

1990

J. Val Roberts and Verle Roberts v. Centerville City,
Centerville City Board of Adjustment, Nancy H.
Groll, William Wingo, Norm Wright, Fred Nelson,
and Dale Rees : Petition for Writ of Certiorari

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Unknown.

Unknown.

Recommended Citation

Petition for Certiorari, *Roberts and Roberts v. Centerville City*, No. 900319.00 (Utah Supreme Court, 1990).
https://digitalcommons.law.byu.edu/byu_sc1/3101

This Petition for Certiorari is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFJ
45.9
.S9
DOCKET NO.

UTAH SUPREME COURT

BRIEF

900319

IN THE SUPREME COURT OF THE STATE OF UTAH

J. VAL ROBERTS and
VERLE ROBERTS,

Plaintiffs and Appellants,

vs.

CENTERVILLE CITY, CENTERVILLE
CITY BOARD OF ADJUSTMENT, and
NANCY H. GROLL, Chairman of
the Centerville City Board of
Adjustment, WILLIAM WINGO, NORM
WRIGHT, FRED NELSON, and DALE
REES, members of the Centerville
City Board of Adjustment,

Defendants and Respondents.

VERIFIED
PETITION FOR WRIT
OF
CERTIORARI

Docket No. 900319

APPENDIX TO BRIEF FOR PETITION FOR WRIT OF CERTIORARI

FILED

JUL 2 1990

Clerk, Supreme Court, Utah

APPENDIX TO BRIEF FOR PETITION FOR WRIT OF CERTIORARI

APPENDIX

- Appendix A: Utah Court of Appeals Memorandum Decision (Not Published)
- Appendix B: Transcript on Appeal
- Appendix C: Utah Rules of Civil Procedure
- Appendix D: Centerville City Ordinances
- Appendix E: Utah State Statutes
- Appendix F: Case Law Cited
- Appendix G: Respondents' Improper Motives
- Appendix H: Memorandum Decision of Weber County Division, 2nd Judicial Court, dated January 3, 1990.
- Appendix I: Affidavits of James G. Parrish, David F. Parrish, Larry G. Smith

APPENDIX A

IN THE UTAH COURT OF APPEALS

FILED

-----oo0oo-----

MAY 2 1990
Gilbert
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

J. Val Roberts and Verle Roberts,)
)
Plaintiff and Appellant,)
)
v.)
)
Centerville City, Centerville City)
Board of Adjustment, and Nancy H.)
Groll, Chairman of the Centerville)
City Board of Adjustment; William)
Wingo, Norm Wright, Fred Nelson,)
and Dale Rees, members of the)
Centerville City Board of Adjustment,)
)
Defendants and Respondents.)

MEMORANDUM DECISION
(Not For Publication)

Case No. 900160-CA

Before Judges Billings, Garff, and Davidson (On Law and Motion).

PER CURIAM:

This matter is before the court on appellee's motion for summary affirmance and on appellant's motion for stay pending appeal. We affirm the trial court's judgment and, accordingly, deny a stay of the judgment.

J. Val Roberts and Verle Roberts ("Plaintiffs") appeal from a summary judgment granted in two cases consolidated in the trial court. Plaintiffs filed Civil No. 42831 in the Second Judicial District Court on January 19, 1988, naming as defendants Centerville City and various city officials ("Centerville"), as well as the judges assigned to pending criminal proceedings against plaintiffs. The complaint sought to enjoin criminal prosecution of plaintiffs for violations of Centerville City Ordinance No. 10-354 prohibiting "parking, storing, or leaving any motor vehicle of any kind which is in an abandoned, wrecked, dismantled, inoperative, rusted, junked, or partially dismantled condition whether attended or not, on any public or private property within the city for a period of time in excess of seven days." Plaintiffs claimed that the ordinance was actually a "zoning" ordinance subject to a "prior non-conforming use" defense. Plaintiffs filed Civil No. 45446 on May 15, 1989 in the Second Judicial District Court, pursuant to Utah Code Ann. § 10-9-15 (1986), to obtain judicial review of a decision of the Centerville City Board of Adjustment refusing to find a prior non-conforming use. In proceedings before the Board of

Adjustment, Centerville showed that the subject property had been zoned "agricultural" since 1952, and that plaintiffs purchased the property in 1964. Roberts thereafter argued that the use of his property to store inoperative vehicles was an accepted and normal accessory use customarily incidental to the use of land for agricultural purposes at the time the zoning ordinance was adopted. On that basis, plaintiffs claimed that their use of the property could not be made illegal by a subsequently enacted ordinance prohibiting the storage of junked, rusted, or partially dismantled vehicles within the city. They also urged the court to find that the Board of Adjustment had no jurisdiction to determine the non-conforming use question.

In November, 1989, the two cases were consolidated based on the stipulation of the parties, and the court allowed the filing of an amended complaint to consolidate the claims. The amended complaint, filed November 21, 1989, contains four claims seeking: (1) a declaration that plaintiffs' use of the property is a prior non-conforming accessory use; (2) a stay of criminal prosecution against plaintiffs; (3) a de novo-type review of the Board of Adjustment's decision; and (4) a declaration that the Board of Adjustment cannot make the determination of a non-conforming use. The City filed an answer and a counterclaim which requested a declaratory judgment that plaintiffs do not have a prior existing non-conforming use of their property and that the use of the property for storing junked or dismantled motor vehicles is not a lawful, accessory use of the property.

Centerville filed a motion for summary judgment based on the following undisputed, material facts:

1. Plaintiffs' property is located within an agricultural zone in Centerville City, Utah.
2. As early as April of 1952, the storage of junked motor vehicles has not been permitted within agricultural zones in Centerville City, Utah.
3. The Roberts purchased their property in 1964.
4. Plaintiffs are currently storing approximately 30 junked motor vehicles on their property in Centerville City, Utah.

Centerville asserted that Roberts did not have a prior non-conforming use because the storage of junked automobiles has never been a lawful use of agricultural property during the period of Roberts' ownership. Further, Centerville argued that the use was not an accessory use because it was not clearly subordinate and customarily incidental to the use of agricultural land for residential purposes and is a use

expressly prohibited by city ordinances. Plaintiffs also sought a partial summary judgment declaring their use to be a prior non-conforming accessory use. The trial court denied plaintiffs' motion and granted Centerville summary judgment. The court found no genuine issue existed as to any material fact and entered judgment as a matter of law against plaintiffs "on the basis that the activities described are not accessory uses to a farming operation and not proper uses in an agricultural zone; and, the Centerville City Board of Adjustment had authority to act and their decision is reasonable and valid."

Plaintiffs filed a notice of appeal purportedly based on dismissal of their claims for an unlawful taking under the Fifth Amendment. In their docketing statement, plaintiffs raise a myriad of issues that were not presented to the trial court, including claims alleging the unconstitutionality of the relevant ordinances. They also raise for the first time on appeal claims based on the Horseless Carriage Act and Junkyard Control Act and claims of "detrimental reliance" and improper motive by Centerville. Plaintiffs further claim that the district court's decision in this case is contrary to an earlier trial court decision, apparently involving another municipality; however, no such decision was argued to the trial court. Finally, they claim that the summary judgment process denied them access to the court. ✓ Respondent Centerville moved for summary disposition on the basis that the majority of the issues raised on appeal are not properly before this court and no substantial question exists as to the remaining issues.

Our review of the record reflects that the only issues properly before this court are whether the court erred in entering summary judgment rejecting Roberts' claims that their use of the property was a valid prior non-conforming use or accessory use and whether the Board of Adjustment lacked jurisdiction to make its determinations as to the non-conforming use issue. We also consider Roberts' claim that the judgment was procedurally defective. All other issues were not raised or were not preserved below and will not be considered for the first time on appeal.

"A grant of summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. In determining whether the trial court properly found that there was no genuine issue of fact, we view the facts and inferences therefrom in the light most favorable to the losing party. And in deciding whether the trial court properly granted judgment as a matter of law to the prevailing party, we give no deference to the trial court's view of the law; we review it for correctness." Utah State Coalition of Senior Citizens v. Utah Power & Light, 776 P.2d 632, 634 (Utah 1989)(citations omitted.) "In granting summary judgment, a trial court must not weigh or resolve disputed evidence." Territorial Savings & Loan Ass'n v. Baird, 781 P.2d 452, 456 (Utah App. 1989) (citations omitted.)

Our review of the record reveals no genuine dispute of the material facts. Both parties agree that Roberts purchased the property in 1964, began storing inoperative vehicles there prior to 1970, and presently has 25 to 30 inoperative vehicles stored on the property. It was also undisputed that the property has been zoned agricultural since 1952. In their response to Centerville's motion for summary judgment, plaintiffs asserted that "[t]he factual question of whether the storage of junk and old motor vehicles is a "prior existing non-conforming use" or "an accessory use for the plaintiffs' agricultural land" precluded summary judgment. Plaintiffs did not support their legal theory with any affidavits containing factual allegations regarding the use of their land. Our review of the pleadings identifies allegations that the property has been used for residential purposes and not for agricultural purposes. We conclude that no genuine factual issue was presented, and consider whether summary judgment was appropriate as a matter of law.

The 1952 zoning ordinance for Centerville City enumerated the allowed uses for land zoned for agricultural use. Centerville asserts that the use of agricultural land for a junkyard is not a use enumerated in the ordinance. We note, however, that the 1952 ordinance defined "junkyard" as follows:

The use of any lot, portion of lot or tract of land for the storage, keeping or abandonment of junk, including scrap metals or other scrap material, or for the dismantling, demolition or abandonment of automobiles, or other vehicles, or machinery or parts thereof; provided, that this definition shall not be deemed to include such uses which are clearly accessory and incidental to any agricultural use permitted in the district.

(Emphasis added.) It is clear that plaintiffs' legal theory was fashioned after the language emphasized above. The 1952 zoning ordinance defines an "accessory use" as a "subordinate use . . . customarily incidental to and located upon the same lot occupied by the main use" Agriculture is defined as: "The tilling of the soil, the raising of crops, horticulture and gardening, but not including the keeping or raising of domestic animals and fowl, except household pets, and not including any agricultural industry or business, such as fruit packing plants, fur farms, animal hospitals or similar uses." Thus, for plaintiffs to state a claim that the storage of inoperative vehicles is a permissible accessory use, they must allege facts tending to show that the storage is a accessory to their agricultural use of the land. An examination of the record demonstrates that the exception in the zoning ordinance is inapplicable. An "accessory use" must be customarily incidental

to a "main use" on the same lot that is agricultural. The record fails to raise a genuine factual issue that plaintiffs were making any agricultural use of their property. As indicated in the pleadings, their use was residential. The purported factual issue raised by plaintiffs was merely a conclusory misstatement of the exception in the zoning ordinances, asserting that the accessory use was allowable simply by virtue of the "agricultural" zoning designation. Plaintiffs have not alleged any facts that would have brought them within the exception for an accessory use to an agricultural use. In response to the present motion for summary disposition, plaintiffs now claim that there was a factual issue as to whether the vehicles were "junked". We note that plaintiffs' own pleadings and memoranda have described the vehicles using that term and conclude that no genuine factual issue exists.

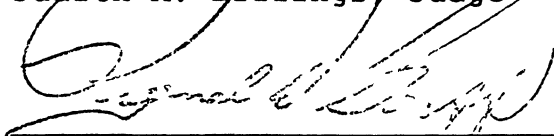
Even construing the facts in the light most favorable to plaintiffs, we can identify no genuine factual dispute about the use of the property. The trial court did not err in concluding, as a matter of law, that the use of the land for storage of inoperative vehicles was not an accessory use to an agricultural use. Similarly, it is undisputed that the plaintiffs purchased their property after the enactment of the zoning ordinance and thus cannot claim a prior non-conforming use. Having concluded that the trial court was correct in ruling as a matter of law that no prior non-conforming use or valid accessory use existed based on the undisputed facts, it is unnecessary to consider plaintiffs' remaining arguments. We further conclude that the form of judgment was appropriate because Utah R. Civ. P. 52(a) requires only a brief written statement explaining the basis for a summary judgment.

The judgment is affirmed, and the motion for a stay pending appeal is, accordingly, denied.

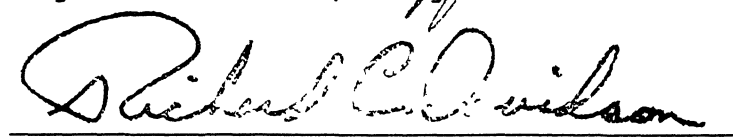
ALL CONCUR:



Judith M. Billings, Judge



Regnal W. Garff, Judge



Richard C. Davidson, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 2nd day of May, 1990, a true and correct copy of the foregoing Memorandum Decision was mailed to each of the following:

J. Val Roberts
Attorney Pro Se
P. O. Box 666
Centerville, UT 84014

Jody K. Burnett
Snow, Christensen & Martineau
Attorneys at Law for Appellees
Ten Exchange Place, 11th Floor
P. O. Box 45000
Salt Lake City, UT 84145

Honorable David Roth
Weber County
Second District Court
#89-0903165

Julia C. Whitfield
Deputy Clerk

900160-CA

APPENDIX B

1 IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
2 STATE OF UTAH, IN AND FOR WEBER COUNTY

3
4 J. VAL ROBERTS, et ux.,)
5 Plaintiff,) Civil No. 890903165
6 -vs-) TRANSCRIPT ON APPEAL
7 CENTERVILLE CITY, et al.,)
8 Defendants)

9
10
11 BE IT REMEMBERED the above entitled matter came on
12 for hearing before the HON. DAVID E. ROTH, judge of the
13 above entitled Court, sitting without a Jury, on July 27,
14 1988, November 8, 1989 and December 13, 1989.

15 WHEREUPON, the following proceedings were had, to wit:

16
17
18
19 A p p e a r a n c e s:

20 BRIAN BARNARD, ESQ.,
21 Attorney for the Plaintiff;
22 JODY BURNETT, ESQ.,
23 Attorney for the Defendant.
24
25

1 (July 27, 1988)

2 THE COURT: Case number 42831, J. Val Roberts
3 and others vs. Centerville City and others, time
4 scheduled for hearing on Motion for Summary Judgment.
5 Plaintiff's Motion, correct?

6 MR. BARNARD: That's correct, your Honor.

7 THE COURT: Who is counsel for Plaintiffs?

8 MR. BARNARD: I am. I am Brian Barnard.

9 THE COURT: Who else do we have here?

10 MR. BURNETT: Your Honor, Jody Burnett and Dan
11 Hill representing Centerville City, Randy Randall, Ted
12 Kanell, David Young Payne. The only named Defendant we
13 do not represent is Judge Alfred Van Wagenen, who is a
14 Circuit Court Judge the underlying criminal action is
15 assigned to. He is represented by Carlie Christensen of
16 the State Court Administrator's Office. But the dispute
17 is largely between my clients and Mr. Barnard. Carlie
18 advised me she did not plan to attend the hearing. I
19 believe, Mr. Barnard, he is named only in the capacity
20 an order in this Court might impact on the criminal
21 action.

22 THE COURT: Mr. Barnard, go ahead.

23 MR. BARNARD: Thank you, your Honor. As the
24 Court is aware, this case is from Davis County. The
25 District Judges there recused themselves and asked this

1 Court to hear it. It involves a dispute as to the use
2 of some property in Centerville.

3 THE COURT: If it helps you any, I have looked
4 at the file and read all your memoranda. So I am
5 familiar with that material.

6 MR. BARNARD: Fine. Essentially what the case
7 is is it seeks the determination that my clients' use of
8 their real property constitutes a non-conforming prior
9 existing use. My clients are being criminally
10 prosecuted because they are storing some dismantled,
11 junked automobiles on their property. The property is
12 currently zoned agricultural. My clients have been
13 using that property to store these dismantled rusted old
14 automobiles since before 1970. We have submitted
15 Affidavits from James Parish, a neighbor, who is a
16 lifelong resident of Centerville, saying that prior to
17 1970 my clients had stored vehicles on the property.
18 Another Affidavit from Larry Smith indicating again that
19 they had stored junked automobiles on the property.

20 In 1970, Centerville City passed an ordinance
21 prohibiting the storage of such automobiles outside on
22 property. My clients were storing such vehicles before
23 1970. It is our position that it is a non-conforming
24 prior existing use. So we ask the Court to make a
25 determination to that effect. If in fact that's the

1 case, and the Court makes such a determination, then the
2 criminal prosecution would be resolved because if the
3 Court makes a finding that it is non-conforming prior
4 existing use, it is a complete bar to the underlying
5 criminal case.

6 The Defendants have suggested that we should simply
7 raise that as a defense in the criminal case. We
8 attempted to do that when the criminal case was before
9 Justice of the Peace Pro Tem David Payne. He declined
10 to give that as a Jury Instruction to the Jury trial
11 that Verle Roberts had. He also listened to my
12 arguments and then declined to rule in my favor on the
13 case that we had for Val Roberts. Both of those cases
14 have been tried in Centerville Justice Court before
15 Judge Payne. Both of my clients were found guilty. We
16 then appealed, and the criminal matter is pending now
17 before Judge Van Wagenen in Centerville or Clearfield.
18 So that's where we stand.

19 THE COURT: Procedurally, what happens after
20 that trial, assuming you go to trial in the Circuit
21 Court and you lose?

22 MR. BARNARD: Well then another--

23 THE COURT: Is that an appealable case? When
24 it goes from the Justice Court to Circuit Court, is that
25 the final disposition of the case?

1 MR. BARNARD: I am not sure, your Honor. And
2 the trial is set tomorrow.

3 THE COURT: Tomorrow?

4 MR. BARNARD: Yes. If we have an appeal for a
5 de novo trial from the Justice Court to the Circuit
6 Court, I would assume that then it would be treated as
7 if it were a brand new case in Circuit Court.

8 THE COURT: Appealable to the Appellate Court?

9 MR. BARNARD: Based upon the record in the
10 Circuit Court. I haven't researched it, but my initial
11 reaction is we would then have an appeal on the record
12 from the Circuit Court to the Court of Appeals.

13 One of the other issues is, your Honor, and it is
14 before the Court today, is a Motion for Injunction to
15 stay the trial tomorrow. So there is two matters. One
16 is our Motion for Summary Judgment, the other is to stay.

17 THE COURT: I am not sure what the relationship
18 is between this Court and that Court with regard to the
19 two separate actions. Technically there probably is no
20 connection.

21 MR. BARNARD: I think from an--under the
22 statute, I don't think the Court has supervisory power,
23 but since they are named as the Defendant, since Judge
24 Van Wagenen is named as the Defendant, and the
25 prosecutor is named as the defendant, I think an Order

1 of this Court telling them not to proceed with the trial
2 would have some effect.

3 THE COURT: The Defendant suggests there is a
4 factual issue.

5 MR. BURNETT: That's correct, your Honor.

6 THE COURT: As to whether or not the abandoned
7 non-operable vehicles were on the property prior to
8 1970. What evidence do you have of that?

9 MR. BURNETT: Well, first of all, even the
10 evidence presented by Mr. Barnard, his clients, is
11 somewhat inconclusive. And it depends on what standard
12 say a Jury in the criminal action, or the Judge, were to
13 apply. In other words, what's a valid prior
14 non-conforming use? Does it have to be continuous? Mr.
15 Barnard suggested that in some vague fashion if there
16 was any vehicle which at any time was inoperable. The
17 cases we have cited suggest it must be continuous. Mr.
18 Roberts in his own deposition says the cars came and
19 went. And at times they were operable. Even the one
20 vehicle he cites he can specifically recall being on the
21 property prior to 1970.

22 THE COURT: You make reference to depositions.
23 I don't have the deposition.

24 MR. BURNETT: Okay. I would be happy to
25 provide the Court with a copy. We have got the excerpts

1 cited in our memorandum. If I could present to the
2 Court the deposition, I would be happy to provide the
3 Court with a copy. Page 25 cites Mr. Roberts'
4 recollection of what vehicles he can recall being on the
5 property. He said--

6 THE COURT: Do you object to the publication of
7 the deposition?

8 MR. BARNARD: I do not. There are some minor
9 corrections, but not relating to what Mr. Burnett is
10 citing.

11 MR. BURNETT: With respect to the '41 vehicle,
12 I think that's page 23, it says it was registered as
13 recently as '74. So I don't think that meets the
14 requirements of the elements.

15 THE COURT: Is it your position we would have
16 to have inoperable vehicles from 1970, beyond 1970, the
17 same ones on the property at the same time for the use
18 to be continuous?

19 MR. BURNETT: That's right.

20 THE COURT: I don't buy that. I think the
21 activities can be continuous and have cars come and go
22 as long as cars are there any any given time.

23 MR. BURNETT: With respect to the Court's
24 question I am at some disadvantage. I have been hired
25 to represent the Defendants in the City action. I am

1 not the prosecutor. Theodore Kanell is one of my
2 clients. I don't know all the evidence they intend to
3 present with respect to that use, or what they
4 presented. I know they have got City Administrators,
5 prior City officials, photographs, things of that
6 nature. And, of course, we have responded to discovery
7 in this case based upon that information from the City
8 Administrator indicating we are not aware of a valid ✓
9 non-conforming use prior to 1970. But I would like to
10 go to the last question first, if I might.

11 More importantly, I don't think under the present
12 Judicial Article, the Court has any supervising
13 authority. The issue isn't raised to the Court to whom
14 the case is assigned. We are de novo. I have spoken to
15 Mr. Kanell. He has said the defendants are entitled to
16 a jury instruction. If the Jury should determine--

17 THE COURT: What's the Instruction going to
18 say? There is a lot of legal issues that you have
19 raised in your objection to the Motion. How do you
20 draft an Instruction that incorporates all of those?
21 Are you simply going to say a prior non-conforming use
22 is a defense? Do you agree and Mr. Kanell agree?

23 MR. BURNETT: I think he does. I think it
24 would have to give instruction.

25 THE COURT: Some of your objections suggest

1 this is not a non-conforming use case at all, don't they?

2 MR. BURNETT: Well, I guess implying the
3 elements--

4 THE COURT: One of the issues you raise, it
5 would have to be a commercial enterprise or a
6 non-conforming use doesn't apply, it is not a taking
7 because--I can't remember the arguments.

✓8 MR. BURNETT: The taking is an entirely
9 different analysis. I will address that. I think
10 that's a throw away issue. I genuinely do. Clearly
11 under all the authorities presented in order to have a
12 taking under the federal or state constitution, you have
13 to be deprived of all economically available use of the
14 property. Zoning by definition represents regulation or
15 restriction on property always, which is or is not
16 subject to a valid prior non-conforming use exception.
17 It is a wholly different matter than whether there is a
18 compensable taking.

19 Mr. Roberts establishes by his own testimony it has
20 been used as a home. He has used it for agricultural
21 purposes.

22 THE COURT: Is this a zoning case?

23 MR. BURNETT: Yes, I think it certainly is a
24 zoning case.

25 THE COURT: If there is a commercial

1 enterprise, a wrecking yard existed before 1970 and
2 there was a zoning change saying henceforth this is not
3 allowed, this would be a non-conforming use.

4 MR. BURNETT: I agree that would meet all four
5 elements.

6 THE COURT: Are you right down to the point of
7 whether or not there is evidence to support the
8 non-conforming activity? Is that the whole issue?

9 MR. BURNETT: No. I agree with the Court there
10 are a couple of legal issues the Circuit Court Judge
11 might have to resolve with respect to whether he agrees
12 with the position my client will take that it must be
13 commercial in nature, and which this clearly is not.

14 THE COURT: Do any of your cases clearly say it
15 must be commercial in nature, or are they all the nature
16 where it is personal?

17 MR. BURNETT: The latter, your Honor, don't
18 address that one way or the other. It just happens to
19 be that all the cases we found on the nature deal with
20 commercial use.

21 THE COURT: Those are not the holding of the
22 case, that's not the holding it has to be?

23 MR. BURNETT: Not specifically. I can't cite
24 the Court to any statement of that nature, no.

25 THE COURT: If--

1 MR. BURNETT: Tied up in that also is this
2 issue of a nuisance.

3 THE COURT: This may be immaterial, irrelevant
4 and unfair. Suppose the occupants of a location in the
5 City had six dogs, and had always kept six dogs for his
6 own pleasure. And the City enacted a Kennel ordinance
7 saying no more than three dogs per household, or some
8 such thing; non-conforming use?

9 MR. BURNETT: No.

10 THE COURT: No because it is not commercial?

11 MR. BURNETT: Even with a commercial--even with
12 a valid non--it is a little bit apples and oranges.
13 That use is still subject to reasonable regulation in
14 the pursuit of public health, safety and welfare.

15 THE COURT: Wrecking yard is not in that
16 category?

17 MR. BURNETT: No, but--well, you couldn't
18 prohibit a wrecking yard. Give you an example. There
19 is a case we cited that deals with this. Suppose the
20 wrecking yard is clearly a valid non-conforming use.
21 The City enacted an ordinance in order to control dust
22 emissions. They want you to pave the parking lot. I
23 think they could require that parking lot to be paved.

24 THE COURT: We don't have that in this case?

25 MR. BURNETT: No, but going down back to the

1 dog illustration the Court brought up, I think if you
2 limit the number of dogs in the kennel as a result of
3 furthering the public health, safety and welfare, you
4 can do that.

5 THE COURT: The dogs are public health, safety
6 and welfare, the wrecking yard is not, the Roberts case
7 is not?

8 MR. BURNETT: Aspects of the wrecking case,
9 aspects of the Roberts case may be. Go back to the
10 taking issue, this would more squarely present the
11 taking. I think it shows where it is not a taking.
12 This Court does not have a phase out provision. You run
13 into some ordinances that do. Even if you have got a
14 valid non-conforming use, you have one year, two years,
15 three years to terminate it, because you have got two
16 policy goals in conflict. The rights of the
17 individual's use of the property and the implementation
18 of a comprehensive zoning scheme, which is frustrated by
19 non-conforming uses. And there are a lot of courts in
20 other jurisdictions that say you can have a phase out
21 provision. Obviously then that wouldn't be a taking.
22 The taking analysis, I don't think whether or not it is
23 a valid non-conforming use is the question. I don't
24 think there is any conceivable even hypothetical
25 analysis that would make it unconstitutional. You would

1 have to be denied all economically viable use of the
2 property, not just a use that you may have devoted the
3 property to in the past.

4 MR. BARNARD: The taking issue is not before
5 your Honor. We concede that there has not been a
6 taking. There may be a taking if this statute is
7 enforced, or if the ordinance is enforced. As of this
8 time, it isn't--it hasn't been enforced. We are trying
9 to prevent the enforcement. The taking issue isn't
10 before your Honor until such time they would actually
11 enforce it. We concede there wouldn't be a taking. We
12 haven't made a motion for Summary Judgment on the taking
13 issue.

14 THE COURT: In order for there to be a
15 non-conforming use, is it necessary that it be obvious
16 to owners that there is a use of the property, a certain
17 use of property? Suppose he had a barn with 12
18 dismantled inoperable vehicles inside. Nobody knew they
19 were there. And the ordinance was then passed. Does
20 that make a difference?

21 MR. BARNARD: I believe it does. And this
22 particular case, there is no question that they were
23 readily observable. The two affidavits from Mr. Parish
24 and from Mr. Smith, the neighbors, say that it was
25 readily observable and they saw it. And if your Honor

1 were to drive by their home today, you can see junked
2 cars in the front yard. But both of those affidavits
3 say that it was readily observable. Also they say that
4 there has been various junked and dismantled cars
5 there. And the deposition of Mr. Roberts says that on
6 the--on an average, there was a half dozen inoperable
7 motor vehicles around the time the ordinance was passed,
8 referring to page 22, lines 6 to 8.

9 Also Mr. Burnett suggests that there has to be many
10 cars there. That is not correct. My--my reading of the
11 underlying criminal ordinance is that if there is one
12 junked vehicle there, that they can charge the crime.
13 The ordinance itself says if you leave one junked
14 vehicle, you have committed a violation of that
15 ordinance.

16 THE COURT: If you carried that argument to an
17 illogical extreme, I suppose if a person had one junked
18 car in their yard prior to the ordinance, they would be
19 entitled to have 50 junked cars in their yard, a
20 non-conforming use.

21 MR. BURNETT: there is case law to the effect
22 that you can't expand the use. So if you have--

23 THE COURT: In this case, you are saying you
24 went from half a dozen to about 25.

25 MR. BURNETT: Up and down. He said on the

1 average there was a half dozen.

2 THE COURT: But there are 25 now?

3 MR. BURNETT: Yes, at least 25 now. And the
4 question there is another issue, too, and that's like if
5 you are running a gravel pit, can you only run the
6 gravel pit the same way you were running it when the
7 ordinance changed.

8 THE COURT: Is there an issue of fact as to
9 whether going from 6 to 25 is a change in the use?

10 MR. BARNARD: It hasn't been raised.

11 MR. BURNETT: It is raised, not argued. One of
12 the bundle of factual issues that will have to be
13 addressed in the criminal case, and even if the case Mr.
14 Barnard relies on, the Clackmore case, say that's an
15 issue of fact. To go back to the illustration the court
16 raised to the one in the garage, the issue of extended
17 use, extended actual reasonable use is inherently a
18 question of fact.

19 MR. BARNARD: The reason I say it hasn't been
20 raised, your Honor, they haven't--their position is
21 there wasn't any cars there in 1970. They are saying as
22 far as we know, there were no used, dismantled unused
23 dismantled cars in 1970. That's why I say it hasn't
24 been raised. They aren't conceding that he had a
25 non-conforming use, and it has changed. What they are

1 saying as far as we know there wasn't any vehicles
2 there. My client has said there was an average of six.
3 Smith and Parish said there were junked vehicles there.
4 So although Mr. Burnett has made the argument, they have
5 not conceded that there was in fact a non-conforming
6 use. I think that's a requirement for them to make that
7 argument.

8 MR. BURNETT: Well, I think we have got the
9 burden of proof reversed on this. This is an
10 affirmative defense on which Mr. Barnard bears the
11 burden. We have identified the elements. We dispute
12 the application, and it is up to he and his clients in
13 that criminal case tomorrow to satisfy those elements in
14 order to avail themselves of that defense. It is not up
15 to us to refute them in advance, or build up a straw man
16 to knock down before we have heard the evidence.

17 MR. BARNARD: Mr. Burnett raised the problem
18 with the criminal proceeding because he is saying we can
19 raise this as a defense in the criminal proceeding.
20 That's fine. The standard of proof is beyond a
21 reasonable doubt in a criminal proceeding. Also my
22 client runs the risk of criminal proceedings. This is a
23 civil matter. We are here in civil court, a
24 non-conforming use, a zoning enforcement of a zoning
25 statute should be in civil court. And my client

1 shouldn't have the possible sanction of a criminal or
2 the sanction of a criminal court. And the fact that he
3 has got a criminal case pending against him as a result
4 of this, that's why we are here. And that's one of the
5 reasons we think this Court should resolve it. And the
6 matter should be stayed in the criminal court.

7 MR. BURNETT: Your Honor, could I address that
8 last point?

9 THE COURT: Go ahead.

10 MR. BURNETT: I think that goes to the very
11 heart of the question, the constitutionality of the
12 concept of giving criminal enforcement by misdemeanor
13 application of zoning ordinances hasn't even been raised
14 or addressed. All the sudden in a reply memo at the
15 last instant inferentially raised. This is a civil
16 matter. We ought to be here. Routinely ordinances of
17 this nature, by making violations of them misdemeanors,
18 it is not challenged. It is proper and permissible. If
19 that's going to be raised, even that ought to be raised
20 before the court. It hasn't been raised. I don't think
21 it is appropriate argument to be made at this time.

22 THE COURT: Anything else?

23 MR. BARNARD: We are here on Motion for Summary
24 Judgment.

25 THE COURT: I know it.

1 MR. BARNARD: Mr. Burnett's only facts are that
2 Randy Randall--that's the only evidence Mr. Burnett has
3 presented, Randy Randall says I don't know how many cars
4 there were in 1970. I don't think there were any. My
5 client has said there was an average of 6. Parish said
6 there was cars. Smith said there were cars. So I think
7 from a factual standpoint Mr. Burnett has not met his
8 burden to show there is material, substantial issues of
9 fact. I think it is properly before the Court on a
10 Summary Judgment. And it is a matter of law.

11 MR. BURNETT: I don't think that's any
12 different than saying four people said the light was red
13 and one guy said it was green, and therefore you ought
14 to rule as a matter of law the light was red. I mean we
15 have answered interrogatories under oath. I don't know
16 all the evidence the prosecutor intends to present
17 tomorrow, but there is a question of fact. And it is
18 not the number of witnesses as we always tell juries in
19 support of a proposition that leads to it. That's a
20 great jury argument for Mr. Barnard, but it is not a
21 question of law.

22 MR. BARNARD: If your Honor will look at their
23 Answers to Interrogatories, Randy Randall said we have
24 looked, we don't know if there was any vehicles. He is
25 not saying I know for a fact there wasn't any vehicles

there. And for Mr. Burnett to say, hey, we answered Interrogatories and we have raised an issue of fact simply isn't true. Randy Randall was the only defendant, the only person that submitted an affidavit on their behalf. And he says I don't know how many vehicles there were there. And that's different than him saying no, there wasn't any vehicles there. And my client saying there was.

MR. BURNETT: He is answering for the City and saying that to the best of his knowledge there were none from what he can determine.

THE COURT: What are the words? I don't have the Answers. Interrogatories are not filed with the Court under the current procedure.

MR. BURNETT: Without destroying the file entirely--

THE COURT: Just read me what he says.

MR. BURNETT: Okay. The question was during 1970, how many inoperable rusted or partially dismantled vehicles were on the property more than seven days. To the best of the knowledge of these answering defendants, there were none. It doesn't say I don't have any idea. He says we have looked into it, and we believe there were none. Now I don't think that's any different than any other cars. Mr. Barnard hasn't deposed Mr.

1 Randall. He wants the Court to read something in his
2 mind and read something that is really a question of
3 fact.

4 THE COURT: It appears there may be a question
5 of fact. It would be a simple one. If I heard the
6 evidence at trial, I would find that prior to 1970 there
7 were probably half a dozen at any given time. I think
8 there is another issue of fact in the case, and that is
9 whether there was a prior non-conforming use. What was
10 that use? The fact there were six cars then and there
11 are 25 now, is that the same use or not? I think that's
12 an issue of fact. I don't see it is a simple all or
13 nothing case. I think as a result of the trial in this
14 civil matter, there may be an in between decision that
15 would be very, very logical. If the person stores up to
16 half a dozen cars continuously prior to the law going
17 into effect, is he then justified in storing 25 or 30?
18 And is that the same use?

19 I see that as a question of fact. For those
20 reasons, I will deny the Motion for Summary Judgment.

21 There is a request for injunctive relief. I am
22 tempted to try to offer some protection until these
23 matters are resolved, but not to the point of striking
24 tomorrow's trial date. I don't think I have that kind
25 of authority over the Circuit Court or the City. I

1 think we ought to be able to trust the system and the
2 Judge to give a proper instruction in your trial. And
3 depending upon the outcome, you have your right to
4 appeal that decision. And if you are correct on this
5 issue, ultimately you ought to prevail.

6 You haven't asked for this kind of relief, but it
7 seems to me it would be appropriate that the City not
8 file additional charges until there is a final outcome
9 of the criminal case, or this case. The City have a
10 problem with that?

11 MR. BURNETT: No, your Honor. We have not done
12 so, and I think I am safe in--

13 THE COURT: I assume if there is a conflict in
14 Circuit Court that there is a method for the Defendants
15 to stay the penalty phase until there is an outcome in
16 the appellate court, if that's where it goes. With
17 that, I don't see that there is any serious detriment to
18 the plaintiffs in allowing them to go to trial on the
19 criminal matter where the burden of proof is much higher
20 than it will be on this civil case.

21 I think there is an issue as to what the prior
22 non-conforming use was as to the extent and scope of
23 it. That would justify this case going to trial.

24 Someone want to volunteer and try to memorialize
25 this in some sort of Order?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. BURNETT: I will do so, your Honor.

THE COURT: All right. You want your
deposition back?

MR. BURNETT: Yes. Thank you, your Honor

---0---

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(November 8, 1989)

THE COURT: Case number 3165-89, J. Val Roberts vs. Centerville City. I assume there is another case that's been consolidated with this, and that would be number 45446. I haven't seen the Order signed by Judge Taylor. I think you all agree that's happened?

MR. BARNARD: Yes.

MR. BURNETT: Yes, your Honor. Maybe it will be assigned a different number, Davis County number 42831. The Order was signed by Judge Taylor November 3rd and forwarded by my office to Davis County Clerk's Office on November 6th or 7th to accomplish that consolidation.

THE COURT: Mr. Burnett, you represent the Defendants, and you have moved for Summary Judgment. Mr. Barnard, you have responded to that and made your own Motion for Partial Summary Judgment

MR. BARNARD: That's correct.

THE COURT: Mr. Burnett, you want to argue that?

MR. BARNARD: If I may, those Motions were made prior to the Stipulation and Order to Consolidate. As part of the Stipulation and Order, we have agreed that I can file an Amended Complaint consolidating and re-alleging both of the allegations from both of the cases in this case before you. It seems to me it is

1 somewhat premature to be arguing these Motions for
2 Summary Judgment in light of the fact that we have
3 agreed I can file the Amended Complaint.

4 THE COURT: Is that the Amended Complaint in
5 the file?

6 MR. BARNARD: No, the Amended Complaint--

7 THE COURT: He is nodding his head yes, and you
8 are saying no.

9 MR. BARNARD: The Amended Complaint in this
10 case deals with the issue of the Board of Adjustment.
11 We have agreed that there is another Amended Complaint
12 that we can file which will combine the allegations from
13 the other case, the Davis County case, with this case.
14 So, it is my intention to file an Amended Complaint
15 other than the one that's already in the file.

16 THE COURT: And that has not been prepared?

17 MR. BARNARD: That has not been prepared
18 because the Order allowing me to do that was only signed
19 last week, and the stipulation was only signed the week
20 before. So it seems to me--and these Motions were made
21 prior to reaching that agreement, and prior to the Order
22 Consolidating them. So it seems to me it is premature.
23 And what we should do, I should file an Amended
24 Complaint combining all the causes of action, and we
25 should brief it and come back before your Honor.

1 THE COURT: Did you call Mr. Burnett and
2 suggest that to him?

3 MR. BARNARD: I did. I spoke to him yesterday
4 afternoon and suggested we do that. He indicated he
5 thought the issue--one issue was properly before your
6 Honor.

7 MR. BURNETT: Can I be heard on that, your
8 Honor?

9 THE COURT: Sure.

10 MR. BURNETT: I have got a copy of the Amended
11 Complaint in the case before Judge Taylor. I will be
12 happy to present that to the Court for your review. It
13 seeks determination as a Declaratory Action that
14 Plaintiffs have non-conforming use, and seeks to enjoin
15 further criminal prosecution for violation of
16 Centerville City's Ordinances.

17 Both of these cases have been a logistical and
18 procedural nightmare, dragged out from my client's
19 perspective far too long. We have been trying to get a
20 discreet issue, the 10/19 challenge to the Board of
21 Adjustment for some period of time. The hearing has
22 been scheduled for a period of time. I don't see why
23 combining this Complaint with the presently framed
24 Complaint before your Honor will have any question about
25 the discrete issue about affirming or overturning the

1 Board of Adjustment. It has been difficult to move the
2 case forward. We are scheduled for this, all prepared.
3 The memoranda have all be filed. And I see no reason
4 why this can't proceed to a determination today.

5 For that matter, I think it might ultimately render
6 some of the other issues moot.

7 THE COURT: What is that?

8 MR. BURNETT: That's the Amended Complaint that
9 was previously filed with the action with Judge Taylor.

10 THE COURT: But it is not the one that you say
11 you have permission to file now?

12 MR. BARNARD: That's correct.

13 MR. BURNETT: Now I disagree with that. The
14 stipulation is you can file an Amended Complaint
15 combining the actions in both cases. I am saying you
16 look at this Complaint and the one he has proposed in
17 this case, and that ought to be universal possibilities.
18 Even if it is not, I don't see how that will impact the
19 Motion presently before the Court to determine the
20 validity of the Board of Adjustment's determination.

21 MR. BARNARD: The Motion before the Court, your
22 Honor, was based upon the original Complaint that was
23 filed here. And their Motion was to dismiss the whole
24 case because they are saying we had an appropriate
25 hearing in front of the Board of Adjustment. End of

1 story. I filed a Motion to file an Amended Complaint in
2 this case, saying the Board of Adjustment doesn't have
3 the power to sit as a Court; that the existence or
4 non-existence of a prior existing use is an issue of
5 fact that can be resolved, or should be resolved, by the
6 Court. So I filed an Amended Complaint and Motion to
7 file an Amended Complaint in this action. That has not
8 been received by the Court because we just recently
9 stipulated that I could do so.

10 And then I filed, as Mr. Burnett indicated, a
11 proposed--or an Amended Complaint in the other case.
12 And I need to combine the two. And the allegations will
13 be not only that there is a non-conforming prior
14 existing use, but the Board of Adjustment does not have
15 the power to sit as a Court of Law and determine that
16 there isn't a non-conforming use.

17 So I think all of the issues are tied in together.
18 And it is inappropriate to say okay, we will determine
19 now that the Board of Adjustment was okay. And if I
20 make some other allegations, we will look at those. I
21 think the right way to handle it is to allow me to file
22 an Amended Complaint and combine all of those causes of
23 action and come back and resolve it.

24 THE COURT: Are you saying that your memorandum,
25 doesn't deal with the issue of whether or not the Board

1 of Adjustment has the power to do what they did? You
2 haven't addressed those issues yet?

3 MR. BARNARD: No, it has.

4 THE COURT: Then what would you give me in
5 addition to that if you filed your Amended Complaint?

6 MR. BARNARD: Well, on that issue, probably
7 nothing more.

8 THE COURT: What other issue would you raise?

9 MR. BARNARD: The other issues are a factual
10 issue with regard to whether or not there is a
11 non-conforming use. What the situation was with regard
12 to the case that was in front of Judge Taylor, we filed
13 an action, and we alleged that there was a
14 non-conforming prior existing use. That case was
15 pending. While that was pending, the City took some
16 action against my client. We requested a hearing, and
17 we had a hearing before the Board of Adjustment as to
18 the action that was taken by the City. And we alleged
19 in that hearing that there was a non-conforming use.

20 THE COURT: What was the date of that hearing?
21 Is that the March 13th hearing?

22 MR. BARNARD: That was the early part of this
23 year, yes.

24 THE COURT: The same as the one in my case?

25 MR. BARNARD: That's correct.

1 THE COURT: What's the difference between my
2 case and Judge Taylor's case?

3 MR. BARNARD: Judge Taylor's case was a law
4 suit we filed asking for determination by the District
5 Court that there was a non-conforming use. While that
6 was pending, a separate administrative proceeding was
7 started. And in that separate proceeding, there was a
8 hearing and a presentation.

9 THE COURT: When did you file the case before
10 Judge Taylor?

11 MR. BARNARD: 1988. I am not sure when, but
12 substantially before the administrative hearing. And
13 then we filed an Amended Complaint a month or two ago in
14 that action before Judge Taylor eliminating a couple of
15 Defendants and changing the causes of action in that
16 case in front of Judge Taylor. So actually we have two,
17 two ways of asserting that we have a non-conforming use.

18 THE COURT: This all boils down to the same
19 issue?

20 MR. BARNARD: It does. What they are
21 contending, what the City is contending, is the Board of
22 Adjustment is the ultimate decider. They make a
23 determination as to whether or not there is a
24 non-conforming use. It doesn't matter that we filed a
25 separate action in front of Judge Taylor asking the

1 District Court to make that factual determination. They
2 are saying we had our chance, we told our story in front
3 of the Board of Adjustment, although we have told that
4 story after we filed the law suit in front of Judge
5 Taylor. And so then they are saying, well, you have had
6 your chance and the Board of Adjustment's decision is
7 final. That's why Mr. Burnett is suggesting that if
8 this Court upholds what the Board of Adjustment did,
9 then our objection, our Complaint that was before Judge
10 Taylor, is moot.

11 THE COURT: The case I have was filed after the
12 Board of Adjustment action suggesting that they acted
13 inappropriately, or for some other reason, and asking
14 this Court to overturn it. Judge Taylor's case, which I
15 haven't seen, was filed prior to the Board of Adjustment
16 ever meeting?

17 MR. BARNARD: That's correct.

18 THE COURT: What happened in that case in the
19 meantime? Did either of you ask that that be remanded
20 back to the Board of Adjustment?

21 MR. BURNETT: No.

22 THE COURT: It just sat there?

23 MR. BARNARD: Just sat there.

24 THE COURT: This all happened in the meantime?

25 MR. BARNARD: That's correct.

1 MR. BURNETT: Your Honor, could I address this
2 issue briefly?

3 THE COURT: Sure.

4 MR. BURNETT: Our position is not that somehow
5 the Board of Adjustment's determination divested the
6 District Court of jurisdiction, but it is a basic
7 administrative exhaustion and due process argument. It
8 would be nice for a lot of applicants appearing before
9 administrative bodies if we avoid raising issues before
10 those bodies. They could go before the Court and say
11 this wasn't addressed and therefore Courts ought to
12 address it. That would totally emasculate the process.
13 We think the framework is clear. This is a matter
14 appropriate for resolution before the Board of
15 Adjustment. The Plaintiffs are here to challenge that.
16 I don't see how an action styled somewhat differently,
17 but involving the same subject matter beforehand, that
18 laid dormant, somehow ought to be an impediment to it
19 being resolved.

20 THE COURT: Should this have gone to Judge
21 Taylor in the case, say wait a minute, we haven't had
22 our hearing before the Board of Adjustment, this action
23 is filed prematurely and should be stayed or remanded or
24 administrative remedies haven't been exhausted,
25 therefore--

1 MR. BURNETT: Well, I would suggest that fact
2 occurred, your Honor. We had--actually, your Honor
3 heard a Motion in about July of 1988 in that case with
4 respect to injunctive proceedings against further
5 criminal prosecution in the Justice and Circuit Court;
6 separate issue. The other issue laid dormant. We had a
7 status conference in about February of 1988--or '89,
8 excuse me, this year. And a trial date was scheduled in
9 June. That trial date was postponed by stipulation of
10 counsel precisely because of the pendency of the Board
11 of Adjustment determination. The Plaintiffs professed
12 to file an Amended Complaint in that action. The
13 Amended Complaint they filed was filed in October of
14 this year in that case, long after even the Motions were
15 framed in this case as an apparent attempt to expand
16 those issues. I don't think it is fair to say that
17 there was any maneuvering unfairly to cast a pall over
18 that proceeding. I may have that stipulation with me.
19 And I think it refers specifically--okay. The
20 stipulation recites that the trial date ought to be
21 continued to a date convenient with the Court and
22 parties as a result of pending motions in a related
23 proceeding in the Circuit Court and administrative
24 hearing before the Centerville Board of Adjustment.
25 Until such decision has been received, it would be

1 premature to proceed to trial in the District Court
2 actions. And parties will not be able to frame the
3 issues pursuant to a recent ruling granting Plaintiff's
4 Motion to Amend.

5 MR. BARNARD: Back where we started, your Honor.

6 THE COURT: Just a minute. A couple of things
7 make me uneasy. I think this thing has to finish
8 sometime, some place, and I would like to do it in such
9 a way we wrap it all up in one tight package, rather
10 than having some loose ends. And I see loose ends here
11 because the Order to Consolidate was signed a day or two
12 ago I assume by Judge Taylor. I haven't seen it. And I
13 don't have his file. In fact in reading one of the
14 letters that Mr. Barnard sent, I was of the
15 understanding it would be consolidated and shifted to
16 his court because that's what your letter said.
17 Apparently the Order says otherwise.

18 I don't think I am up to speed on the case to decide
19 what the effect is of a case filed in another court and
20 then later a hearing was had with no reference to that
21 hearing in the case, no Order saying this is stayed
22 pending resolution of your administrative remedies. I
23 am really not sure that what we are talking about isn't
24 form over substance. It seems that way to me. But I
25 also seem to think that unless I have had a chance to

1 see what your ultimate complaint is going to be, and
2 what your ultimate argument is going to be in the
3 memoranda, I prefer not to rule until I have it all in
4 one package.

5 I think I can probably bifurcate the cases. We can
6 go forward on this one. I think I am pretty much on top
7 of this, having read your memoranda and pleadings. But
8 to tie it all up now that it is consolidated, I don't
9 think I can accomplish that today. It seems to make
10 sense to do it all at once or we go forward on just this
11 case.

12 MR. BURNETT: No, I think my client is
13 primarily interested in consolidating and getting the
14 entire issue resolved. If the Court's preference in
15 doing that is to hold off--

16 THE COURT: I don't want to start a whole new
17 series of memoranda going back and forth. Can we avoid
18 that by setting a date now and letting you file your
19 Amended Complaint, file an answer, update your
20 memoranda, both independent of each other any way you
21 want to, and come back in 30 days?

22 MR. BURNETT: I would be in favor of that.

23 THE COURT: Mr. Barnard?

24 MR. BARNARD: That's fine.

25 THE COURT: Will that work? Rather than

1 following the rule 4501 where we have to go back and
2 forth and make a request for hearing. What I recommend
3 you do, have you got the Complaint ready to file?

4 MR. BARNARD: It can be done within a week.

5 THE COURT: Where are we? You will have that
6 done by the 15th. Are you able to respond within a week?

7 MR. BURNETT: Yes, your Honor, we could.

8 THE COURT: In the meantime, if you have some
9 idea what the issues are going to be, if you could both
10 have your memoranda updates prepared and submitted by
11 the 29th, and exchange copies with each other.

12 MR. BARNARD: That date would be a problem for
13 me, your Honor. I have a trial that week.

14 THE COURT: December 6th?

15 MR. BARNARD: That would be fine.

16 THE COURT: We will have a hearing on the
17 13th. I am sorry we couldn't finish this today. I
18 wasn't aware which way it was going to be consolidated,
19 and I haven't had a chance to look at the other file.

20 MR. BURNETT: What time would that be on the
21 13th, your Honor.

22 THE COURT: 11:00 o'clock. Tell Jerry not to
23 set anything else.

24 MR. BURNETT: Very well.

25 MR. BARNARD: Thank you, your Honor.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Thank you.

---0---

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(December 13, 1989)

THE COURT: 3165-89, Roberts vs. Centerville City. Time scheduled for hearing. Two cases were consolidated. The other case is 42831, Davis County file that was transferred up to Judge Taylor, and now consolidated with 3156-89.

I have examined all the documents in both files, re-read the memoranda that were submitted, plus any additional documents that were filed. Is it still the Defendant's Motion for hearing?

MR. BARNARD: There is a--

MR. BURNETT: There is a Motion for Partial Summary Judgment by the Plaintiff, your Honor.

THE COURT: Matter to you who goes first?

MR. BARNARD: I am closer to the podium.

THE COURT: Go ahead.

MR. BARNARD: Thank you. There is two issues, your Honor. One is whether or not the Board of Adjustment is the exclusive agency to determine whether or not there was a non-conforming prior existing use. And that's the issue of our Motion for Partial Summary Judgment. Mr. Burnett suggests that given the fact the Board of Adjustment determined we did not have a non-conforming prior existing use, that's the end of the story. We can come here for plenary review as to

1 whether or not it is arbitrary or capricious. I don't
2 think that's the law. I think we are entitled to have a
3 determination by the District Court whether or not we
4 have a prior existing non-conforming use. And the fact
5 that we did avail ourselves of the Board of Adjustment
6 hearing process doesn't preclude us from asking this
7 Court, or a District Court, to examine the issue.

8 And the fact of the matter was that we had filed an
9 action, the action that has now been consolidated into
10 this one, for a court determination, a District Court
11 determination as to whether or not we had a
12 non-conforming prior existing use before we went before
13 the Board of Adjustment. So that's one issue. And we
14 have discussed that in detail in our memorandum.

15 The other issue is whether or not in fact we have a
16 prior existing non-conforming use. My client bought the
17 real property in 1964. At that time it was zoned
18 agricultural. It is our position that as of 1964 when
19 they bought it, an appropriate accessory use was to
20 store junk, to store vehicles, to store machinery.

21 In March of 1970, the City enacted an ordinance
22 which then prohibited the storing of junk vehicles. It
23 is that 1970 ordinance that my clients are being
24 criminally prosecuted under. And that ordinance, from ,
25 March of 1970, makes it clear that the storage of junk

1 vehicles is illegal. So what our position is, is that
2 prior to 1970 the storing of rusted junked vehicles was
3 an appropriate accessory use for agricultural land. As
4 of 1970, when that storage was specifically outlawed, it
5 was no longer an appropriate accessory use, and
6 therefore we have a prior existing non-conforming use.

7 With Mr. Burnett's Motion and my Motion, we have
8 attached copies of Affidavits from two Parish brothers
9 and a Mr. Smith, who are neighbors, and my client,
10 indicating that they were in fact storing those junk
11 vehicles prior to 1970. Mr. Burnett suggests that this
12 Court can rule as a matter of law that we don't have a
13 prior existing non-conforming use. I don't think that's
14 the case. I think we have a factual dispute. And the
15 factual dispute is whether or not prior to 1970 the
16 storage of vehicles like this was an appropriate and
17 legal accessory use in an agricultural zoned area.

18 There is no question at all that after 1970 it
19 wasn't a legal use because of the ordinance 10-3-54.
20 But I think we have a factual dispute as to whether or
21 not before 1970 it was an appropriate accessory use. I
22 don't think that can be resolved as a matter of law.
23 Thank you.

24 THE COURT: Mr. Burnett.

25 MR. BURNETT: Thank you, your Honor. First of

1 all with respect to the authority of the Board of
2 Adjustment, I think it is important to delineate the
3 origin of that authority. The challenge here is not the
4 authority of the Board of Adjustment per se, but the
5 process. The appeal to the Board of Adjustment was not
6 a direct request of the Board of Adjustment to determine
7 this issue. It is the appellate right to pursue by a
8 person aggrieved of a decision of the Zoning
9 Administrator, really, trying to take issue with the
10 interpretation and enforcement of the ordinance by the
11 zoning ordinance, which is an appeal.

12 Secondly, I don't know what significance there is to
13 the fact there was a pre-existing lawsuit. It is really
14 a question of exhaustion. And if you could always
15 circumvent an exhaustion right by being the first to
16 beat a path to the courthouse door, obviously the
17 requirement would be meaningless. I think in this State
18 there is a clear exhaustion requirement in seeking a
19 judicial review in the land use decisions.

20 Let me give the Court a couple of cases. They are
21 not in the memo directly. I wasn't certain what the
22 thrust--Merrihew vs. Salt Lake, found at 659 P2d 1065, a
23 1983 opinion of the Utah Supreme Court. And Christ vs.
24 Mapleton City at 497 P.2d 633, a 1972 decision of the ,
25 Utah Supreme Court. But more importantly than that, I

1 think the fundamental problem with the Plaintiffs'
2 approach to this case is that they obviously ignore the
3 earlier ordinance prohibiting junk yards and related
4 types of uses in A-2 zones. And that's why I don't
5 think that there is a factual dispute and it is a
6 question of law.

7 The issue here is not that Centerville City has
8 attempted to countermand the contents of those
9 affidavits submitted. Those affidavits were reviewed by
10 the Board of Adjustment and the Centerville City
11 Administrator. And they identify storage of up to 6
12 vehicles from 1964 to 1970 on the property in question.
13 There is a fundamental question with respect to the
14 character of that use at that time because those
15 affidavits address the temporary storage for purposes of
16 repair to operability, renovation, that type of thing.
17 I think the Board of Adjustment as a secondary basis for
18 their decision determined there was a fundamental change
19 in the character of use once he started storing 25 or 30
20 junked vehicles without an apparent attempt to renovate
21 on the property. But the primary thrust of the Board's
22 decision was based on a 1952 ordinance which determined
23 that this was not a permitted use in this zone. And
24 that's Exhibit I to our July 3, 1989 memorandum. And I
25 think it requires you to walk through the ordinance.

1 The ordinance speaks in terms of what is permitted and
2 says anything not permitted is prohibited.

3 This is an A-2. You may do all things permitted in
4 R-2. That's page 6, back up to page 4 of Exhibit I it
5 recites you may do certain things as accessory uses.
6 But it clearly says all other uses are prohibited. And
7 in a separate section defines junk cars. And defines
8 that as storage of inoperable vehicles on the premises.
9 Long before the Roberts purchased, long before the
10 non-conforming use, that was a prohibited use in
11 Centerville. That's the thrust of our position with the
12 Court. Regardless of whether it is a plenary review or
13 a de novo review by this Court, in either event it is
14 clearly a question of law that can be addressed by the
15 Court. And Plaintiffs, in none of their memoranda have
16 addressed the earlier ordinance at all; silent with
17 respect to it.

18 There is also confusion between non-conforming use
19 and accessory use. I don't think there is any defining
20 as accessory prior non-conforming use. The
21 non-conforming must have been lawful before it is later
22 prohibited, of course. That's our thrust with the
23 ordinance in question.

24 Accessory use defined in this ordinance involves a ,
25 use which is customary, incidental to the use of the

1 property that's properly zoned for and defined in the
2 ordinance. I know the terms on all fours or squarely on
3 the numbers are often over used. I don't know how you
4 get much closer than Board of County Commissioners vs.
5 Thompson, the Colorado case we cited to the Court, where
6 specifically you had some farmstead uses. An argument
7 was made the storage of old Packard vehicles as a hobby
8 was incidental use and an accessory use. The Court said
9 no, it is not, it stands the whole zoning ordinance on
10 its head to stretch it that far. That's exactly what
11 has occurred here. There has been no attempt to
12 distinguish that case. It establishes for the use, Mr.
13 Roberts' use, it is prohibited as a non-conforming or
14 accessory use.

15 I don't know there is any fact question regardless
16 of whether you look at it as a plenary or a direct and
17 de novo, direct as a matter of law.

18 Absent questions from the Court, we are willing to
19 submit it on that basis.

20 THE COURT: Mr. Barnard.

21 MR. BARNARD: Thank you. Mr. Burnett says we
22 should look at Exhibit I of his--attached to his
23 memorandum. And Exhibit I has a series of definitions
24 in it. And at section 31 of Exhibit I talks about junk
25 yard. Exhibit I is the 1952 ordinance. And there is no

1 question that junk yards were outlawed by the 1952
2 ordinance. But what is pertinent in that is at
3 paragraph 31 in the definitions, it defines junk yard.
4 And it defines a junk yard as the use of any lot,
5 portion of lot or tract of land for the storage, keeping
6 or abandonment of junk, including scrap metal or other
7 scrap material, or for the dismantling, demolition or
8 abandonment of automobiles or other vehicles or
9 machinery or parts thereof. Provided that this
10 definition shall not be deemed to include such uses
11 which are clearly accessory and incidental to any
12 agricultural use permitted in the district.

13 So he is correct. Junk yards were outlawed in
14 1952. But what that definition says is if it is an
15 accessory use and incidental to agricultural use, it is
16 not a junk yard. Therefore, it is not outlawed.

17 In 1970 the City then enacted an ordinance which
18 clearly outlawed the storage of junk, even in an
19 agricultural area. And our position is it is the
20 accessory use that is the non-conforming prior existing
21 use. So we are saying yes, it is agricultural land.
22 And an accessory to that, accessory use to that, just as
23 in their definition of junk yard, was to store junk and
24 old vehicles. And so we had a prior existing
25 non-conforming use based upon the accessory use, which

1 then was outlawed in 1970.

2 So back where we started. The question is the
3 question of fact. And that is whether prior to 1970 we
4 had an appropriate non-conforming prior existing
5 accessory use to store junk on that agricultural land.
6 I don't think it can be resolved as a matter of law.

7 With regard to the involvement of the Board of
8 Adjustment, we attached that to our memorandum also.
9 Previously when somebody made an application--somebody
10 could make an application to the Board of Adjustment in
11 Centerville City and say I have a non-conforming use,
12 please certify it. Please authorize me to have that
13 use. And then the City was authorized to give a permit
14 and say yes, in fact you do have that. The current
15 statute, the current ordinance in Centerville doesn't
16 allow that. There isn't an approval process at this
17 point. And so under the old statute if there was an
18 argument and you applied to them, they said yes, you
19 have a proper use and certified it. Then you could
20 continue to use it. That was eliminated. And that is
21 again cited in our memorandum. That was eliminated and
22 no longer is the case.

23 So what was the process at one time with the Board
24 of Adjustment could approve those uses is no longer the
25 case. And that's why I think that the appropriate forum

1 to determine the existence of a non-conforming use is
2 the District Court that can look at all the facts and
3 make a judicial determination. And the fact that that
4 authority was taken away from the Board of Adjustment, I
5 think, is a strong indication they don't have the power
6 and are not the exclusive remedy for determining whether
7 or not there is such a use. Thank you.

8 THE COURT: I am prepared to find, and do find,
9 that the activities described by Mr. and Mrs. Roberts in
10 the evidence that they have submitted to the Court, I
11 don't know whether we call them Plaintiffs or Defendants
12 at this point, the activities that they have described
13 are not accessory use in a farming operation. And they
14 would not be valid and proper in an agricultural zone.

15 And, having made that finding, Centerville City's
16 Motion for Summary Judgment is granted.

17 I think that resolves the issues in both cases. To
18 the extent it might not, I also recognize the authority
19 of the Board of Adjustment to do what they did and make
20 the findings that they made. And if the matter were
21 submitted for plenary review of this Court, the decision
22 would be the same.

23 Centerville City is making a request for
24 injunction. Neither party has responded to that. I
25 think it is an appropriate request, and I will grant

1 it. However, I will stay any action to enforce the
2 injunction for a period of 30 days so that the Roberts
3 can consider what options they have at this point.

4 Mr. Burnett, will you prepare the necessary
5 documents?

6 MR. BURNETT: I will do so and forward them to
7 Mr. Barnard, your Honor. Thank you.

8 MR. BARNARD: Thank you.

9 ---0---

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

STATE OF UTAH)
) ss.
County of Weber)

I, James N. Jones, do hereby certify that I am one of the Official Court Reporters for the State of Utah, and a competent machine shorthand writer.

That on July 27, 1988, November 3, 1989 and December 13, 1989, I reported in machine shorthand the proceedings had in the case entitled J. Val Roberts vs. Centerville City, case No. 890903165.

That thereafter, I reduced my machine shorthand notes to typewriting, and the foregoing transcript, pages 1 through 47, inclusive, constitute a full, true and correct transcript of the proceedings had at said times as reported by me.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th day of March, 1990.


James N. Jones
Certified Shorthand Reporter

APPENDIX C

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the

facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or 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.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPENDIX D

CENTERVILLE TOWN ZONING ORDINANCE

AN ORDINANCE TO REGULATE BY ZONES THE LOCATION, HEIGHT AND BULK OF BUILDINGS AND OTHER STRUCTURES: THE PERCENTAGE OF LOT WHICH MAY BE OCCUPIED: THE SIZE OF LOTS, COURTS, AND OTHER OPEN SPACES: THE DENSITY AND DISTRIBUTION OF POPULATION: THE LOCATION AND USE OF BUILDINGS AND STRUCTURES FOR TRADE, INDUSTRY, RESIDENCY, RECREATION, PUBLIC ACTIVITIES OR OTHER PURPOSES:

BE IT ORDAINED BY THE BOARD OF TRUSTEES OF CENTERVILLE TOWN, STATE OF UTAH, AS FOLLOWS:

Section 1. SHORT TITLE.

This ordinance shall be known as the Zoning Ordinance of Centerville, Utah.

Section 2. PURPOSE, INTERPRETATION AND CONFLICT.

A. This ordinance is designed and enacted for the purpose of promoting the health, safety, morals, convenience, order, prosperity and welfare of the present and future inhabitants of Centerville, including amongst other things the lessening of congestion in the streets or roads, securing, safety from fire and other dangers: providing adequate light and air, classification of land uses and distribution of land development and utilization, protection of the tax base, securing economy in governmental expenditures, fostering the Town's agricultural and other industries, and the protection of both urban and nonurban development.

B. In interpreting and applying the provisions of this ordinance, the requirements contained herein are declared to be the minimum requirements for the purposes set forth.

C. This ordinance shall not nullify the more restrictive provisions of covenants, agreements, other ordinances or laws, but shall prevail notwithstanding such provisions which are less restrictive.

Section 3. DEFINITIONS.

A. For the purpose of this ordinance, certain words and terms are defined as follows: Words used in the present tense include the future; Words in the singular number include the plural and the plural the singular; Words not included herein but defined in the Building Code shall be as defined therein.

1. Accessory Use or Building -- A subordinate use or building customarily incidental to and located upon the same lot occupied by the main use or building.

(2) Agriculture -- The tilling of the soil, the raising of crops, horticulture and gardening, but not including the keeping or raising of domestic animals and fowl, except household pets, and not including any agricultural industry or business, such as fruit packing plants, fur farms, animal hospitals or similar uses.

3. Apartment Hotel -- Any building which contains dwelling units and also satisfies the definition of a hotel, as defined in this ordinance.

4. Apartment Motel -- Any building or group of buildings which contains dwelling units and also satisfies the definition of a tourist court as defined in this ordinance.

5. Apartment House -- See Dwelling, Multiple.

6. Alley -- A public thoroughfare less than twenty-six (26) feet wide.

7. Basement -- A story partly underground, having at least one-half (1/2) its height above the average level of the adjoining ground.

8. Boarding House -- A building where, for compensation, meals are provided for at least five (5) but not more than fifteen (15) persons.

9. Building -- Any structure having a roof supported by a columns or walls, for the housing or enclosure of persons, animals or chattels.

10. Building, Accessory -- A subordinate building, customarily incidental to and located upon the same lot occupied by the main building. On any lot upon which is located a dwelling any building which is incidental to the conducting of any agricultural use shall be deemed to be an accessory building.

11. Building, Main -- The principal building or one of the principal buildings upon a lot, or the building or one of the principal buildings housing the principal use upon the lot.

12. Building, Height of -- The vertical distance from the grade to the highest point of the coping of a flat roof or to the deck line of a Mansard roof, or to the plate line of a pitch or hip roof.

13. Cellar -- A story having more than one-half of its height below the average level of the adjoining ground. A cellar shall not be counted as a story for the purposes of height measurement.

14. Court -- An open, unoccupied space, other than a yard, on the same lot with a building or group of buildings, and which is bounded on two or more sides by such building or buildings. The width of a court is its least horizontal dimension, measured between opposite sides in the same general direction as the yard or lot line on which the court opens. The length of a court is its least horizontal dimension measured at right angles to its width.

ghend 15. Dairy -- A commercial establishment for the manufacture or retail sale of dairy products.

16. Dwelling -- Any building, or portion thereof, which is designed for use for residential purposes, except hotels, boarding houses, lodging houses and tourist cabins.

17. Dwelling, Single-Family -- A building arranged or designed to be occupied by one family, the structure having only one dwelling unit.

18. Dwelling, Two-Family -- A building arranged or designed to be occupied by two families, the structure having only two dwelling units.

19. Dwelling, Three-Family -- A building arranged or designed to be occupied by three families, the structure having only three dwelling units.

20. Dwelling, Four-Family -- A building arranged or designed to be occupied by four families, the structure having only four dwelling units.

21. Dwelling, Multiple-Family -- A building arranged or designed to be occupied by more than four (4) families.

22. Dwelling, Group -- One or more buildings, not more than two and one-half (2½) stories in height, containing dwelling units and arranged around two (2) or three (3) sides of a court which opens onto a street.

23. Dwelling Unit -- One or more rooms in a dwelling designed for living or sleeping purposes, and having one but not more than one (1) kitchen.

24. Family Food Production -- The keeping of not more than one horse; one cow; two sheep; one pig (over 2 months old); twenty rabbits; twenty-five chickens; ten each of the following or other barnyard fowl, turkeys; geese, ducks; pheasants; pigeons provided, that an additional number of animals equal to the number listed herein and an additional number of fowl equal to five times the number listed herein may be kept for each five thousand (5000) square feet in the lot over and above eight thousand (8000) square feet.

25. Garage, Private -- An accessory building designed or used for the storage of not more than four (4) automobiles owned and used by the occupants of the building to which it is accessory; provided, that on a lot occupied by a multiple dwelling, the private garage may be designed and used for the storage of one and one-half (1½) times as many automobiles as there are dwelling units in the multiple dwelling. On a lot with a dwelling, a garage shall be considered a part of the dwelling if the two structures have one or more walls in common. Where a garage is thus part of a dwelling, it shall require the same side yard and front yard as a dwelling in the same zone. Where a garage is not thus part of a dwelling, but is provided with a front yard and side yard equal to that required for dwelling, in the dwelling to which it is accessory; otherwise, it shall be located not less than six (6) feet in the rear of the dwelling and not closer than fifteen (15) feet to any existing dwelling on adjacent property.

26. Garage, Public -- A building or portion thereof, other than a private garage, designed or used for servicing, repairing, equipping, hiring, selling, or storing motor-driven vehicles.

27. Grade.

(a) For buildings adjoining one (1) street only, the elevation of the sidewalk at the center of that wall adjoining the street.

(b) For buildings adjoining more than one (1) street, the average of elevations of the sidewalk at the centers of all walls adjoining streets.

(c) For buildings having no wall adjoining the street, the average level of the ground (finished surface) adjacent to the exterior walls of the building. All walls approximately parallel

used home

or for Driven Vehicles

to and not more than five (5) feet from a street line are to be considered as adjoining a street.

28. **Home Occupation** -- An occupation carried on by the occupant of a dwelling as a secondary use in connection with which there is no display; no stock in trade; and not more than two (2) persons employed, other than members of the family residing on the premises.

29. **Hotel** -- A building designed or occupied as the more or less temporary abiding place of fifteen (15) or more individuals who are, for compensation, lodged, with or without meals, and in which no provision is made for cooking in any individual room or suite.

30. **Household Pets** -- Animals or fowl ordinarily permitted in the house and kept for company or pleasure, such as dogs, cats, and canaries, but not including sufficient number of dogs to constitute a kennel, as defined in this ordinance. Household pets may include the keeping of not more than ten (10) pairs chinchillas.

31. **Junk Yard** -- The use of any lot, portion of lot or tract of land for the storage, keeping or abandonment of junk, including scrap metals or other scrap material, or for the dismantling, demolition or abandonment of automobiles, or other vehicles, or machinery or parts thereof; provided, that this definition shall not be deemed to include such uses which are clearly accessory and incidental to any agricultural use permitted in the district.

32. **Kennel** -- Any lot or premises on which three (3) or more dogs, at least four (4) months old, are kept.

33. **Lodging House** -- A building where lodging only is provided for compensation to five (5) or more, but not exceeding fifteen (15) persons, in contradistinction to hotels open to transients.

34. **Lot** -- A parcel of land occupied or to be occupied by a main building or group of main building and accessory building, together with such yards, open spaces, lot width and lot area as are required by this ordinance, and having frontage upon a street. Except for group dwellings, where more than one dwelling is placed on a lot, each dwelling structure shall be provided with the minimum lot frontage, lot area, front yard, rear yard and side yards as are required for one such dwelling on a lot in the same zone.

35. **Natural Waterways** -- These areas, varying in width, along streams, creeks, springs, gullies, or washes which are natural drainage channels as determined by the Building Inspector, in which areas no buildings shall be constructed.

36. **Nonconforming Use** -- The use of any building or premises contrary to the use regulations of this ordinance for the zone in which the building or premises is located.

37. **Parking Lot** -- An open area, other than a street, used for the temporary parking of more than four (4) automobiles and available for public use, whether free, for compensation, or as an accommodation for clients or customers.

38. **Parking Space** -- Space within a building, lot or parking lot for the temporary parking or storage of one (1) automobile.

39. **Stable, Private** -- a detached accessory building for the keeping of horses owned by the occupants of the premises and not kept for remuneration, hire or sale.

40. **Stable, Public** -- A stable other than a private stable.

41. **Story** -- That portion of a building, other than a cellar, included between the surface of any floor and the surface of the floor or ceiling next above.

42. **Story, Half** -- A story with at least two (2) of its opposite sides situated in a sloping roof, the floor area of which does not exceed two-thirds (2/3) of the floor immediately below it.

43. **Street** -- A public thoroughfare which affords principal means of access to abutting property and is more than twenty-six (26) feet wide.

44. **Structural Alterations** -- Any change in the supporting members of a building, such as bearing walls, columns, beams or girders.

45. **Tourists Court** -- A group of attached buildings containing individual sleeping rooms, designed for or used primarily by automobile tourists or transients, with garage attached to each sleeping space conveniently located on each unit, including such buildings, motels or motor lodges.

46. **Trailer, Automobile** -- A vehicle with or without motive power, designed to be used for human habitation.

see 1st Definition

conforming use

Accessory Use Defined -

47. Trailer camp -- Any area or tract of land used or designed to accommodate two (2) or more automobile trailers or camping parties.

48. Use, Accessory -- A subordinate use, customarily incidental to and located upon the same lot occupied by the main use.

49. Yard -- An open space on a lot other than a court, unoccupied and unobstructed from the ground upward, except as otherwise provided herein.

50. Yard, Front -- An open space on the same lot with a building, between the front line of the building (exclusive of steps) and the front lot or street line and extending across the full width of the lot.

51. Yard, Rear -- An open, unoccupied space on the same lot with a building, between the rear line of the building (exclusive of steps) and the rear line of the lot and extending the full width of the lot.

52. Yard, Side -- An open, unoccupied space on the same lot with a building, between the side line of the building (exclusive of steps) and the side line of the lot and extending from the front yard line to the rear yard line.

Section 4. ESTABLISHMENT OF ZONES.

A. For the purposes of this ordinance, Centerville is divided into seven classes of zones, as follows:

Residential zone	R-1
Residential zone	R-2
Residential zone	R-3
Agricultural zone	A-1
Agricultural zone	A-2
Commercial zone	C-1
Commercial zone	C-2
Manufacturing zone	M-1
Agricultural zone	A-3

2 Zone created

Section 5. BOUNDARIES OF DISTRICTS AND ZONES THEREIN.

A. The boundaries of each of the districts of Centerville which are hereby zones, and the zones, therein, are hereby established as shown on the map or maps entitled "Zoning Map of Centerville", or as hereafter amended, which map or maps are attached, and all boundaries, notations, and other data shown thereon are made by this reference as much a part of this ordinance as if fully described and detailed herein. The said map or maps shall be filed in the custody of the Town Clerk of Centerville and may be examined by the public, subject to any reasonable regulations established by the Town Clerk.

B. Where uncertainty exists as to the boundary of any district or zone therein, the following rules shall apply:

(1) Wherever the boundary is indicated as being approximately upon the center line of a street, alley or block, or along a property line then, unless otherwise definitely indicated on the map, the center line of such street, alley or block, or such property line, shall be constructed to be the boundary.

(2) Wherever such boundary line is indicated as being approximately at the line of any river, irrigation canal, or other waterway or railroad right-of-way, or any section line, then in such case the center of such stream, canal or waterway, or of such railroad right-of-way, or the boundary line of such public land or such section line shall be deemed to be the boundary.

(3) Where such boundary lines cannot be determined by the above rules, their location may be found by the use of the scale appearing upon the map.

(4) Where the application of the above rules does not clarify the boundary location, the Board of Adjustment shall interpret the map.

Section 6. RESIDENTIAL ZONE R-1

A. Use Regulations.

In Residential Zone R-1 no building or land shall be used, and no building shall be erected which is arranged, intended or designed to be used for other than one or more of the following:

1. Single-family dwellings.
2. Churches, except temporary religious uses or buildings.
3. Libraries, museums, art galleries.
4. Public schools, private educational institutions serving a curriculum similar to that ordinarily given in public schools, child day care or nursery.

6. Public parks, public recreational grounds and buildings; public buildings; public utilities.

7. Household pets; agriculture; nurseries and greenhouses, provided that there is no retail or wholesale shop operated in connection therewith; provided that all incidental equipment and supplies including fertilizer and empty cans, etc., are kept within a building.

7. One unlighted signboard not exceeding eight (8) square feet in area, appurtenant to the lease or sale of the property, also a bulletin board not exceeding eighteen (18) square feet in area erected upon the premises of a church or other institution for the purpose of displaying the name and activities of services therein, provided that such signboard must be set within ten (10) feet of the building lines; one identification sign not exceeding twelve (12) square feet in area, for buildings other than dwellings.

8. Temporary buildings for uses incidental to construction work, which buildings must be removed upon the completion or abandonment of the construction.

9. Home occupations.

10. Accessory uses and buildings customarily incidental to the above.

11. Rabbits and chickens for family food production.

B. Area Regulations

The minimum lot area shall be not less than 10,000 square feet for any main building.

C. Frontage Regulations.

The minimum width of any lot for a main building shall be eighty (80) feet at a distance thirty (30) feet back from the front lot line.

D. Yard Regulations.

1. Side Yards.

The minimum side yard for any dwelling shall be ten (10) feet, and the total width of the two required side yards shall be not less than twenty-five (25) feet. Other main buildings shall have a minimum side yard of twenty (20) feet and the total width of the two side yards shall be not less than forty (40) feet. Except as provided in the definition of private garages, accessory buildings shall have a side yard of not less than one foot, and shall be located not closer than twenty-five (25) feet to a dwelling on adjacent property. On corner lots, the side yard which faces on a street shall be not less than twenty (20) feet for both main and accessory buildings.

2. Front Yard

The minimum setback for main buildings shall be thirty (30) feet, or the average of the existing buildings where fifty (50) per cent of the frontage is developed, but in no case less than fifteen (15) feet. The minimum setback line for accessory buildings shall be at least twenty five (25) feet in the rear of the main buildings, except for private garages as provided in the definition thereof, which shall be six (6) feet.

3. Rear Yard.

The minimum rear yard for any main building shall be thirty (30) feet, and for accessory buildings one (1) foot, provided that on corner lots which rear upon the side yard of another lot, accessory buildings shall be located not closer than ten (10) feet to such side yard. Unattached garages shall be six (6) feet back of the house.

E. Height Regulations.

No building shall be erected to a height greater than two and one-half (2½) stories or thirty-five (35) feet, except as otherwise provided herein, and no dwelling structure shall be erected to a height less than eight feet six inches (8'6").

Section 7. RESIDENTIAL ZONE R-2.

A. Use Regulations.

In Residential Zone R-2, no building or land shall be used and no building shall be erected which is arranged, intended or designed to be used for other than one or more of the following uses:

1. Any use permitted in Residential Zone R-1

2. Two-family dwellings.

B. Area Regulations.

The minimum lot area shall be not less than eighty five hundred (8,500) square feet for any main building.

C. Frontage Regulations.

The minimum width of any lot for a main building shall be

sixty-seven (67) feet at a distance thirty (30) feet back from the front lot line.

D. Yard Regulations.

1. Side Yards.

The minimum side yard for any dwelling shall be eight (8) feet; and the total width of the two required side yards shall be not less than twenty (20) feet. Other main buildings shall have a minimum side yard of twenty (20) feet, and the total width of the two side yards shall be not less than forty (40) feet. Except as provided in the definition of private garages, accessory buildings shall have a side yard of not less than one (1) foot, and shall be located not closer than fifteen (15) feet to a dwelling on adjacent property. On corner lots, the side yard which faces on a street shall be not less than twenty (20) feet for both main and accessory buildings.

2. Front and Rear Yards and Height Regulations.

Same as for Residential Zone R-1.

Section 8. RESIDENTIAL ZONE R-3.

A. Use Regulations.

In Residential Zone R-3, no building or land shall be used and no building shall be erected which is arranged, intended or designed to be used for other than one or more of the following uses:

1. Any use permitted in Residential Zone R-2.

2. Four-family dwellings.

B. Area Regulations.

The minimum lot area shall be not less than seventy five hundred (7,500) square feet for the first unit and not less than five hundred (500) square feet for each additional unit.

C. Frontage Regulations:

The minimum width of any lot for a main building shall be sixty (60) feet at a distance thirty feet (30) feet back from the front lot line.

D. Yard and Height Regulations.

Same as for Residential Zone R-2.

Section 9. AGRICULTURAL ZONE A-1.

A. Use Regulations.

In Agricultural Zone A-1, no building or land shall be used and no building shall be erected which is arranged, intended or designed to be used for other than one or more of the following uses:

1. Any use permitted in Residential Zone R-1.

2. Fruit and vegetable stands for the sale only of agricultural products produced in Davis County and providing, further, that such stands comply with the safety standards as adopted by Centerville Town.

3. Animals and fowl for family food production.

4. Fruit and vegetable storage and packing plants for the storage or packing of agricultural products produced on the premises.

B. Area, Frontage & Yard Regulations.

Same as for Residential R-1.

Section 10. AGRICULTURAL ZONE A-2.

A. Use Regulations.

In Agricultural Zone A-2, no building or land shall be used and no building shall be erected which is arranged, intended or designed to be used for other than one or more of the following uses:

1. Any use permitted in A-1.

B. Area, Frontage and Yard Regulations.

Same as residential R-2.

Section 11. COMMERCIAL ZONE C-1.

A. Use Regulations.

In Commercial Zone C-1, no building or land shall be used and no building shall be erected which is arranged, intended or designed to be used for other than one or more of the following uses:

1. Art or antique shop.

2. Bakery, provided all goods produced are sold at retail on the premises; book or stationery store; beauty parlor; bicycle shop.

3. Cafe; confectionery; clothes cleaning and drying; collection agency; refreshment stand, but not including the sale of draft beer.

to Permitted Uses +
used.

4. Drugstore; delicatessen.
5. Dwellings.
6. Florist or gift shop; fruit store.
7. Grocery, meat or vegetable store, including frozen-food lockers incidental to the main grocery or food business.
8. Ice cream shop, provided all goods produced are sold at retail on the premises; ice storage, of not more than five (5) tons capacity; interior decorating store.
9. Jewelry store.
10. Locksmith.
11. Magazine shop.
12. Offices, business or professional.
13. Painter, or paint store; paper hanger, or wallpaper store; public parking area; public utility substations and services; public buildings.
14. Service stations, but not including public garages or automobile repairing, automobile painting or welding; shoe repair shop; shoe-shine shop; single-family dwelling.
15. Tailor shop; taxi stand.
16. Accessory uses and buildings customarily incidental to the above.

B. Special Provisions.

The above specified stores, shops or businesses shall be retail establishments and shall be permitted only under the following conditions:

1. Such businesses shall be conducted wholly within an enclosed building, or on a lot which is enclosed by a solid wall, board fence or evergreen hedge not less than six (6) feet in height, except for the sale of gasoline and oil by service stations, the parking of automobiles, and service to persons in automobiles.
2. All products produced, whether primary or incidental, shall be sold at retail on the premises.
3. Any exterior sign displayed shall pertain only to a use conducted within the building or lot or shall appertain to the lease or sale of the property; such sign shall be attached flat against a wall of the building or the enclosing wall, fence or hedge and parallel to its horizontal dimension, and shall not exceed thirty-six (36) square feet in area. One such sign only, or its equivalent in square footage in not more than three (3) signs, shall be permitted on each wall, fence or hedge facing a street or a parking lot. In no case shall a sign project above the height of the building.

C. Area and Frontage Regulations.

None.

D. Yard Regulations.

1. Side Yards

For dwellings, same as Residential Zone R-2; otherwise none, except that wherever a building is built upon a lot adjacent to a Residential or Agricultural Zone boundary there shall be provided a side yard of not less than ten (10) feet on the side of the building adjacent to the zone boundary line, and on corner lots, the same yard which faces on a street shall be not less than twenty (20) feet.

2. Front Yard.

The minimum setback for all buildings, hedges, fences and walls shall be twenty (20) feet.

3. Rear Yard.

The minimum rear yard for all buildings shall be fifteen (15) feet.

E. Height.

No building shall be erected to a height greater than two and one-half (2½) stories or thirty-five (35) feet.

SECTION 12. COMMERCIAL ZONE C-2.

A. Use Regulations.

In Commercial Zone C-2, no building or land shall be used, and no building shall be erected which is arranged, intended or designed to be used for other than one or more of the following uses:

1. Any use permitted in Commercial Zone C-1.
2. Retail stores or businesses.
3. Advertising signs or structures and billboards; amusement enterprises, including a billiard or pool hall, bowling alley, boxing arena, dance hall, games of skill and chance, racetrack, shooting gallery, theater auditorium; apartment hotels, apartment motels; automobile and trailer sales area.

1 Services for Parking
Automobiles

4. Baths; pet shop or taxidermist; bird store; business college or private school operated as a commercial enterprise; bus depot; blueprinting or photostating.
5. Catering establishment; circus or amusement enterprise of similar type, transient in character; cleaning establishment.
6. Electrical and heating equipment; employment agency.
7. Department, furniture or radio store; dressmaking shop; dry goods or notions store.
8. Film exchange.
9. Hospitals or sanitariums (except animal hospitals); hotels.

10. Ice storage.
11. Laundry.
12. Manufacture of goods to be sold at retail on the premises; medical or dental clinics and laboratories; millinery shop, music conservatory or music instruction; monument works, retail; mortuary; motels.

13. Newstand; nursery, flower or plant, provided that all incidental equipment and supplies, including fertilizer and empty cans, etc., are kept within a building.

14. Pawnshop; plumbing or sheet metal shops, if conducted wholly within a completely enclosed building; pony-riding ring, without stables; printing, lithographing or publishing; public garage, including automobile repairing and incidental body and fender work, painting or upholstering, if all operations are conducted wholly within a completely enclosed building; public services, including electric distributing substation, fire or police station, telephone exchange and the like.

15. Second-hand store, if conducted wholly within a completely enclosed building; sign-painting shop, if conducted wholly within a completely enclosed building; storage building for household goods; studios (except motion picture).

16. Tire shop operated wholly within a building; tourist court; trailer camp; trade school if not objectionable due to noise, odor, vibration, etc.,

17. Upholstering shop, if conducted wholly with a completely enclosed building.

18. Wedding chapel, rescue mission or temporary revival church; wholesale merchandise broker, excluding wholesale storage.

19. Accessory uses and buildings customarily incidental to the above.

B. Area and Frontage Regulations.

None

C. Yard Regulations.

1. Side Yards.

The minimum side yard for any dwelling shall be eight (8) feet, and the total width of the two required side yards shall be not less than eighteen (18) feet; provided, that dwelling structures over thirty-five (35) feet in height shall have one (1) foot of additional side yard on each side of the building for each two feet, such structure exceeds thirty-five (35) feet in height, and for other buildings, same as Commercial Zone C-1.

2. Front Yards.

None

3. Rear Yards.

Same as for Commercial Zone C-1.

D. Height Regulations.

None

Section 13. MANUFACTURING ZONE M-1.

A. Use Regulations.

In Manufacturing Zone M-1, no building or land shall be used and no building shall be erected which is arranged, intended or designed to be used for other than one or more of the following uses:

1. Any use permitted in Commercial Zone C-2 except multiple dwellings, hotels, apartment hotels, motels and apartment motels.
2. Assembly of electrical appliances, electronic instruments and devices, radios and phonographs, including the manufacture of small parts only, such as coils, condensers, transformers and crystal holders.

3. Automobile assembling, painting, upholstering, rebuilding, reconditioning, body and fender work, truck repairing or overhauling; tire reconditioning, recapping or retreading; furniture manufacture.

OR Repairing IN C-2 ZONE
Driveway Repairs BY
NEW CS. AM/POWELL ETC.
-2 Zoned

not fire shop not conducted
d/with in building

4. Blacksmith shop, welding or machine shop, excluding the following: punch presses over twenty (20) tons rated capacity, drop hammers and automatic screw machines.

5. Foundry, casting light-weight nonferrous metal not causing noxious odors or fumes.

6. Laboratories.

7. Manufacture, compounding, processing, packaging, or treatment of such products as bakery goods, candy, cosmetics, dairy products, drugs, perfumes, pharmaceuticals, perfumed toilet soap, toiletries, and food products except the following: Fish, meat, sauerkraut, pickles, vinegar, yeast, and the rendering of fats and oils.

8. Manufacture, compounding, assembling or treatment of articles of merchandise from the following previously prepared materials: Bone, cellophane, canvas, cloth, cork, feathers, felt, fiber, fur, glass, hair, horn, leather, paper plastics, precious or semiprecious metals or stones, shell, straw, textiles, tobacco, wood, yarn and paint.

9. Manufacture of pottery and figurines or other similar ceramic products, using only previously pulverized clay, and kilns fired only by electricity or gas.

10. Manufacture and maintenance of electric and neon signs, billboards, commercial advertising structures, light sheet-metal products, including heating and ventilating ducts and equipment, cornices and eaves, etc.

11. Manufacture of musical instruments, toys, novelties and rubber and metal stamps.

12. Veterinary or dog or cat hospital; kennels.

13. Wholesale business; storage warehouse.

14. The following uses, provided they are conducted wholly within a completely enclosed building or within an area enclosed on all sides with a solid wall, compact evergreen hedge or uniformly painted board fence not less than six (6) feet in height:

(1) Motion picture studio.

(2) Coal and wood yards, lumber yards and planing mill.

(3) Contractor's equipment storage yard or plant, or rental of equipment commonly used by contractors.

(4) Draying, freighting or trucking yard or terminal.

(5) Building material sales yard, including the sale of rock, sand, gravel and the like as an incidental part of the main business, but excluding concrete mixing.

(6) Junk Yard.

(7) Power, light or steam plant central station.

(8) Small boat building.

(9) Stone monument works, wholesale.

15. Accessory uses and buildings customarily incidental to the above.

B. Area Regulations.

The minimum lot area shall be not less than five thousand (5000) square feet for each one-family dwelling, with seven hundred fifty (750) additional square feet for each additional family unit in a dwelling structure having more than one (1) dwelling unit; for group dwellings, not less than five thousand (5000) square feet for the first separate dwelling structure, with two thousand (2000) square feet for each additional separate dwelling structure, and with seven hundred fifty (750) square feet additional for each additional dwelling unit in excess of one (1) dwelling unit in each separate dwelling structure; not less than ten thousand (10,000) square feet for any motel or trailer camp; and not less than five thousand (5000) square feet for any other main building.

C. Frontage Regulations.

The minimum width of any lot for any main building shall be sixty (60) feet.

D. Yard Regulations.

1. Side Yards.

Same as for Residential Zone R-2 except that dwelling structures over thirty-five (35) feet in height shall have one (1) foot of additional side yard on each side of the building for each two (2) feet such structure exceeds thirty-five (35) feet in height.

2. Front Yard

The minimum setback for main buildings shall be thirty (30) feet, or the average of the existing buildings where fifty (50) per cent of the frontage is developed, but in no case less than fifteen (15) feet. The minimum setback line for accessory buildings shall be at least ten (10) feet in the rear of the main building.

Henriksen 2226

2-2)

Sessions would Yesd. Not
used on 6' Foot Fence

K 2nd permitted in C-2
hind ≥ 6' fence.

3. Rear Yard.
Same as for Residential Zone R-1.
4. Height Regulations.
No building shall be erected to a height greater than six (6) stories or seventy-five (75) feet.
5. Coverage Regulations.
No building or group of buildings, with their accessory buildings, shall cover more than seventy (70) per cent of the area of the lot.

Section 14. AGRICULTURAL A-3 (New zone suggested)

A. Use Regulations.

In Agricultural Zone A-3, no building or land shall be used and no building shall be erected which is arranged, intended or designed to be used for other than one or more of the following uses:

1. Any use permitted in Agricultural A-2.
2. Billboards for directional and informational signs only.

B. Area, Frontage and Yard Regulations.

Same as for Residential A-2.

Section 15. GENERAL PROVISIONS.

The regulations hereinafter set forth in this section qualify or supplement, as the case may be, the zone regulations appearing elsewhere in this ordinance.

A. Additional Use Regulations.

1. The requirements of this ordinance as to minimum building site area shall not be construed to prevent the use for a single family dwelling of any lot or parcel of land in the event that such lot or parcel of land is held in separate ownership at the time this ordinance becomes effective.

B. Additional Yard Regulations.

1. On any lot held under a separate ownership from adjacent lots, and of record at the time of the passage of this ordinance, the side yard requirements may be waived to the extent that the buildable width of such lot is not reduced to less than twenty-five (25) feet, except that at least a four (4) foot side yard is required on each side of any interior lot and the side yard on the street side of a corner lot must be at least ten (10) feet.

2. Every part of a required yard shall be open to the sky, unobstructed except for accessory buildings in a rear yard, and except for the ordinary projections of skylights, sills, belt courses, cornices and other ornamental features.

3. Open or lattice enclosed fire escapes; fireproof outside stairways, and balconies opening upon fire towers projecting into a yard not more than five (5) feet and the ordinary projections of chimneys and flues are permitted.

C. Additional Height Regulations.

1. Public, semipublic or public service buildings or hotels, when authorized in a zone, may be erected to a height not exceeding sixty (60) feet, if the building is set back from each otherwise established building line at least one (1) foot for each additional foot of building above the normal height limit required for the zone in which the building is erected.

2. Penthouses or roof structures for the housing of elevators, stairways, tanks, ventilating fans or similar equipment required to operate and maintain the building, and fire or parapet walls, skylight, towers, steeples, flagpoles, chimneys, smokestacks, water tanks, wireless masts, theater lofts, silos or similar structures may be erected above the height limits herein prescribed, but no space above the height limit shall be allowed for the purpose of providing additional floor space.

3. No main building shall be erected to a height less than eight feet six inches (8'6").

D. Annexation.

1. Annexed land shall be classified in the same zone as that existing on contiguous land.

E. Clear View of Intersecting Streets.

No obstruction to view in excess of two (2) feet in height, except a reasonable number of lawn trees, shall be maintained on the premises of a corner lot between the front and side street lines and the building lines, provided that such trees as are planted shall be not less than fifteen (15) feet from the front and side street lines, and are pruned high enough to permit unobstructed vision to automobile drivers.

Application A-3 Zone to newly
annexed land

F. Animals and Powl.

No animals or fowl shall be kept or maintained closer than forty (40) feet from dwelling, and no barn, coop, pen or corral shall be kept closer than forty (40) feet to any street.

G. Building Regulations.

Domestic water supply and sewage disposal shall comply with the County Board of Health requirements as represented by a certificate of approval from said Board of Health in all applications for a building permit where either an approved supply of piped water under pressure, or a sewer, is not available.

H. Off-street parking and space regulations.

1. Automobile parking space. There shall be provided at the time of erection of any main building or at the time any main building is enlarged or increased in capacity, minimum off-street parking space with adequate provision of ingress and egress by standard sized automobiles, as follows:

a. Parking space for dwellings: In all residential districts there shall be provided in a private garage or in an area properly located for a future garage, space for the parking of one (1) automobile for each dwelling unit in a new dwelling, or each dwelling unit added in the case of the enlargement of an existing building.

b. For buildings other than dwellings: For a new building or for any enlargement or increase in a seating capacity, floor area or gross area of any existing main building there shall be at least one (1) permanently maintained parking space of not less than one hundred twenty-six (126) square feet new area, as follows:

(1) For church, high school, college and university auditoriums and for theatres, general auditoriums, stadiums and other similar places of assembly, at least one (1) parking space for every ten (10) fixed seats provided in said buildings:

(2) For hospitals, at least one (1) parking space for each two beds capacity, including infants' cribs and childrens beds. For medical and dental clinics, at least ten (10) parking spaces provided that three (3) additional parking spaces shall be provided for each doctor or dentist having offices in such clinic in excess of three (3) doctors or dentists.

(3) For tourist courts and apartment motels, at least one (1) parking space for each individual sleeping or living unit; for hotels and apartment hotels at least one (1) parking space for each two sleeping rooms, up to and including the first twenty (20) sleeping rooms, and one (1) parking space for each three (3) sleeping rooms over twenty (20).

(4) For restaurants or establishments that serve meals, lunches, or drinks to patrons either in their cars or in the building, and for dance hall and recreational places of assembly, at least one (1) space for each two hundred (200) square feet of floor space in the building.

(5) For mortuaries, at least thirty (30) parking spaces for liquor stores, at least twenty (20) parking spaces.

(6) For retail stores selling direct to the public, one parking space (1) for each five hundred (500) square feet to floor space in the building.

Parking space as required above shall be on the same lot with the main building, or in the case of buildings other than dwellings, may be located not farther than five hundred (500) feet therefrom.

c. Public parking areas: Every parcel of land hereafter used as a public parking area shall be paved with an asphaltic or concrete surfacing and shall have appropriate bumper guards where needed as determined by the Building Inspector. Any lights used to illuminate said parking areas shall be so arranged as to reflect the light away from adjoining premises in any Residential Zone.

Section 16. BOARD OF ADJUSTMENT.

A. A Board of Adjustment is hereby established, the members of which shall be appointed by the Board of Trustees of Centerville Town. The Board shall consist of five (5) members, each to be appointed for a term of five (5) years and renewable for cause by the appointing authority upon written charges and after public hearing, except that of the first five (5) members so appointed, one member shall be appointed to serve until July 1, 1952, one member to serve until July 1, 1953, one member to serve until July 1, 1954, one member to serve until July 1, 1955, and one member to

serve until July 1, 1956. In the month of June 1952, and every year thereafter, one member shall be appointed for a five year period to take the place of the member whose term shall next expire. Any vacancy occurring on said Board by reason of death, resignation, removal, or disqualification shall be promptly filled by the Board of Trustees of Centerville Town for the unexpired term of such member. One member shall be a member of the Centerville Planning Commission.

B. It shall be the duty of such Board to hear all appeals taken by any person aggrieved or by any officer, department, board or bureau of the Town affected by and decision of the officer in charge of the administration of this ordinance. Said Board shall adopt rules for the regulation of its procedure and conduct of its duties not inconsistent with the provisions of this ordinance or of the state law and shall have the power to hear and decide appeals for variances from the terms of this ordinance in specific cases where such a variance will not be contrary to the public interest, where owing to special conditions a literal enforcement of the provisions of this ordinance will result in any unnecessary hardship, and for the purpose of assuring that this ordinance shall be observed in spirit and substantial justice done thereunder. Except as otherwise provided herein, such variances shall be limited to reasonable reductions in required side yards, front yards, rear yards, height regulations; reasonable reduction in the requirements of lot area, frontage, off-street parking areas, and minimum court dimensions.

C. In exercising the above mentioned powers such Board may in conformity with the provisions of the law, reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from and may make such determination as ought to be made and to that end shall have all the powers of the officer from whom the appeal is taken, provided, that before any variance may be granted it shall be shown that special circumstances attach to the property covered by the application, which do not generally apply to the other property in the same zone; that because of said special circumstances, property covered by the application is deprived of privileges possessed by other properties in the same zone; and that the granting of the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone.

D. The concurring vote of a majority of the five members of the Board shall be necessary to reverse any order, requirement, or determination of any such administrative official, or to decide in favor of the applicant on any matter on which it is required to pass or to effect any such variation or special exception to this ordinance.

E. The Board of Adjustment may, after public notice and hearing, vary the application of the use zone regulations herein established in harmony with their general purpose and intent as follows:

1. Where a zone boundary line divides a lot in single ownership at the time of the passage of this ordinance, permit a use authorized on either portion of such lot to extend to the entire lot, but not more than fifty (50) feet beyond the boundary line of such zone in which such use is authorized.

2. Permit a temporary building for commerce or industry in a residence zone, which building is incidental to the residential development, such permit to be issued for not more than a period of one (1) year.

Section 17. ENFORCEMENT.

A. The Building Inspector, appointed under the provisions of the Building Code of Centerville Town is hereby designated and authorized as the officer charged with the enforcement of this ordinance, but the Board of Trustees of Centerville Town may by resolution or ordinance, from time to time entrust such administration, in whole or in part, to any other officer of Centerville Town without amendment to this ordinance.

B. From the time of the effective date of this ordinance, the Building Inspector shall not grant a permit for the construction or alteration of any building or structure if such construction or alteration would be in violation of any of the provisions of this ordinance; nor shall any municipal officer grant any permit or

license for the use of any building or land if such use would be in violation of the ordinance.

C. Powers and Duties.

It shall be the duty of the Building Inspector to inspect or cause to be inspected all buildings in course of construction or repair. He shall enforce all of the provisions of this ordinance, entering actions in the court when necessary, and his failure to do so shall not legalize any violation of such provision. The Building Inspector shall not issue any permit unless the plans of and for the proposed erection, construction, reconstruction, alteration or use fully conform to all zoning regulations then in effect.

Section 18. BUILDING PERMIT AND CERTIFICATE OF OCCUPANCY.

A. Building permit required.

The construction, alteration, repair, removal or occupancy of any structure or of any part thereof, as provided or as restricted in this ordinance, shall not be commenced, or proceeded with, except after the issuance of a written permit for the same by the Town Building Inspector; provided that no permit shall be necessary where the erection, construction, reconstruction or alteration is minor in character as defined herein or as determined by the Building Inspector.

B. Certificate of Occupancy required.

No land shall be used or occupied and no building hereafter structurally altered or erected shall be used or changed in use, except for agricultural purposes, until a certificate of occupancy shall have been issued by the Building Inspector, stating that the building or the purposed use thereof, or the use of the land, complies with the provisions of this ordinance. A like certificate shall be issued for the purpose of maintaining, renewing, changing, or extending a nonconforming use. A certificate of occupancy either for the whole or a part of a building, shall be applied for coincidentally with the application for a building permit, and shall be issued within the ten (10) days after the erection of structural alteration of such building, or part, shall have been completed in conformity with the provisions of this ordinance.

Section 19. AMENDMENTS.

The Board of Trustees of Centerville Town may from time to time amend the number, shape, boundaries or area of any district or districts or of any zone, or any regulation of or within such district or districts or zones, or any other provision of the zoning ordinance, but any such amendment shall not be made or become effective unless the same shall have been proposed by or be first submitted for the approval, disapproval, or suggestions of the Centerville Planning Commission, and if disapproved by such commission within thirty (30) days after such submission, such amendment, to become effective, shall receive the favorable vote of not less than a majority of the entire membership of the Board of Trustees of Centerville Town.

Before finally adopting any such amendment, the Board of Trustees shall hold a public hearing thereon, at least thirty (30) days notice of the time and place of which shall be given by at least one (1) publication in a newspaper of general circulation in the County.

Section 20. NON-CONFORMING USES.

A. Any lawful use of buildings or land at the time of the passage of this ordinance, that does not conform to the regulations prescribed in this ordinance, shall be deemed a non-conforming use and such use may be continued, but if such non-conforming use is discontinued for the period of one year or more, except for residential structures or accessory farm structures, any future use of said building or land must be in conformity with the provisions of this ordinance. A non-conforming use may be extended to more floor area throughout a building provided no structural changes are made. A non-conforming use, if changed to a conforming use may not thereafter be changed back to any non-conforming use.

B. Repairs and structural alterations may be made to a non-conforming building providing that the floor space of such building is not increased.

C. A non-conforming building or structure which is damaged or partially destroyed by fire, flood, wind, earthquake, or other calamity or act of God, or the public enemy, to the extent of not

nonconforming use provisions

more than one and one half (1½) times its assessed value at that time, may be destroyed and the occupancy or use of such building, structure, or part thereof, which existed at the time of such partial destruction, may be continued or resumed, provided that such restoration is started within a period of one (1) year and is diligently prosecuted to completion. In the event such damage or destruction exceeds one and one-half (1½) times the assessed value of such non-conforming building or structure, no repairs or reconstruction shall be made, except in the case of residences or accessory farm buildings, unless every portion of such building or structure is made to conform to all regulations for new buildings in the zone in which it is located.

Section 21. LICENSING & PENALTIES.

All departments, officials and public employees of Centerville Town, which are vested with the duty or authority to issue permits or licenses shall conform to the provisions of this ordinance and shall issue no such permit or licenses for uses, buildings, or purposes where the same would be in conflict with the provisions of this ordinance, and any such permit or license, if issued in conflict with the provisions of this ordinance, shall be null and void.

Any person, firm, or corporation, whether as principal, agent, employed or otherwise, violating or causing or permitting the violation of any of the provisions of this ordinance shall be guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not more than two hundred ninety-nine (299.00) dollars or by imprisonment in the County Jail of Davis County for a term not exceeding three (3) months, or by both such fine and imprisonment. Such person, firm, or corporation shall be deemed to be guilty of a separate offense for each and every day during which any portion of any violation of this ordinance is committed, continued, or permitted by such person, firm, or corporation, and shall be punishable as herein provided.

Section 22. VALIDITY.

Should any section, clause, or provision of this ordinance be declared by the courts to be invalid, the same shall not effect the validity of the ordinance as a whole or any part thereof, other than the part so declared to be invalid.

This ordinance will become effective at 11:59 A.M. on the 2nd day of April, 1952.

Golden L. Latham, Clerk

See Ord. Minutes - 4/2/52

*Noted: Leg. Office
Handwritten: Charles H. Smith, Jr. Service
D.H.W.*

§ 10-354. STORING, PARKING OR LEAVING DISMANTLED OR OTHER SUCH MOTOR VEHICLE PROHIBITED:
EXCEPTIONS. No person shall park, store, leave, or permit parking, storing, or leaving any motor vehicle of any kind which is in an abandoned, wrecked, dismantled, inoperative, rusted, junked, or partially dismantled condition whether attended or not, on any public or private property within the city for a period of time in excess of seven days. . . .

Code of Revised Ordinances of Centerville, Utah, 1985
Revision.

That ordinance was enacted and became effective on December 17, 1985.

The predecessor of § 10-354 was § 7-5-4 of the Revised Ordinances of Centerville, Utah 1968; that ordinance enacted on March 17, 1970 and repealed on December 17, 1985 provided in pertinent part:

DISPOSITION OF WRECKED OR DISCARDED VEHICLES. No person in charge or control of any property within the City, whether as owner, tenant, occupant, lessee, or otherwise, shall allow any partially dismantled, non-operating, wrecked, junked, or discarded vehicle to remain on such property longer than 30 days; and no person shall leave any such vehicle on any property within the City for a longer time than 30 days; . . .

The Centerville City Ordinances define "non-conforming use" as:

A use which lawfully occupied a building or land at the time this Zoning Ordinance became effective but which does not conform with the use regulations of the zone in which it is located.

§ 12-310-2 (1)(AO.).

The applicable Centerville City Ordinance governing non-conforming uses is found at § 12-350-3 (2) and provides in pertinent part, as follows:

Except as hereinafter specified, any use, . . . lawfully existing at the time of the enactment or subsequent amendment of this Ordinance, may be continued, even though such use . . . does not conform with the provisions of this Ordinance for the district in which it is located. . . .

A. Affidavit: Following effective date of this Ordinance or any amendment thereto, by which a use, . . . becomes non-conforming, the owner of the land use, . . . may register such non-conforming use . . . with the Zoning Administrator an affidavit setting forth the time that said use, . . . came into existence, . . . and the size of and extent of the non-conforming use existing on the effective date of this Ordinance, or applicable amendment. The Zoning Administrator shall preserve the affidavit and on the basis of the affidavit issue a Certificate of Occupancy.

APPENDIX E

41-21-1. "Utah Horseless Carriage" defined.

"Any motor vehicle which is thirty years or older, from the current year, primarily a collector's item, and used for participation in club activities, exhibitions, tours, parades, occasional transportation, and similar uses, but which is not for general daily transportation, shall, for the purposes of this act, be known as a "Utah Horseless Carriage."

41-21-2. "Registration-fees-Affidavit-Affidavit--Certificate--License plates.

"(1) In lieu of the annual registration fees levied in Section 41-1-127, the registration fees for any "Utah Horseless Carriage" shall be \$10,

ARTICLE 17
OPTIONAL TITLES FOR COLLECTOR MOTOR
VEHICLES

41-1-195. Definitions.

As used in this article:

(1) "Division" means the Motor Vehicle Division of the State Tax Commission.

(2) "Lienholder" means a person with a security interest in a collector motor vehicle.

(3) "Owner" means a person, other than a lienholder, having clear title to a collector motor vehicle or having title to the property subject to a security interest.

(4) "Collector motor vehicle" means any motor vehicle 20 years or older from the current year that is not used on the highway and has been acquired primarily as a collector's item.

(5) "Security interest" means an interest which is reserved or created by an agreement to secure the payment or performance of an obligation and which is valid against third parties.

History: C. 1953, 41-1-195, enacted by L. 1990, ch. 292, § 1. came effective on April 23, 1990, pursuant to Utah Const., Art. VI, Sec 25
Effective Dates. — Laws 1990, ch. 292 be-

41-1-196. Optional certificate of title — Application by owner — Grounds for refusal of application — Certificate of inspection required — Qualified inspectors — Duties.

(1) The division shall provide for an optional certificate of title for a collector motor vehicle under this article if:

(a) the applicant certifies that the vehicle qualifies under the definition of a collector motor vehicle under this article; and

(b) the applicant complies with all other optional titling provisions of this article.

(2) An owner shall apply for an optional certificate of title on forms prescribed and furnished by the division. Each person to be recorded as owner shall sign the application. All signatures shall be notarized. The application shall contain:

(a) the name, residence address of the owner, or business address if the owner is a firm, association, or corporation;

(b) a description of the collector motor vehicle including the make, model, the model year as specified by the manufacturer, the manufacturer's identification number, the vehicle identification number, and any other information required by the division; and

(c) a statement by the owner listing one lien or encumbrance, if any, upon the collector motor vehicle and the names and addresses of all persons having any security interest in it.

(3) Every application for an optional certificate of title for a collector motor vehicle which has been titled in another state or foreign country shall be accompanied by the certificate of title last issued. In the event the collector motor vehicle is from a state or foreign country which does not issue or require certificates of title, the owner shall submit a bill of sale, sworn statement of ownership, or any other evidence of ownership required by the division.

(4) (a) Every application for an optional certificate of title for a collector motor vehicle not previously titled in this state shall be accompanied by a certificate of inspection by a qualified motor vehicle identification number inspector.

(b) Members of the State Tax Commission, any officer of the division designated by the State Tax Commission, and all peace officers of the state are qualified motor vehicle identification number inspectors. The inspectors shall inspect the collector motor vehicle and make a record of the inspection on a form prescribed by the division.

(c) No fee may be charged for the inspection.

(5) An optional certificate of title for a collector motor vehicle issued under this article may not be used as a certificate of title required prior to registering a motor vehicle under this chapter.

History: C. 1953, 41-1-196, enacted by L. 1990, ch. 292, § 2. came effective on April 23, 1990, pursuant to Utah Const., Art. VI, Sec. 25
Effective Dates. — Laws 1990, ch. 292 be-

41-1-197. Certificate of title — Records — Division requirements.

The division shall maintain a current record of any optional certificate of title issued by it. Records of the division relating to titles are public records and shall be available to the public during office hours in accordance with Section 41-1-9.

History: C. 1953, 41-1-197, enacted by L. 1990, ch. 292, § 3. came effective on April 23, 1990, pursuant to Utah Const., Art. VI, Sec. 25
Effective Dates. — Laws 1990, ch. 292 be-

41-1-198. Security interests and liens — Recording procedure.

Security interests and liens against collector motor vehicles shall be recorded under and subject to Sections 41-1-80 through 41-1-87.

History: C. 1953, 41-1-198, enacted by L. 1990, ch. 292, § 4. came effective on April 23, 1990, pursuant to Utah Const., Art. VI, Sec. 25
Effective Dates. — Laws 1990, ch. 292 be-

41-1-79.5. Abandoned and inoperable vehicles — Determination by commission — Disposal of vehicles.

An abandoned and inoperable vehicle, for the purposes of this act, shall not be considered a "motor vehicle" under said act when said vehicle has been inspected by an authorized investigator or agent appointed by the State Tax Commission, and when said investigator or agent shall have made a written determination that the vehicle in question cannot be rebuilt or reconstructed in such a manner as to allow its use on the highways of this state as a self-propelled vehicle.

Before the issuance of such a written determination as provided herein, an affidavit shall be required from the owner of said inoperable vehicle or the purchaser thereof for salvage, identifying the vehicle by serial number and certifying that said inoperable vehicle will not be rebuilt or reconstructed or in any manner allowed to operate upon the highways of the state of Utah as a self-propelled vehicle. The operator of the junk or salvage yard disposing of such an inoperable motor vehicle shall be required to keep copies of such affidavits and such other written records as shall be required by the State Tax Commission.

Upon such determination that such a vehicle is inoperable and cannot be rebuilt or reconstructed, the vehicle in question may be converted to scrap or otherwise disposed of without necessity of compliance with the requirements of Sections 41-1-78 and 41-1-79, Utah Code Annotated, 1953.

History: C. 1953, 41-1-79.5, enacted by L. 1965, ch. 76, § 4.

Meaning of "this act". — The term "this

act," referred to in the first paragraph, means Laws 1965, ch. 76, which appears as §§ 41-1-1, 41-1-49, 41-1-79.5 and 41-1-134.

APPENDIX F

Exhibit "A"

Town Orders Removal Of Antique Autos

By WANDA LUND

Deseret News Staff Writer

FARMINGTON — A man who has been collecting antique automobiles since 1939 has been ordered to rid himself of the old vehicles before Aug. 28.

He is Melville B. Held Sr., 66, 547 N Main, who has collected 22 Model A Fords and numerous other old automobiles. He keeps 20 of his Model A's on his Farmington property, a 1¼ acre lot.

When he first came to Farmington in 1941 he had already collected a 1923 Essex, a 1923 Packard Phaeton and a 1934 DeSoto Airflow, and he has added to this collection over the years.

"I've been notified by letter that I must get rid of the obsolete vehicles I have or I will be fined or put in jail," he said. "I won't pay a fine. I will let them put me in jail."

"If I have to, I will get enough licenses to put on that whole string of cars," he said. "I am going to keep my Model A's."

He said he has a special

fondness for the cars and never wants to sell them "as long as I have enough to eat. "When I get hungry, I'll sell them," he said.

He was told in a form letter that Farmington City has had

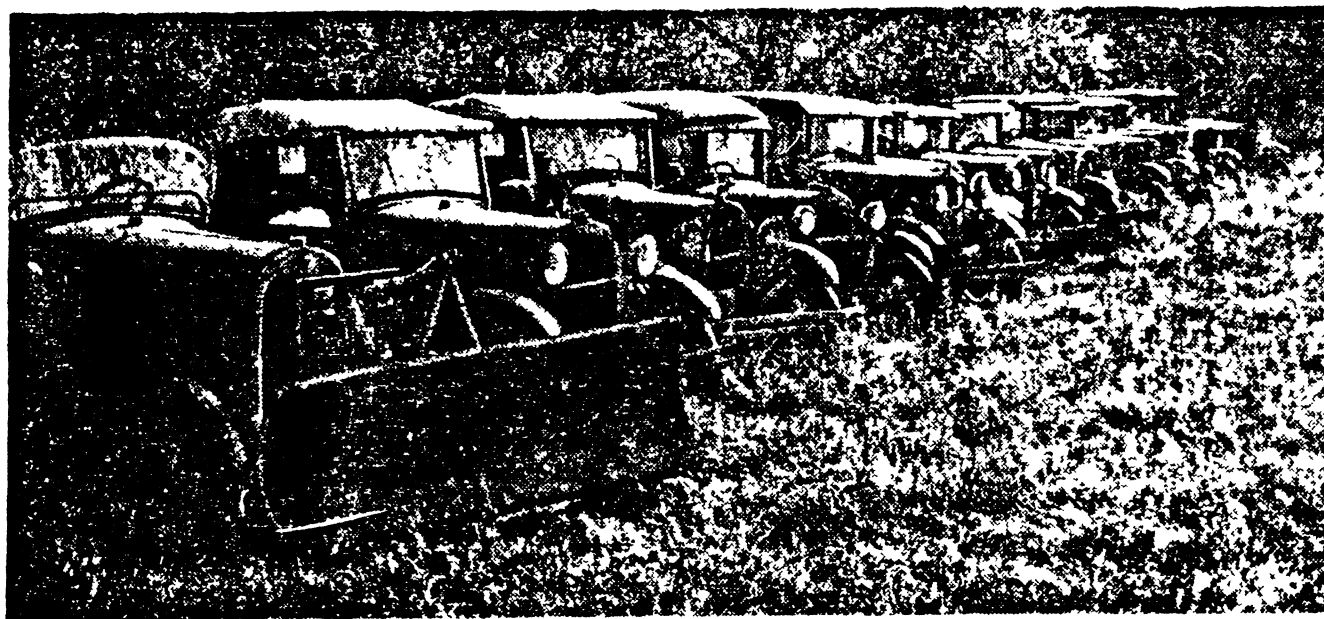
a zoning ordinance since December, 1957, and that he would have to get rid of his obsolete cars.

"This ordinance was adopted for the express purpose of insuring that the community

would grow in an orderly fashion and that the beauty and desirability of Farmington would be constantly improved," the letter said in part.

Held retained an attorney to

represent his interests. In a letter to Jay Johnson, city zoning administrator, the attorney, Bill Thomas Peters, said the Held family had moved onto the property November 15, 1941 with three



An eyesore? Farmington says so, and has ordered owner to remove cars.

cars and had continued to acquire other vehicles then. —

"The ordinance seek to enforce against Mr. Held was not passed years and one month time that Mr. Held commenced using his manner above described wrote

"Under the law, opinion that Mr. Held's nonconforming use, nonconforming use scribed as the use building that existed when the zoning became effective and continued to exist time.

"The action you take against Mr. Held been held to be a constitutional right protected by the United Constitution and protected by the of the State of Utah

He said zoning must permit the of nonconforming use at the time nance was enacted.

COPY

May 25, 1989

Brian M. Barnard, Attorney
Utah Legal Clinic
214 East Fifth South
Salt Lake City, Utah 84111-3204

Dear Brian:

Enclosed please find three copies of a Deseret News article dated Wednesday, August 18, 1971. I'm sure I do not need to draw to your attention the parallels between what Farmington tried to do eighteen years ago and what Centerville City has been trying to do over the last couple of years. This case was resolved in the District Court in Farmington by Judge Thornley K. Swan against Farmington City on a finding of prior nonconforming use.

Five or six years ago I contacted attorney Bill Thomas Peters but could not get his cooperation in going back into his closed files. Perhaps you will have more success. I can also follow up with Farmington City and try searching the District Court records again if you think that a good move.

I've enclosed a check for \$300.00 in case you have to spend some money with Mr. Peters to get access to his files. If you don't, you may apply the entire amount to what I owe you for the work you have already done. This case was generally widely known in Davis County and is the one that I referred to in my letter to City Attorney Keith Stahle. I do not believe the City's complaints against my wife and myself were actually brought in good faith.

Sincerely yours,

J. Val Roberts
Attorney at Law

JVR:vhr
Encl. 3 Deseret News articles
Check #7414, \$300.00

officials had acquiesced for several months. The Supreme Court of Illinois held that where the owner's actions are induced by the conduct of municipal officers, and where in the absence of an estoppel, he would suffer a substantial loss and the "municipality would be permitted to stultify itself by retracting what its agents had done," an estoppel would be raised by the court. See also the later Illinois case of *City of Evanston v. Robbins*, 117 Ill. App.2d 278, 254 N.E.2d 536 (1969), holding that in zoning cases the doctrine of estoppel may be applied where the record suggests that the detriment to the public is negligible and there is no risk to public health or safety.

Other cases invoking estoppel where building permits had been issued and construction had been commenced or completed include *Tankersley Brothers Industries, Inc. v. City of Fayetteville*, 227 Ark. 130, 296 S.W.2d 412 (1956); *Strong v. County of Santa Cruz*, 15 Cal.3d 720, 125 Cal.Rptr. 896, 543 P.2d 264 (1975); *Township of Haverford v. Spica*, 16 Pa.Cmwlth. 326, 328 A.2d 878 (1974). In the latter case, the court quoted with approval at 882 the following from *In re Heidorn*, 412 Pa. 570, 195 A.2d 349 (1963):

While courts are reluctant, and should be, to impose the sanction of laches on governmental divisions, equity cannot close its eyes to the sloth, indifference or official neglect of a municipal body any more than it can to the neglect of an individual where such neglect harms an innocent person.

I would affirm the judgment of the trial court. The undisputed evidence and the findings of fact made by the Board of Adjustment and the trial court require the imposition of an estoppel against the city in enforcing its ordinance against this property owner. The misleading acts and inaction of the city, together with the reliance thereon by the owner, are clear. There was no prevarication or equivocation here by the owner as the majority suggests. The city does not contend that any problem of public health or safety will be encoun-

tered if a variance is granted. I am in full accord with the statement made by the court in *New-Mark Builders, Inc. v. City of Aurora*, 90 Ill.App.2d 98, 233 N.E.2d 44 (1967), cited in *City of Evanston v. Robbins*, supra, that "[m]unicipal corporations, as well as private corporations and individuals, are bound by the principles of fair dealing."



Hal GADD, Plaintiff and Respondent,

v.

York A. and Rose T. OLSON, Defendants, Third-Party Plaintiffs and Appellants,

v.

Mark T. JOHNSON, Third-Party Defendant and Respondent.

No. 18876.

Supreme Court of Utah.

July 5, 1984.

Owner of land brought action against former owners to recover amounts due under contract and for eviction. Former owners filed action against financier. The Third District Court, Salt Lake County, Paul G. Grant, J., granted summary judgment in favor of current owner and the financier, and former owners appealed. The Supreme Court, Hall, C.J., held that former owners adequately alleged fraud based on misrepresentation of effect of legal documents involved in financing transaction by the financier.

Reversed and remanded.

Stewart, J., concurred in the result.

1. Judgment \S 181(2)

Motion for summary judgment can only be granted when there is no genuine issue as to any material fact and, even assuming the facts as asserted by the party moved against to be true, he could not prevail.

2. Fraud \S 10

Misrepresentations of law or of the legal effect of contracts and writings do not constitute remedial fraud.

3. Fraud \S 10

Where the speaker sustains a confidential relation to the hearer or possesses superior means of information or wilfully misleads him into a misconception of his rights and liabilities, misrepresentation as to the legal effect of written instruments may be actionable fraud.

4. Contracts \S 94(1)

Fraudulent misrepresentations as to the legal effect of an instrument will avoid it, even if made to one who has actually read it, if unable to judge of its true construction; the fraud must be contemporaneous with the execution of the instrument and most consist in obtaining the assent of the party defrauded by inducing a false impression as to its legal or literal nature and operation.

5. Fraud \S 44

Complaint which alleged that financier represented to homeowners that he was in the business of helping people save their homes from foreclosure and would loan them enough money to save theirs, that the representation was false and known by the financier to be false, that the financier misled the owners to believe that documents executed in the transaction effected nothing more than a loan rather than a sale of the home, that the homeowners were under emotional and economic distress at the time and had no legal counsel, that owners relied upon the representations made by the financier, and that owners suffered a loss of the equity in their home and were eventually evicted therefrom stated a claim for fraud based on misrepresentation of the legal effect of the documents.

6. Judgment \S 185.2(1)

If party moving for summary judgment chooses not to file affidavits, opposing party need not file affidavits in order to avoid summary judgment. Rules Civ. Proc., Rule 56(e).

Robert B. Hansen, Salt Lake City, for defendants, third-party plaintiffs and appellants.

James H. Deans, Salt Lake City, for plaintiff and respondent.

Richard W. Perkins, Salt Lake City, for third-party defendant and respondent.

HALL, Chief Justice.

York and Rose Olson, defendants and third-party plaintiffs herein, appeal from a summary judgment that dismissed their third-party action against Mark Johnson for fraud.

Prior to April 8, 1981, the Olsons (hereinafter "appellants") were in default in the payment of their obligations under a trust deed note and trust deed on their house. To avoid losing the house through foreclosure, appellants accepted an offer of financial assistance from Mark Johnson (hereinafter "respondent"). On April 8, a transaction conceived by respondent was effected between the parties (i.e., appellants and respondent) whereby appellants conveyed their interest in the house to respondent by warranty deed at a purchase price equal to the unpaid principal balance of the trust deed note (\$30,748.89), plus the amount needed to cure the default (\$4,250.48), and respondent simultaneously leased the house back to appellants with an option to repurchase at a price of \$42,400.

The nature of the April 8 transaction is at the core of the instant dispute. Although the instruments evidencing the transaction clearly characterize it as a sale, lease back and option to repurchase, appellants maintain that respondent represented the transaction to be a mere "loan" and the said instruments to be the necessary vehi-

cle for effecting the loan. They claim respondent's representations led them to believe the transaction would permit them to retain ownership of the house, rather than relinquish such ownership.

Respondent denies having made such representations. He maintains that his characterization of the transaction was in all respects consistent with that set forth in the instruments themselves.

Following the subject transaction, respondent remedied the default and assumed the outstanding trust deed obligation. Less than a month later, he sold the subject property to Hal Gadd (plaintiff herein) subject to the above-described lease and option. Gadd likewise assumed the loan outstanding on the property. In addition, he paid consideration of approximately \$6,500 and executed a trust deed in the sum of \$1,000. Thereafter, beginning in May of 1981, appellants tendered their monthly payments (considered by them as "loan" payments) to Gadd. They continued to do so through the month of February, 1982. In March, however, they apparently defaulted. As a result, Gadd brought this suit to collect the delinquent payments and to have appellants evicted.

Subsequently, after appellants had entered their responsive pleadings, Gadd filed a motion for summary judgment. On September 28, 1982, the court granted the motion, awarding Gadd restitution of the subject premises together with a money judgment.

Included in the responsive pleadings filed by appellants in the eviction action was a third-party complaint wherein appellants alleged they had been defrauded by respondent Mark Johnson. Respondent filed an answer to the said complaint and later entered a motion for judgment on the pleadings.

At the hearing on respondent's motion for judgment on the pleadings, the court

examined not only the pleadings themselves, but other documents as well, such as the written lease, the option, the notice of default on the trust deed, a letter that had accompanied respondent's payment of the expenses related to appellants' default and the cancellation of notice of default. The court then ruled that summary judgment be granted in respondent's favor. This appeal ensued.

Appellants contend that the trial court erred in two respects: (1) in granting a summary judgment upon respondent's motion for judgment on the pleadings; and (2) in granting summary judgment at all, since genuine issues of material fact exist and remain unresolved. We address only the latter, inasmuch as it constitutes the basic and dispositive issue.

[1] A motion for summary judgment can only be granted when "there is no genuine issue as to any material fact,"¹ and "even assuming the facts as asserted by the party moved against to be true, he could not prevail."² This Court has also stated:

[S]ince the party moved against is denied the opportunity of presenting his evidence and his contentions, it is and should be the policy of the courts to act on such motions with great caution, to assure that a party whose cause might have merit is not deprived of the right to access to the courts for the enforcement of rights or the redress of wrongs.^[3]

Appellants argue that respondent's denial (in his answer) of their allegations in the third-party complaint, that respondent had defrauded them by misrepresenting the character and legal effect of the subject transaction, created such a factual dispute as to preclude the entry of summary judgment.

Respondent's defense of the summary judgment consists of two arguments: (1) the written instruments executed by appel-

3. *Id.*

1. Utah R.Civ.P. 56(c); *Hall v. Fitzgerald*, Utah, 671 P.2d 224, 226 (1983).

2. *McBride v. Jones*, Utah, 615 P.2d 431, 432 (1980)

lants disprove their theory as to the character of the transaction; and (2) appellants' bare, self-serving allegations in their pleadings did not raise a factual dispute sufficient to preclude summary judgment. The first argument is premised upon the following rule:

A motion for summary judgment permits an excursion beyond the pleadings, and if the facts discovered irrefutably disprove facts pleaded, summary judgment is appropriate.^[4]

Respondent submits that the facts discovered by the trial court in its "excursion beyond the pleadings," specifically the warranty deed, the lease and the option, "irrefutably disprove" the facts pleaded by appellants relative to the mischaracterization of the transaction and that summary judgment was therefore appropriate.

[2] Relevant to the instant inquiry is the general rule that "misrepresentations of law or of the legal effect of contracts and writings does [sic] not constitute remedial fraud."⁵ This rule would be dispositive were it not for certain applicable exceptions.

In *Adamson v. Brockbank*,⁶ a case involving a similar misrepresentation as to the legal effect of a written instrument (deed), this Court acknowledged the aforementioned general rule, but noted that "[t]here are exceptions to the rule, or rather circumstances or conditions rendering it inapplicable"⁷ The Court held that such excepting circumstances and conditions did exist in that case, though it did not specify what they were.⁸

[3, 4] The circumstances that generally render the rule inapplicable include the following:

4. *Aird Ins. Agency v. Zions First National Bank*, Utah, 612 P.2d 341, 343 (1980).

5. *Adamson v. Brockbank*, 112 Utah 52, 185 P.2d 264, 276 (1947) (quoting *Ackerman v. Bramwell Investment Company, et al.*, 80 Utah 52, 12 P.2d 623, 626 (1932)).

6. 112 Utah 52, 185 P.2d 264 (1947).

7. *Supra* note 5.

[W]here the speaker sustained a confidential relation toward the hearer, or possessed superior means of information, or wilfully misled him into a misconception of his rights and liabilities.^[9] [Emphasis added.]

In this same regard, some courts have held:

Fraudulent representations as to the legal effect of an instrument will avoid it, even if made to one who has actually read it, if unable to judge of its true construction. But the fraud must be contemporaneous with the execution of the instrument and must consist in obtaining the assent of the party defrauded, by inducing a false impression as to its legal or literal nature and operation.^[10] [Emphasis added.]

[5] In the instant case, appellants allege the following facts or "conditions and circumstances" as grounds for their claim of misrepresentation: (1) respondent represented to them that he was in the business of helping people save their houses from foreclosure and would loan appellants enough money to save theirs; (2) said representation was false, and respondent knew it was false; (3) respondent misled appellants to believe that the documents executed in the transaction effected nothing more than a "loan"; (4) appellants were under emotional and economic distress at the time and had no legal counsel to assist them; (5) appellants relied upon the representations made by respondent, and such reliance under these circumstances was reasonable; and (6) as a result of the transaction appellants suffered a loss of their equity in the house and were eventually evicted therefrom. Assuming these factual assertions are truthful, as we are compelled to do by the rules governing summa-

8. *Supra* note 6, at 276.

9. 17 C.J.S. Contracts § 158 (1963). See also *White v. Harrigan*, 77 Okl. 123, 186 P. 224 (1919).

10. *Stegman v. Professional & Business Men's Life Ins. Co.*, 173 Kan. 744, 252 P.2d 1074, 1081 (1953) (quoting *Berry v. Whitney*, 40 Mich. 65 (1879)).

IN THE SECOND CIRCUIT COURT, STATE OF UTAH, WEBER COUNTY

CITY OF CENTERVILLE)	
)	
Plaintiff,)	DECISION
)	
vs.)	
)	
VERLE ROBERTS,)	Case No. 88-1000-034
)	
Defendant,)	

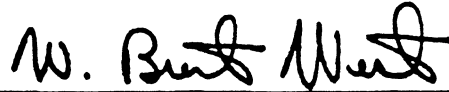
Defendant's motion is hard to categorize. It doesn't fall into any of the traditional post-conviction motions. Under Section 77-35-23 Utah Code Annotated, the Defendant can file a Motion to Arrest the Judgment anytime prior to sentencing. A Motion for a New Trial must be made, pursuant to Section 77-35-24 (c) Utah Code Annotated, within 10 days of sentencing. Under Section 77-35-26 Utah Code Annotated, the Defendant has 30 days to appeal. None of these rules appear to apply. Even if they did, Defendant's motion wouldn't be timely.

Section 77-35-22 (e) Utah Code Annotated allows the Court to correct an illegal sentence, or a sentence imposed in an illegal manner, at any time. The Court is not certain that this provision is applicable. However, if the Defendant is relying upon this provision, then her motion is premature. Her conviction or sentence hasn't been determined to be illegal.

Page Two
City of Centerville vs.
Verle Roberts
Case No. 88-1000-034

Finally, the court is concerned about the fact that although the Defendant did request a stay of the criminal case pending the civil case, the Defendant could have tried to obtain injunctive relief from the District Court. She didn't do so. The Defendant's Motion in Arrest of Judgment is denied.

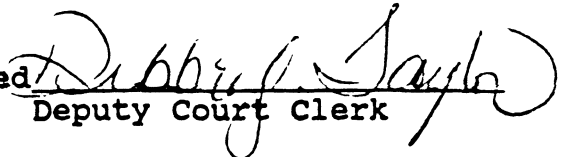
DATED this 1st day of November, 1989.



W. Brent West
Circuit Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Decision to Brian M. Barnard, Attorney for Defendant, at Utah Legal Clinic, 214 East Fifth South, Salt Lake City, Utah 84111-3204, and to Ted E. Kanell, Attorney for Plaintiff, 4 Triad Center #500, Salt Lake City, Utah 84110, dated this 1st day of November, 1989.

Signed 
Deputy Court Clerk

Syllabus.

FORSYTH *v.* HAMMOND.CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH
CIRCUIT.

No. 615. Argued January 20, 1897. — Decided April 19, 1897.

Under the judiciary act of March 3, 1891, c. 517, the power of this court in certiorari extends to every case pending in the Circuit Courts of Appeals and may be exercised at any time during such pendency, provided the case is one which, but for this provision of the statute, would be finally determined in that court.

While this power is coextensive with all possible necessities, and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy this court that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State, or some matter affecting the interests of the Nation, in its internal or external relations, demands such exercise.

As, in the contests between the parties to this suit, the Circuit Court of Appeals for the Seventh Circuit and the Supreme Court of the State of Indiana had reached opposite conclusions as to their respective rights, and as all the unfortunate possibilities of conflict and collision which might arise from these adverse decisions were suggested when this application for certiorari was made, it seemed to this court that, although no final decree had been entered, it was its duty to bring the case and the questions here for examination at the earliest possible moment.

The plaintiff in error having voluntarily commenced an action in the Supreme Court of the State to establish her rights against the city of Hammond, and the questions at issue being judicial in nature and within the undoubted cognizance of the state court, she cannot, after a decision by that court be heard in any other tribunal to collaterally deny its validity.

Though the form and causes of action be different, a decision by a court of

Opinion of the Court.

said: "It is evident that it is solely questions of gravity and importance that the Circuit Courts of Appeal should certify to us for instruction; and that it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the Court of Appeals is made final, to be certified, can be properly invoked." *Lau Ow Bew, Petitioner*, 141 U. S. 583, 587; *In re Woods*, 143 U. S. 202; *Lau Ow Bew v. United States*, 144 U. S. 47, 58; *American Construction Company v. Jacksonville Railway Company*, 148 U. S. 372, 383.

We have declined to issue writs of certiorari in cases where, there being only a matter of private interest, there had been no final judgment in the Court of Appeals. *Chicago & Northwestern Railway v. Osborne*, 146 U. S. 354. On the other hand, in *The Three Friends*, at the present term, *ante*, 1, we issued a writ of certiorari in a case appealed to the Circuit Court of Appeals before any action had been taken by that court; but this was in view of the fact that the question involved was one affecting the relations of this country to foreign nations, and therefore one whose prompt decision by this court was of importance, not merely for the guidance of the Executive Department of the Government, but also to disclose to each citizen the limits beyond which he might not go in interfering in the affairs of another nation without violating the laws of this.

We reaffirm in this case the propositions heretofore announced, to wit, that the power of this court in certiorari extends to every case pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that court. And further, that while this power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the Courts of Appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal

Opinion of the Court.

and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise.

Among the considerations thus suggested are those which indicate why in this case the court properly exercised its power and issued the writ of certiorari. There was a conflict between the decision of the Circuit Court of Appeals for the Seventh Circuit and the Supreme Court of the State of Indiana. The latter court had declared that the proceedings by which the contiguous territory was annexed to the city of Hammond were legal, and, therefore, that that territory was to be considered by all the officers of the State of Indiana as within the territorial limits of the city. The United States Circuit Court of Appeals by its decision in this case had declared that such annexation proceedings were invalid; and that the property of this petitioner was not within the city limits. This tract of plaintiff's was not on the extreme limit of the lands sought to be incorporated into the city, and if the decision of the Circuit Court of Appeals was enforced there would be a tract of a few hundred acres within the exterior boundaries of the city of Hammond, as defined by the judgment of the Supreme Court of the State, withdrawn from the city's jurisdiction, and in fact excepted from its territorial limits. All the unfortunate possibilities of conflict and collision which might arise from these adverse decisions were suggested when this application for certiorari was made, and, although no final decree had been entered, it seemed to us a duty to bring the case and the question here for examination at the earliest possible moment.

Coming now to the merits of the case it appears that on the pivotal question of the validity of the annexation proceedings the decision of the Supreme Court of the State is one way and that of the Court of Appeals directly the reverse. It is insisted by the plaintiff that the determination of the boundaries of a municipal corporation in the first instance, and any subsequent change in its boundaries by annexation of outside territory, are matters solely of legislative cognizance, and not judicial in their nature; that such

*This opinion is subject to revision before
publication in the Pacific Reporter.*

IN THE SUPREME COURT OF THE STATE OF UTAH

-----oo0oo-----

Robert Dunn,
Plaintiff and Appellant,

No. 880067
F I L E D
April 2, 1990

v.

Gerald L. Cook, Warden, Utah
State Prison, State of Utah,
Defendant and Appellee.

Geoffrey J. Butler, Clerk

Third District, Salt Lake County
The Honorable Michael R. Murphy

Attorneys: David B. Watkiss, Debra J. Moore, Carolyn Cox,
Salt Lake City, for appellant
R. Paul Van Dam, Dan R. Larsen, Salt Lake City, for
appellee

STEWART, Justice:

Robert Dunn's petition for a writ of habeas corpus was dismissed without a hearing on the ground that all the issues raised were waived because they could or should have been raised on Dunn's prior direct appeal. We reverse and remand to the trial court for a hearing.

A jury convicted Dunn of second degree murder and aggravated kidnapping.¹ He was represented at trial by a court-appointed attorney. After the conviction, the attorney wrote to Dunn and advised against an appeal based on the attorney's belief that if the appeal were successful, Dunn could be resentenced to death at a retrial. The attorney's belief was incorrect. Utah Code Ann. § 76-3-405 prohibits imposition of

1. Both of the offenses that Dunn was originally charged with, first degree murder and aggravated kidnapping, were capital offenses at the time the charges were made. Dunn was convicted of aggravated kidnapping and the lesser included offense of second degree murder and was sentenced to life imprisonment. The crime of aggravated kidnapping was subsequently reduced from a capital felony to a first degree felony by a 1983 amendment.

a new sentence that is more severe than the prior sentence.² Wisden v. District Ct. of Sevier County, 694 P.2d 605, 606 (Utah 1984); State v. Sorensen, 639 P.2d 179, 180-81 (Utah 1981); Chess v. Smith, 617 P.2d 341, 343 (Utah 1980). See Bullington v. Missouri, 451 U.S. 430 (1983) (penalty phase of a capital proceeding is a trial on the issue of punishment and double jeopardy considerations apply; therefore imposition of a life sentence by a jury in a first trial precludes subsequent imposition of a death penalty following retrial).

Nevertheless, Dunn insisted on an appeal, and the attorney filed with this Court what purported to be an Anders brief and a motion to withdraw. See Anders v. California, 386 U.S. 738 (1967); State v. Clayton, 639 P.2d 168 (Utah 1981). The brief summarily recited the prosecution evidence and the defendant's evidence and then framed four issues: whether the trial court erred in (1) denying a motion for a change of venue; (2) admitting a photograph of the victim's body; (3) refusing to suppress bullets found in Dunn's belongings; and (4) ruling that the evidence was sufficient to sustain a conviction. Each issue was stated in a single sentence, followed by a few case citations. The relevance of the cases was neither stated nor argued nor in any way related to the facts of the case. There certainly was no argument and no presentation of the law and facts of the case in the best light possible for defendant.

Dissatisfied with his attorney's efforts, Dunn filed what purported to be a pro se brief. Three of the issues listed in the brief were repetitious of three issues in the Anders brief. None of the issues presented by Dunn was supported by a statement of facts, argument, analysis, or authorities.

This Court granted defense counsel's motion to withdraw and affirmed Dunn's conviction in a per curiam opinion, State v. Dunn, 646 P.2d 709 (Utah 1982). Without any legal or factual analysis, the opinion simply held that the issues raised were "without merit." 646 P.2d at 711. The opinion disposed of the case without examining any of the points raised in either brief.

Thereafter, Dunn filed a pro se petition for a writ of habeas corpus in the district court, asserting primarily that his counsel had rendered constitutionally ineffective assistance

-
2. Utah Code Ann. § 76-3-405 (1978) provides:
Where a conviction or sentence has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied.

at trial. Specifically, Dunn alleged that his counsel failed (1) to make proper objections, (2) to obtain evidence, and (3) to request jury instructions regarding accomplice involvement, and (4) he stipulated to the admission of evidence which should have been excluded. Dunn asserted that his counsel had refused to raise issues on appeal which Dunn had requested and had filed an Anders brief contrary to Dunn's desire. Dunn also alleged that the trial court erred in (1) denying his motion for a change of venue, (2) refusing to exclude a photograph of the victim's body, (3) refusing to suppress evidence found in a search of Dunn's belongings, and (4) admitting testimony of defendant's conviction of a prior crime. Dunn also argued that the trial court erred in the selection of the trial jury, that some jurors had prior knowledge of the case, and that jurors had access to information from the co-defendant's trial.

The State moved to dismiss Dunn's petition on the basis that the claims either had been raised on direct appeal or were waived because they should have been raised on direct appeal. The trial court agreed that all the issues either were raised or could have been raised on direct appeal and dismissed Dunn's petition. Dunn appeals that dismissal. For this appeal, this Court appointed counsel because it appeared there might be some merit to some of Dunn's issues.

The doctrines of waiver and res judicata do not stand as an unyielding bar to the litigation of claims that either once were or could have been litigated in a prior proceeding. However, a few of our cases over the years have stated only part of the governing rule in this jurisdiction, thereby leaving the impression that waiver or res judicata might be an absolute bar. The policy of finality certainly does have a high place in our hierarchy of judicial values, but that policy is not so compelling as to be more important than the vindication of a person's constitutional right to a fair trial, notwithstanding the defaults of a defendant's attorney. Hurst v. Cook, 777 P.2d 1029, 1034-35 (Utah 1989).

Our cases are replete with instances where issues were addressed on the merits pursuant to a habeas corpus petition which had been addressed and resolved on direct appeal or should have been raised on direct appeal and were not. Recently, in Hurst, this Court described the interaction of the doctrines of waiver and res judicata and the priority accorded them on a habeas hearing for a post-conviction remedy:

The function of a writ of habeas corpus as a post-conviction remedy is to provide a means for collaterally attacking convictions when they are so constitutionally flawed that they result in fundamental unfairness and to provide for collateral attack of sentences not

authorized by law. The general judicial policy favoring the finality of judgments cannot, therefore, always prevail against an attack by a writ of habeas corpus. As important as finality is, it does not have a higher value than constitutional guarantees of liberty. Protection of life and liberty from unconstitutional procedures is of greater importance than is res judicata. . . . "[H]owsoever desirable it may be to adhere to the rules, the law should not be so blind and unreasoning that where an injustice has resulted the [defendant] should be without a remedy."

This Court has frequently held that while habeas corpus is not a substitute for appeal, a conviction may nevertheless be challenged by collateral attack . . . where an obvious injustice or a substantial and prejudicial denial of a constitutional right has occurred, irrespective of whether an appeal has been taken.

777 P.2d at 1034-35 (citations omitted, footnotes omitted) (quoting Martinez v. Smith, 602 P.2d 700, 702 (Utah 1979)). The same point was made in State v. West, 765 P.2d 891, 894 (Utah 1988), where we stated that a "defendant's failure to raise his claim on direct appeal is not dispositive" of his habeas corpus petition. See also Fernandez v. Cook, 783 P.2d 547 (Utah 1989); Chess v. Smith, 617 P.2d 341 (Utah 1980); Gonzales v. Morris, 610 P.2d 1285 (Utah 1980); Martinez v. Smith, 602 P.2d 700 (Utah 1979); Helmuth v. Morris, 598 P.2d 333 (Utah 1979); Rammell v. Smith, 560 P.2d 1108 (Utah 1977); Allgood v. Larson, 545 P.2d 530 (Utah 1976); Brown v. Turner, 21 Utah 2d 96, 440 P.2d 968 (1968).

Our cases are in accord with the rules governing post-conviction procedures. Rule 65(B)(i) of the Utah Rules of Civil Procedure expressly recognizes that a petition for a writ of habeas corpus may be filed after an appeal from a conviction has been taken. Subsection (2) of Rule 65(B)(i) states, "The complaint shall also state whether or not the judgment of conviction that resulted in the confinement complained of has been reviewed on appeal, and if so, shall identify such appellate proceedings and state the results thereof." The existence of prior appellate proceedings, however, does not ipso facto bar subsequent habeas corpus proceedings. Recently this Court, after a direct appeal had resulted in the affirmance of a conviction, used a writ of habeas corpus to order remand for an evidentiary hearing on the ground that the defendant had been

deprived of the effective assistance of counsel. Fernandez v. Cook, 783 P.2d 547 (Utah 1989). The Court reasoned that counsel who represented the petitioner both at trial and on appeal could not have effectively presented an ineffective assistance of counsel claim on appeal when that argument would necessarily have challenged his own performance at trial and on appeal.

Nevertheless, not all petitions for writs of habeas corpus may be heard on the merits after a trial and appeal or the waiver of an appeal; finality does prevail unless a petitioner can prove the existence of unusual circumstances. As we noted in Hurst, ordinary types of trial error that are not likely to affect the outcome may not be challenged on petitions for writs of habeas corpus. 777 P.2d at 1035 n.5. See Bundy v. DeLand, 763 P.2d 803 (Utah 1988). To be entitled to a writ, a petitioner must show that there was an obvious injustice or a substantial and prejudicial denial of a constitutional right. Hurst, 777 P.2d at 1035. In short, "the unusual circumstances test was intended to assure fundamental fairness and to require reexamination of a conviction on habeas corpus when the nature of the alleged error was such that it would be 'unconscionable not to reexamine' . . . and thereby to assure that 'substantial justice [was] done'" Codianna v. Morris, 660 P.2d 1101, 1115 (Utah 1983) (Stewart, J., concurring) (quoting Martinez v. Smith, 602 P.2d 700, 702 (Utah 1979); Brown v. Turner, 21 Utah 2d 96, 99, 440 P.2d 968, 969-70 (1968)).

This case is not unlike Fernandez. Although Dunn had an appeal from his conviction, unlike Fernandez, Dunn now alleges, in effect, that his prior direct appeal was a sham because of his counsel's ineffective representation. In fact, Dunn further contends that because his counsel also rendered ineffective assistance at trial in violation of his Sixth Amendment right to counsel, it was all but impossible for him to provide effective assistance on appeal. Dunn's direct appeal was presented by counsel in the form of an Anders brief and a short supplemental pro se brief filed by Dunn. The Anders brief did not meet the standards necessary to provide effective assistance of counsel on appeal.

The constitutionally guaranteed right to counsel encompasses the right to the effective assistance of counsel both at trial and on the first direct appeal of right. Evitts v. Lucey, 469 U.S. 387 (1985); Strickland v. Washington, 466 U.S. 668, 685 (1984). We acknowledge that this Court stated in its per curiam opinion that "counsel has complied in every respect with the Anders requirements." State v. Dunn, 646 P.2d 709, 711 (Utah 1982). It was on that basis that the Court granted counsel's motion to withdraw. Nevertheless, in light of the authorities and analysis that have been provided by Dunn's present counsel on this habeas appeal, we have a far better basis for judging whether the Anders brief filed on behalf of Dunn fell short of the standards required of Anders briefs. We

hold that it did fall short in a number of respects. Among other things, it failed to raise several nonfrivolous issues which should have been raised on the appeal, as demonstrated by Dunn's present counsel on this appeal. Unfortunately, this Court was not in a position to have detected those issues on its own in the prior appeal.

In this state, Anders has been supplemented by State v. Clayton, 639 P.2d 168 (Utah 1981). In Clayton, we stated:

[C]ounsel's brief must contain a statement of the facts, a description of the proceedings, and the citation of pertinent authorities sufficient to permit this Court to fulfill its obligation [to decide whether the case is wholly frivolous].

. . . The brief must also certify that counsel has met the requirements of [furnishing the indigent with a copy of the brief and time to raise any points which he chooses], and it should incorporate, in as full detail as appropriate, any points the indigent has raised with counsel. . . .

. . . [T]his Court will grant counsel permission to withdraw and will affirm the conviction (rather than dismiss the appeal) in criminal appeals that are found to be wholly frivolous, but will do so only when the Court is unanimous in that decision. Otherwise, the appeal must be pursued on the merits.

639 P.2d at 170. An Anders brief is in one sense an abbreviated form of a regular brief, but it is different from a regular brief in that it must demonstrate that the potentially meritorious issues are frivolous. At the same time, counsel must retain an adversarial stance by showing that the record has been searched and the law researched with the good faith intent of advancing the defendant's interest. That is not to say, however, that counsel may exceed the boundaries of ethical representation. Counsel must continue to identify with the defendant's position, until it is truly clear that the issues are frivolous.

It is not enough to list issues and case citations; the arguments must be sufficiently articulated to justify the conclusion that counsel has truly sought to present meritorious issues but cannot. Penon v. Ohio, 109 S. Ct. 346 (1988). In Robinson v. Black, 812 F.2d 1084 (8th Cir. 1987), the court stated:

Counsel did not act as an advocate for Robinson when he briefed all issues in favor of the government and concluded Robinson's claims were meritless. Robinson had a right to expect counsel to brief and argue his case to the best of counsel's ability, showing the most favorable side of defendant's arguments. Counsel changed the adversarial process into an inquisitorial one by joining the forces of the state and working against his client.

812 F.2d at 1086-87. See also DeMarrias v. United States, 444 F.2d 162 (8th Cir. 1971); Smith v. United States, 384 F.2d 649 (8th Cir. 1967).

The Anders brief filed here briefly recited the prosecution evidence and the defense evidence and then stated four issues. Each issue was phrased as a single short sentence. The brief had no argument. The brief simply listed a few cases, but their facts and the principles they stand for were not stated. Only two of the four stated issues contained citations to any part of the record. Dunn's pro se brief had seven typewritten pages which set forth an array of questions based on the record. One page listed seven issues without any argument or citation of authority.

The so-called Anders brief filed by counsel violates the Anders, Penson, and Clayton requirements in at least three ways. First, no arguments were articulated, which demonstrated that each issue was in fact frivolous. Although defense counsel might think that an issue is frivolous, Anders requires that he objectively demonstrate that the issue is frivolous. Second, only two of the four issues counsel raised were supported by record citations, and even in those instances only a range of pages where the issue arose was given. Each of the issues should have contained references to the record. The issues should have been analyzed and appropriate record and legal citations given in each instance. A complete brief on the merits is usually unnecessary; however, this Court needs to be assured that an issue is not just meritless, but that counsel has engaged in sufficient analysis of the record and case law to be secure in the belief that the issues are frivolous. Third, the Anders brief should have included and addressed the issues that Dunn raised in his pro se brief. While two of those issues do appear to be frivolous on their face, two are not frivolous on their face. Those two issues should have been argued to the extent they were arguable.

In all events, Dunn can hardly be held to have waived the effective assistance of counsel issue by not including it in his pro se brief. It requires effective counsel to demonstrate that prior counsel's performance did not meet constitutional standards.

The State relies upon Hafen v. Morris, 632 P.2d 875 (Utah 1981), for the proposition that the issue of ineffective assistance of counsel may not be raised in a habeas proceeding since it should be raised on direct appeal. The State also cites Zumbrunnen v. Turner, 27 Utah 2d 428, 497 P.2d 34 (1972), and Bryant v. Turner, 19 Utah 2d 284, 431 P.2d 121 (1967), for the proposition that ineffective assistance may not be raised in a habeas proceeding. To the extent that these cases can be said to stand for the proposition that the issue of ineffective assistance of counsel may not be raised on habeas, they are hereby disapproved. For practical purposes, they were disapproved sub silentio in Fernandez, if they ever in fact constituted a full and proper statement of Utah law.

Finally, the State once again seeks to have this Court adopt the federal cause and prejudice standards to govern waiver on habeas. We expressly decline to do so. The circumstances of federal habeas are different from the circumstances of state habeas. In our view, it is appropriate that federal habeas review be more difficult to obtain than state habeas review.

In sum, the conclusion is unavoidable that the Anders brief was inadequate as a matter of law and shows that Dunn received ineffective assistance of counsel on appeal. Penson v. Ohio, 109 S. Ct. 346 (1988). It follows that the prior appeal is not a bar to the habeas proceedings and that the case must be remanded to the district court for further proceedings. Fernandez v. Cook, 783 P.2d 547 (Utah 1989). The failure to raise a number of substantive issues that have been identified by Dunn's attorneys on this appeal supports the proposition that counsel rendered ineffective assistance on the direct appeal.

The State also argues that Andrews v. Shulsen, 773 P.2d 832 (Utah 1989) held that a petitioner must show "good cause" as to why claims raised in a habeas corpus proceeding which could or should have been raised earlier were not raised in a prior post-conviction proceeding. The State suggests that without a showing of good cause, it is "an abuse of the writ and requires dismissal of the petition." Andrews, 773 P.2d at 833. The State, however, is in error. Andrews v. Shulsen, was an appeal from Andrews' third petition for habeas corpus.³ The issue in that case was what the petitioner had to show to raise an issue that had not previously been presented in a prior petition. The Court held that although an issue was not necessarily waived forever, if not raised in a petition, it could be subsequently raised only upon a showing of "good cause" for not having done so previously. See Hurst v. Cook, 777 P.2d 1029 (Utah 1989).

3. Andrews' second petition for post-conviction relief grew out of a petition for habeas corpus in the federal district court. Andrews v. Morris, 677 P.2d 81, 82 (Utah 1983). See Andrews v. Shulsen, 773 P.2d 832, 832-33 (Utah 1989).

The Court expresses its gratitude to appointed counsel for their excellent work on this case.

Reversed and remanded for proceedings on the merits of the petition.

I CONCUR:

Christine M. Durham, Justice

ZIMMERMAN, Justice: (Concurring in the Result)

I join the majority's analysis of the deficiencies of trial counsel's representation of appellant on his initial appeal. For that reason, I conclude that this case presents the "unusual circumstances" necessary to permit the raising of the effective-assistance-of-counsel claim by way of collateral attack. Fernandez v. Cook, 121 Utah Adv. Rep. 13, 14 (1989); Hurst v. Cook, 777 P.2d 1029, 1035 (Utah 1989) (collecting cases on "unusual circumstances").

However, just as I did not join in the Hurst opinion, I cannot join the present opinion of Justice Stewart, speaking for himself and Justice Durham. It tracks the dictum in Justice Stewart's opinion in Hurst, dictum which can be read to suggest that the requirement of unusual circumstances is relatively meaningless and that we readily permit the raising of new issues on collateral attack. There are certainly a number of instances where we have found unusual circumstances to exist, but there are a great number more where we have not. Counsel should not be lulled by the seeming liberality of the language used by the majority into thinking that we casually entertain collateral attacks. We do not.

I likewise cannot agree with the majority's apparent effort to distinguish Andrews v. Shulsen, 773 P.2d 832 (Utah 1988), an effort that can only reinforce the misimpression created by the dictum on unusual circumstances. The majority seems to be restricting to cases arising in a very specific procedural context the requirement discussed in Andrews that before a petitioner is entitled to have a court address claims raised on collateral attack that could or should have been raised earlier, the petitioner must show "good cause" why those claims were not raised earlier.

It is true that Andrews arose in a procedural posture different than the present case. However, that is not

dispositive for me. The issue in Andrews was the same as the issue in Fernandez and in the present case: Has the petitioner demonstrated that there was a sufficiently good reason why the issues raised had not been presented earlier? In all three cases, an attempt at that showing was made. And in answering that question, it is not important whether it is labeled "good cause" under rule 65B(i)(4) of the Utah Rules of Civil Procedure or "unusual circumstances" under our habeas corpus case law. In my view, the standard is operatively the same, regardless of the rubric used. By attempting to distinguish Andrews as it has and minimize the good cause requirement, the majority can only further delude the bar about the nature of the threshold showing necessary before the merits of a claim will be addressed on collateral attack.

One final point. I heartily join in that portion of the majority opinion applauding the efforts of counsel we appointed to represent appellant. Their pro bono efforts are but one example of a fine tradition in the legal profession that too seldom receives the recognition it deserves.

Hall, Chief Justice, concurs in the concurring opinion of Justice Zimmerman.

Howe, Associate Chief Justice, concurs in the result.

APPENDIX G

P. O. Box 666
Centerville, Utah 84014
February 28, 1990

David A. Hales, City Administrator
Centerville City
521 North 400 West
Centerville, Utah 84014

Dear Mr. Hales:

As per your telephone request of February 28th, my wife, Veryl, and I will plan to meet with you and the City Engineer, Fred Campbell, at your offices on the afternoon of March 5th at 3:00 p.m. It is my understanding that the City's position has changed and that because there is some State money available to pay for sidewalk improvements, the City is now considering the purchase of sufficient additional right of way in front of my property upon which to install curb, gutter, and sidewalk.

Sincerely yours,

J. Val Roberts

JVR:vhr

7-1-1-1 #1

COPY

P. O. Box 666
Centerville, Utah 84014
March 20, 1990

David A. Hales, City Administrator
Centerville City
521 North 400 West
Centerville, Utah 84014

Re: Sidewalk Improvement Project

Dear Mr. Hales:

My letter of February 28, 1990, confirming our telephone conversation clearly stated that the willingness of my wife and myself to attend any meeting regarding sidewalk in front of our property was based upon your statement that the new City Administration had changed the position of the prior Administration and was now willing to acquire, by purchase, sufficient additional right-of-way to install sidewalk.

The statement you made which opened our March 5, 1990, meeting at 3:00 p.m., "We have decided that we own ten feet of your property west of the curb and gutter," was the same kind of an intimidation tactic that had been used by former councilman, Rob Arbuckle, at the time that the present curb and gutter was placed in front of my property and that of my neighbors in the Spring of 1976 and was inconsistent with your earlier representations and inconsistent with your March 15, 1990, letter, paragraph 3, wherein you state, "If land and temporary construction easements need to be acquired from you for this project, then just compensation will be paid."

The recollection of my neighbor, James G. Parrish, and my own is that you were one of those in attendance at the last meeting held with City Officials and Andy Sopko wherein Mr. Sopko affirmed the action taken nearly ten years earlier by the State in allowing the present curb and gutter to be placed one foot east of the actual right-of-way which belonged to the State at that time. My file reflects that Mr. Sopko's comments to all concerned were, "Mr. Roberts is correct. The State does not own sufficient right-of-way on the west side of SR-100 upon which to install sidewalk." There does not seem to be any rational

David A. Hales
City Administrator

-2-

March 20, 1990

explanation for the assertion you made on March 5th, "We probably own an additional ten feet of the Parrish property when you consider the quick-claim deeds we got when we put in the sidewalk."

The problem is not now, and has never been, the total width of the right-of-way as described in the 1951 survey which Mr. Holbrook brought to the meeting. On this point, I refer you to the October 24, 1975, letter from Andrew J. Soplo to the Honorable Stanley Green, Mayor, Centerville City, particularly paragraph 2 wherein Mr. Soplo states that he and the District Engineer, Mr. Bjorn Wang, determined that, "The State does not have a 33 foot right-of-way west of the monument line through the area in question, but that the placement of curb and gutter with back of the curb 25.5 feet from the monument line**would be well within the State right-of-way." I also invite your special attention to the determination made by the District Traffic Engineer, Mr. Edward D. Julio, which is set out in the third paragraph of the same letter, a copy of which is attached to refresh your memory and for the information of Mayor Egan, Attorney Michael Mazuran, City Engineer Fred Campbell, and Department of Transportation Representative Dean R. Holbrook.

I believe it is hornbook law that notwithstanding any grant which the City may have received from the State, the City does not have standing to claim ownership of any portion of a State road such as SR-106. Such a claim, if made, can only be made by the sovereign State of Utah.

My research reflects that the State of Utah acquired what is now SR-106 from Bountiful through the North Farmington Junction on May 12, 1931; and that in the area in front of my private property, the State had a total right-of-way width of 33.15 feet of which 34 feet lies east of the center monument line and approximately 26 feet 4 inches lies west of the monument line. This is consistent with the State having given permission for the placement of the present curb and gutter at a point 25.5 feet west of the monument center line leaving approximately 1 foot of State-owned right-of-way for utility easements and placing the present curb and gutter well within the State right-of-way as pointed out in Mr. Soplo's October 24, 1975, letter to Mayor Green. (See State excavation permit applications dated 18

David A. Hales
City Administrator

-3-

March 20, 1990

November 1975 and corresponding Utah State Highway Department construction permits dated November 19th and numbered serially 28648, 28649, 28650, and 28651.)

It appears to me to be the most elemental form of engineering to know that whenever you are dealing with a right-of-way which came into being as a remainder interest like that of SR-106, it is not possible to determine the width of that remainder interest by a survey taken some 100 years after its creation such as you mention was done by Great Basin Engineering on the Allen property. The width of remainder interest can only be determined by surveying opposing properties on both sides of the road.

Centerville City, having permitted its private contractor to carelessly remove the survey pin installed at the time that the Ezra Parrish estate was divided among his heirs in connection with the City's installation of sidewalk on the Harold Parrish property in November of 1987, cannot be taken very seriously when it claims that the City needs a new survey of only the portion of the State right-of-way that abuts my property and that the reason for this need is because of a survey on the Allen property which adjoins my property on its north boundary. The request is surely not made in good faith.

So that there will be no misunderstanding, let me reemphasize that the question here is not a question of the value of a number of square feet of property or the amount that should be paid for the removal of 40-year-old black willow trees and the resulting loss of cooling shade unless it is the intention of the State to attempt a condemnation procedure so as to enlarge the State's right-of-way as I do not believe the City would have standing to try and enlarge a State road. It would appear to me to give rise to the possibility of a case of first impression based upon the fact that the present right-of-way was four feet wider than it now is before the City secured permission from the State of Utah to replace the sidewalk originally installed by the citizens in 1922 on the 34 feet of State right-of-way that lies east of the center line thereby returning to private ownership, without compensation by the recipients to either the State or the City, without public hearing, and without the use of the usual procedures described by law when a portion of a public

David A. Hales
City Administrator

-4-

March 20, 1979

right-of-way is to be abandoned by either the State or the City. The result was the return to private ownership of some four feet of right-of-way which had been in the public domain since 1922 together with the installation of a buffer strip on the east portion of the right-of-way which had never previously existed and which is approximately 3 1/2 feet wide today. But for the foregoing actions, there would be no need, or very little need, to purchase any right-of-way west of the present curb and gutter. If anyone reasonably believes that a condemnation action could succeed against private property lying west of the present curb and gutter, I will not only represent myself and my wife, but would expect to defend against such a case to the full extent of the law.

By this letter, I renew offers previously made to prior City Administration to sell for public use sufficient right-of-way along with the appropriate construction easements to permit the installation of a public sidewalk, retaining wall, and appropriate safety rail. I am personally satisfied that whatever price may be negotiated, it will be substantially less than the cost of a precedent setting condemnation law suit or the cost of realigning the pavement strip within the center of the right-of-way and relocating the easterly curb and gutter as mentioned in the October 24, 1975, letter from the Utah Department of Transportation's Andy Sopko to Mayor Stanley Green. It is, additionally, my firm conviction that whatever compensation we may arrive at will be considerably less than the 10.5 million dollars recently levied against the City of Provo for the negligent design and installation of a high voltage power line. It is also reasonable to suppose that whatever either the City or the City and the State together may ultimately pay for the property necessary to install a public sidewalk in front of my home, the sum will be considerably less than the cases set out in the Pacific Reporter where the State of Utah has been found negligent in right-of-way design.

For the reasons set out in our March 5th meeting in connection with the City's dealings with the widow Lydia Hilpack when the Chase Lane improvements were installed, both my wife and myself hold ourselves ready to enter into good-faith negotiations with experienced right-of-way negotiators who recognize the

David A. Hales
City Administrator

-5-

March 20, 1970

futility of threats and attempts at intimidation. The City and the State should govern themselves accordingly, and it may be that Mr. Holbrook's greatest service can be in suggesting a person to be employed as right-of-way negotiator.

Sincerely yours,

J. Val Roberts
Vern H. Roberts

JVR:yhr

Encl. Letter dated October 24, 1975, from Andrew J. Soplo, Utah
State Department of Transportation
Letter dated September 1, 1976, from C. Sidney Noole,
Centerville City Administrator

cc: Mayor R. Michael Hjar
Michael Mazuran, Attorney at Law
Fred Campbell, City Engineer
Dean Holbrook, Utah Department of Transportation



CENTERVILLE CITY

521 North 400 West • Centerville, Utah 84014 • (801) 295-3477

75th Anniversary of Incorporation
1915 - 1990

March 16, 1990

Mayor

Michael K. K.

City Council

Michael B. Barton

Bruce E. Erickson

Nancy W. Gibbs

Kent M. Lindsey

Steven M. Mangel

City Administrator

David A. Hales

Mr. & Mrs. J. Val Roberts
499 North Main Street
Centerville, Utah 84014

Re: SR106 (Main Street) Sidewalk Improvement Project

Dear Mr. & Mrs. Roberts:

Thank you for taking time to meet with Fred Campbell, Dean Holbrook and me on Tuesday, March 6, 1990, to discuss the SR106 (Main Street) Sidewalk Improvement Project.

During our meeting, I indicated the City would like to install sidewalk improvements along the west side of SR106 (Main Street) next to your property and that of Mr. & Mrs. Carl Allen and Mr. & Mrs. Samuel Parrish. A sidewalk safety grant has been awarded by the Utah Department of Transportation to Centerville which can offset up to 75% of the construction costs associated with this project.

It is our hope to schedule project construction for this summer if all right of way and easements issues can be resolved with the abutting property owners. If land and temporary construction easements need to be acquired from you for this project, then just compensation will be offered.

During our meeting you stated that your east property line lies one foot west of the existing curb and gutter. A recent survey of the Allen property performed by Great Basin Engineering as well as maps prepared by the Utah Department of Transportation show the same property line located approximately ten feet west of the current gutter. In order to determine if any of your land needs to be acquired and to locate all property improvements that may be affected by this project, we feel a survey of your property needs to be performed.

During our meeting, you declined to grant the City permission to conduct a survey of your property. After discussing this matter further with the City Engineer and Mr. Holbrook, we still feel that a survey is necessary for the reasons stated above. I could assure you that the surveyor would be presented with any and all information you have either presented to us in writing or that you would like to present to him prior to his conducting the survey.

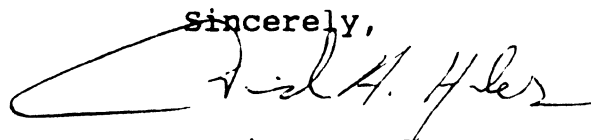
Mr. & Mrs. J. Val Roberts

-2-

March 14, 1990

I would like you to reconsider your position on this matter and grant the City permission to have a registered land surveyor conduct a survey of your property. If I do not receive any written communication from you within seven days from the date of this letter, I will assume you will not grant permission for the survey as requested. Thank you for your consideration of this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "David A. Hales", with a large, sweeping initial "D" that loops around the first part of the name.

David A. Hales
City Administrator

DAH:mh

cc: Mayor R. Michael Kjar
Michael Mazuran
Fred Campbell
Dean Holbrook

March 20, 1990

Michael J. Mazuran
Attorney at Law
2180 South 1300 East, #260
Salt Lake City, Utah 84106

Re: Centerville City Sidewalk
Improvement Project

Dear Michael:

As per our telephone conversation of Monday, March 19th, I am enclosing the following additional documents relative to State Road 106 and the events of 15 years ago which led to the placement of curb and gutter one foot east of the west boundary of the remainder interest owned by the State which abuts my residence at 499 North Main in Centerville, Utah. The documents are as follows:

1. Copy of a letter dated October 28, 1975, from myself to the then Mayor, Stanley Green. You will note that this document makes reference to the October 24, 1975, letter from Andrew J. Sopko of the Utah State Department of Transportation to Mayor Green and to a May 19, 1975, meeting which, as I recall, involved myself, Mayor Green, Mr. Sopko, and all of the individuals listed at the bottom of the letter except for Samuel Parrish.

2. A Utah State Department of Highways, District Two, excavation permit application dated the 18th of November 1975, specifically requesting permission to install curb and gutter on a line 25.5 feet west of the center line of the monuments at Parrish Lane, or 400 North, and Chase Lane, or 1000 North. You should note that the excavation permits mentioned by serial number in my letter of today to David Hales, the Centerville City Manager, were issued by the State of Utah in response to the November 18, 1975, application.

3. The next document is an "excavation permit" within Centerville City road right-of-way. You should note that the applicant for this permit was Ronald R. Kremer, now deceased, who was the predecessor in interest to Carl Allen, the abutting property owner on my north fence. You should also note that the

Michael J. Mazuran
Attorney at Law

-2-

March 20, 1990

permit is dated May 11, 1976, and was approved by an individual whose initials are C.S.N. or C. Sidney Noble, City Administrator. Note that it was also approved by the Centerville City Administrator on the same date it was applied for. At the time it was my position that since SR-106 was a State right-of-way and the improvements we were installing were installed entirely on State right-of-way, no Centerville permits were required; however, an officious City Councilman named Robert Arbuckle attempted to stop the unloading of a truck load of wet, ready-mix cement because there had been no application for a Centerville permit. I was not present at the time, and so Ronald Kremer went to the City Offices, applied and paid for the permit which Arbuckle insisted was necessary.

4. The final document is a copy of a Centerville City Corporation receipt dated May 11, 1976, under receipt No. 1322 for the sum of \$8.00 paid by Ronald Kremer for the excavation permit.

In short, the thing was not done in a corner nor without the full approval of the sovereign State of Utah and of the then City officials. It seems to me to be indisputable that the City may not now claim more than the State has ever owned in terms of the right-of-way. You'd think 15 years would be enough to have settled the matter particularly where some of the principals are now deceased.

If you're interested or it will aid in settling the issues in the minds of present City officials, you may take my deposition, and I will give you a full account of how there got to be more property on one side of the center line than the other back in 1922 and how the right-of-way originated as a remainder interest rather than a dedicated street.

Sincerely yours,

J. Val Roberts
Attorney at Law

JVR:vhr
cc: Mayor R. Michael Kjar

UTAH STATE DEPARTMENT OF HIGHWAYS
DISTRICT TWO
2410 West 2100 South
Salt Lake City, Utah 84119
A. J. Sopko - 328-6283

EXCAVATION PERMIT APPLICATION

DATE 18 November 1975

Application of: Ronald Kremer

Name of Business

Business Address: 535 North Main Centerville, Utah 84014

For the purpose of: Installing Curb and Gutter

within right-of-way limits of State Maintenance Section No. 26 in the following

Location: State Highway 106 West side beginning at a point on the North

Remarks: West boundary of 535 North Main and the Southwest boundary of 535 North Main
and continuing South on a line 25.5 feet West of the Monument Centerline between
the intersection of Chases Lane and the Monument at the intersection of Perish Lane
and SR 106. To connect to existing curb gutter on the North and the North boundary of
the work outlined herein shall start 25 NOV 1975 2:00 PM to 19 1/2.

Before the above work is commenced, the applicant will notify: A. J. Sopko,

Telephone Number 328-6283, and commencement of said work is understood to indicate

that the applicant will comply with the instructions of the State Road Commission

with respect to the performance of said work, and that he will properly safeguard

said work to prevent accident and save the State Road Commission free and harmless

from all damages caused through his operations under this permit. Permittee

assumes full responsibility for failure of backfill in excavations, tunnels and all

cuts. He will replace surface to original construction.

APPLICATION OF: Ronald Kremer

By: D. W. Roberts

Title: Attorney at Law

Phone: 295-9003

EXCAVATION PERMIT

WITHIN CENTERVILLE CITY ROAD RIGHT-OF-WAY

Bond No. _____ Permit No. _____

Name of Bonding Company _____ Issued By _____

Receipt No. _____

Applicant Richard R. Krumm

Address 535 W. Main Centerville Ct

Contractor's License No. _____ Phone 295 6017

Purpose of Excavation, Crossing or Alteration curb and gutter

Work To Commence May 11 1976 DATE Work To Be Completed May 25 1976 DATE

Location 535 W. Main to south location.

(Description, sketch, or plan required in triplicate — indicate nature and extent of excavation, method of accomplishing, means of handling traffic and length of construction period)

Instructions and Provisions:

A. For and in consideration of the granting of said permission the applicant agrees to the following instructions and provisions of the Centerville City Corporation Street Department ordinance with respect to the performance of work under this permit:

1. Verify with the Supt. in charge of streets or the utility companies concerned the location of all underground facilities which might be located within the limits of said excavation and will be responsible for, and will repair or pay for, any damage to such underground facilities.
2. Erect and maintain about said installation during the excavation and until the street is restored to its normal condition, sufficient guards, signals, barricades and lights to prevent accidents.
3. As soon as reasonably possible or upon order from Roads Supt. after the completion of said work, restore the street to the same condition in which it existed prior to said excavation, including the removal of rocks, dirt, rubbish and all other materials from the street which exist as a result of excavation, and be responsible for maintaining the surface of the excavated area from settlement and deterioration for a period of three years after first restoration.
4. In case the excavation is through asphalt or cement or beneath stone blocks, make the cut perpendicular at the sides and ends from the surface for the full length and width of all excavations to the necessary depth.
5. Notify the Supt. of Streets at least 4 hours prior to back filling, indicating the time the trench is to be back filled.
6. Not to permit any excavation to remain open in any street for a period of more than 10 days, nor to close any street or restrict traffic without prior permission of city.
7. Be responsible for maintaining and guarding the excavated area for a period of three years after first restoration.
8. In all cases back fill according to standard specifications and use material for that purpose which shall be properly tamped or a sufficient quantity of water used to properly settle the materials to the satisfaction of the Supt. in charge of streets. If materials cannot be properly compacted, sand or other porous material will be used.
9. In case excavating is done by machine, do such excavating with either a trenching machine or pull shovel which does not have cleats, spikes or other protruding parts which will come in contact with the street surface when such machine is in motion, such machine to have a cutting width of not to exceed 40 inches.
10. Hold the City harmless from any and all claims, liability, demands or damages for any and all injury to persons or property arising in any manner out of or by reason of such excavation.
11. Respond to the City in damages for failure to conform to any or all of the requirements set forth in this section.

B. The applicant shall file with the City Recorder a bond of indemnity to Centerville City Corporation, with sureties approval by the City Council. Such bond shall be a corporate surety bond in the sum of \$1000.00 conditioned as above provided to cover all excavations made for a period of three years from date of filing said bond.

C. If any of the provisions of said bond, this permit, or ordinance of Centerville City Corporation is violated or not observed, the Councilman in charge of streets may do all things necessary or proper to repair such street or way at the expenses of the person making the excavation.

I hereby acknowledge that I have read the instructions and provisions of this permit and ordinance of Centerville City Corporation and agree to assume all duties and obligations provided therein.

Date May 11 - 1976

Applicant Richard R. Krumm

By Richard R. Krumm

STANLEY GREEN
Mayor
JEANNETTE H. SESSIONS
Recorder
JANEEN K. HANCOCK
Treasurer
CLIFFORD RUSSELL
Chief of Police

Centerville City Corporation

P. O. Box 728
521 NORTH 400 WEST
CENTERVILLE, UTAH 84014

September 1, 1976

ROBERT M. ARBUCKLE
R. DEAN LAYTON
DEFORREST SMOUSE
STEVEN C. MYERS
E. THOMAS RANDALL
Council Members

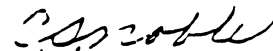
Mr. Val Roberts
499 North Main
Centerville, Utah 84014

Dear Mr. Roberts;

I have inspected the curb and gutter installed on Main Street in front of all your properties. As near as I could ascertain all alignments and grades have been properly observed. The quality of workmanship seems good. I did not observe any cracks, spalling or other evidences of failure. If these occur within the next year or two I feel sure your contractor will attend to them for you.

In view of my inspection I would suggest you can safely conclude your financial arrangements with your contractor.

Very truly yours,



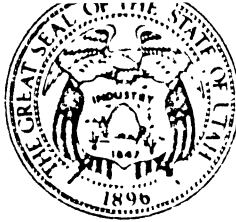
C. Sidney Noble
City Administrator

CSN/jhs

TRANSPORTATION COMMISSION

R. LAVAUN COX
CHAIRMAN
WAYNE S. WINTERS
VICE CHAIRMAN
CLEM H. CHURCH
SAMUEL J. TAYLOR
CHARLES E. WARD

RONALD A. FERNLEY
SECRETARY



UTAH DEPARTMENT OF TRANSPORTATION

2410 West 2100 South
Salt Lake City, Utah 84119

October 24, 1975

Director
Blaine J. Kay, P.E.
Assistant Director
C.V. Anderson, P.E.

District Director
~~XXXXXXXX~~
W. D. Hurley, P.E.

The Honorable Stanley Green, Mayor
City of Centerville
470 North 400 West
Centerville, Utah 84014

Dear Mayor Green:

This office has received two letters from Mr. L. Val Roberts, Attorney at Law, pertaining to the desire of residents to install curb and gutter on the west side of Main Street, north of Parrish Lane. It is our understanding that Centerville has an ordinance requiring installation of sidewalk where curb and gutter has been placed.

Inasmuch as the standard state right-of-way of 66 feet was in question, Mr. Bjorn Wang, District R/W Design Engineer, was asked to help resolve the problem. It appears the state does not have a 33 foot right-of-way west of the monument line through the area in question, but that placement of the curb and gutter with the back of curb 25.5 feet from the monument line (standard for 66' right-of-way) would be well within the state right-of-way.

Mr. Edward D. Julio, District Traffic Engineer, and I, made an on-the-site inspection to determine the possibility of shifting the curb and gutter easterly to provide room for the parking strip and sidewalk on existing right-of-way. It is our opinion that shift should not be made due to the width of the present roadway and the set-back of the existing curb and gutter north of the area.

We regret that we could not be more helpfull in providing a solution, however, the department does not have funds for obtaining additional right-of-way in that area at the present time. We do appreciate your concern for upgrading and providing a safe traffic condition on state highways.

Yours truly,

Andrew J. Sopko
Contract Claims & Utility Officer

cc: W. D. Hurley
L. Val Roberts
B. Wang
E. D. Julio

Feb 5, 1951. Further Study of Zoning Ordinance Approved pg 151
Feb 27th 1951. Pg 160 Public hearing on Zoning Ordinance
1st Pub hearing was March 1951 after which
revisions were made

April 30th 1951. Annexed Area Between Chase & Parish Lane
Letters to Home owners to apply for water connection while
trenches were still open pg 161 How far East
of Hwy established by 163 ^{5 hours 1000 Feet East of Hwy 12 at 26th St} ~~did this go~~
pg 164 Application of Leo Hart & Ray Pennooth for
Annexation is again rejected due to Low water

May 1951 pg 183 Rough plan for future development of Area called
the Annexed Area 3300-3500 so has to be East

3-7-1951 Ouzel Creek Bought this permit in March 1951 and
so the May 1951 Zoning Ordinance does not affect his
Commercial Bldg pgs 191 HLI 2 major Road plan letter

Feb 1951 People of the Annexed Area petition City Board to restore
planning and zoning from adopting that plan without their
approval except as to Road entrances Board pg 195

Feb 1952 Change in Zoning public hearing to be held pg 200

March 4 52 Admits to planning Zoning Ordinance #45 public hearing
scheduled for March 27th 1952 pg 204 pg 205 Pub
Hearing

April 1 1952 Adopted Ordinance #45 passed

April 5th 1952 Leo Hart & Ray Pennooth 150 foot Strip East of
towards East Boundary of Parish Lane Approved pg 210

July 7th 1952 Annexation of d

APPENDIX H

JODY K BURNETT (A0499)
DANIEL D. HILL (A5202)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendants
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH

J. VAL ROBERTS and VERLE
ROBERTS,

Plaintiffs,

vs.

CENTERVILLE CITY, et al.,
Defendants.

SUMMARY JUDGMENT, PERMANENT
INJUNCTION AND ORDER

Civil No. 890903165

Judge David E. Roth

The above-captioned matter came on regularly for hearing before the above-entitled court, the Honorable David E. Roth presiding, on December 13, 1989. The plaintiffs were represented by Brian M. Barnard and defendants were represented by Jody K Burnett and Daniel D. Hill. Several issues were presented for the Court's consideration, including plaintiffs' Motion for Partial Summary Judgment and defendants' Motion for Summary Judgment on the plaintiffs' Complaint and defendants' Counterclaim seeking declaratory and injunctive relief. The Court having read all of the pleadings, memoranda, affidavits and exhibits filed

with respect to these motions, and having heard oral argument on behalf of the parties, and having reviewed the entire file in this matter and being fully advised, determined that there was no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law against the plaintiffs on the plaintiffs' Complaint on the basis that the activities described are not accessory uses to a farming operation and not proper uses in an agricultural zone; and, the Centerville City Board of Adjustment had authority to act and their decision is reasonable and valid as more fully set forth in the defendants' memoranda. The Court further determined that there was no genuine issue as to any material fact as to defendants' Counterclaim and defendants are entitled to judgment as a matter of law against the plaintiff on their Counterclaim for declaratory and injunctive relief, and based on that ruling, it is hereby

ORDERED, ADJUDGED AND DECREED that defendants' Motion for Summary Judgment as to all claims made in the plaintiffs' Second Amended Complaint is hereby granted and the plaintiffs' Second Amended Complaint is hereby dismissed, with prejudice and upon the merits, no cause of action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants' Motion for Summary Judgment on their Counterclaim filed in response to the plaintiffs' Second Amended Complaint is hereby granted and a permanent injunction is entered ordering that

plaintiffs must immediately remove all junked, dismantled or inoperable motor vehicles from their property and be permanently enjoined from any such future use of the property in question. This injunction is stayed for thirty (30) days from the date of entry of this Order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs' Motion for Partial Summary Judgment is hereby denied.

DATED this 3rd day of January, 1990.

BY THE COURT:

151

David E. Roth
District Court Judge

AFFIDAVIT OF SERVICE

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

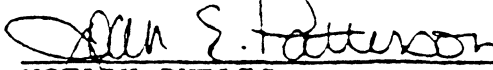
Sharon M. Allhands, being duly sworn, says that she is employed by the law offices of Snow, Christensen & Martineau, attorneys for Defendants herein; that she served the attached Summary Judgment, Permanent Injunction and Order (Case No. 890903165, Second District Court for Weber County) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Brian M. Barnard
Utah Legal Clinic
214 East Fifth South
Salt Lake City, Utah 84111-3204

and causing the same to be mailed first class, postage prepaid, as indicated above, on the 18th day of December, 1989.

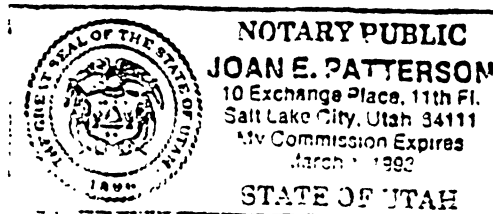

Sharon M. Allhands

SUBSCRIBED AND SWORN to before me this 18th day of December, 1989.


NOTARY PUBLIC
Residing in the State of Utah

My Commission Expires:

3/1/93



APPENDIX I

THE AFFIDAVIT OF JAMES G. PARRISH

COMES NOW JAMES G. PARRISH, a resident of Davis County, Centerville, Utah, and first being sworn upon his oath, deposes and says:

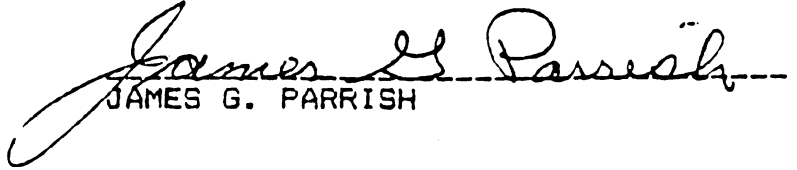
1. I have lived at 445 North Main continuously since 1917 except for a period of time which I spent in college and my military service during the Second World War. The property now owned by J. VAL ROBERTS at 499 North Main was in the PARRISH family prior to my time. I built my first home on the back of my lot at 445 North Main in 1955. I completed my present residence at 445 North Main in March of 1960 and have lived there continuously to the present time.

2. J. VAL ROBERTS purchased the property at 499 North Main from my brother, JOHN D. PARRISH, in January of 1964 shortly after JOHN had completed the remodeling.

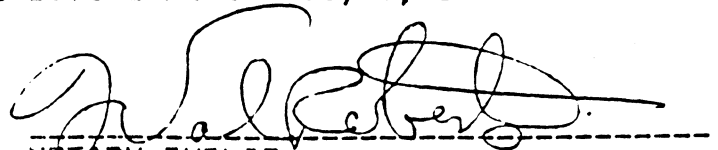
3. From my personal observations as a neighbor, I am aware that MR. ROBERTS has used the property as a family residence and in connection with that use has kept on the property cows, calves, pigs, and chickens as well as using it as a place to repair, overhaul, and renovate, old, partially dismantled and wrecked automobiles. MR. ROBERTS' use of the property as a place to keep old automobiles and outdated agricultural machinery is well known both by me and other members of the PARRISH family who are near

neighbors. Such activity by MR. ROBERTS has been readily observable since shortly after he purchased the property in January of 1964 and continues to the present time.

Dated this 9th day of July, 1988.


JAMES G. PARRISH

SUBSCRIBED AND SWORN to before me on July 9, 1988.


NOTARY PUBLIC
Residing at Centerville, Utah

My commission expires January 22, 1991.

AFFIDAVIT OF DAVID F. PARRISH

DAVID F. PARRISH, first being sworn upon his oath, deposes and says that:

1. I reside at 469 North Main, Centerville, Davis County, Utah. I have lived at this address since 1925 except for the period of time from 1943 to 1946 when I was in the military service and from January 1951 to February 1954 when I was in Japan. I have owned the property at this address since it came to me from the estate of my father, EZRA B. PARRISH, in 1952 or '53.

2. My first recollection of a particular car owned by J. VAL ROBERTS and his family was a Mercedes Benz. I remember thinking he must be doing pretty well selling insurance to be able to drive a Mercedes. I know that VAL and his sons have torn down quite a few cars at his place on an ongoing basis, and they were doing it even before I helped VAL put the cement pad west of his house. I also remember the large circular cement chunks we put in the driveway on the south side of the house. We were all repairing things through those years. I remember lots of old pickup trucks over there. There was a red one that I recall even before the red one that is there now which I know he got from the TINGEY brothers in Centerville. I remember a Volkswagon Ghia VAL had because my friend, LAWRENCE MILLER, in Farmington had a Ghia that I had ridden in several times.

3. As I recall, VAL had old cars at his place dating from the same period of time that he had milk cows. I do not recall

the specific years involved, but SAM PARRISH'S hay and milking barn still stood on the property that joins VAL'S property on the north. It also sticks in my mind because both of VAL'S sons were too young to milk, and the old brindle cow that I milked for him managed to kick me off the milking stool even though I had her back legs in chain hobbles, her head in a stanchion, and her hips in a large, no-kick clamp.

4. I remember VAL working on old cars with an acetylene torch, and my general recollection is that he has had a lot of old cars there at various times.

5. One rusty old body that comes to my mind was the one that sat at the back of the house just east of where we put in the cement pad. I remember his sons sanding on that old car, and I recall that they had one painted part that they were going to put on the back of it. They never did get the rusty old thing to a point where they could drive it.

6. I became Post Master in Centerville in 1965, and I recall that there were old cars on the property before 1970 which sticks out in my mind because 1970 was the year that the nationwide Post Office Convention was held in Salt Lake City and as Utah Post Masters, we had the obligation to host the Convention.

7. Another thing that stands out in my mind is the time we treed a raccoon at my place; and when it jumped out of the tree, it ran over to VAL'S and we caught it in a pile of old tires near the black Ford pickup that VAL drove whenever he could get it

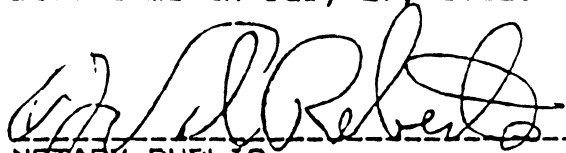
running. I can't remember the exact year, but I recall that after we caught the raccoon, some people from over in North Salt Lake came to Centerville and picked it up.

Dated this 27th day of July, 1988.



DAVID F. PARRISH

SUBSCRIBED AND SWORN to before me on July 27, 1988.



NOTARY PUBLIC
Residing at Centerville, Utah

My commission expires January 22, 1991.

THE AFFIDAVIT OF LARRY G. SMITH

COMES NOW LARRY G. SMITH, a resident of Centerville, Davis County, Utah, and first being sworn upon his oath, deposes and says:

I have known J. VAL ROBERTS since he first moved to Centerville in the Spring of 1960.

I have lived at 544 North Main, Centerville, since I purchased the property in August of 1967. Before my present property, I owned the house at 2014 North Main, Centerville.

Val and I both sold insurance for Beneficial Life of Utah in the early 1960's. In about 1964, I left Beneficial Life to open a Beeline Service Station on Beck Street in Salt Lake City. I later moved in 1965 to a Phillips 66 station on Beck Street in Salt Lake City.

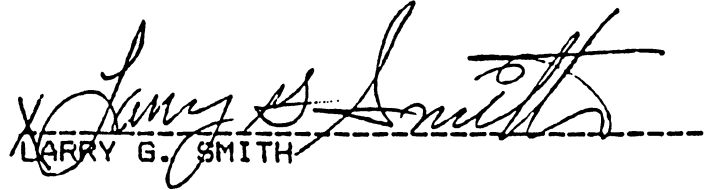
I started as a Phillips 66 lessee for TOM RANDALL DISTRIBUTING on 500 West in Bountiful, Utah in 1966 subsequently purchasing the property at that location.

My recollection of wrecked or partially dismantled automobiles on VAL'S property goes back to August of 1967 when I moved into my present address at 544 North Main and includes the 1941 Ford half-ton pickup that was at various times partially dismantled and inoperable at VAL'S home. It is still there today. I also recall the 1955 Chrysler New Yorker.

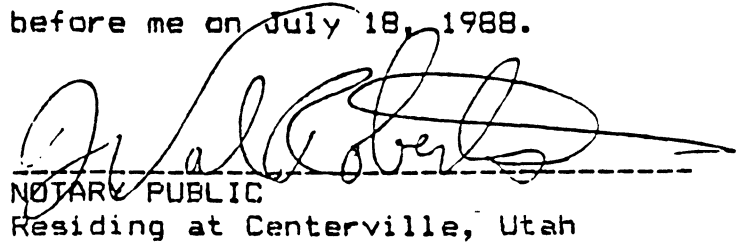
I do not recall other vehicles specifically though I serviced and inspected other old cars VAL has patched together over the years he traded with me in the service station business at all three of my locations.

To my present recollection, VAL has never driven anything but old cars which he had to patch together with wire and clamps.

Dated this 18th day of July, 1988.


LARRY G. SMITH

SUBSCRIBED AND SWORN to before me on July 18, 1988.


NOTARY PUBLIC
Residing at Centerville, Utah

My commission expires January 22, 1991.