The Board opposes that motion and moves the Court to deny the petition for rehearing.

PREVIOUS DISPOSITION BY THIS COURT

On May 1, 184, this Court handed down its written decision in the above-entitled matter after full briefing, argument, debate, and consideration by the Court. That opinion had two major elements: (1) the establishment of the applicable standard of review and procedures governing judicial review of a Board of Adjustment decision under Section 10-9-15, Utah Code Ann., and (2) the application of those standards to the particular facts in this case. The Supreme Court reversed the district court on both elements because it had improperly assumed the powers to conduct a trial de novo on the facts. It assumed all powers of the Board by reweighing the facts according to its own values and felt at liberty to substitute its own judgment and priority of public policy.

The principles of the standard of review clearly established for district courts to follow in Board of Adjustment cases arising under said Section 10-9-15, Utah Code Ann. seeking "plenary action for relief" clearly include:

(1) Board decisions like those other zoning administrative bodies "should be allowed a comparatively wide lattitude of discretion"; and

(2) "their actions are endowed with a presumption of correctness and validity"; which

(3) "the courts should not interfere with unless it is shown that there is no reasonable basis to justify the action taken."[1]

(4) "The judicial review is not to be a retrial on the merits"[2] or reweigh the evidence and the court is not allowed to substitute its judgment for that of Board."

(5) "The role of the district court in reviewing the Board of Adjustment's decision is to determine whether the action taken was so unreasonable as to be arbitrary or capricious. In order to make that determination, the district court may take additional evidence, but it must be related to the issues that were raised and considered by the Board."[3]

Having clarified the law, which had not been respected in this case by the district court that conducted a trial de novo

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[1]Page 3 of Supreme Court's Decision of May 1, 1984 in the above case, hereinafter "Decision of May 1, 1984", citing Cottonwood Heights Citizens Ass'n v. Board of Commissioners, 593 P.2d 138, 140 (1979).

[2]Decision of May 1, 1984 at page 3.

[3]Id.

and assumed the power of the Board to reweigh policy and the facts, the Supreme Court properly proceeded to apply the correct law to the record.

The Court correctly perceived that the district court had asserted its own individual judgment prioritizing the retention of low income housing regardless of zoning considerations. In doing so it had erred, and that error could and was properly corrected by the Supreme Court looking to see if there was a reasonable basis for the Board's decision. The Court noted that perhaps evidence in the record could have supported the district court's decision, had it had the authority to reweigh and balance according to its own values. But the court held it was not the court's prerogative to weigh the evidence anew.

> "However it does not matter whether the judge agrees or disagrees with the rationale of the Board or the policy grounds upon which a decision is based. It does not lie within the prerogative of the trial court to substitue its judgment for that of the Board where the record discloses a reasonable basis for the Board's decision." Id. at page 6.

Having the record before it as issue in controversy, the Supreme Court applied the correct law in its review. It found "the record in this case clearly reflects, that the Board of Adjustments action was not arbitrary or capricious and that there was a reasonable basis in the evidence to justify it."

The dissenting opinion disagreed, not with the Court's statement of the law, but with the application of the law to the facts. The dissenting opinion's main thesis that the majority

opinion erred in its perception of the facts by giving greater deference to the Board's decision than it did to the district court. The dissent gave and argued the Court should give deference to findings cited by the district court, but failed to address the tainting impact of the district court's error in substituting its judgment and values upon its findings. In reliance on the district court's findings, the dissent would have estopped the Board from enforcing the zoning ordinances.

DECISION SOUGHT ON REHEARING

Respondent, in effect, desires the majority to adopt the dissenting opinion. Appellant asks the Court to dismiss the Respondent's Petition and affirm its decision of May 1, 1984 in all respects.

ARGUMENT

POINT I

THE COURT DID NOT ERR IN ITS DECISION OF MAY 1, 1984 AND SHOULD DENY RESPONDENT'S MOTION FOR REHEARING.

A. RESPONDENT'S PETITION MERELY REARGUES ITS CASE AND THE DISSENTING OPINION.

The arguments raised by Respondent were briefed, argued and specifically considered by the Court in the opinions of the decision of May 1, 1984. In support of Respondent's motion for rehearing, Respondent urges that the Supreme Court erred, when in applying the law to the facts of this case, it found that there was ample evidence in the record to support the Board of

Adjustment's decision and thus was not arbitrary nor capricious.

Respondent suggests that because there is evidence in the record as reweighed by the district court to support the latter's decision, that the Supreme Court is precluded from reversing for it must give deference to the district court findings under the traditional doctrine of limited appellate review. That issue and Respondent's position is not new, it is merely reargument.[4] It is the thesis of the dissenting opinion[5] and is one which this prevailing opinion specifically considered and rejected when it determined the scope of judicial review is to refrain from substituting "its judgment for that of the Board where the record discloses a reasonable basis for the Board's decision."[6]

This holding of law conforms to the well reasoned law of similar cases and should be affirmed. The holding was adopted after complete briefing, argument and consideration but disagreement in a strong dissent. It is a holding with which it can be expected the Respondent as a defeated party, together with the dissenting author, would not agree. But in accordance with the long-established and worthy policy of this court, mere disagreement does not provide an appropriate ground to justify a

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[4]Respondent's Brief Points I(D) and II, Appellant's Brief, Point I and (C) in particular.

[5]Decision of May 1, 1984, dissent at page 9.

[6]Id., majority opinion at p. 4.

rehearing. Ducheneau v. House, 4 U. 292, 9 P. 618, (1886), Jones v. House, 4 U. 484, 9 P. 619 (1886); Cunnington v. Scott, __ U.__, 9 P. 619 (1886).

B. THE SUPREME COURT DID NOT ERR WHEN IT DECLINED TO EXTEND A PRESUMPTION OF VALIDITY TO THE DISTRICT COURT'S FINDINGS, BUT REVIEWED THEM MERELY FOR THE PURPOSE OF IDENTIFYING THE EXISTENCE OF SUPPORT FOR THE DECISION OF THE BOARD OF ADJUSTMENT.

Respondent and the dissenting opinion suggest the Supreme Court erred in failing to give proper deference to the district court's findings. As discussed generally above, that issue is not new, was briefed, argued, and unsuccessfully raised in the dissent and rejected.[7]

Respondent now further suggests that after conducting the trial as a matter of original jurisdiction and substituting its own values prioritizing low cost housing over other valid zoning objectives, the district court also concluded that the Board's decision was arbitrary and capricious, that the latter statement can be extracted from its setting untainted by the district court's fundamental errors.

The Court properly discerned that candid refusal of the district court to extend a presumption of validity to the Board's decision and correspondingly limit its scope of judicial review inherently tainted the entirety of its actions, precluding the

[7]Appellant's Brief, Point I & (C) in particular, Respondent's Brief, Point I(D) and II, argument, and the dissenting opinion.

Supreme Court from deferring to or relying on the district court's findings and conclusions.[8] When such error and abuse of judicial power occurs, the matter must be remedied by Supreme Court intervention. Otherwise, the error becomes perpetuated and insulated; the primary safeguard of judicial restraint becomes meaningless, and the district courts become super boards of adjustment.

The tainting error of a district court's failure to apply the appropriate limited scope of review cannot be expunged by asking if there is evidence to support the erroneous decision, but to properly review the evidence in the favor of the Board.

This Court properly fulfilled its duty by conducting the review under the scope of analysis that should have been applied at the district court level. Was there a reasonable basis for the Board's actions? This Court did not substitute its judgment for that of the discretion of the trial court for the discretion is not vested in the district court but in the Board. There is nothing to suggest how this court or individual justices might have voted had they been members of the Board, and they carefully declined to give that appearance. Obviously this was and remains a case over which reasonable parties could and do disagree.

In reversing on the facts, the Court correctly cured the errors in the same manner as courts reaching the same conclusion

[8]Decision of May 1, 1984 at page 4.

in other similar matters have done and should do. Rickard v. Fundenberger, 1 Kan App. 2nd 222, 563 P.2d 1069 (1977).

C. THE RECORD SUPPORTS A REASONABLE BASIS FOR THE BOARD OF ADJUSTMENT DECISION. THE COURT DID NOT ERR IN ITS ANALYSIS OF THE RECORD.

The issue as to whether the record provides a reasonable basis to support the Board decision when analyzed from the correct scope of judicial review has been in controversy in every phase of this appeal--in briefing, argument and opinions. People disagree, but the court, after careful consideration, has found the "record clearly reflects"[9] there was a reasonable basis and has ruled in the Board's favor. That ruling should be affirmed without reservation or further rehearing.

Respondent cites a series of a selected few of the Supreme Court's statements that it believes are not consistent with the record, but in actuality are only inconsistent with its myopic perception of those facts. Individually and collectively the discrepancies are non existent or insignificant to the totality of the record before the Court and upon which it based its decisions. It is simply unpersuasive reargument at best--and unabashedly self serving and selective--omitting acknowledgement of all the facts supporting the Board's decision.

Specifically:

(1) As to the argument that the "special circumstances"

[9]Decision of May 1, 1984 at p. 4.

required for a variance is satisfied by the 3-year period between issuance of the duplex permits and the enforcement action. This simply demonstrates Respondent's misunderstanding of the requirement--despite prior briefing on the issue[10] and the Court's decision.[11] The Court correctly and specifically held on page 5 that "the property itself contains some special circumstances relating to the alleged hardship." The Court properly ruled that such circumstances were missing in this case.

(2) Respondent attacks the Court's statement that the City was not made aware during the application and approval process that structure was being used as a dwelling. However, it cites absolutely no authority in the record other than the existence of the plat plan showing an existing structure. Seeing a structure that is in position and a size smaller than proposed carports situated on an alley in a parking lot (Exhibit D-31) attached to an application disclosing there are no dwellings on the lot outlined within the project and scope of permit does not equal disclosing the use would be for a dwelling. The Court was properly persuaded that ambiguous disclosure of an existing building which looks and would be legal if it were used as a garage or

[10]Appellant's Brief, pages 25-29.

[11]Decision of May 1, 1984 at pp. 5-6.

storage shed is not equivalent to disclosure of an extra unit exceeding the number for which approval was given.

(3) Respondent suggests there is no admissible evidence to support the Court's view that the City, during construction, had no reason to believe the structure was used as a dwelling. Seeing a structure that looks the size, shape, position, characteristic of a garage does not disclose its undisclosed use as a dwelling. The testimony of the building inspector that he saw the building "which looked like an old building" proves he saw it but doesn't prove he knew or even considered it was being used as a dwelling. In fact, on September 30, 1975, it is and was true according to the testimony of Mr. Xanthos that it was not being so used.

Mr. Peguillian's testimony as to the information he received from his supervisor who was training him, was offered as under res gestae exception to the heresay rule. It was admissible to prove that when inquiring about the structure received an answer that induced him to believe that the building would be removed. The statement may or may not have been true, perhaps Mr. Lawson lied to Mr. Peguillian. But the statement is significant for it was made by a person: who had reason to be familiar with the project, who was in a special position of authority to require removal, who would have known the significance it would make to the new inspector, and who knew the action it would reasonably induce

Mr. Peguillian to forebear. (R-385-389). It does adequately support the Court's position.

Contrary to Respondent's view, the non-heresay testimony of Mr. Peguillian that he observed "the older building over in the corner, set out there by the alley" (R-388) does not suggest he knew or believed it to be used as a dwelling.

(4) Respondent errs and confuses the evidence. It states Mr. Peguillian first visited the project site in May of 1975 (a time Mr. Xanthos testified he occupied the structure as a dwelling.) A close reading of the record (R-385-389) discloses Mr. Peguillian testified he was hired in May of 1975. (R-384). Later in July, he received the area from Mr. Lawson (R-385). The first time he inspected the duplexes was when he went out with Mr. Lawson to do a final inspection (structural) for a certificate of occupancy. His initialed date of the inspection was September 30, 1975. (R-387 and Exhibit 21D-(6).

(5) The Court did not conclude that the structure was not occupied during construction as suggested, but that City inspectors had no reason to believe it was being used as dwelling because then they had no reason to believe it was not the garage or storage shed it appeared to be. This does conform to the record.

(6) Certificates of occupancy are dated April 23, 1975 and correspond to the time an owner requests final inspec-

tions to begin. Mr. Blair explained in the record inspections occur upon request after that date, but the certificates are not given out until after all final inspections have been completed and the last being the building inspection. (Exhibit 23-P and R-223) Consequently, Mr. Peguillian's testimony is consistent with the documentation of the record and decision of this Court.

(7) Respondent's characterization of the Court's statement that the structure was never listed as a residence with the City is inaccurate. This Court stated "there was evidence that structure was never listed as an independent residence in the City records, did not have an assigned address and did not have authorized water, sewer or electrical service." That is true. Exhibit 21-D and testimonies of Mr. Blair and Mr. Hafey.

(8) Respondent makes note that at court the building plans could not be produced by the City but omits noting that it couldn't produce them either, even though it produced old bills, tax notices, contracts, etc. related to the property and project. It also omits mentioning that the property owners did work without required permit, removed buildings without permit, and changed the addresses it placed on the units in the field adding to the confusion in redords.

Regardless of the number of errors alleged, they are simply knit picky and are largely inaccurate. It is simply symptomatic

of Respondent's tenacious unwillingness to accept the fact that others, including the Court, can view the facts differently than they would like them to.

Whether considered separately or in their totality, the allegations of error are insubstantial, meritless and are much ado about nothing. The petition for rehearing upon them should be dismissed for what it is--unconvincing reargument.

POINT II

REMAND IS NOT NECESSARY, IS CONTRARY TO THE INTERESTS OF JUDICIAL ECONOMY.

As a last-ditch effort to avoid enforcement of the Board's decision affirmed by this Court, Respondent begs for a remand. The remand is not necessary and is, in light of the detailed review of the record by the Court, inappropriate. This is not a matter where the trial court has original jurisdiction to weigh the evidence in light of its own interpretation of the ordinance and public policy. Consequently, the district court has no unique function that cannot and has not been performed by the Supreme Court. The decision is final, and should remain so. In the interest of judicial economy, the parties and courts should be spared of unnecessary additional burdens.

CONCLUSION

The Respondent's petition is completely based on issues and facts already correctly considered by this Court. Basically, it reechoes the concern of the dissenting opinion. At best, it is

blatantly repitious self serving reargument that did not prevail. The supposed errors cited as the grounds for rehearing either aren't errors at all or are completely insignificant minutia.

The principal holdings on the law are not objected to directly. Respondent instead objects to the proper application of them by the Supreme Court. There is no other body better able to conduct the limited appellate review in light of the appropriate standards this Court has established.

There is nothing in the petition which gives any valid reason to consider the Court's decision. Therefore, the appellant believes the petition should be dismissed, that the significant, well-reasoned decision by the Court of May 1, 1984 should be affirmed to provide guidance to the district courts of this state to avoid future error.

Respectfully submitted this 21 day of June, 1984.

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Adjustment of Salt Lake City

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