1983

Craig M. Chambers and Linda C. Chambers v. Smithfield City And Robert Richardson : Reply Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

CRAIG M. CHAMBERS and LINDA C. CHAMBERS, Plaintiffs/Appellants,	)	
vs.	)	Supreme Court No. 19252
SMITHFIELD CITY and ROBERT RICHARDSON, Defendants/Respondents.	)	

REPLY BRIEF OF APPELLANT

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Appeal from the Judgment of the First District Court of Cache County

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STATEMENT OF FACTS

Appellants agree with the amplification of the Statement of Facts contained in Respondents' Brief (hereafter "Resp. Br.").

ARGUMENT

POINT I. THE CITY HAD NO AUTHORITY TO GRANT THE VARIANCE.

In the Brief of Appellants (hereafter "App. Br."), Appellants demonstrated that the City lacked authority to grant the variance in question on the basis of at least three independent grounds: a) the variance violated the spirit of the

zoning ordinance; b) the property lacks any special circumstances; and c) Richardson suffers from no unnecessary hardships and difficulties.

Respondents failed to even address the first and most important ground for reversal. Point IA of Appellants' Brief explained in detail why a reduction in lot size such as the one Richardson obtained from Smithfield violates the spirit of the Smithfield City Ordinance. That proposition was supported by ample statutory authority and interpretive case law from Utah and other jurisdictions. Respondents did not (nor could they) deny that the basic harmony with the spirit of the zoning ordinance is an essential aspect of any variance. Respondents did not deny that this variance in fact violated the spirit of the Smithfield City Zoning Ordinance. Their failure to deal with the issues raised in Point IA of Appellants' Brief should be taken as a concession that the argument and supporting authority contained therein are accurate.

Appellants' second major substantive point was that the Richardson property had no legally cognizable special circumstances attached to it (App. Br. 11). Respondents again failed to even address this point in their brief, and that failure should be taken as an admission that the variance fails to meet the requirements of Section 10-9-12(3)(b), Utah Code Annotated.

The great bulk of Respondents' Brief on the substantive

variance issues addresses "practical difficulties" vs. "unnecessary hardships" tests, the self-imposed hardship doctrine and standards of review. All of these arguments miss the basic point of Appellants' Brief, which is the failure of this variance to comply with Utah Statutory standards, the most vital and basic of which is observance of the spirit of zoning ordinances.

The "practical difficulties" and/or "unnecessary hardship" portion of the statutory test for variance was addressed by Respondents, but their arguments are misplaced in light of Utah Code Section 10-9-12(3)(a), and in any case, they have failed to show any legally significant "hardship" or "difficulty" suffered by Richardson.

Respondents devote great attention in their brief to distinguishing between the "practical difficulties" standard and the "unnecessary hardship" test, and they urge upon the Court the adoption of the less stringent "practical difficulties" test, especially in cases such as the present one where they claim an "area" variance is used. Their argument fails because the Utah Statute establishes the test to be employed as "difficulties and hardships." Section 10-9-12(3)(a), Utah Code Annotated (emphasis added). Respondents admit that the "practical difficulties" standard they urge is to be found "in many state statutes" (Resp. Br. 10). This Court should adhere to and apply the clear language of the applicable Utah Statute and reject Respondents' attempt to have the Court adopt a foreign statutory standard.

Another reason Respondents' proposed test should be rejected is that the more demanding "unnecessary hardship" test would never be applied. They argue that "it is only logical to assume a less stringent standard for an area variance." They cite to a Delaware case construing a statute which makes an express distinction between use and area variances (Resp. Br. 12). However, under Walton v. Tracy Loan & Trust Co., 97 U.249, 92 P.2d 724 (1939), use variances were determined to be violative of the spirit of the zoning ordinances. If use variances are per se invalid in Utah, then the other standards to be applied to variances, whether "practical difficulties" or "unnecessary hardships", could only be applied to area variances.

Having urged the Court to adopt a "practical difficulties" standard, Respondents then failed to show where Richardson suffered any "practical difficulties." As Respondents themselves point out "whether or not the Utah Courts accept [Respondents' proposition regarding standards] is not necessary for disposition of this case. . ." (Resp. Br. 12). Appellants have not yet been told what Mr. Richardson's "practical difficulties" or "unnecessary hardships" were.

Respondents argue that the "self-created hardship" doctrine does not apply since Richardson himself did not "create" the hardship. Although it is true that Richardson purchased the lot in a substandard condition, the record makes it clear that the preceding owner divided the one acre lot, and that Richardson

purchased it fully aware that it was restricted (See App. Br., Statement of Facts). Although Richardson purchased the larger sublot of the original acre, the remaining one-third acre had a home already constructed on it (See App. Br. Statement of Facts #3). The effect of the variance, therefore, was not only to allow a home to be built on a two-third acre lot (Richardson's) but also to allow a home on a one-third acre lot (the prior home). As is well pointed out in Respondents' Brief, the strict application of the self-created hardship doctrine could work an injustice in many cases. The better rule is to apply the self-created hardship doctrine on a case by case basis and consider a purchase with knowledge of restrictions as a "highly significant fact which . . . weighs heavily against the owner seeking a variance." Levy v. Board of Adjustment of Arapahoe County, Colo., 369 P.2d 991 (1962). Mr. Richardson should not be allowed to blind himself to valid zoning regulations and ignore the consequences of buying and obviously restricted lot.

POINT II. THE SMITHFIELD CITY VARIANCE PROCEDURE IS ILLEGAL.

Appellants' principal procedural contention is that the system employed in Smithfield City incorrectly endows the City Council with the ultimate decision making power with regard to variance requests (App. Br. 16-19). Respondents claim that the Smithfield City system merely provides "extra" procedural

protections for Appellants and others similarly situated.

Again, by contending that the City Council has variance powers, Respondents ignore Utah Statutes. Section 10-9-12, Utah Code Annotated states that "the board of adjustment shall have the following powers:", including power to "authorize upon appeal. . .variance. . ." If, as Respondents claim, the City Council can assume the position of the board and grant variances, a board of adjustments could be rendered useless. The legislature intended that the board have a function in zoning administration and review and so required that all cities wishing to exercise zoning powers create a board of adjustments. Section 10-9-6, Utah Code Annotated.

As anticipated, Respondents continue to rely on Thurston v. Cache County, 626 P.2d 440 (Utah, 1981) as their sole authority supporting their proposition that the Smithfield City variance procedures are legally acceptable. They claim that because the Thurston case involved "procedural" questions, the principles of law expounded therein are "directly on point" (See Resp. Br. 5). However, the enabling statute was different in that case (county as opposed to city), and the entire procedure was different (conditional use permit as opposed to variance). Thurston simply did not reach the question of a variance.

The distinction between the Thurston case and the present one is most clear when the respective statutes involved are compared. In the Thurston case, the county commission had

discretionary power to delegate "special exceptions" jurisdiction to the board of adjustments. Thurston, 626 P.2d at 445, 446. The statute referred to in Thurston was Section 17-27-15, Utah Code Annotated, which reads in pertinent part as follows"

> "The board of county commissioners shall provide and specify. . .general rules to govern the . . .jurisdiction of said board of adjustment."

(empnasis added). There is not such provision in Title 10, Chapter 9 dealing with city board of adjustments.

> "Any zoning resolution of the board of county commissioners may provide that the board of adjustment may. . .make special exceptions to the terms of the zoning regulations. . ."

Section 17-27-15, Utah Code Annotated (emphasis added). Again, there is no such provision with regard to City boards of adjustment. The statutes in question in this case, as opposed to those involved in the Thurston case, leave the City Commission with no discretion over the board's clearly defined variance powers.

> "[T]he legislative body shall provide for the appointment of a board of adjustment."

Section 10-9-6, Utah Code Annotated (emphasis added).

Section 10-9-8, Utah Code Annotated.

> "The board of adjustment shall have the following powers:. . .(3) To authorize upon appeal. . .variance from the terms of the ordinance."

Section 10-9-12, Utah Code Annotated (emphasis added). Nowhere in the City enabling act can there be found any implication that the Commission has power to retain jurisdiction over variances. The ultimate variance decision-making power rests with the board of adjustment, and that proposition is as "clear" from the statutory language," as was the proposition in Thurston "that the County Commission need not interest the Board of Adjustments within the power to issue special exceptions. . ." Thurston, 626 P.2d at 446.

POINT III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS.

In Points IIA and IIB of Respondents' Brief, Respondents attempt to delineate what they feel are the standards of review to be employed by this Court in reviewing the Board of Adjustment's and District Court's decisions. The inconsistencies in Respondents' arguments point to the difficulty counsel for both parties have had in arriving at an appropriate standard of review given the overlay of a summary judgment on top of a review of a quasi-judicial administrative body.

Respondents complain on the one hand that "the facts are not in dispute," and that it is Appellants' burden "to bring forth such evidence to the Trial Court" (Resp. Br. 14). On the other hand, they urge upon the Court the Oklahoma method for reviewing such cases, which specifies that "appeals from the decisions of the board of adjustment are to the District Court, and the cause is tried de novo" (Resp. Br. 16).

The proper standard of review can be determined only by examining the alternatives. First, if the District Court is to review the board's decision on a de novo basis as per Whitcomb v. City of Woodward, 616 P.2d 455 (Okl. App., 1980), then the District Court would hear the evidence for and against the variance and determine therefrom whether the board of adjustments was within its discretion in granting or denying the variance. The de novo approach obviates the necessity of the board maintaining a detailed record of the evidence because such a record is developed at the trial court level. The "presumption of regularity" which the board of adjustment's decisions enjoy would be maintained since the District Court would affirm if some substantial evidence supported the board's decision. This Court could then review the record in the District Court and determine whether the District Court's conclusions are appropriate in light of the evidence adduced.

An alternative method of review is to have the District Court review the board's decision without taking any evidence.

Using this methodology, the District Court would determine whether the board was within its discretion merely by reviewing the proceedings before the board. In this case, the Supreme Court would look to the evidence adduced at the board of adjustments level to determine if the decision is supported.

No matter which review methodology is employed, three conditions must be met. First, there must be a record of evidence adduced upon which the reviewing Court can determine if the board abused its discretion. Second, the applicant (Richardson) must bear the burden of producing evidence to support the granting of the variance. Third, the reviewing court must indulge the board with a presumption of correctness in its decision. If any one of these conditions are not met, this Court has nothing to review or no standard by which to review it.

Respondents claim that "there is no direct challenge that this case was not a proper one for summary judgment." (Resp. Br. 14). The case is ripe for summary judgment but in favor of Appellants. This is so because not only are there no contested facts, but there are absolutely no facts, contested or otherwise, on the record which support the variance, the board's decision or the trial court's summary judgment. Respondents infer that it is Appellants' burden to produce evidence for the trial court or the board. Where Respondents have failed to produce evidence supporting the variance, the only burden carried by Appellants is to point out this absence of evidence.

In Topanga Ass'n for a Scenic Community v. County of Los Angeles, 522 P.2d 12 (Cal., 1974), the California Supreme Court concluded:

> "that variance boards. . .must render findings to support their ultimate rulings. We also conclude that when called upon to scrutinize a grant of a variance, a reviewing court must determine whether substantial evidence supports the findings of the administrative board, and whether the findings support the board's action."

Topanga, 522 P.2d at 14, 15. The reasoning of the Court was that the findings and evidence must be on the record.

> "both to enable the parties to determine whether and on what basis they should seek review, and, in the event of review, to apprise a reviewing Court of the basis for the board's action."

Topanga, 522 P.2d at 16. The reviewing Court should still "resolve doubts" in favor of the administrative findings and decision, but in doing so "must scrutinize the record." Topanga 522 P.2d at 16.

In the present case, there is no record to scrutinize, there is merely a "findings" sheet which is a checklist of statutory standards to which the board (or commission) must pay lip service. What little factual data which are gleaned from the minutes do not support the determination of the board.

The trial Court erred in granting summary judgment. If it reviewed the board's decision on the basis of the evidence adduced before the board, it erred because there was no evidence

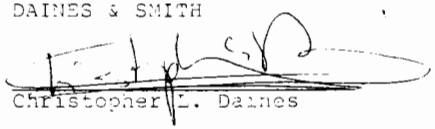
to support the board's findings. If it wished to independently determine whether there was any evidence to support the board's decision, it erred because there was no evidence to support the board's findings at the trial court level. No matter where the evidence was to be taken, it was Richardson's responsibility to produce the evidence and not Appellants' as is implied in Respondents' Brief.

CONCLUSION

Smithfield City granted a variance to Richardson. The variance violated the spirit of the ordinance. The property had no special circumstances. Richardson did not suffer from any difficulties or hardships absent the variance. By operation of Section 10-9-12, Utah Code Annotated, the City was powerless to grant the variance. Furthermore, the City Commission should not have granted the variance. The trial Court erred in upholding the variance. Summary judgment was granted where the record was almost entirely void of facts. Appellants clearly contested what few facts were adduced in the variance hearings. This Court should accordingly reverse the summary judgment.

RESPECTFULLY SUBMITTED this 2nd day of December, 1983.

DAINES & SMITH



Christopher L. Daines

CERTIFICATE OF MAILING

I hereby certify that mailed two (2) copies of the foregoing document, postage prepaid, this 2nd day of December, 1983 to Steven R. Fuller and B.H. Harris, HARRIS PRESTON GUTKE & CHAMBERS, 31 Federal Avenue, Logan, Utah 84321 and W. Scott Barrett, BARRETT & BRADY, 300 South Main, Logan, Utah 84321.