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IN THE SUPREME COURT, STATE OF UTAH

CRAIG M. CHAMBERS and LINDA C. CHAMBERS, Plaintiffs/Appellants, vs. SMITHFIELD CITY and ROBERT RICHARDSON, Defendant/Respondent	* * * * * *	Supreme Court No. 19252

BRIEF OF RESPONDENT, SMITHFIELD CITY

* * * * *

Appeal from the Judgment of the First District Court
of Cache County, State of Utah
Honorable VeNoy Christoffersen, Judge

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IN THE SUPREME COURT, STATE OF UTAH

CRAIG M. CHAMBERS and LINDA C. CHAMBERS, Plaintiffs/Appellants,	*	
vs.	*	Supreme Court No. 19252
SMITHFIELD CITY and ROBERT RICHARDSON, Defendant/Respondent	*	

BRIEF OF RESPONDENT, SMITHFIELD CITY

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CRAIG M. CHAMBERS and LINDA C. CHAMBERS, *
Plaintiffs/Appellants, *

vs. *

SMITHFIELD CITY and ROBERT RICHARDSON, *
Defendant/Respondent *

BRIEF OF RESPONDENT, SMITHFIELD CITY

Supreme Court No. 19252

NATURE OF THE CASE

This is an action brought by Plaintiffs to enjoin the issuance of a building permit by Defendant, Smithfield City to co-defendant, Robert Richardson.

DISPOSITION BY TRIAL COURT

Having found the case to be proper for summary judgment, the Trial Court, Judge VeNoy Christoffersen presiding, granted the Defendant, Smithfield City's Motion for Summary Judgment and denied Plaintiff's Motion for Summary Judgment.

DISPOSITION SOUGHT ON APPEAL

Defendant/Respondent Smithfield City, and Robert Richardson (hereinafter "Smithfield City" and "Richardson") request that the Trial Court's decision be affirmed.

STATEMENT OF FACTS

Smithfield City accepts the statement of facts as given by the Appellants in their brief, but adds the following summary and additional facts to be considered by the Court.

On May 27, 1982, pursuant to the Revised Ordinances of Smithfield City, Utah, Ch. 4-2(d)(6) and after twice deliberating and discussing the grant of a variance to co-Respondent, Robert Richardson, the Smithfield City Board of Adjustment approved a lot (area) variance sought by Richardson. Record at 53, 54 (record hereinafter denoted as R.). As part of the Board's review of the variance application, twelve findings were studied item by item as they related to the factual situation under consideration and each item was voted upon separately before the variance was passed. (R. 57). Because the site for the proposed building is zoned RE-1 (requiring 1 acre in area) and inasmuch as Mr. Richardson owned .67 acre, the lot having been split by a previous owner, he sought for and received approval under the Special Questions provision of the Smithfield City Zoning Ordinances for an adjustment to the lot size requirements of the RE-1 zone. (R.54).

The challenged portion of the ordinance reads as follows:

2-d. Special questions.

> (6) Whenever unusual circumstances exist, the Smithfield City Council may grant variances for buildng purposes on an individual lot basis or piece of property, even though said building and/or lot may not be in conformance with existing zoning laws. The Smithfield City Council will consider such exceptions only when recommended by both the Board of Adjustments and the Planning Commission.

Once approval by the Board of Adjustment was obtained, the variance was discussed and approved by the Smithfield Planning & Zoning Commission and the City Council. (R.54, 50, 40). At least one of the Plaintiffs was present at the meetings where the variance was discussed. (City Council, R.40; Planning & Zoning Commission, R.45, 47; Board of Adjustments, R.52, 54).

From Appellants' own complaint, it is evident that they not only attended the hearings on the variance proposal but also received notice of the same. "In all cases the Plaintiff objected to the variance upon receiving notice of the above mentioned hearing." (R.2).

The final grant of the variance precipitated a law suit by a neighboring land owners, Appellants herein, attempting to enjoin the issuance of a building permit and to declare invalid the procedures under which the variance was granted.

QUESTIONS PRESENTED

1. Where a City Council retains a right to review "special question" decisions made by a Board of Adjustment, have the Appellants, neighboring landowners, been denied certain procedural rights under Utah law?

2. Is a Board of Adjustment acting within its authority when the Board approves the grant of a zoning variance allowing a building permit to issue on a .67 acre lot in an area restricted to one acre lots?

ARGUMENT

I. THE REVIEW PROCEDURES PRESCRIBED IN THE CHALLENGED ORDINANCE ARE WITHIN THE COUNCIL'S LEGISLATIVE POWERS AND DO NOT DIMINSH BUT RATHER INCREASE THE PROCEDURAL RIGHTS GRANTED THE APPELLANT UNDER UTAH LAW.

It is Appellants' contention that the review provisions of the Smithfield City Ordinance somehow harms the Appellants by violating a procedural right. It is difficult to understand wherein the Appellants have been harmed inasmuch as the challenged ordinance actually grants the Appellants greater procedural safeguards. According to Appellants, when the Board of Adjustment made its decision to approve the variance that decision should have been final. Nevertheless, the Ordinance requires the approval of both the Planning & Zoning Commission and the Smithfield City Council before such a variance is granted.

Appellants' position is incompatible with itself; they protest that the review provision denies them a procedural right, yet this same procedure allows the Appellants two more opportunities to have the decision by the Board of Adjustment reviewed and perhaps overturned. Had the Board, the Planning Commission or the City Council rejected the variance request the matter would have ended there. Both the character of the zoned area and the rights of the Appellants are doubly protected by the challenged ordinance.

The right of a County Commission to review the acts of a County Board of Adjustment was firmly established in Thurston v. Cache County, 626 P.2d 440 (Utah 1981). The situation there

is directly analogous to a municipal council and its respective Board of Adjustment. In Thurston at 446, the Court stated:

> Neither is there any requirement that, in making such a delegation of authority, the County Commission must surrender all control or power of review; the Board of Adjustments is constituted by statute a forum for review of all administrative zoning decisions, but nowhere is it made the exclusive repository of appellate powers. Should the County Commission elect not to bestow upon the Board of Adjustments the power to issue special exceptions but to place such power in the Planning Commission instead, and to reserve to itself final say in the dispensation of such exceptions, we cannot say that it has sought to clothe itself with authority not granted by the Legislature.

Appellants attempt to distinguish Thurston by pointing out that Thurston dealt with a County Commission's review of a conditional use permit. Appellants overlook the fact that the issue in Thurston was procedural in nature and that the principle of law expounded by the Court is directly on point in this case.

Despite Appellant's assertion that a prohibition of variance review by a City Council is "implicit in the entire framework of municipal zoning", no such expressed prohibition is found in the statutes. (Appellant's Brief, page 17) Appellants read far more restrictions in the enabling act (U.C.A. §10-9-6) than appear in the actual language. With reference to a County Board of Adjustment, which is appointed by the County Commission just as a City Board of Adjustment is appointed by the City Council (U.C.A. §10-9-7), the Thurston Court, at 446, stated:

> Plaintiffs' interpretation of the Enabling Act, moreover, imposes a curious administrative parodox on county zoning systems within the state.

> By law, the county commission is the body which initially forges the zoning resolution, upon recommendation from the planning commission. It is the task of the county commission to decide which uses will be permitted in which zoning districts, and upon what, if any, conditions. Plaintiffs' interpretation would require the County Commission to pass all administrative control over the implementation of so much of a plan as relates to special exceptions, conditional uses, and the like, to a subordinate body, which ceases to be answerable to the commission itself. Notwithstanding the fact that the county commission would retain whatever control it desired over the issuance of regular building permits, it would be deprived of any supervisory power over the issuance of any "special exceptions". Assuming, arguendo, that such "special exceptions", are conditional use permits, we cannot agree that such an arbitrary separation of power was within the contemplation of the legislature.

It would seem an "administrative parodox" for the Legislature to have provided for a City Board of Adjustment, "a subordinate body, which ceases to be answerable" to the City Council itself. Thurston, supra.[1]

A. Any alleged defective notice procedure is excused or cured by actual notice received or participation by Appellants at the hearings.

Despite affirmatively admitting in their complaint, "In all cases the Plaintiff objected to the variance upon receiving notice of the above-mentioned hearings", Appellants contend that they were injured by allegedly inadequate provisions for notice

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[1] It is also argued that the review procedures of the Smithfield City Ordinance go beyond the enabling statute making all actions taken thereunder void. Were this the case, the more appropriate judicial response would be to sever the offending language of the ordinance rather than declare the entire ordinance and all actions taken by the Board void. Such a severance is provided for by ordinance. Smithfield City, Utah, Ordinances, Ch. 10-4.

in the Smithfield Ordinance. (R.2). (Appellants' Brief at 18) In Thurston, supra, at 447, the Utah Court brushed a similar contention aside as "harmless error" even if such a defect were found to have existed. The Court said:

> It is conceded by all parties that both plaintiffs were present at the hearings which dealt with the matters here under consideration. As such, they were afforded an adequate opportunity to hear and dispute the reasons underlying the county action. Commonly, the presence of an objecting party at the hearing cures most deficiencies in notice requirements relating thereto.

In summary, Appellants' arguments with regards to procedural infirmities point to alleged defects which may or may not exist, but in no case have Appellants pointed to any harm which they have suffered due to such alleged defects or infirmities. In fact, Appellants have benefited from greater procedural rights than those found in other municipalities without an ordinance similar to the one challenged herein.

II. THE BOARD OF ADJUSTMENT HAD THE AUTHORITY TO GRANT AN AREA VARIANCE TO CO-DEFENDANT, RICHARDSON.

The statutory language of Utah Code Ann. §10-9-12 (1953) authorizes a City Board of Adjustment to grant special exceptions and variances from the strict terms of a city zoning ordinance. The necessity of this type of "escape-valve" from the narrow application of a zoning ordinance is obvious. Coronet Homes Inc., v. McKenzie, 439 P.2d 219, 224 (Nev. 1968). Without the relief provided by a variance procedure, some courts have indicated that the confiscatory and inequitable nature inherent in a zoning system might not withstand constitutional scrutiny.

In Freeman v. Board of Adjustments of City of Great Falls, 34 P.2d 534, 538 (Mont. 1934), the Montana Court underlined the importance of a variance authority:

> It is therefore apparent that the provision for a board of adjustment (or similar fact-finding body) vested with broad general powers, is important to the validity of the zoning ordinance and the statute under which it was enacted. In the absence of such a board vested with power to prevent the inequalities and injustices which might otherwise result from a strict enforcement of the zoning ordinance, there would be grave doubts as to the constitutionality of the ordinance and the statute under which it was enacted.

As a creature of statute, the powers of a City Board of Adjustment are only so broad or so narrow as dictated by the statutory language. See U.C.A. §10-9-12 (1953). A reading of the foregoing statute reveals that the Legislature has given a Board of Adjustment certain subjective criteria without tying the Board to specific objective restrictions. It has therefore fallen to the courts to more fully define the parameters of a Board's authority. The major Utah case which rules on the powers vested in a Board of Adjustment is Walton v. Tracy Loan & Trust Company, 97 U. 249, 92 P.2d 724 (1939). Appellants have relied heavily on Walton to justify their attack on the decision by the Smithfield City Board of Adjustment. As was recognized by the Trial Court, however, Walton is easily distinguished from the present case. (R.81)

In Walton, the Utah Court held that a variance granted by the Salt Lake City Board of Adjustments permitting the erection of a gasoline service station in a residential area (a prohibited

use in that particular zone), was an improper exercise of the Board's power. At 729, the Court stated:

> We hold therefore that the Board of Adjustment has no power to permit or authorize the use of property for, or the erection or construction of a building designed to be used for, any purpose or use not permitted within such district by the terms of the Zoning Ordinance of Salt Lake City;... .
>
> (Emphasis added)

The entire opinion of the Court is replete with references to a change in use whereas the present case involves a variance in area only. Therefore, Walton clearly diverges from the present case and other cases involving area variances.

The variance requested by Richardson does not contemplate a change of use but merely a reduction in area or lot size from the RE-1 or one-acre residential estate zone. Richardson's application for a building permit for "home occupation" and a "single family dwelling" as part of a "residential estate neighborhood" are permitted and intended uses under this zoning classification. (R.29).

The standard for the grant of a an area variance is considerably less stringent than that of a use variance. This distinction was articulated in Alumni Control Board v. City of Lincoln, 137 N.W.2d 800, 805 (Neb. 1965):

> A use variance is one which permits a use other than that prescribed by the zoning ordinance in a particular district. An area variance has no relationship to a change of use. It is primarily a grant to erect, alter or use a structure for a permitted use in a manner other than that prescribed by the restrictions of the zoning ordinance.

Another distinguishing feature between an area and use variance is that courts have held area variances should be considered in conjuction with the less demanding "practical difficulties" standard found in many state statutes. In Village of Bronxville v. Francis, 1 App.Div.2d 236, 150 N.Y.S.2d 906; Aff'D 1 N.Y.2d 839, 135 N.E.2d 724 (1956), a variance from the local zoning ordinance was granted "so as to permit the construction of a bank building containing floor area in excess of the amount permitted by the ordinance." The Court went on to say at 909:

> When the variance is one of area only, there is no change in the character of the zone district and the considerations present in the Otto case are not present. A change of area may be granted on the ground of practical difficulties alone, without considering whether or not there is an unnecessary hardship. (Cite omitted) This court is committed to the rule that, in the absence of statutory provision to the contrary, special hardships need not be established as a condition to granting an area variance.

This case was discussed in III Anderson, American Law of Zoning, Section 18.47 (1968):

> The Court distinguished sharply between area variances, which involve yard, set back, lot coverage, density, or similar regulations and use variances, which permit a use proscribed by the ordinance. It not only found that "practical difficulties" and "unnecessary hardships" were distinct standards, but that each was intended to limit the Board's power to grant a particular kind of variance. The Court held that the Steinhilber requirement of unnecessary hardship limited the power of a Board of Zoning Appeals to grant use variances, but that area variances could be granted upon a showing that a literal application of the zoning regulations would result in practical difficulties.
>
> (Emphasis Added)

This concept was reaffirmed in Anderson v. Board of Appeals, 22 M.D. App. 28, 322 A. 2d 220, 226 (1974) wherein the Maryland Court of Appeals stated:

> Use variances are customarily concerned with "hardship" cases, here the land cannot yield a reasonable return if used only in accordance with the use restriction of the ordinance and a variance must be permitted to avoid confiscatory operation of the ordinance, while area variances are customarily concerned with "practical difficulty".

Following the decision in Walton in 1939, the Utah Legislature modified the standard or test to be used in the granting of a variance. In 1949, the Utah Legislature added the practical "difficulty" test to the "hardship" standard by the addition of paragraph (3)(a) to U.C.A. §10-9-12.[2] (1953) The amendment implies that the Legislature intended a different test be applied.[3] This trend has been followed by other courts. In

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[2] U.C.A. §10-9-12(3)(a)
(3)(...) Before any variance may be authorized, it shall be shown that:
(a) the variance will not substantially affect the comprehensive plan of zoning in the city and that adherance to the strict letter of the ordinance will cause difficulties and hardships, the imposition of which upon the petitioner is unnecessary in order to carry out the general purpose of the plan. (Emphasis added).

[3] See Journal of Legal Studies, Brigham Young University, Summary of Utah Law: Land Use Zoning and Eminent Domain, Section 11.13 (1979). The author states that "the inclusion of a term 'practical difficulties' in Sections 10-9-12 (3)(a) and 17-27-16(3) of the Utah Code came about after a decision in Walton which might possibly indicate that the legislature did recognize two standards that necessarily should be applied to two types of variances".

Board of Adjustment v. Kwik-Check Realty, Inc., 389 A.2d 1289, 1291 (Del. 1978) the Delaware Court construed a statute similar to the Utah Zoning Law and held:

> ... that the Superior Court correctly distinguished the two types of variances and prescribed a less burdensome test where an area variance is in issue under Section 1352(a)(3). Many states, with comparable statutory provisions, have adopted such an interpretation. (See cases cited below)[4] The rational, which we approve is that a use variance changes the character of the zoned district by permitting an otherwise proscribed use, (cite omitted), whereas an area variance concerns only the practical difficulty in using the particular property for a permitted use.

It is only logical to assume a less stringent standard for an area variance:

> An area variance relating to restrictions such as side yard, rear yard, frontage, setback or minimum lot requirements, does not alter the character of the zoned district, whereas a use variance seeks a use ordinarily prohibited in the particular district.

(Emphasis added)

Wolf v. District of Columbia Board of Zoning Adjustment, 397 A.2d 936, 941 (D.C. App. 1979)

Whether or not the Utah Courts accept the concept of practical difficulties and area variances as a combined standard is not necessary for dispostion of this case, but the reasoning behind the standard is submitted for the Court's consideration.

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[4] See Indian Village Manor Company v. Detroit, Mich. App., 6 Mich. App., 679, 147 N.W. 2d 731 (1967); WestMinister Corp. v. Zoning Bd. of Review of the City of Providence, R.I. Supr., 103 R.I. 381, 238 A. 2d 353 (1968); Palmer v. Board of Zoning Adjustment, D.C. App., 287 A. 2d 535 (1972), and Mclean v. Soley, Md. App., 270 Md. App. 208, 310 A.2d 783 (1973). See also 3 Anderson, American Law of Zoning, Section 14.45 et seq. (1968).

In the present case, the Smithfield City Board of Adjustments found that both difficulties and hardships would be imposed upon the applicant if his permit was not granted. (R.57 at para. h).

After Walton, supra, it is clear that a Board of Adjustments does not have the right to grant a use variance, but it seems to be the contention of the Appellant that the Board of Adjustments be rendered virtually impotent, powerless to grant even an area variance. The parameters of the Board of Adjustment's authority are not so constricted. In Freeman, supra, at 537, the Montana Court addressed this point:

> Appellant contends that the board of adjustment did not have the power to authorize the issuance of the permit to Clark. In this connection it is suggested that the variation which the board has the power to make refers only to slight variations, such as the height of a building, or the distance it must be from the street, etc. We find little merit in this contention. Obviously, the Legislature could not fix any definite rule that would fit every individual case of alleged hardship. The authority conferred upon the board was, of necessity, of a general nature and discretionary.

Although appellants would use the dicta of the Walton Court to confine variances to "detail and construction" in the granting of building permits, but it does not appear from the cases or the statutes that such a limited function was intended. (Appellant's Brief page 8).

A. A decision by the Board of Adjustment should be overturned only if clearly an abuse of discretion or illegal.

An examination of the record, reveals that considerable time and effort was spent by all three governmental bodies involved in dicussing and deliberating the variance request made

by Mr. Richardson. More than one meeting was held in which Appellant and others appeared and voiced their opinions. (R. 40, 45, 47, 50, 53, and 54). In addition, in the discussion of the proposed variance, as recorded in the minutes of each meeting, the Board of Adjustments examined twelve separate areas of critical importance and found, after voting upon each, that the variance could pass. (R.57).

Appellant's brief repeatedly refers to "no evidence" or "nothing in the record" to support the Trial Court's granting of Summary Judgment and indeed implies that such judgment was "premature". (See Appellant's Brief pages 5, 6, 9 12, 13 and 15). Nevertheless, there is no direct challenge that this case was not a proper one for summary judgment. The facts are not in dispute and nowhere has Appellants alleged by affidavit or otherwise that such a dispute exists. If the Appellants were aware of conflicting evidence that would lead to a disputed material fact, then it is their burden to bring forth such evidence to the Trial Court. In a recent Utah case, Franklin Financial v. New Empire Development Company, 659 P.2d 1040, 1044 (Utah 1983), it was asserted on appeal that summary judgment was inappropriate as the adverse party's supporting affidavits were defective. The Court said:

> However, it is axiomatic that matters not presented to the trial court may not be raised for the first time on appeal.

The Court also held at 1044:

> The opponent of the motion, once a prima facia case for summary judgment has been made must file responsive affidavits raising factual issues, or risk the Trial Court's conclusion that there are no factual issues. Rule 56(e).

Appellants may now wish for a more complete record on appeal, but the burden was theirs to contest the evidence or bring forth missing facts by affidavit. They are now critical of the Board's findings as incomplete or not specific enough, yet nowhere do the statutes require such specificity. (Appellants' Brief at 13). A similar issue was quickly disposed of in Parish of St. Andrews Protestant Episcopal Church v. Zoning Board of Appeals of the City of Stamford, 232 A.2d 916, 920 (Conn. 1967):

> To find error in the manner in which the board made its required findings or that those findings did not fully comply with the standards enumerated in the regulations would compel this court to indulge "in a microscopic search for technical infirmities" in the board's action and would unscrupulously interfere with "the legitimate activities of civic administrative boards". (Cite omitted)

Inasmuch as there are no responsive affidavits alleging controverted facts or the lack thereof, Appellant's repetitious reference to "no evidence" or that the judgment was "premature" is misplaced.

B. Standard of Review on Appeal.

When a party attempts to overturn a decision by an administrative zoning authority, it must first overcome a presumption of correctness and validity which attaches to the decision by

such an authority. Courts have generally deferred to the decision of a Board of Adjustment as the Board makes its decision based on personal knowledge of the property, the zoned area and after full discussion at meetings held by the Board.

The standard for an appellate review of such a decision was carefully stated in Whitcomb v. City of Woodward, 616 P.2d 455, 456 (Okl.App. 1980):

> The granting or denial of a variance is within the sound discretion of the municipal zoning official and the boards of adjustment. (Cite omitted) Appeals from the decisions of the boards of adjustment are to the District Court and the cause is tried de novo. These proceedings are equitable in nature. Therefore, the scope of review of this Court is not to substitute its judgment for that of the trial court, but rather to determine whether the trial court has abused its discretion. Unless clearly against the weight of the evidence, the judgment of the trial court will not be disturbed. (Cite omitted)
>
> In variance cases a presumption exists in favor of the correctness of the determination arrived at by the board of adjustment. When this determination has been affirmed by the district court on appeal, this presumption is entitled to great weight. (Cite omitted)

See also Mueller v. City of Phoenix, 102 Ariz. 575, 435 P.2d 472, 478 (1967) and III ANDERSEN, supra, Section 18.50 at page 278.

It appears that the Appellants would have this Court substitute its judgment for that of both the Trial Court and the Board of Adjustment. In Rickard v. Fundenberger, 1 Kan.App.2d 222, 563 P.2d 1069, 1072 (1977) the Kansas Court considered an action by a neighboring land owner to enjoin construction of a building in an area zoned residential. The Zoning Board of

Appeals refused to cancel the Defendant's building permit, but at trial the District Court reduced the size of the building the Appellant could construct. The Appellate Court reversed this decision emphasizing the importance of the role of the Zoning Board of Appeals. The Court said:

> The law in Kansas is clear that neither a trial court nor an appellate court can substitute its judgment for that of the Board of Zoning Appeals in matters other than law or essentially judicial matters, and neither court can declare the board's actions unreasonable unless clearly compelled to do so by the evidence. (Cites omitted)
>
> (...)
>
> From the record it is clear the Trial Court exceeded the permissible extent of judicial review and substituted its judgment for that of the Board of Zoning Appeals of Lyons, Kansas. That it could not do.

The majority of Appellant's argument, Points I (A)(B) and (C) of Appellants' brief, is directed towards asking this Court to stand in the place of the Board of Adjustment and act as a type of "super zoning commission". <u>Ford Leasing Development Company v. Board of County Commissioners</u>, 528 P.2d 237, 240 (Colo. 1974). They ask this Court "to look past the conclusions made by the Board of Adjustments" and "independently examine the record to see if the spirit of the ordinance was violated", but the burden of persuasion and evidence was upon the Appellants prior to their taking this appeal. (Appellants' Brief p.9) The presumption of correctness that attaches to a decision by a Board of Adjustment will not generally be interferred with unless that burden is met. This principle was

discussed in Cottonwood Heights Citizen's Association v. Board of Commissioners of Salt Lake County, 593 P.2d 138, 140 (Utah 1979) wherein the Court held:

> Due to the complexity of factors involved in the matter of zoning, as in other fields where courts review the actions of administrative bodies, it should be assumed that those charged with that responsibility (the Commission) have specialized knowledge in that field. Accordingly, they should be allowed a comparatively wide latitude of discretion; and their actions endowed with a presumption of correctness and validity which the courts should not interfere with unless it is shown that there is no reasonable basis to justify the action taken.
>
> (Emphasis Added)

Respondents submit that Appellants have failed to show there was no "reasonable basis to justify the action taken" by the Smithfield City Board of Adjustment and therefore the decision should stand. Cottonwood Heights, supra.

C. The doctrine of self-created hardship is inapplicable as Richardson did not create the hardship.

It is Appellant's contention that Richardson knew or should have known prior to purchasing the property of the one-acre zoning restriction and therefore he should be prohibited from building on the lot. The Trial Court directly addressed this argument and stated at R.83:

> Richardson himself did not create the problem because it was the previous owner that split the lots which are subject to the one-acre restriction. Richardson and the second party would not be allowed to make use of the property nor would anyone else who subsequently bought from them if this were to be rigidly applied, and unless the property was rezoned, probably set forever unused for any purpose.

If Utah were to adopt the doctrine as espoused by Appellants, the whole purpose behind the enactment of variance procedures would be undermined. Property would be held inalterably fixed in its present condition without recourse for relief or change except for an entire rezoning.

Other courts have held that a better rule is to approach each variance on a case-by-case basis to determine if it meets the standards for the grant of a variance despite previous restrictions. In Board of Adjustment of Oklahoma City v. Shanbour, 435 P.2d 569, 575 (Okl. 1968) the Court discussed what it felt to be a better rule:

> Although New York and several other states hold that purchase of property with knowledge, actual or presumed, of restrictions contained in zoning ordinances prohibit the purchaser from seeking any variance from such restrictions, it is our opinion that the better rule and the one followed in a number of jurisdictions is that such purchase does not prohibit the granting of a variance. See 2 Rathkopf, supra, [The law of Zoning and Planning (3rd Ed.) Ch. 48] Section 2, and cases cited therein. In our view, were we to hold that such a purchase was a self-imposed hardship, an undue restriction would be placed upon a purchaser, who, although he was able to show that the operation of a zoning ordinance upon the property did create an unnecessary hardship, would be barred from seeking relief.

See also Wolf, supra, 945 at ft. 3 and Jones v. Zoning Board of North Catasauqua, 455 A.2d 754, 755 (Pa. 1983) at ft. 4.

The rule, ascribed to by Appellants, is more correctly stated in 82 Am. Jur. 2d §280, Zoning and Planning (1976):

> In any event, though, the courts are fairly well agreed that a variance may not be granted to the owner of a substandard lot where the applicant deliberately created the substandard nature of the lot.
>
> (Emphasis added)

This statement of the rule presents a more logical approach to the question of self-created hardship. Since Richardson did not create the "substandard nature of the lot", he and his successors in interest should not be bound to such a harsh restriction which would deny the existence of any exception, despite the hardships or difficulties imposed.

CONCLUSION

The question of whether or not to grant a zoning variance is one of particular local concern. Local authorities are generally familiar with the needs and actual circumstances of the community and are in the best position to plan the orderly growth and expansion of the community.

The grant of a .33 acre variance by the Board of Adjustments in conjunction with the Planning and Zoning Commission and City Council, after due care and deliberation, is not outside the scope of the municipal authority. The integrity of the overall zoning plan remains intact and the spirit of the ordinance has not been altered.

Appellants have plainly received all procedural rights to which they are entitled and more. Their protests as to a lack of procedural safeguards is a smoke-screen to obscure the fact that they have received greater procedural protection than that

to which they normally would be entitled in the absence of the challenged ordinance.

For the reasons and authorities cited herein, the undersigned respectfully requests this Court to affirm the decision of the Trial Court.

RESPECTFULLY SUBMITTED this 1st day of November, 1983.

HARRIS, PRESTON, GUTKE & CHAMBERS

By: ______________________
Steven R. Fuller

By: ______________________
B. H. Harris,
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Co-Defendant, Robert Richardson joins in this Brief by Smithfied City and elects not to file additional authority as the issues presented are amply covered herein.

BARRETT & BRADY

By: ______________________
W. Scott Barrett
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Robert Richardson

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing BRIEF OF RESPONDENT, SMITHFIELD CITY, to the following:

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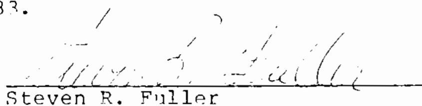

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