1983

Diane M. Jorgensen and Craig M. Jorgensen v. Salt Lake City Corporation, A Body Corporate And Politic Under The Laws of The State of Utah, and the Board of Adjustment of Salt Lake City : Reply Brief

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Plaintiffs consider a Reply Brief necessary and appropriate in this particular case. The format of this Reply Brief in Sections A-E below will be such as to specifically address the arguments referenced in Respondents' Brief.

ARGUMENT

A. Response to defendants' Point IA, D and E: The lower court failed to properly interpret § 10-9-15, Utah Code Ann. (1953) and applied an erroneous standard of review.

Point IA, D and E of Defendants' Brief asserts that § 10-9-15, Utah Code Ann. (1953) requires the district court to apply an appellate standard of review and presume the validity of the Board of Adjustment's decision. Defendants' entire argument is made without any reference to the actual wording of § 10-9-15, Utah Code Ann. (1953). The argument relies entirely upon a zoning treatise and cases wherein there was either no statute providing specifically for a cause of action or review for a person aggrieved by a zoning decision or the statute in question limited the scope of review in the courts.

Defendants' argument, then, seeks to substitute general zoning concepts in contravention of the express intent of the legislature reflected in § 10-9-15, Utah Code Ann. (1953), that aggrieved persons have a "plenary action for relief." Defendants in essence are asking this Court to

legislatively eradicate the words "plenary action" from the statute.

Defendants' reliance upon the zoning authority and cases they cite are misplaced and the authorities themselves are used out of context. For example, defendants rely upon certain language taken out of context from McQuillin's work on municipal corporations. (Res. Br. p. 10). Defendants, however, fail to reference the very first sentence of the section quoted:

> The scope of judicial review of the decisions of zoning boards is, of course, dependent upon governing statutes, and usually it is broader than a determination of the board's jurisdiction. 8A McQuillin, Municipal Corporations § 25.334 at p. 472 (1976). (Emphasis added.)

McQuillin goes on to state in the same section and just before the language quoted by defendants:

> But the extent of review and inquiry in particular cases depends, of course, upon issues of fact and applicable law properly before the court. Id.

McQuillin, then, is really authority for the proposition that the scope of review is dependent upon the language of the applicable statute. It is not authority for

the proposition that judicial review under § 10-9-15, Utah Code Ann. (1953) or any similar statute is limited to an appellate standard. McQuillin, however, is authority for the principle that the language of the governing statute determines the scope of review.

Defendants also place great reliance on four Utah cases: Cottonwood Heights Citizen Assoc. v. Bd. (Utah 1979); Gayland v. Salt Lake County, 11 U.2d 307,358 P.2d 633 (1961); Naylor v. Salt Lake City Corp., 17 U.2d 300, 410 P.2d 764 (1966); Crestview-Holladay Home Owners Assoc., Inc. v. Engh Floral Corp., 545 P.2d 1150 (Utah 1976) (Res. Brief, pp. 10-11.) These cases, however, are inapposite. Three of these cases, Cottonwood Heights, Gayland, and Crestview-Holladay involve county zoning matters for which there is no statutory provision granting an aggrieved person an appeal, cause of action or right of review. Jurisdiction in each of these cases was presumably based on Article VIII, §§ 7 and 9 of the Utah Constitution[1] or Rule 65B(b), Utah R. Civ. P., which operates

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[1] In Baker v. Dept. of Registration, 3 P.2d 1082, 1087-89 (Utah 1931), this Court held that the district courts and Supreme Court have appellate jurisdiction over the Department of Registration, an administrative body, pursuant to the above-referenced constitutional provisions.

in lieu of the old common law writs. Gayland involved a claim under the Declaratory Judgment Act seeking to invalidate an ordinance.

Not one of these cases involved § 10-9-15, Utah Code Ann. (1953) or any other statutory provision governing the rights of a person aggrieved by a decision of a zoning board. Consequently, their analysis of the scope of review and effect of a Board decision is not pertinent to this Court's determination of the meaning of § 10-9-15, Utah Code. Ann. (1953).

The cases from other jurisdictions relied upon by defendants (Res. Br. pp. 22-24, 28) are equally inapposite. Williams v. Zoning Adjustment Board of the City of Laramie, 383 P.2d 730 (Wyo. 1963) involved a statute using the words "reviewed" and "appeal". Obviously, an appellate scope of review was appropriate in that context. The remaining cases from other jurisdictions relied upon by defendants did not involve statutory actions challenging zoning decisions. Levy v. Board of Adjustment of Arapahoe County, 141 Colo. 493, 369 P.2d 991 (1962) expressly involved a "certiorari-type action". Id. at 992. In Richard v. Fundenberger, 1 Kan. App. 222, 563 P.2d 1069 (1977) no reference at all was made to any statute

and presumably the claim was pursuant to a special writ, as were the Utah cases relied upon by defendants.

Defendants' attempt to rely on what they assert is a "universally accepted principle" (Res. Br. p. 10) that the scope of review of zoning decisions is extremely limited fails to come to grips with the essential issue in this case: Did the district court erroneously limit its scope of consideration of plaintiffs' "plenary action" under § 10-9-15, Utah Code Ann. (1953)? Defendants' entire brief is dedicated to convincing this Court to legislate and effectively delete the words "plenary action" from the statute.

It is to no avail that defendants point out what they consider an anomaly, i.e., plaintiffs' position would result in a different standard for judicial review of decisions from city and county zoning boards. The anomaly, if any, is merely the result of the legislature's failure to provide a statutory mechanism for review of county zoning board decisions. This circumstance, however, cannot deter this Court from giving the term "plenary action" in § 10-9-15, Utah Code Ann. (1953) its plain meaning.

Defendants' assertion that controversies before the Board of Adjustment are complex and inappropriate for consideration by the courts is not correct. The controversy

presented in this case indicates just the opposite. The case is not complex and merely involves the application of a city ordinance to the facts. This is exactly the type of circumstance courts deal with daily which might well make them better equipped to fairly resolve such disputes. Moreover, there is no issue involving separation of powers. The action of the Board of Adjustment is clearly adjudicatory, not legislative. Dillon Cos., Inc. v. Boulder, 183 Colo. 117, 515 P.2d 627 630 (1973). Consequently, there can be no legitimate assertion that a separation of powers issue looms. The logical extension of such an assertion is that any judicial review of administrative decisions breach the separation of powers principle.

B. Response to defendants' Point IB: The district court's ruling denied plaintiffs their right to a plenary action.

Defendants apparently concede that the most pertinent authority is Denver & R.G.W.R. Co. v. Public Service Commission, 98 U. 431, 100 P.2d 552 (1940). The statute in that case referenced an "action" for "plenary review" which "shall proceed as a trial de novo" and is as close to the statutory wording in issue, "plenary action", as will be found anywhere. This Court ruled that the words "trial de novo" added nothing and that an action under the applicable statute

required a full review of all facts and law upon the record made in the agency.

Defendants concede that this is the proper interpretation of the Denver Rio Grande case. (Res. Br. pp. 14-15). A close reading of the case illustrates that this Court did not consider an action under the statute to be limited in scope so as to require the application of appellate standards. This Court instead placed emphasis on the review of all facts.

Instead of acknowledging the pertinence of the Denver Rio Grande case to the instant case, defendants launch into an analysis of another case, Denver & R.G.W.R. Co. v. Central Weber Sewer Improvement District, 4 U.2d 105, 287 P.2d 884 (1955), whose only pertinence is that the Denver and Rio Grande happened to be a party in that case too. The Central Weber case did not, as the instant case and the Denver & Rio Grande case, involve a statute granting an action to an aggrieved party. It was a proceeding under a writ. As the decision in Peatross v. Board of Commissioners of Salt Lake County, 555 P.2d 281 (Utah 1976), also discussed by defendants, indicates, extraordinary writ proceedings are in the nature of an appeal and accordingly limited in scope.

The proceedings under § 10-9-15, Utah Code Ann. (1953), and the statute construed in the Denver & Rio Grande case are "actions" and thus constitute utilizations of the district courts' original jurisdiction, not their appellate jurisdiction. Consequently, they are not as limited in scope as extraordinary writ proceedings.

C. Response to defendants' Point IC: The district court erroneously considered the record of a proceeding conducted over a year before the proceeding in issue.

Defendants' suggest there is irony in plaintiffs' seeking to preclude consideration of the record before the Board in the 1980 proceeding in this plenary action. What plaintiffs sought, however, was to limit defendants to the record of their creation and prohibit the use of the record in a proceeding conducted over 16 months before the subject Board proceeding which addressed issues under a completely different ordinance.

The record in the October, 1980 proceeding was on the issue of home occupation. Consequently, counsel was not concerned about the neighbor's complaints or even his statements as they were not relevant to the issue of home occupation. Consequently, there was not even an effort to cross-examine and little concern for contrary evidence.

Over 16 months later in March, 1982, however, the issues had changed. Home occupation was irrelevant. What was relevant was the new ordinance and such matters as the character of the neighborhood and nuisance. Plaintiffs would have to counter adverse evidence, if any, of conditions in March, 1982, not conditions in October, 1980.

There was, however, no such evidence and defendants knew they would have to use the October, 1980 record regardless of the pertinent time period being March, 1982. This 1980 record was not used for and not necessary for background as contended by defendants. All that was necessary was evidence of neighborhood conditions in March, 1982. A neighbor's complaint concerning alleged conditions in October, 1980 was irrelevant and should not have been considered by the district court.

Not only was the October, 1980 record irrelevant, it was not subject to cross-examination. Since the October, 1980 hearing addressed only the issue of whether plaintiffs' child tending was a home occupation, counsel made no attempt to cross-examine or rebut the neighbor's complaints. Such matters were just irrelevant in October, 1980. Such matters were, however, relevant in March, 1982. It was therefore necessary for defendants to put on new evidence of conditions which could

be cross-examined or rebutted. This defendants did not do but instead waited until this matter was before the district court and offered the October, 1980 record as an exhibit. Such a use of a record truly demeans any fair concept of procedural due process. Administrative participants are entitled to cross-examine and submit rebuttal evidence. Goldberg v. Kelly, 397 U.S. 254, 269-70 (1970); Doe v. United States Civil Service Comm'n, 483 F.Supp. 539, 597 (S.D.N.Y. 1980).

Defendants suggest that the record in the October, 1980 proceeding is within the hearsay exceptions recited in Rule 63(16) and (17), Utah Rules of Evidence. These exceptions, however, must be considered in the context of the proceeding in question. The proceedings were taped and a report of the content was made. This report purports to reflect what was said and by whom. The report concludes with the only determination made by the Board, i.e., "that the tending of children is not a home occupation." There were no other determinations by the board and all further references in the meeting report are evidence, not facts. Rule 63(16) limits its applicability to facts and is therefore inapplicable.

Rule 63(17) is not applicable to records such as the one in issue which is a substitute for a transcript of evidence. The rule was intended to admit official records

illustrating official actions or findings. It could not have been intended to allow the use in court of transcript substitutes which are otherwise not admissible under Rule 63(3), which is applicable to depositions and prior testimony. Otherwise, the Utah Rules of Evidence would make a mockery of the concepts of right, opportunity and motivation for cross-examination as stated in Rule 63(3).

Try as they may, defendants have failed to justify the use of the record in the October, 1980 proceeding. The issues in the October, 1980 proceeding were different than those in the March, 1982 proceeding which was the only proceeding before the district court. Whatever background that was necessary, if any, was recited in the later, March, 1982, proceeding. (Pl. Ex. 1.) Plaintiffs did not have any reason to cross-examine or rebut the October, 1980 evidence in the context of the different issues which were eventually presented in the March, 1982 proceeding. Moreover, there was no evidence that the alleged conditions in the period August to October, 1980 persisted in March, 1982. The use of the October, 1980 proceedings as evidence before the district court of the matters addressed in the March, 1982 proceeding violate any concept of fundamental fairness, regardless of the scope of the district court's consideration.

D. Response to defendants' Point II: Irregularities in the proceedings before the Board, individually and in the aggregate, warrant reversal.

Defendants suggest that plaintiffs have waived standing to oppose the decision of the district court for the reason that plaintiffs objected to the court's adoption of the slanted findings proposed by defendants themselves. (Res. Br. pp. 29-30.) After the parties were informed of the ruling of the district court, defendants submitted proposed findings which were slanted, weighted entirely in defendants' favor and included matters which could not have even been decided if the court were truly to apply an appellate standard. (R. 121-130.) Plaintiff opposed entry of the findings on the grounds that Rule 52(a), Utah R. Civ. P., limited the use of findings and conclusions to "actions tried upon the facts without a jury." (R. 112-113.)

Plaintiffs asserted then and submit now that defendants' attempt to have the court adopt its slanted findings was inconsistent with its position, adopted by the district court, that this matter was an appellate proceeding. Defendants were just overreaching and the district court would not allow findings when, in accordance with defendants' own theory, there was not an "action tried upon the facts without a jury" as contemplated by Rule 52(a), Utah R. Civ. P.

Consequently, the court did not need to pass point by point defendants' proposed findings.

There is no reason to repeat the arguments concerning the insufficiency of the evidence and irregularities at the March and April, 1982 proceedings. (App. Br. pp. 27-31.) Nevertheless, some minor reference is necessary to the numbered items raised in defendants' brief. (Res. Br. pp. 30-38.)

1. Defendants seek to dismiss the Board's publication referencing plaintiffs' proposal as a "preschool center", rather than accurately calling it a "home day care service" on the grounds that it was a clerical error. Regardless of the type of error, a reading of the letters of two neighbors, who were not at the meeting to hear defendants' retraction, indicates that they were thinking of a substantial enterprise, a "preschool center". (Thomson and Stocking letters contained in P. Ex. 1.) The Board actually referred to these letters as being adverse to plaintiffs' application (Pl. Ex. 1 and Ex. 2 to Memorandum in Support of Motion for Preliminary Injunction, R. 54-55). The resulting prejudice is verified by the Board's express view that applications such as the plaintiffs' must be denied if there is opposition. (Findings and Order, pp. 1-2, 3, 4, contained in Pl. Ex. 1; and Ex. 2 to Memorandum in Support of Motion for Preliminary

injunction, R. 53-54, 55, 56.) The Board, then, by mischaracterizing the application, aided in creating the very opposition upon which it based its denial of plaintiffs' application.

2. Defendants assert that there was no reason for the Board to inspect the property and activities in question beyond a "windshield viewing." The defendants are thereby saying that they need not view the very activities in question, the activities which they characterize as a nuisance with no evidentiary support.

3. Defendants' arguments concerning the Board's finding that the neighborhood is composed of many elderly people is particularly telling. Defendants refer to "the appearance of the ten individuals that had appeared before the Board in the various hearings." (Res. Br. p. 31.) In order to come up with the number ten, the defendants had to utilize some fancy mathematics which is not supported by the record. Not even the record of the October, 1980 proceeding combined with the proceeding in issue illustrates the age of the people objecting, their number or any other fact which establishes that a total of ten elderly individuals had appeared in two hearings over a 16 month period. Even if the record would so indicate, a counting of the number and age of those objecting

cannot support a finding by the Board that the neighborhood is composed of many elderly people. All it could establish is that those objecting were elderly.

Defendants' other argument concerning the character of the neighborhood is that plaintiffs' offered no evidence that the neighborhood is not predominantly elderly. There is a good reason why such evidence was not offered: plaintiffs had no idea this was even an issue. The only reference to age or elderly nature of the neighborhood in the entire record is contained in the order section of the Board's Findings and Conclusions (Pl. Ex. 1) and in the record referring to the motion to deny the application (R. 64). These two references are stated as grounds supporting the motion and order to deny plaintiffs' application. Certainly this Court cannot hold plaintiffs to a standard which penalizes them for failure to disprove the elderly nature of the neighborhood when it was not until a motion to deny the application was made that the first reference to age and the composition of the neighborhood was made. The proceedings were over seconds later when the motion passed.

4. Defendants' attempt to respond to plaintiffs' argument that the Board merely denied the application because there was some opposition is best characterized by their own statement:

> The alleged tainting impact of one isolated statement in a lengthy proceeding spanning two meetings was properly ruled by the lower court not to be determinative and not proved correct by appellant Jorgensen. (Res. Br. p. 33.)

The Court should accept defendants' challenge, read the record of the proceedings and see that four references are made to the fact of opposition and absence of support as being determinative. A reading of the entire record will indicate that this case was determined by the fact of some opposition and the concept that the Board allowed a few but loud opponents to dictate the outcome.

5. Defendants make reference to some items that they contend provide record evidence supporting its finding of nuisance. (Res. Br. p. 33.) It should be noted that no reference is made to the record. For most of the items listed there is no supporting evidence in the record. For those items where there is support, it should be noted that reference must be made to the earlier proceeding of October, 1982 where the issue was home occupation. Other items referenced by defendants, such as the existence of a winding street, are not truly relevant to a nuisance claim.

6. Defendants appropriately indicate that under the Ordinance two independent concepts must exist before an

application should be granted: the absence of evidence indicating (a) change in character of the neighborhood and (b) nuisance. (Res. Br. p. 34.) Defendants then argue that age is appropriate in considering the character of the neighborhood but that age should not be considered in analyzing nuisance under the standard of the hypothetical reasonable person.

The inconsistency of defendants' position suggests that the character of the neighborhood under the ordinance is not determined by the type of people living there (age, race, sex, etc.). Instead the character of the neighborhood should be analyzed in the context of the type of activity for which application is made. Thus, it would be important to consider that plaintiffs' application was for home day care of five children in addition to her own preschooler. It was not an application for a preschool center as the Board stated in its published notice. It would also be important to consider such things as the location of a church and large parking lot abutting plaintiffs' property to the south.[2] The Board, however, did not consider such things in determining whether there would be a change in the character of the neighborhood.

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[2] This is established by the survey of plaintiffs' property which is a part of the record.

E. Conclusion.

Defendants have failed to adequately address the specific and more significant irregularities that occurred along the path of this matter. Plaintiffs in this Reply Brief have attempted to respond to only those points of some singular significance. Nevertheless, it is important that this case be considered by the Court as a whole. Each of the irregularities must be viewed as an integral part of the entire case. In this way, it will be seen that fundamental fairness, both procedural and substantive, was lacking. In this context it is most appropriate to give the statutory term "plenary action" its plain meaning. If given the opportunity to truly pursue their express statutory right of a plenary action, unimpeded by a standard of limited appellate review, plaintiffs will only be afforded that which the legislature intended. The result, however, will be a decision on the merits, not a decision tainted by the irregularities before the Board.

Respectfully submitted
this 13th day of January, 1984

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CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Reply Brief of Appellants/Plaintiffs this 13th day of January, 1984 to:

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