

2001

## Jay Peterson v. Provo : Reply Brief

Utah Court of Appeals

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Jay Peterson; Appellant Pro Se.

Gary L. Gregerson; David C. Dixon; Gary A. McGinn.

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IN THE UTAH COURT OF APPEALS

Jay Peterson,  
Plaintiff and Appellant,  
CA

Appellate Case No. 20010319-

v.

City of Provo,  
Defendant and Appellee.

Appeal from the Fourth District Court, Utah County, Judge Schofield

REPLY BRIEF OF THE APPELLANT

Jay Peterson  
Appellant pro se  
2025 North 1450 East  
Provo, Utah 84604

**FILED**  
Utah Court of Appeals

FEB 11 2002

Paulette Staggs  
Clerk of the Court

## **TABLE OF CASES**

1. V-1 Oil Company v. Dept. of Environmental Quality, 939 P2d 1192, (S.Ct.Ut.1997)..1
2. V-1 Oil Company v. Dept. of Environmental Quality, 893 P2d 1093 (Ut.App.1995)...1
3. Tumey v. Ohio, 273 U.S.510, 531-35, 47 S.Ct.437, 444-45, 71 L.Ed.749 (1927).....2

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**1 Due Process was not provided by a biased hearing officer who, with actual hostility and actual bias, was found by District Judge Schofield to be “patently unfair.”**

The City of Provo has confused this issue in its brief by a vague reference to V-1 Oil Company vs. Dept. of Environmental Quality, 939 P2d 1192 (S.Ct. Utah 1997). The Supreme Court in that case reversed the decision of the Utah Court of Appeals in V-1 Oil Company vs. Dept. of Environmental Quality, 893 P2d 1093 (Utah App.1995).

Contrary to the Court of Appeals, the Supreme Court in V-1 Oil found that prior to the hearing and prior to any showing of actual bias, a staff attorney for the Department could not be presumed biased and disqualified as a hearing officer in accusatory proceedings brought by the Department as long as he personally did not participate in the investigation and prosecution.

Provo City’s use of this holding in V-1 Oil is a classic use of a “straw man” argument intended to divert this Court of Appeals from the real issues.

The real issue in this case is the actual receipt by the hearing officer of \$100 in pecuniary benefit, the actual hostility and actual bias shown from the record, as demonstrated by the following analysis as well as by the finding by Judge Schofield. After reading the transcript, hearing the parties, and considering the exhibits, Judge Schofield found that it was “patently unfair” for that hearing officer to have ordered the defendant/appellant to pay him the \$100 in costs. (See footnote 3, page 4 of his Ruling, Addendum 2, Appellee’s brief.)

For legal authority on the real issues, we need only look more closely at the Supreme Court's guidelines in V-I Oil, which are summarized at pages 1197, 98 as:

“Commentators have noted that accusatory proceedings, due to their similarity in both form and consequence to formal criminal proceedings, require particular attention to due process concerns. (Cit. omitted) Therefore, stricter due process requirements apply to adversarial, adjudicative decision making than to legislative type decision making. The most fundamental requirement in this context is “the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” (Cit. omitted) As a necessary corollary to this opportunity, affected parties must receive adequate notice, and they must be assured that their concerns will be heard by an impartial decision maker. (Cit. omitted) “Scholars and judges consistently characterize provision of a neutral decisionmaker as one of the three or four core requirements of a system of fair adjudicatory decision making.” (Cit. omitted) Where a party to an adversary proceedings can demonstrate actual impermissible bias or an unacceptable risk of an impermissible bias on the part of a decision maker, the decision maker must be disqualified... A clear demonstration of partiality apparent on the face of the record (Cit. omitted) or a showing of direct, pecuniary interest (Cit. omitted) automatically requires disqualification of the decision maker... The presence of a clear, substantial pecuniary benefit is one of the most evident causes of either conscious or subconscious bias; and perhaps more important, it is the type of temptation that inevitably compromises public confidence in the process itself, undermining the legitimacy of any decision so tainted. Thus, the (U.S.) Supreme Court concluded that disqualifying bias will be presumed whenever the decision maker has a substantial pecuniary interest in the outcome.(Cit. omitted)”

The Utah Supreme Court then cited, among others, Tumey v. Ohio, 273 U.S.510, 531-35, 47 S.Ct. 437, 444-45, 71 L.Ed. 749 (1927). In Tumey, the U.S. Supreme Court found a due process violation when the mayor acted as the hearing officer and was paid for the hearing from the \$12 in costs that he imposed only upon conviction, finding,

“The mayor of the village of North College, Ohio, had a direct personal pecuniary interest in convicting the defendant who came before him for trial, in the twelve dollars of costs imposed in his behalf.”

In addition to this presumptive due process violation arising from the payment of \$100 in costs to this hearing officer only upon “conviction,” his actual bias and hostility demonstrated during the hearing have been gross and blatant. Your appellant, who is pro se and not an expert on administrative law, was completely naive at the time of the

hearing and did not know that the frequent bias of administrative judges was already a bitterly contested legal issue. It was only when he was slapped in the face by the obviously biased hearing officer, who tried to stifle and virtually shout down any criticisms of Provo City at the hearing, and then received another slap in the face from the grossly unfair order to pay \$100 for the hard labor of this biased performance, that your appellant from actual experience discovered the extent of bias that Provo City has created in its pet court. Citizens will never believe that this system is fair, no matter how many times a distant Supreme Court could be tricked into saying that yes indeed, it's really, really fair.

It should be noted that the Supreme Court's reversal in V-1 Oil of the Utah Court of Appeals, on a different issue, was motivated in large part by the alleged impracticality and expense of providing a truly unbiased judge instead of the internal, highly suspect staff attorney for the Department. It would not be at all impractical or more expensive for Provo City to provide that its hearing officers are appointed by a neutral judge in a fair manner such as by random rotation, instead of directly by the specific prosecutor to further his unrestrained power, whims, and malice. Under the present system the prosecutor makes telephone calls to lawyers with (or without) experience as administrative judges until she finds one who seems to be adequately "cooperative," who she can then control quite effectively. A neutral judge would appoint hearing officers from the same list of experienced lawyers, at the same expense, but without the corrupt element of prosecutor control. This small reform would cost nothing. The lengthy opinion of this Court of Appeals in the first V-1 Oil case is an excellent, detailed brief in

support of this easy reform. It is the same reform that all of the lawyers and ethics committees have been vigorously advocating for many years.

When your appellant saw the hearing officer and the extremely dishonest prosecutor meeting privately for a social break and overheard them laughing together at the discomfiture of another defendant, it was just too obvious that the prosecutor can and does substantially control the judge under the present grossly unfair system. If English grammar usage is still an accurate test, then this particular prosecutor, Mr. Davis, cannot have more than a sixth grade education. Somehow, the least educated and most corrupt elements of Provo society have gained control of the judicial process.

To give some perspective to the extent of this problem, appellant cites his own letter to the hearing officer “denigrating” the system of building permits that should have been made a part of the record in this case. That letter cited appellant’s discovery that the secretary of the building department, on the last hour before her sudden “vacation,” could not find building permits for two additions built to the front of the home of an influential “neighborhood chairman” living nearby in Provo. Recently, after substantial further investigation by appellant, he has discovered that the likely reason for this lack of permits is the impossibility of complying with the hillside ordinance in Provo. The “chairman” would have been required to employ a very expensive licensed engineer who undoubtably would have insisted upon an exploratory fifteen foot deep trench fifty feet to the east and west of the proposed additions to examine the safety of the soil structure. Such trenching (and more) was militantly required of another neighbor building a new home. But this necessary exploration would have required a virtually impossible, quite dangerous tunnel under his existing home. Thus the “chairman” probably never obtained

the building permits for the two additions and relied upon either his influence or even downright bribery to protect himself from later repercussions or prosecutions. The same conundrum would affect thousands of other Provo residents living on the bench, where hundreds of additions are built every year. A preliminary picture starts to emerge of a cesspool of corruption in Provo where influence, cronyism, or bribery (not to mention racism) have completely overwhelmed the rule of law. This is hardly the time for the Utah Court of Appeals to rubber stamp a phony court to keep this likely graft flowing.

**II. The other due process violations not only by themselves require reversal, but also further prove the actual bias of the hearing officer.**

First we find the City of Provo telling us in its brief that notice of “illegal accessory building” is adequate and that (contradictorily) it was “appellant’s fault” that he didn’t receive notice. The hearing officer, in between private sessions with the grossly dishonest prosecutor laughing at the defendants, also found the oxymoron of “constructive notice.”

How could a licensed attorney, the hearing officer, casually invent the concept of “constructive notice” unless he was totally biased and himself dishonest? The law is ever so clear that notice must be actual. There just isn’t any wiggle room even for the slipperiest lawyer in the law of due process for “constructive notice.”

Likewise, the notice given by Provo for “illegal building” is about as much notice as charging a criminal defendant with “illegal activity.” Notice is simply not constitutionally adequate unless it provides enough information so that a litigant will know what issues will be tried and can prepare his evidence and defense with enough



time for a meaningful hearing. The notice given was so vague and so far from actual notice of the issues that would be raised at the hearing that it borders on contempt of court for Provo City to then plead speciously that it was somehow “appellant’s fault” that he didn’t know what issues would be raised by the shifty, fumbling prosecutor at the hearing. Is there any court in America so insensitive to basic fairness that it would buy into Provo’s ridiculous argument?

Then consider the hearsay comment that the shifty prosecutor slipped into the record at the end of the hearing that there was no building permit for one of the sheds. The hearing officer immediately, actually eagerly, accepted this hearsay as conclusive evidence. The law provides that the records exception to hearsay requires the custodian to introduce the records and then respond to cross-examination. The eagerness of the hearing officer to accept a hearsay comment, the only evidence that an existing building was not initially permitted, as conclusive evidence of violation, not only by itself violates due process, but also is yet more evidence of the pervasive bias of the hearing officer.

The Provo City ordinances themselves make it clear that hearsay cannot be used in an ordinance prosecution. As a licensed attorney, and in order to pass the bar exams, the hearing officer would have had to know that the constitutional law of due process also bars the use of hearsay. But instead, he eagerly endorsed and exploited the due process violation to find the one conviction that he needed to extort his \$100 in pay from another victim, the laughingstock of his private sessions with the dishonest prosecutor. He virtually shouted down appellant’s objection to this hearsay evidence at the hearing. The woman who hired him, the chief prosecutor for the City

for zoning violations, included in her letter to appellant her “ruling” that hearsay evidence would be admissible, contrary to the ordinances. (Isn’t it revealing that the City’s head prosecutor can manage to provide advance written notice of the prosecutor’s pet rules of law, albeit illegal ones, misrepresented much like a judge’s ruling, while providing no notice of the actual issues to be tried, clearly the duty of the prosecutor?) Did the hearing officer then make an unbiased decision in finding the one conviction that he needed for his \$100? Of course not. He decided that the illegal rule of law invented by his boss the prosecutor from her ghoulish imagination would be the rule that he would apply, despite his obvious knowledge that such rule cannot possibly be lawful. It violates due process to base a conviction solely upon the hearsay evidence tossed into the record at the last minute by a notoriously dishonest prosecutor and further proves the bias of the hearing officer.

Although Provo City tries to excuse itself by noting the one week for additional evidence given appellant, it neglected to tell this court that the hearing officer limited the evidence that he would accept to only the provision of a building permit. The owners of buildings rarely if ever retain building permits and only careful investigation of city records can provide relevant evidence. In this case the custodian of the records suddenly left for “vacation” and the records were not accessible. (It would not be surprising to discover that her sudden “vacation” was motivated by her apprehension that the evil empire dominating Provo was about to be discovered by an uncompromising reformer.) Due process was never provided. Instead, the biased hearing officer admitted the hearsay, did not provide for cross examination, and

invented “constructive notice” as his excuse for Provo City’s failure to give actual notice and failure to provide actual due process.

The District Court refused to admit appellant’s proffered affidavit on one of the issues that potentially could have ameliorated some of the due process violations that now remain uncured and require reversal. Instead the District Court in its Ruling makes the not very lucid statement (and untrue comment) that, “Both parties agree that this court’s review of the actions of the hearing officer are limited to a review of the record generated in the hearing.” (Ruling, page 2) Although the theory is inherently a rather crazy one, Provo City seems to be implying in its sketchy brief that notice and due process violations during a hearing can be cured after a hearing. But they can in no way be “cured” when no further evidence can be introduced despite appellant’s proffer.

The double jeopardy issue is not “mute” (moot) because Provo City has brought a formal motion in the District Court for a new trial, has aggressively pursued this violation of the double jeopardy clause, has kept the motion apparently still pending, and may renew its efforts at any time. It is appropriate for judicial economy to decide also this ancillary issue, already joined and briefed by the parties in the record from the lower court, instead of letting it develop into a wasteful second appeal.

### **Conclusion**

Appellant was denied all of the core requirements of due process of law. He did not actually know what issues the prosecutor would raise at the hearing and was actually surprised by them, denying him a meaningful hearing. This lack of adequate notice can

be justified by neither the oxymoron of “constructive notice,” nor by the contradictory bamboozlement that it was “appellant’s fault” that he did not receive adequate notice. The purported “conviction” was based only upon the last minute, casual hearsay confided by the flagrantly dishonest prosecutor in a surprise claim at the end of the hearing while the actual witness was impossible to cross examine even after the hearing because of her sudden “vacation.” In his review, District Court Judge Schofield found that the order requiring appellant to pay the hearing officer \$100 for his services was “patently unfair.”

Pursuant to the Supreme Court guidelines established in V-1 Oil, the hearing officer is presumed to be biased because of his receipt of \$100 in “costs” whenever he finds a conviction. There is also ample evidence of hostility and actual bias from the record as an alternative ground to reverse his conviction because he was not the neutral decision maker required for due process of law.

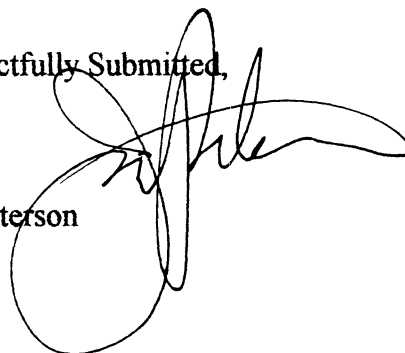
This case is a shocking inditement of the Provo City Court because not just one, but all of the core requirements for due process of law were deliberately denied. The conviction should be reversed by this Court of Appeals.

As ancillary relief within the liberal authority of a court of equity, this court should also order the City of Provo to reimburse all other defendants who were charged \$100 in “costs” along with a letter explaining how their core rights to due process were denied and their appropriate recourse, or direct or at least recommend that Judge Schofield so provide.

DATED this 23<sup>th</sup> day of January, 2002

Respectfully Submitted,

Jay Peterson

A handwritten signature in black ink, appearing to read 'Jay Peterson', written over the printed name.

Certificate of Service

I hereby certify that I caused to be mailed, in the United States Mails, postage prepaid, on this 11th day of February, 2002, a true and correct copy of the foregoing, APPELLANT'S REPLY BRIEF to the following:

David C. Dixon  
Attorney for Provo City  
P.O. Box 1849  
Provo, Utah 84603

A handwritten signature in black ink, appearing to read "David C. Dixon", is written over a solid horizontal line. The signature is stylized with large loops and a long horizontal stroke at the end.