

2003

West Valley City v. Teresa Foy : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,)	
)	
Plaintiff-Appellee)	
)	
vs)	Docket No. 2003-0503
)	
TERESA FOY,	)	Priority 15
)	
Defendant-Appellant	)	ORAL ARGUMENT REQUESTED

APPELLANT'S BRIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY

The Honorable Pat B Brian, District Judge

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FILED
Utah Court of Appeals

NOV 25 2003

Paulette Stagg
Clerk of the Court

IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,)	
	)	APPELLANT'S BRIEF
Plaintiff-Appellee)	
)	
vs)	
)	
TERESA FOY,	)	Case No. 2003-0503
)	
Defendant-Appellant	)	ORAL ARGUMENT REQUESTED

DESIGNATION OF THE PARTIES

The Plaintiff-Appellee WEST VALLEY CITY is a Utah municipal corporation. The Defendant-Appellant TERESA FOY is a natural person.

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STATEMENT OF JURISDICTION OF THIS COURT

Jurisdiction of this Court is granted pursuant to the provision of Section 78-2a-3(2)(j), Utah Code, and pursuant to the "pour over" Order of the Utah Supreme Court entered in this case.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This appeal and the predicate factual and legal situation in which is arose present the following issues:

1. Whether the District Court erred in granting summary judgment when (1) there were genuine issues of material fact before the Court which should have precluded such summary judgment and (2) the Plaintiff WEST VALLEY CITY ["the CITY"] did not show it was, as a matter of law, entitled to judgment.
2. Whether the CITY, admitting that it received the "request for hearing" document in a timely manner, can ignore and disregard the mandatory provisions and requirements of its own ordinances and procedures, by failing to provide the requested "hearing".
3. Whether the District Court properly ruled in favor of the City and against Defendant FOY when there were genuine issues of fact in

dispute as to whether the observed violations were actually upon her parcel.

4. Whether the District Court, by ruling within the factually-disputed issue concerning the "request for hearing" and the Defendant's claimed (by the Court, but not necessarily by the CITY) "failure to exhaust her administrative remedies" that she had not requested a hearing, violated the provisions of Section 63-46-19(3), Utah Code, concerning the "defenses" allowed to Defendant FOY.

5. Whether the District Court erred in denying the Defendant an opportunity for trial on the basis that she had "failed to exhaust her administrative remedies" when she had, in fact and in law, fully complied with the municipal ordinances applicable to the "request for hearing", that she had acted through her agent in timely requesting the "hearing", had clothed that agent with "apparent authority" to act in her behalf, and it was the City, in disregard of its own ordinances, which failed to hold the previously-scheduled "hearing", ostensibly out of fear of improperly disregarding her

"rights" (so the City assessed the full amounts of "fines" against her).

6. Whether or not the District Court erred in granting summary judgment when the CITY failed to abide by the clearly applicable provisions of Section 10-11-1, Utah Code [pertaining to the duties of local enforcement officers in cases of debris and clutter], including but not limited to the fact that the City incurred "no clean-up expense" because the CITY did not clean-up the parcel, as the statute requires.

7. Whether the municipality is bound by the limitations and restrictions clearly imposed by the provisions of state statute [Section 10-11-1 et seq, Utah Code] and must abide by such provisions, or whether generalized vague and ambiguous "enabling legislation" authorizing enforcement actions against "nuisances" (not necessarily so characterized in the municipal ordinances) may trump the more detailed and dispositive provisions of state statute.

8. Whether or not the District Court erred in holding the Defendant personally liable for

the debts of a validly-formed and -operating corporation when the Defendant natural person was merely a "director" of said corporation which owned the parcel upon which the majority of the alleged violations occurred.

9. Whether the 1998 "Notice" document recorded by the County was a "wrongful lien" as proscribed by Section 38-11-901 et seq, Utah Code, and whether issues of fact precluded the District Court from granting summary judgment in the municipality's favor on that issue.

For each of the foregoing "legal" issues identified above, the "standard of review" for the appellate court in this case is as follows:

A trial court's conclusions of law in civil cases are reviewed for correctness. **United Park City Mines Company vs Greater Park City Company**, 870 P.2d 880, 885 (Utah Supreme Court 1993); **Society of Separationists, Inc. vs Taggart**, 862 P.2d 1339, 1341 (Utah Supreme Court 1993); **Kasco Services Corporation vs Benson**, 831 P.2d 86, 89 (Utah Supreme Court 1992); **McMahan vs Dees**, 873 P.2d 1172, 1175 (Utah Court of Appeals 1994); **Wade vs Stangl**, 869 P.2d 9, 12 (Utah Court of Appeals 1994); **Allstate Insurance Company vs Liberty Mutual**

Insurance Group, 868 P.2d 111, 112 (Utah Court of Appeals 1994).

Whether the trial court properly interpreted (or applied) a statute is a question of law reviewed for correctness. **Ong International (U.S.A.), Incorporated vs 11th Avenue Corporation**, 850 P.2d 447, 450 (Utah Supreme Court 1993); **Bennion vs Graham Resources, Incorporated**, 849 P.2d 569, 570 (Utah 1993); **Jacobsen Investment Company vs State Tax Commission**, 839 P.2d 789, 790 (Utah Supreme Court 1992).

This standard of review has also been referred to as a "correction of error standard". **Jacobsen Investment Company vs State Tax Commission**, 839 P.2d 789, 790 (Utah Supreme Court 1992); **Sanders vs Ovard**, 838 P.2d 1134, 1135 (Utah Supreme Court 1992); **Commercial Union Associates vs Clayton**, 863 P.2d 29, 36 (Utah Court of Appeals 1993). "Correction of error" means that no particular deference is given to the trial court's ruling on questions of law. **Provo River Water Users' Association vs Morgan**, 857 P.2d 927, 931 (Utah Supreme Court 1993); **Higgins vs Salt Lake County**, 855 P.2d 231, 235 (Utah Supreme Court 1993). The "correction of error" standard means that the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of

law. **Howell vs Howell**, 806 P.2d 1209, 1211 (Utah Court of Appeals 1993).

STATEMENT OF THE CASE

In September 1997 the Plaintiff WEST VALLEY CITY [hereinafter "the CITY"] adopted ordinances to establish and implement a "code enforcement program". Approximately 35 days later---in October 1997---CITY code enforcement officers allegedly observed numerous items of debris, junk, deleterious objects, and other "clutter" upon what those officers believed---albeit INCORRECTLY---to be a single parcel, owned by the Defendant-Appellant TERESA FOY. [In actuality, of the SIX claimed violations, fully FOUR thereof were upon the Lancer, Incorporated parcel. A fifth violation was upon both parcels. And the sixth violation was upon only the FOY parcel.] At times material hereto, Defendant FOY was the sole owner of a 0.15-acre parcel of real estate, located at 3247 West 3650 South, West Valley City and upon which was located a single-family residential dwelling. The dimensions of the "FOY parcel" are approximately 64 feet in the east-west direction and 104 feet in the north-south dimension. Plaintiff's Complaint, ¶3. RECORD at 000002. [Unknown to CITY personnel at the time of the observed violations---but made known to them shortly thereafter-

--was the legal existence and status of a second parcel, the "LANCER, INCORPORATED parcel immediately south of the "FOY parcel".]

As required by City ordinance the code enforcement officers prepared and caused to be mailed to Defendant FOY, then residing in Blanding, Utah, a "notice of violation" directing her to clean up the clutter on her (sic) parcel and notifying her of her "right" to request "a hearing" on the matter. Plaintiff's Complaint, ¶5 Plaintiff's Complaint. RECORD at 000002. In response to the "notice" mailed to her, Defendant FOY contacted her husband Jim Decker---who, with others, were occupying the Foy parcel (and the Lancer, Incorporated parcel) as tenants thereon. Mr Decker and others were in fact responsible for the clutter and zoning violations ostensibly identified by the CITY. Mr Decker caused a letter to be prepared which requested "a hearing", as follows:

October 25, 1997

to: Administrative Hearing Coordinator
City of West Valley
Ordinance Enforcement Office
3600 South Consitutuion Blv.
West Valley, Utah 84119

re: case # 97-5215

from: Renter K Cooper
3247 West 3650 South
West Valley, Utah 84119

Dear Sirs,

Please schedual a hearing as to the above.

Request: 1. That the ordinance officer who issued the citation be present at **the hearing**.

2. That the officer be available for minor questions, discussion.

The landlady, of this particular property, resides in distance South Eastern, Utah. She has made it very clear that she will have no envolement whatsoever. Furtherwell, **she expects this matter to be handle between us here in West Valley City**, directives should be sent to the renter at the above address.

The Landlady's only wish: to be informed "once and only once" of the clearance/resolution of these charges.

Could a complete copy of the citation as well as excerpts of the city code cited as violations be mailed? We will be expecting a letter directly from the City Ordinance, soon.

Thank you.

Emphasis added. Spelling errors in original. RECORD at 000055. A photocopy of the "request for hearing", dated showing receipt by the CITY, is found at ATTACHMENT 1 to this APPELLANT'S BRIEF.] The letter was properly addressed to the specified person, was timely mailed with proper postage affixed to the envelope, and was ACTUALLY RECEIVED by the City, BEFORE the stated deadline.

Although Ms FOY's husband (Mr Decker) stated the CITY originally scheduled a "hearing" as requested, the CITY claims no hearing was scheduled. [The CITY does not dispute that a case file was "opened" against Mr

Decker---albeit against the "corporate parcel"---on December 1st (1997); the hearing on Mr Decker's case was held on December 8th---a mere five days later! See AFFIDAVIT OF JAMES DECKER. RECORD at 000091-000095. The CITY has offered no credible explanation for the apparent discrepancy that the "Jim Decker case" was opened and proceeded to "hearing" in as short a period as seven days, when the municipal ordinance grants to the propertyowner a ten-day period in which to request "a hearing". Furthermore, the CITY has been unable to produce a written "request for hearing" on the "Jim Decker case", nor do the City's records contain such a "written request".]

Although the CITY acknowledged that the original "Request for Hearing" letter referred to the property address correctly, the stated "case number", and that the owner lived in southern Utah and had requested the on-site persons to handle the matter with the City, the City "did nothing" with the "request for hearing". Eventually, a hearing officer---ostensibly as a result of ex parte communications from Code Enforcement personnel---assessed almost \$7,000 in "administrative fines" against the Defendant TERESA FOY for the alleged six violations allegedly observed upon her parcel.

Shortly thereafter the CITY filed with the Salt

Lake County Recorder a "Notice of Violation" describing the alleged violations and the facts and processes which had resulted in the assessment of the administrative "fines" against the FOY parcel.

When the City was unable to collect the "fines" its "hearing officer" had assessed, the CITY instituted the judicial action in the Third District Court, West Valley Department, to obtain a civil judgment to collect those "fines".¹

The Defendant responded to the civil action by pleading numerous factual and legal defenses to the CITY's pleaded claims. Ultimately, the Defendant filed a counterclaim against the CITY for the CITY's filing of a "wrongful lien" against her parcel. [In the course of the litigation, the District Court---holding that the recorded documents were not a "lien"---granted partial summary judgment in favor of the City on the

¹The instant judicial action, filed in the District Court for the so-pleaded singular purpose of obtaining a "judgment" to collect the "administrative fines" imposed by the Administrative Hearing Officer, contravenes the prohibition found in Section 63-46b-19(2)(c), Utah Code, which provides:

(c) Except to the extent expressly authorized by statute, **a complaint seeking civil enforcement of an agency's order may not request, and the court may not grant, any monetary payment apart from taxable costs.**

Emphasis added. Coupled with the proscriptions and limitations imposed upon the CITY by the provisions of Section 10-11-1 et seq, Utah Code, pertaining to the procedures to be followed by the CITY, the foregoing limitation arguably precludes the action altogether.

The "judgment" prepared by the CITY's counsel and entered by the District Court does not award any monetary payment to the CITY, even though such was sought in the initial pleadings.

counterclaim.] RECORD at 000406-000409.

In May 2003 the District Court entered an Order granting the CITY's Motion for Summary Judgment. RECORD at 000714-000716. This appeal ensued.

SUMMARY OF ARGUMENTS

The Defendants' arguments are summarized as follows:

1. Summary Judgment in favor of the Plaintiff was inappropriately granted due to the genuine dispute of material fact: particularly, Defendant FOY did, in fact, request a hearing albeit through her authorized agents.
2. The City should be estopped to assert the facts are not in genuine dispute due to its own intentional failure to meaningfully respond to the Defendant's "pre-trial discovery" efforts.
3. The City's failure to abide by the "mandatory" provisions of its own ordinances (to grant a hearing) precludes successful judicial action in this case.
4. The District Court erred in granting Summary Judgment against Defendant FOY for all of the claimed violation when CITY witnesses had previously testified under oath that only

a portion of the "violations" were located upon the FOY parcel.

5. The District Court erred in holding Defendant FOY personally responsible for the corporate "violations" because she was a director of that corporation.

6. The provisions of the CITY's "code enforcement ordinances" violate the detailed and specific provisions of Section 10-11-1 et seq, Utah Code, pertaining to the duties of cities in cases of "weedy lots", etc.

7. The District Court erred in prematurely dismissing the Defendant's counterclaim on the "wrongful lien" issues.

ARGUMENT

I

SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF WAS INAPPROPRIATE

A

GENUINE ISSUES OF MATERIAL FACT SHOULD HAVE PRECLUDED THE GRANTING OF SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF MUNICIPALITY

The CITY, on numerous occasions, sought "summary judgment" in its favor on the basis that the Defendant FOY had failed to request a "hearing" before the Administrative Hearing Officer. Such statements---that Defendant FOY did "not request a hearing"---are

incorrect, misleading and constitute a "play on words", advanced in self-serving fashion by Plaintiff CITY and its counsel to justify the municipality's FAILURE TO COMPLY WITH ITS OWN ORDINANCES.

The CITY, claiming to have ignored the timely-filed "K Cooper request for hearing"², seeks to justify its actions (ala inaction) by focusing upon the "agency" (or claimed lack thereof) of "Renter K Cooper". That disingenuous analysis and position is materially flawed and the District Court should have neither countenanced nor implicitly accepted that argument.

The correct analysis should focus upon the FACT THAT A HEARING WAS REQUESTED, ON THE PROPERTY IN QUESTION, CONCERNING THE VERY VIOLATIONS AT ISSUE, BY A PERSON WHO WAS ARGUABLY A "RESPONSIBLE PERSON" AND WHO CLAIMED TO HAVE AUTHORITY AND RESPONSIBILITY TO ACT FOR DEFENDANT TERESA FOY!

In **Hebertson vs Bank One, Utah, N.A.** 1999 UT App 342, ¶2, 995 P.2d 7 (quoting **Parker vs Dodgion**, 971 P.2d 496, 496-497 (Utah Supreme Court 1998), the Court of Appeals wrote:

²See AFFIDAVIT OF JAMES DECKER, RECORD at 000091-00095, which claims that the CITY initially scheduled a "hearing" on the "Teresa Foy parcel", but "switched" the hearing to the newly-opened "case" [involving the "Jim Decker (ala Lancer, Inc.) parcel] only SEVEN DAYS AFTER that case was originally opened!

"In reviewing a grant of summary judgment,
[the appellate court] considers the facts in
light most favorable to the nonmoving party.
..."

1999 UT App 342 at ¶2. Emphasis added.

The so-called "agency issue" (of K Cooper, to act for FOY) might be meritorious and legally significant IF the CITY were attempting to hold Defendant FOY liable for the acts of the "agent" selected by her. Such is NOT the case here! On the contrary: the CITY is trying to OVERLOOK ITS OWN FAILURES in NOT granting a "hearing" on a hypertechnical argument, advanced in "bad faith" and contrary to its own procedures and policies, as embodied within its own ordinances.

The "administrative code enforcement" [A.C.E.] program is governed by the provisions of Title 10 of the CITY's "Municipal Code". Section 10-1-110 of the CITY's "Municipal Code", pertaining to "definitions" applicable to the "code enforcement program", provides as follows:

(19) **"Property Owner"** means the record owner of real property based on the County Assessor's records.

(21) **"Responsible Person"** means a person the City determines is responsible for causing or maintaining a violation of the City Codes or applicable state codes. The term **"Responsible Person"** includes, but is not limited to, a property owner, tenant, person with a legal interest in real property, or person in possession of real property.

Emphasis added. [Arguably, the first sentence contemplates some kind of adjudicative process by which the "City determines [the person to be] responsible for . . . a violation". Thus, Renter K Cooper could---if the City chose to approach it in this fashion---be deemed to be "a responsible person". Thus, his "request for hearing" is facially valid and should have been honored. That the City purports to find persons OTHER THAN PROPERTYOWNERS to be "responsible persons" is confirmed by the "administrative order" entered in "the Jim Decker case" [A.C.E. case # 97-6058, in which Teresa Foy was found---INCORRECTLY, nevertheless---to be the "owner" of the parcel (i.e. "the Lancer parcel") but James Decker was found to be "the responsible person", against whom the administrative order was entered and upon which the City ultimately took a civil judgment---ultimately satisfied---in the Third District Court.³]

Thus, within the "four corners" of the "request for

³The judgment taken by the CITY and later satisfied should constitute a "res judicata" and/or "collateral estoppel" defense, as such involved the very same parcel (the Lancer parcel), the very same claimed violations, and the very same time.

For this new defense which was not available to Defendant TERESA FOY at the time she filed her original "answer", she has concurrently filed a motion for leave to amend to file an amended answer, to incorporate the "collateral estoppel" defense now available to her.

hearing" document [i.e. the "K Cooper letter"], the writer thereof has affirmatively stated his source of authority (i.e. his "agency", as we are now describing it): namely, the landlady wants us (here in Salt Lake County) to handle the problem and deal with West Valley City. In the "request for hearing" he recites information (dates, property address, WVC case file number, the request itself, and so forth) WHICH COULD BE KNOWN ONLY BY A PERSON WITH WHOM DEFENDANT TERESA FOY HAD SHARED SUCH CONFIDENTIAL INFORMATION. The "notice of violation" was MAILED to Defendant FOY in "southeastern Utah", exactly consistent with what Renter K Cooper was saying. A mere 11 days later after the assumed mailing of the "Notice of Violation" to FOY, the October 25th "request for hearing" is mailed and is thereafter received by the CITY. It is "filed" in the very case file [#97-5215] applicable to the "Teresa Foy case".⁴ The foregoing, read "in good faith" (which the CITY now doesn't want to practice) and reasonably would lead to one clear conclusion: that the "agent" (e.g. "Renter K Cooper") has been ostensibly clothed with what the law characterizes is "apparent

⁴The Defendant's attempts [December 1999 and March 2002] to ascertain the FACTUAL TRUTH of the CITY's scheduling of "hearing" in the "Teresa Foy case" have been consistently and effectively resisted and frustrated by the CITY and its counsel!

authority"! In recognition of the "apparent authority" of such person (indeed, a "responsible person"), the CITY simply should have scheduled---which CITY initially did---and thereafter conducted---which the CITY DIDN'T---the requested hearing.

The CITY's Municipal Code [Title 10] pertaining to the issuance and contents of the "notice of violation" expressly provides as follows:

10-2-102. NOTICE OF VIOLATION.

. . . The notice of violation shall include the following information:

. . .
(1) Procedures to request a hearing,
and consequences for failure to
request one.
. . .

There is NO STATED REQUIREMENT---within EITHER the Ordinance or the form "notice" promulgated and issued in ostensible compliance with the Ordinance---which requires any "agency" designation be proved concurrently with the submission of the "request for hearing". There is but a SINGLE SUBSTANTIVE REQUIREMENT concerning the "request for hearing": that it be "in writing". Contrary to the CITY's counsel's frequent assertion, there is within the ordinance NO stated requirement that (1) the "request" be manually signed, or (2) that the "request" be in any specified form, or (3) that any "agency" situation requires a formal

designation and/or additional language or notarization. In similar vein, the "notice of violation" letter from the CITY contained NO EXPRESS REQUIREMENTS as to a specified or expected "form" or "substance" to be contained in the "request for hearing". As per the 1993-recorded quit-claim deed, the CITY and its officials were presumptively and officially "on notice" that Lancer, Incorporated owned the "south parcel", which contained the majority of the observed alleged "violations"! Thus, the CITY cannot ignore the "K Cooper letter", whether written as FOY's agent or not; Cooper, as a tenant, in-possession, etc., must be deemed to be a "Responsible Person" and his "request for hearing" is mandated to be acted upon. In any event, K Cooper can be deemed to be an agent of the Lancer, Incorporated entity!

The October 1997 "Notice of Violation" states, in pertinent part, as follows:

Hearing Rights

You have the right to request a hearing to determine if any violations exist on your property or if you have allowed violations to occur **for which you are responsible**. You **must** file a **written request for hearing** within 10 days from the date the notice of violation was issued. If the notice was mailed, the request for hearing must be made within 13 days of the mailing date. **Address the request to the attention of "Administrative Hearing Coordinator."** Please include your name, address, telephone number, case or citation

number, and violation address. . . .

Emphasis added.

The "Renter K Cooper letter" is addressed to the Administrative Hearing Coordinator. The letter conforms, IN SUBSTANCE, to the mandatory provisions, as directed. The permissive (i.e. "please include") requirements WERE HONORED WITH EXACTNESS, except for the providing of a telephone number. [There is no requirement under the law for a person to have a telephone number. Furthermore, that the CITY has DEMANDED that everything be "in writing" vitiates any "requirement" concerning the need for a telephone number, which might be useful only in the context of scheduling a hearing!] The CITY knows exactly that the "Renter K Cooper" letter refers to this case, because the letter has been filed in the "Teresa Foy case" official file!

The CITY itself characterizes the situation (i.e. the propertyowner's entitlement to a hearing) as being a "right". [See "Notice of Violation" letter. CITY ordinances also utilize the characterization "right".] Indeed, Section 10-2-501 of the CITY's Municipal Code provides:

10-2-501. DECLARATION OF PURPOSE.

The City Council finds that there is a need to
establish uniform procedures for

administrative code enforcement hearings conducted pursuant to the City Code. It is the purpose and intent of the City Council to afford due process of law to any person who is directly affected by an administrative action. Due process of law includes adequate notice, an opportunity to participate in the administrative hearing, and an adequate explanation of the reasons justifying the administrative action. These procedures are also intended to establish a forum to efficiently, expeditiously, and fairly resolve issues raised in any administrative enforcement action.

Emphasis added.

Section 10-2-103 of the West Valley City ordinances provides:

10-2-103. REQUESTING HEARING.

The responsible person has the right to request an administrative hearing. The request must be in writing and must be filed within ten days from the date of service of the notice of violation. Failure to request a hearing as provided shall constitute a waiver of the right to a hearing.

Emphasis added.

It is the most ironic paradox that the corporate entity [LANCER, INCORPORATED] cannot "act through its agent" ["Renter K Cooper" as a "responsible party", if the City chooses]. The City should not be allowed to "pick and choose" which "agent" it is bound to acknowledge. Indeed, following receipt of the "request for hearing", the City through its agents engaged in considerable dialogue with Defendant FOY concerning who actually was her "agent" for purposes of the property

and the scheduled hearing, and inspections of the property. See EXHIBIT 2, attached to this APPELLANT'S BRIEF. RECORD at 000052.

The CITY should not be allowed to say that a hearing was not requested (by FOY). BECAUSE A HEARING WAS REQUESTED! Concerning this type of issue (i.e. municipality's compliance with its own ordinances), the Utah Supreme Court has written:

. . . Stated simply, the City cannot "change the rules halfway through the game." *Brendle vs City of Draper*, 937 P.2d 1044, 1048 (Utah Ct. App. 1997). The City was not entitled to disregard its mandatory ordinances. Because the City did not properly comply with the ordinances governing P.U.D. approval, we conclude that under Utah Code Ann. §10-9-1001(3)(b), the City's decision approving the P.U.D. was illegal.

Springville Citizens vs City of Springville, 979 P.2d 332 at 338, 199 UT 25, ¶30 (Utah Supreme Court 1999). Emphasis added. In this context, the "mandatory" term "shall" describing the duty of the CITY's director to "schedule" (and, implicitly, to hold) a hearing concerning the violations cannot be overlooked. The CITY's failure to conduct the hearing is a fatal defect which absolutely precludes the entry of judgment in the CITY's favor.

The ironic paradox of the CITY's position (i.e. no hearing was granted, because no hearing was requested) is illuminated by the remarks made by the CITY's

attorney during the 13 January 2003 oral argument before the District Court:

Mr LAWRENCE: . . . Ms. Foy did not request a hearing within the meaning of the City Statute which requires that the request for hearing be in writing and be signed by the responsible person.⁵

Ms. Foy now argues that a letter which the City received which we acknowledge receiving and we acknowledge receiving it within the time period but it was from a person named Kay Cooper, supposed a tenant on the property. We don't know who Kay Cooper is. Ms. Foy has made no effort to produce Mr. Cooper. We don't know what his responsibility or relationship to her was. The City is not obligated to take action on the basis of some stranger. In fact, **we feel it is a way of protecting Ms. Foy's rights in the property** that some stranger who we don't know could come up and make any type of decision regarding her property. In the City's opinion the statute is very clear. A request is in writing signed by the responsible person. **If she wanted a hearing she should have requested it.** If she wanted to bring in this Cooper person or her agent, Mr. Decker, she should have done so through the administrative process. She chose not to. She chose not to. **She assumed the risk that the fines would be imposed.**

Transcript of Summary Judgment Hearing, 13 January 2003, page 2, line 8 through page 3, line 3. Emphasis added. RECORD at 000732-000733.

The CITY's position is ludicrous and inconsistent. Under the now-stated justification of "protecting Ms.

⁵On this latter point---that the "request" be signed---the CITY's attorney is in error and is misleading: there is NO REQUIREMENT---in either the ordinance or in the "Notice of Violation" materials sent to the propertyowner---which requires the "request" to be signed!

Foy's rights" (Mr Lawrence's terminology, quoted above), the CITY goes forward and DENIES her the very "hearing" her agent requested! The CITY then imposes, through its Hearing Officer, in an ex parte (or default) fashion, the administrative fines in FULL AMOUNT against her! Some "protection"! [The CITY, were it as legitimately concerned about "protecting" Ms FOY's rights as it claims, could have merely straightened out the "agency" issue, with Ms FOY.]

Later within the 13 January 2003 "summary judgment oral argument hearing" Mr Lawrence (counsel for the CITY) stated:

MR. LAWRENCE: She acknowledged receiving that notice. I believe it was October 28th or 29th which was within the ten day period for her to respond. Within that ten day period the City received a letter signed by someone named K. Cooper, the initial "K". **The City did not accept that as a valid request for a hearing because we don't know who Mr. Cooper is. We had no idea of what his connection to the property was. He claimed he was a tenant. We don't, the letter claims he was a tenant. Because we felt that the property owner, the responsible person has the responsibility of requesting a hearing, we held that was not a valid request for a hearing.**

Transcript of 13 January 2003 Summary Judgment Hearing, page 23, lines 8 through 19. Emphasis added. RECORD at 000753.

The CITY mischaracterized the actual "evidence" before the District Court. The Plaintiff's Summary

Judgment Memorandum intentionally misstated and misrepresents the administrative history of this case.

The Plaintiff's Memorandum stated [numbered items #5 of the so-called "Undisputed Facts" on page 2 thereof] that

". . . Foy had the right to a hearing, and had until October 30, 1997 to request a hearing."

Emphasis added. RECORD at 00560. The following "undisputed fact" [#6] states in its entirety:

6. Although Foy acknowledged receiving the Notice, the City received no written request for a hearing **from her**.

RECORD at 00560-00561. Emphasis added. As "authority" for the foregoing assertion, reference is made to the Deposition of Teresa Foy. Nevertheless, the sophistry and syntax of the wording of "fact #6" is noteworthy. When the Defendant's deposition is examined, the following testimony is "in the record":

Q (by Mr Lawrence): Did you receive a Notice of Violation that there were alleged violations on the property?

A (by Ms Foy): Yes, I did.

Q You received the letter, that was at your address in Blanding?

A In Blanding, Utah, yes.

Q Did **you** contact the West Valley City at the office?

A No, I did not.

Q Did **you** contact them in writing?

A No, I did not contact West Valley. I **contacted my agent, Jim Decker who lived at the property** who was my husband.

Q So you contacted him?

A Yes.

Q And what did you say?

A I said this needs to be taken care of.

Q And to your knowledge did he take care of it?

A I don't know. I was down in Blanding. I have no record or I did not see anything or did not know. I just told him to take care of it.

Q Okay, I have no other questions.

DEPOSITION OF TERESA FOY, page 6. RECORD at 00579.

Emphasis added. Thus, Defendant FOY "authorized" her "agent(s)" to "take care of" the problem: those agents had "authority" to "request a hearing", and did so!

That Ms FOY did not personally request a hearing does not imply that a hearing was not requested---albeit by her agent! What has been conveniently deleted from the CITY's self-serving characterization of the "undisputed facts" [i.e. particularly #6] is that the Plaintiff's agent---Jim Decker---caused a written request for hearing to be sent to West Valley City, by "Tenant K Cooper".

Although the City originally scheduled the matter for a "hearing" (in December 1997), that hearing was unilaterally cancelled and the "Jim Decker case"---involving the corporate property---was heard in its stead. See also SUPPLEMENTAL AFFIDAVIT OF JAMES DECKER, Paragraph 3. RECORD at 000513. The City claimed it had no indication of authority in favor of "K Cooper" to request a hearing, and so for a month (e.g. November 1997, until November 24th or so) the City dances around

and requests that Mrs Foy provide some kind of written authorization, to the effect that Jim Decker is her "agent". Ultimately, FOY provided that authorization: her November 24th letter, as included in Plaintiff's MEMORANDUM. RECORD at 000584.

That the City received a "request for hearing" is acknowledged and confirmed by Candace Gleed, Administrative Hearing Director, in her deposition, in which she stated:

Q [by Mr Homer]: Well, **you received a written request for hearing and you obviously thought that it referred to this parcel because it ended up in this file?**

A [by Ms Gleed]: **Correct.**

Q: So what did you do at that point?

A: **We did nothing with it. . .**

Candace Gleed Deposition, page 17, lines 19 through 24.
Emphasis added. [RECORD at _____.]

The CITY seemingly takes the inconsistent position that the "Cooper letter" does not constitute the requisite "request". [As noted, this position contradicts the CITY's earlier actions during the entire month of November 1997 when the CITY actively was proceeding towards a scheduled hearing on the "Foy parcel".⁶] The "Cooper letter" was written at the

⁶The Defendant FOY attempted to engage in pre-trial discovery as to the scheduling of the hearing on the "Foy parcel", the creation of separate files for the "Foy" and "Lancer" parcels (but only after 1 December 1997), and the particular violations which were observed on each of the two

direction of Ms Foy's agent, Mr Jim Decker. [See AFFIDAVIT OF JAMES W DECKER. RECORD at 000091-000095.] It is sufficient to invoke the right to a "hearing". In this context, it is further significant that the CITY seemingly takes the position that Ms Foy is a "responsible person" (for purposes of designating a natural person to whom the Notice of Violation was sent). Section 10-1-110(u) of the pertinent WVC Ordinance gives certain "status" examples to illustrate who may be considered to be a "responsible person", as follows:

The term "Responsible Person" includes, but is not limited to, a property owner, **tenant**, person with a legal interest in real property **or person in possession of real property**.

Emphasis added. Mr Cooper was a "tenant" and a "person in possession" of the real property. Thus, as a "responsible person" under the City's own "definition" for the "Notice of Violation" purposes, his written letter should be sufficient to invoke the right to a "hearing", as the City initially commenced to undertake but in the end did not follow-through.

The Plaintiff has submitted the November 24th letter of TERESA FOY as "Exhibit C" to its Memorandum.

parcels. This otherwise material and legitimate pre-trial discovery was strongly resisted by the CITY, which obtained a "protective order" keeping such critical information undisclosed.

Arguably, the letter "speaks for itself". The text of the letter is interesting: namely, there seems to have been considerable discussion between Ms FOY (in Blanding, Utah) and the CITY's administrative personnel, including but not limited to the CITY's apparent request that Ms FOY provide written documentation as to Mr Jim Decker's "agent" status in representing the interests of Ms FOY. However, the text itself is not what is probative of the issues. That the letter was simply written and submitted---as contrasted with what it said---and is herewith submitted is significant: if only as unqualified PROOF that the CITY was then proceeding towards a "hearing" as requested! If a hearing was not going to be conducted, then there would have been no necessity for the CITY staff dialog with Ms FOY and request that she submit something in writing as to Decker's status (as an "agent"). These factual inferences should have been approached in a light favorable to the non-moving party [FOY], such that the District Court should not have granted summary judgment.⁷

⁷The District Court's granting of summary judgment in favor of the CITY on the basis that FOY had failed to "exhaust her administrative remedies" (by failing to request a hearing) implicitly disregards the numerous "legal defenses" FOY pleaded. That FOY, in the District Court action, is entitled to raise and defend on those "legal defenses" is provided by Section 63-46-19(3), Utah Code, which provides in relevant part:

**THE CITY'S FAILURE TO ADEQUATELY COMPLY WITH
PERTINENT PRE-TRIAL DISCOVERY REQUESTS
ESTOPS THE CITY FROM ASSERTING
THE FACTS ARE NOT IN GENUINE DISPUTE**

In March 2002 the Plaintiff responded to Defendant's SECOND REQUEST FOR ADMISSIONS BY PLAINTIFF WEST VALLEY CITY. The Defendant's "requests for admissions" focused upon numerous "factual core issues" pertinent to the case. The Plaintiff's three-page "response" to the Defendant's "requests for admissions" is essentially verbatim and consistent⁸ in its answer (response), as follows:

The City neither admits nor denies this request. The records of the West Valley City Enforcement Division, and the records previously submitted in this matter, are the best evidence pertaining to this request, and speak for themselves.

Emphasis added. RECORD at 000611-000614. A photocopy of

(3) In any proceeding for civil enforcement of an agency's order, **in addition to any other defenses allowed by law, a defendant may defend** on the ground that:

(a) **the order sought to be enforced was issued by an agency without jurisdiction to issue the order;**

. . . .

Emphasis added. The CITY's failure to abide by its own MANDATORY ordinances deprives the agency of "jurisdiction" to enter the "order" (i.e. administrative fines) sought to be judicially enforced.

⁸The only difference in any of the responses is that the response to Request #1 refers to "the records of the Salt Lake County Recorder", whereas the other responses refer to "the records of West Valley City code enforcement division".

the City's 4-page response is attached hereto as **EXHIBIT #4**. [The Defendant thereafter filed a motion to determine the sufficiency of the CITY's responses to the Requests for Admissions. RECORD at 000672-00697. The Defendant's motion was denied by the District Court.]

The Defendant's "requests for admissions" are legitimate pre-trial discovery, to which a meaningful response is REQUIRED. The CITY **must admit or deny** those requests; the City should not be allowed to "duck the issue" through the consistent use of an unresponsive answer to the "requests for admissions"!

Having given such evasive and unresponsive "answers" to the Requests for Admissions---whose purpose was to precisely focus upon specific factual issues---the Plaintiff WEST VALLEY CITY cannot now say that the facts are not in genuine dispute. The CITY, by its own EVASIVE responses (non-answers) to the Requests for Admissions cannot claim the facts are not in genuine dispute; thus, the City cannot claim that Summary Judgment is appropriate!

To the previously-submitted "requests for admissions" and other pre-trial "discovery requests", first submitted to the City in December 1999, the CITY did not answer but instead filed a motion for a

"protective order" and claimed to answer the discovery would be unduly burdensome. The City eventually agreed to conduct an "administrative hearing" (the so-called "remand hearing"), during which the Defendant could cross-examine the City-provided witnesses and thus develop a sworn testimony "record" as to the City's evidence and/or position on these issues. However, when the City finally conducted the "administrative hearing" before Remand Hearing Officer Zane Gill⁹ the City's attorney (Mr Elliot Lawrence) produced NO WITNESSES, produced NO SWORN TESTIMONY, and only produced and offered for admission into evidence (but without sufficient custodial or foundational explanation) certain "hearsay" documents (i.e. "corporation" records from the State of Utah) having nothing to do with the merits of the claimed violations!

II

CITY'S FAILURE TO FOLLOW ITS OWN ORDINANCES [CONCERNING THE GRANTING OF THE REQUESTED "HEARING"] PRECLUDES SUMMARY JUDGMENT IN FAVOR OF THE CITY

As noted above, Defendant FOY, through her "agents" (who, as "tenants" in possession of the premises, were "responsible persons" for the alleged "violations") requested the administrative "hearing". The CITY never

⁹ALJ Keith Stoney---who conducted the first hearing---was disqualified by order of the District Court, which ordered a new "hearing" before an impartial administrative law judge.

granted the hearing.¹⁰

That a hearing is to be held is MANDATED by the City's own ordinances! Section 10-2-503 of the CITY's "Municipal Code", pertaining to "REQUEST FOR ADMINISTRATIVE CODE ENFORCEMENT HEARING" states:

. . . .

(2) The request for hearing shall be made in writing and filed with the Director.

(3) As soon as practicable after receiving the written notice of the request for hearing, the Director shall appoint an administrative code enforcement hearing officer and schedule a date, time, and place for the hearing.

Emphasis added.

The MANDATORY NATURE of the requirement is stated clearly. [Note the "passive voice" wording of Subsection (2) of the ordinance. But Subsection (3) is absolutely clear that after a "written request for hearing" is received, the Director "SHALL" schedule a hearing!]

Section 10-2-503 of the CITY's "Municipal Code", pertaining to "REQUEST FOR ADMINISTRATIVE CODE

¹⁰Mr Decker asserted that the CITY "switched" the "Foy hearing" (which had been originally scheduled for early December) with the "Jim Decker hearing" on the case which had been "opened" by the CITY just a few days before. See AFFIDAVIT OF JIM DECKER, ¶7. RECORD at 000091-000096. The administrative files of the CITY, produced pursuant to a G.R.A.M.A. request but not produced pursuant to pre-trial discovery, as being the subject of a "protective order" entered by the District Court, are unclear and ambiguous on these issues.

ENFORCEMENT HEARING" states:

. . .

(2) The request for hearing shall be made in writing and filed with the Director.

(3) As soon as practicable after receiving the written notice of the request for hearing, **the Director shall** appoint an administrative code enforcement hearing office and **schedule a date, time, and place for the hearing.**

Emphasis added.

The MANDATORY NATURE of the CITY's usage of the verb "shall" [in WVCMC § 10-2-503(3): as in "the Director shall schedule the hearing"] is made clear by two provisions of the West Valley City ordinances, thus:

1-1-102 RULES OF CONSTRUCTION.

In the construction of this Code, and of all ordinances of the City, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the City Council, or the content clearly requires or indicates otherwise.

. . .
(3) "May" means the requirement, condition, or action referred to in the sentence is permissive.

. . .
(6) **"Shall" means the requirement, condition, or action referred to in the sentence is mandatory.**

. . .

Emphasis added.

In WVCMC §10-1-109, adopted in 1997 as part of the Code Enforcement Ordinance, the municipal ordinance provides:

10-1-109 GENERAL RULES OF INTERPRETATION OF
ORDINANCE

For purposes of this Title:

(2) **Shall is mandatory**, may is permissive.

Emphasis added.

In **Springville Citizens for a Better Community vs City of Springville**, 1999 UT 25, 979 P.2d 332 (Utah Supreme Court 1999), the Supreme Court invalidated municipal action due to the municipality's failure to comply with its own legislatively-enacted standard made mandatory through the use of the term "shall". The Court wrote:

. . . The irony of the City's position on appeal is readily apparent: the City contends that it need only "substantially comply" with ordinances it has **legislatively deemed to be mandatory**. Stated simply, the City cannot "change the rules halfway through the game." *Brendle v. City of Draper*, 937 P.2d 1044, 1048 (Utah Ct. App. 1997). **The City was not entitled to disregard its mandatory ordinances.**

1999 UT 25 at ¶30, 979 P.2d at 338. Emphasis added.

In **Herr vs Salt Lake County**, 525 P.2d 728 (Utah Supreme Court 1974), the Utah Supreme Court wrote:

The meaning of the word *shall* is **ordinarily that of command**.

Emphasis added. 525 P.2d at 729.

In **West Valley City vs Roberts**, 1999 Utah Ct App 358, 993 P.2d 252 (Utah Court of Appeals 1999), the

Utah Court of Appeals held that the mandatory requirement that administrative hearings be tape recorded warranted a reversal of the District Court's dismissal of a "petition for review" on the basis that no electromagnetic recording was actually made. The case was remanded for a new hearing.¹¹

III

**THE DISTRICT COURT ERRED IN OSTENSIBLY IMPOSING
PERSONAL LIABILITY UPON DEFENDANT FOY
FOR THE CLAIMED VIOLATIONS ON THE SOUTHERN PARCEL
OWNED BY THE CORPORATE ENTITY BY REASON OF
HER "DIRECTOR" STATUS WITH THAT CORPORATION**

As noted, there were in actuality TWO PARCELS upon which the alleged violations: the 0.15-acre parcel [the "north parcel" or the "FOY parcel"] actually owned by FOY and the 0.30-acre parcel [the "south parcel" or the "Lancer parcel"] owned by the separate legal entity, Lancer Incorporated, a Utah corporation.

At the first "remand hearing" (before Hearing

¹¹The case at bar is procedurally distinguishable from **Roberts**, which involved a "petition for review" of the administrative hearing. In the case at bar, the City---ostensibly seeking judicial action to enforce (i.e. collect upon its otherwise uncollectible "administrative fines") the administrative order---has filed the action. The instant action is NOT one involving "judicial review" of an agency action. Thus, the Court has no "jurisdiction" to remand the case back to the administrative hearing officer.

The CITY's failure to abide by the conditions prerequisite necessary for its claims (that is, to grant the requested hearing), simply precludes the CITY---as a matter of law---of obtaining any judgment in its favor!

Officer Stoney, who was later disqualified by District Court action), CITY witnesses testified that only two of the six alleged violations were observed upon the FOY parcel. Furthermore, the alleged violations upon the FOY parcel were cleaned up as of the November 26th inspection. Thus, there were, at most, only about 26 days' (not forty-seven days') worth of violation, and then only two violations (not six). CITY witnesses claimed that the other FOUR violations were located SOLELY upon the Lancer, Incorporated parcel. [CITY witnesses also stated that one of the violations (of the two) on the FOY parcel was also located on the Lancer parcel.]

The electromagnetic tape recording of the "remand hearing" (in lieu of the CITY's response to the pre-trial discovery) was LOST while in the custody of the CITY and its personnel (Hearing Officer Stoney and/or others). Also LOST were the large blueprint-sized drawing (map) showing the location of the allegedly-observed "violations", as well as the photograph of that same map.

At the second "remand" hearing (following Hearing Officer Stoney's disqualification by the District Court), the CITY's attorney (Mr Lawrence), contrary to his representations to the District Court (that the

Defendant would have opportunity to develop a factual record), had available for presentation of sworn, live testimony NO WITNESSES. Instead, Mr Lawrence merely presented a few documents---actually photocopies of "corporation" records from the Utah Department of Commerce---ostensibly evidencing the "director" (not officer) status of Defendant FOY with the Lancer, Incorporated entity. These documents, with counsel's unsworn explanation as to foundation and significance, were received by the "remand" hearing officer (Zane Gill) over the objection of Defendant FOY, ostensibly for the purpose of establishing that the "clutter" on the premises was that of Defendant FOY. [In actuality, the District Court's "remand order" was intended to ascertain the "location"---not the "ownership"---of the observed violations].

The CITY argued---which arguments were ultimately accepted by the District Court---that as a "corporate officer" of Lancer, she was PERSONALLY RESPONSIBLE for the "violations" committed upon the Lancer parcel, thus:

MR. LAWRENCE: Your Honor, the City has never said that she's liable for the actual corporation. **We said she is a responsible person for the actual corporation.** A manager of a business can only serve as a representative of that business. She's a director of Lancer Incorporated and she's one of two shareholders. **She's responsible. If she**

wants to recover from Lancer Incorporated then she can, if you renew this objection to using evidence of the hearings that officially didn't exist.

Transcript of Summary Judgment Hearing, 13 January 2003, page 14, lines 14 through 21. Emphasis added. RECORD at 000728-000756.

That the City would argue---and that the District Court would ostensibly rule---that the individual corporate "director" (e.g. FOY) is "personally" responsible for the debts of the corporation (i.e. through her payment of the assessed "administrative fines", for which she can seek "reimbursement" from the corporation, as Mr Lawrence has stated) goes against hundreds and hundreds of years of black-letter "corporate law".

A corporation is a SEPARATE, free-standing entity. Except in the most narrow of situations---not present in the case at bar---a corporate director or shareholder is NOT PERSONALLY LIABLE for the debts of the corporate entity.

Because the CITY assumed---incorrectly---that Defendant FOY owned the entire "parcel" (i.e. approximately 205 feet in the north-south dimension), the "administrative order" assessed fines against her personally for claimed "violations" occurring on the "southern parcel" (owned by LANCER, INCORPORATED). The

City's oversight became apparent only after this litigation was filed and "answered", although Defendant FOY's on-site agent (James Decker) had previously explained the situation to CITY personnel.¹²

¹²That the CITY was unaware of the corporate ownership of the "southern parcel" was "found" by ALJ Keith Stoney during the first "remand hearing". ALJ Stoney noted:

. . . However, because Lancer Inc., was the owner of the back parcel, **but was unknown to the City**; because the 2nd parcel has the same address as the first; . . .

Administrative Code Enforcement Order, p. 17, dated 8 August 2000. RECORD at 000489.

Although ALJ Stoney was subsequently disqualified as being arguably less than impartial within the "remand" context, his observation on this narrow point is correct.

Furthermore, his finding as to the location of the various claimed "violations" is absolutely significant. ALJ Stoney wrote:

(3) The "Notice of Violation" delineated six violations, **four of which existed only on Lancer Inc. property** and a fifth, weeds over six inches, existed predominantly on Lancer Inc. property.

Emphasis added. RECORD at 000479. Thus, any actual or imputed bias or lack of objectivity on the part of ALJ Stoney aside, his stated "finding" (quoted) as to the locations AFFIRMATIVELY SHOWS---as was the testimony of the CITY's OWN WITNESSES who testified under oath as to the locations of the claimed "violations"---that FOUR OUT OF SIX claimed violations occurred on "the Lancer parcel" and NOT the Teresa Foy parcel! Thus, by simple arithmetic, the most the CITY would be entitled to receive in a judicial judgment against FOY would be two-sixths (one-third) of the \$6900 claimed: approximately \$2300.

Unfortunately, the CITY has lost, misplaced and/or erased the electromagnetic tape recording of the Stoney "remand" hearing. The CITY has also lost the diagram (map) upon which the City's own witnesses testified as to the locations---with respect to the two distinct parcels---of the claimed violations. How convenient! Such certainly deprives the Defendant of any meaningful "judicial review" of the "remand

The CITY asserted that because Defendant FOY was a "director" of LANCER, INCORPORATED, she is still personally liable for the "fines" assessed for the claimed "violations" committed upon the "Lancer parcel". Over the vigorous and timely objection of the Defendant FOY, the District Court implicitly ruled that she was personally liable for those corporate debts.

It is essentially "black-letter law", established for centuries that corporate directors and investors ARE NOT PERSONALLY LIABLE for the debts of the corporate entity. On this particular issue the encyclopedic work **American Jurisprudence (Second)** under the entry "Corporations" and more specifically focusing upon "director liability" states:

§1829. Generally

In most instances, the directors or officers of a corporation are not liable to its creditors or third persons for corporate acts or debts. The directors or officers of a corporation are not liable for corporate acts and debts simply by reason of their official relation to the corporation; they are merely the agents of the corporation and on principle should no more be held liable therefor than any other agent should be held liable for the acts and debts of his principal. **They are not guarantors of corporate debts, . . .**

hearing" process. [The second "remand hearing" was no better: the CITY produced NO SWORN WITNESSES. RECORD at 000604. See also SUPPLEMENTAL AFFIDAVIT OF JAMES W DECKER, ¶5. RECORD at 000512-000514.]

18B Am Jur 2d, "Corporations", p. 680. Emphasis added.
Footnotes to cases omitted.

This principle (of non-liability of the corporate director) is followed in Utah. In **Stratton vs West States Construction**, 21 Utah 2d 60, 440 P.2d 117 (Utah Supreme Court 1968), cited in the **Am Jur 2d** article quoted herein, the plaintiff had contracted with the corporate defendant for home remodeling services. The plaintiff brought suit against the corporation AND its president and major stockholder (Mr Lords), who appealed an adverse trial court judgment against him. In REVERSING THE TRIAL COURT'S ENTRY OF JUDGMENT PERSONALLY AGAINST THE CORPORATE OFFICER, the Utah Supreme Court wrote:

. . . The mere fact that Lords was president and major stockholder of defendant corporation through which he might derive an incidental benefit from the corporate breach, does not indicate he was acting for his personal benefit. A corporation can only act through its agents, and there is no evidence indicating that Lords in his participation in the transaction acted beyond the scope of his powers or against the interests of the corporation.

440 P.2d at 118. Emphasis added.

Indeed, the "state law" on this subject--- notwithstanding any "municipal law" in conflict therewith, which conflict would render the municipal provisions INVALID---is clearly consistent with those

centuries-old principles. Section 16-10a-302, Utah Code, effective since 1992, provides for the following "corporate powers":

(1) to sue and be sued, complain and defend **in its corporate name;**

(4) to purchase, receive, lease, or otherwise acquire and **own, hold, improve, use, and otherwise deal with, real or personal property,** or any legal or equitable interest in property, wherever located;

Emphasis added.

The provisions of Section 10-1-202 of the CITY's own Municipal Code are significant:

10-1-202 CONSTRUCTIVE NOTICE OF RECORDED DOCUMENTS.

Whenever a document is recorded with the County Recorder as authorized or required by this Title or applicable state codes, recordation **shall provide constructive notice of the information contained in the recorded document.**

Emphasis added. In 1993 the Defendant FOY conveyed---by Quit-Claim Deed properly delivered to the grantee (Lancer, Incorporated) and thereafter RECORDED in the Office of the Salt Lake County Recorder---to the corporation LANCER, INCORPORATED her interest in the "Lancer, Incorporated parcel". See Quit-Claim Deed, dated 1 July 1993 and recorded 6 July 1993; recordation # 5346983. [The recordation of that Deed actually CREATED the so-called "Lancer, Incorporated parcel".]

Thereafter, the entire world is "on notice" that the corporation---not Defendant FOY---is THE OWNER of the parcel. The CITY's own ordinance [Section 10-1-202] states that such a recordation "shall provide constructive notice of the information contained in the recorded document". Under Section 57-1-13, Utah Code, a quit-claim deed properly executed and delivered

. . . shall have the effect of a conveyance of all right, title, interest and estate of the grantor in and to the premises therein described and all rights, privileges and appurtenances thereunto belonging, at the date of such conveyance.

Emphasis added.

That the CITY, having made a major mistake in overlooking the CORPORATE OWNERSHIP of the "south parcel" upon which the majority of the claimed violations were located, cannot now successfully practice "damage control" by claiming that Defendant FOY, as a "director" of the corporate entity, is personally liable to pay the "fines" associated with such claimed violations. The CITY's complaint [Paragraph 3] describes the "property" (its terminology) as the 104-foot north-south dimension parcel: the 0.15-acre Teresa Foy parcel. The Complaint thereafter [Paragraph 5 thereof] makes sweeping allegations---denied in Defendant's "answer"---as to the existence of the SIX claimed "ordinance violations"

formerly present upon "the property". The Defendant's "answer" placed those allegations in dispute, by the SEVENTH DEFENSE (observed violations on property owned by others) and the EIGHTH DEFENSE (failure to join indispensable party: the owner of the parcel on which the violations were actually observed).

Having committed a major blunder in its administrative process (i.e. the "notice of violation") and in its judicial pleading, the CITY has now---when the Lancer parcel was pointed out to it---attempted to "save face" by raising, albeit incorrectly, the "corporate" issue.

The District Court was unquestionably informed of this "factual" situation (dispute), but chose to ignore the same in erroneously granting summary judgment against Defendant FOY.

IV

**THE ADMINISTRATIVE ACTION, AS WELL
AS THIS JUDICIAL PROCEEDING SEEKING ENFORCEMENT
OF THE ADMINISTRATIVE DECISION, IS INVALID
INASMUCH AS IT CONTRAVENES THE EXPRESS PROVISIONS
OF SECTIONS 10-11-1 ET SEQ, UTAH CODE**

The provisions of Section 10-11-1, Utah Code, are directly applicable to the City's actions in observing the clutter, deleterious objects, and debris upon real estate within its boundaries: the municipality's inspector "shall" (read: mandatory) notify the

propertyowner and if the propertyowner doesn't clean it up, the municipality may and may thereafter bill the propertyowner for the expenses actually incurred! If the propertyowner doesn't pay, the charges for those clean-up expenses actually incurred may become a lien against the parcel and subject to collection with the property taxes. Certain procedural opportunities for review and "appeal" are available to the propertyowner. [The complete text to the provisions of Section 10-11-1 et seq, Utah Code---which have remained "on the books" and unchanged for decades---are included herein as EXHIBIT 3 to this APPELLANT'S BRIEF.]

These provisions---and the CITY's failure to comply therewith---were pleaded as a "defense" to the CITY's claims.

The "bottom line" is that the Legislature has expressly mandated exactly what the municipality is to do, when faced with a "debris, deleterious objects, refuse" situation: this municipality is to clean it up and bill the propertyowner! But the City isn't authorized to "fine" the person and receive monies, in excess of those clean-up expenses!

These detailed provisions, expressly and explicitly detailing every step to be followed (in mandatory context, through the use of the verb "shall"), are

binding upon the CITY. The CITY's attempted reliance upon other, more generalized, generic "enabling legislation" pertaining to "nuisances"¹³ is misplaced!

In **Harding vs Alpine City**, 656 P.2d 985 (Utah Supreme Court 1982), the municipality had adopted a sewer-connection ordinance at variance with the statute, in that the municipality could have required the propertyowner to connect to a sewer system which was further away than 300 feet (which was the limitation under the statute). [The statute impliedly allowed a propertyowner who was not within 300 feet of the existing sewer line to not connect.] In invalidating the ordinance, the Supreme Court held that the conflicting ordinance was "clearly beyond the City's powers". The **Harding** Court quoted from the **State vs Hutchinson** decision, as follows:

There are ample safeguards against any abuse of power at the local level. Local governments, as subdivisions of the State, exercise those powers granted to them by the State Legislature, and the exercise of a delegated power **is subject to the limitations**

¹³No showing was ever made and the actual text of the ordinance provisions under which the Defendant was "charged" and administratively "fined" were presented to the Court, to the effect that the CITY itself---by express ordinance---designated the debris, unsightly materials, etc., situation as being a "nuisance". Thus, any "enabling legislation", if any, cited by the CITY as being applicable to the "civil fines" for such "nuisances" is INAPPLICABLE and INAPPROPRIATE, particularly in the face of the express provisions of Section 10-11-1 et seq, Utah Code.

imposed by state statute and state and federal constitutions. 624 P.2d at 1121.

Emphasis added. Citations to cases omitted in original text.

The **Harding** analysis and result is clearly applicable to the case at bar. In the instant situation, Section 10-11-1, Utah Code, dealing with the very "debris", "junk" and other refuse allegedly at issue, allows the citizen propertyowner certain rights: (1) notification, (2) 20 days in which to respond to the notification, (3) which notification is mailed, certified mail, and (but not only) (4) the right to be billed ONLY FOR THE ACTUAL COSTS THE MUNICIPALITY ACTUALLY INCURS IN THE CLEAN-UP! To allow WEST VALLEY CITY to disregard the provisions of Section 10-11-1, Utah Code, absolutely applicable to the case at bar, results in the very situation which rendered the municipal ordinance in **Harding** invalid: namely, that certain portions of the statutory text would have to be read (and/or not-applied), as a nullity. This the Supreme Court was unwilling to do. In the case at bar, we are not dealing with merely a few words of statutory text: we're dealing with hundreds and hundreds of words contained in Section 10-11-1 et seq, Utah Code. Plaintiff's position seeks to ignore each and every one of those words!

The West Valley Ordinance and the A.C.E. program established thereunder (providing for "fines" and "civil penalties" unrelated to the actual clean-up costs as contemplated by Section 10-11-1 et seq, Utah Code), are in conflict with State Statute and are invalid!

V

**TRIAL COURT'S DISMISSAL OF "WRONGFUL LIEN"
COUNTERCLAIM WAS IMPROPER DUE TO
GENUINE DISPUTE AS TO FACT**

Following the issuance of the "administrative order" assessing the \$6,900 in administrative fines against Defendant FOY, the CITY filed for record with the Salt Lake County Recorder a "Notice of Violation". The City's stated purpose in doing so was to "notify" the propertyowner. [That stated reason was disingenuous, as the propertyowner was already aware--- through direct mailings to her---of the entry of the administrative order.] The real purpose of the recordation was to "lien" the real property, so as to be able to collect those assessed "administrative fines".

The Defendant FOY, through her agents, demanded in writing that the CITY remove the "liens", asserted to be "wrongful liens" in contravention of Section 38-9-1, Utah Code, in that they were not authorized by statute

and/or they contained material misstatements. When the CITY refused, the Defendant FOY filed a counterclaim. RECORD at 000203-000221.

The CITY responded that the filings were not "liens". However, before the Defendant FOY could obtain meaningful responses to her pre-trial discovery requests (concerning how many "satisfaction" payments were received when parcels so "liened" were sold to third-parties---the CITY applied for and received a "protective order" foreclosing any effective "discovery" on the issue.¹⁴

CONCLUSION

The District Court erred in granting summary judgment against Defendant FOY, when so many of the necessary "facts" were "in genuine dispute": particularly, when a "request for hearing" had been TIMELY FILED. The "agency" arguments advanced by the City are not only inconsistent with the mandatory provisions of its own ordinances (requiring a hearing to be held), but are also inconsistent with state law

¹⁴That the District Court eventually granted a "remand" to an administrative hearing officer for three limited areas of inquiry (i.e. did the observed "clutter" belong to the Defendant, what efforts FOY had made towards the clean-up, and what costs did the CITY incur in the clean-up) did not change the problem. The "protective order" effectively precluded any meaningful development of any factual record as to what the CITY's intentions and/or the CITY's awarenesses as to the operational effect of the "liens".


(that is, that a corporation can act only through its "agents"). That the CITY (and the District Court) were fully aware that MOST of the claimed violations were located upon the Lancer, Incorporated parcel precludes, as a matter of law, the judgment against Defendant FOY, on the claimed basis that she was a "director" of that corporation and thus is a "responsible party".

The CITY's "code enforcement procedures" (ostensibly authorizing "administrative fines") when in fact the CITY incurred no actual expenses in the clean-up of the parcel(s), contradicts the detailed and binding guidelines and requirements of Section 10-11-1 et seq, Utah Code, properly pleaded as a "defense" and which should have been overcome before summary judgment could have been entered.

The District Court's granting of summary judgment on the "wrongful lien" counterclaim was in error, in light of the factual disputes as to the "lien" documents actually filed.

The judgment of the District Court should be and must be reversed.

Respectfully submitted this 25th day of November, 2003.


STEPHEN G. HOMER
Attorney for Appellant
TERESA FOY

CERTIFICATE OF DELIVERY

I certify that I caused TWO COPIES of the foregoing APPELLANT'S BRIEF to be hand-delivered and/or mailed, first-class postage prepaid, to Mr J Richard Catten, Attorney at Law, Office of the West Valley City Attorney, West Valley City Corporation, 3600 South Constitution Boulevard, West Valley City, Utah 84119, this 25th day of November, 2003.

A handwritten signature in black ink, appearing to read "Stephen Thomas", with a long horizontal flourish extending to the right.

ADDENDA

EXHIBIT 1: 25 October 1997 REQUEST FOR HEARING

EXHIBIT 2: 24 Nov 1997 FOY letter

EXHIBIT 3: DEFENDANT's Requests for Admissions

EXHIBIT 4: CITY's Responses to discovery requests

EXHIBIT 5. Section 10-11-1, Utah Code

EXHIBIT 6: WEST VALLEY CITY "CODE ENFORCEMENT" ORDINANCES

EXHIBIT 7. District Court "Memorandum Decision"

EXHIBIT 8. District Court "Summary Judgment" Order

October 25, 1997

*Received
10/29/97
CJW*

to: Administrative Hearing Coordinator
City of West Valley
Ordinance Enforcement Office
3600 South Consitution Biv.
West Valley, Utah 84119

re: case # 97-5215

from: Renter K. Cooper
3247 West 3650 South
West Valley, Utah 84119

Dear Sirs,

Please schedual a hearing as to the above.

Request: 1. That the ordinance officer who issued the citation be present
at the hearing.

2. That the officer be available for minor questions, disscussion.

The landlady, of this particular property, resides in distance South
Eastern, Utah. She has made it very clear that she will have no envolement
whatsoever. Furtherwell, she expects this matter to be handle between
us here in West Valley City. Mail, directives should be sent to the renter
at above address.

The Landlady's only wish: to be informed "once and only once" of the
clearance/resolution of these charges.

Could a complete copy of the citation as well as excerpts of the city code
cited as violations be mailed? We will be expecting a letter directly
from the City Ordinance, soon.

Thank you,

342 South 200 Est 63-11
Blanding, Utah 84511
November 24, 1997

Terrie Nordell
Ordinance Enforcement Officer
3600 Constitution Blvd.
West Valley City, Utah 84119-3720

Dear Ms. Terrie Nordell or others concerned:

This letter is to inform you in writing of what I talked to you about on the 18th of November. I am working on the papers you said you needed from my attorney. He recommended I quickly finish the divorce and get the papers to you stating when I left the house and abandoned the property to James Weston Decker, who is at present my husband. These papers will state the house is to be Weston's as ownership with the divorce. So these papers will be forth coming as soon as possible.

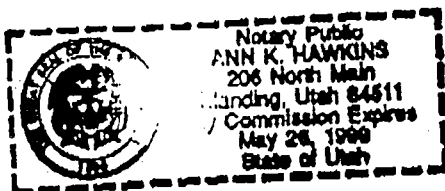
I, Teresa Decker, as deed owner of the home, give James Weston Decker the authority to invite inspectors on to the property at 3247 Lancer Way to inspect the grounds and deal with this man on this issue.

If there is any question you have feel free to contact myself or my attorney. My number is 1-435-678-2788 in Blanding, Utah or my attorney, Steven C. Russell at Affordable Legal Advocates. Their number is 532-5100. Nancy would be the one that could best answers your questions there.

Sincerely,

Teresa Foy Decker

Teresa Foy Decker



This day 25 Nov 1997
Ann K Hawkins

Expires 26 May 97

STEPHEN G HOMER (1536)
Attorney at Law
9225 South Redwood Road
West Jordan, Utah 84088
Telephone (801) 561-9665
Attorney for Defendant TERESA FOY

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
WEST VALLEY CITY DEPARTMENT, STATE OF UTAH

WEST VALLEY CITY,)
)
Plaintiff) DEFENDANT'S SECOND SET OF
) REQUESTS FOR ADMISSIONS BY
vs) PLAINTIFF WEST VALLEY CITY
)
TERESA FOY,) Civil No. 980103950CV
)
Defendant) Case assigned to Judge Brian

TO THE PLAINTIFF WEST VALLEY CITY AND ITS ATTORNEY:

The Defendant TERESA FOY, pursuant to the provisions of Rule 36 of the Utah Rules of Civil Procedure, requests that the Plaintiff WEST VALLEY CITY admit, for the purposes of the pending action only, the truth of the matters identified herein. Please note that the matter will be deemed to be admitted unless said request is responded to within 30 days after service of the request.

Your answer, if the request is denied, shall specifically deny the matter set forth or set forth in detail why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify its answer or deny only a part of the

matter of which an admission is requested, the party shall so specify so much of which of it as is true and qualify the remainder.

DEFINITIONS

As utilized in this Requests for Admissions, the following words and phrases have the following meanings:

The phrase "the City", "you", "your" and derivatives thereof refer to the Plaintiff WEST VALLEY CITY and/or its authorized officers, agents and employees acting within the scope of their employment with Defendant WEST VALLEY CITY, as appropriate.

The phrase "Teresa Foy parcel" means and refers to that certain real estate located within Salt Lake County and having a street address of 3247 West Lancer Way (3650 South), West Valley City, Utah. The legal description of the real estate is:

Beginning at a point which is on the South right-of-way line of 3650 South Street, said point being 1377.7 feet South and 275 feet West from the Northeast Corner of Section 32, Township 1 South, Range 1 West, Salt Lake Base and Meridian, and running thence West 64 feet; thence South 104 feet; thence East 64 feet; thence North 104 feet to the point of beginning. [Contains 0.15 acres.] [Salt Lake County Sidwell # 15-32-278-054]

The phrase "Lancer, Incorporated parcel" means and refers to that certain real estate located in Salt Lake County and more particularly described as follows:

Beginning at a point which is South 104 feet and 1377.7 feet and West 275 feet from the Northeast Corner of Section 32, Township 1 South, Range 1 West, Salt Lake Base and Meridian, and running thence South 204 feet; thence West 64 feet; thence North 204 feet; thence East 64 feet to the point of beginning. [Contains 0.30 acres.] [Salt Lake County Sidwell # 15-32-278-055]

REQUESTS FOR ADMISSIONS BY PLAINTIFF WEST VALLEY CITY

REQUEST FOR ADMISSION # 1. Admit that on or about 14 October 1997 the Defendant TERESA FOY was the owner of the Teresa Foy parcel.

REQUEST FOR ADMISSION # 2. Admit that the administrative case file to which the "administrative code enforcement" [hereinafter sometimes "A.C.E."] action involving the "Teresa Foy parcel" was assigned was and is referred to by the case file number of 97-5215.

REQUEST FOR ADMISSION # 3. Admit that the administrative enforcement and judicial proceedings within A.C.E. case file # 97-6058 against the Lancer, Incorporated parcel involved the same alleged violations (or at least some of them) which formed the basis of the administrative code enforcement action against the Teresa Foy parcel in A.C.E. case file #97-5215.

REQUEST FOR ADMISSION # 4. Admit that following the conclusion of the "Jim Decker case" involving the Lancer, Incorporated parcel and alleged violations upon such parcel, as contained within A.C.E. case file #97-6058, West Valley City filed in the Third Judicial District Court a civil action against Jim Decker and obtained a money judgment against Jim Decker for the fines and costs administratively assessed for the alleged violations, if any, upon the parcel in case file #97-6058, which District Court judgment was fully paid and satisfied.

REQUEST FOR ADMISSION # 5. Admit that the violations which the agents of the Plaintiff WEST VALLEY CITY claimed to observe were

not entirely or singularly upon the Teresa Foy parcel; but rather some of the claimed violations within A.C.E. case #97-5215 were upon the Lancer, Incorporated parcel.

REQUEST FOR ADMISSION # 6. Admit that the request for administrative hearing on the "Teresa Foy parcel" of Defendant TERESA FOY for the hearing was received by the Plaintiff WEST VALLEY CITY in a timely manner, within the time periods specified by ordinance.

REQUEST FOR ADMISSION # 7. Admit that in response to the "written request for hearing" on the Teresa Foy parcel in A.C.E. case #97-5215, authorized personnel of West Valley City actually scheduled a "hearing" before the administrative law judge Lohra Miller, said hearing to be held on or about December 3rd of 1997.

REQUEST FOR ADMISSION # 8. Admit that on 26 November 1997 authorized agents and employees of the Plaintiff WEST VALLEY CITY, including but not limited to Code Enforcement Officer Cecelia Giorgi, were invited to inspect the TERESA FOY premises and did in fact conduct an inspection of the TERESA FOY premises.

REQUEST FOR ADMISSION # 9. Admit that on 26 November 1997 authorized agents and employees of the Plaintiff WEST VALLEY CITY, including but not limited to Code Enforcement Officer Cecelia Giorgi, were personally on the premises and failed to observe any violations of municipal ordinances upon the TERESA FOY premises.

REQUEST FOR ADMISSION # 10. Admit that on 26 November 1997 and for each day thereafter, continuously until and beyond 16 December

1997, there were no violations on the TERESA FOY parcel.

REQUEST FOR ADMISSION # 11. Admit that except for the aforementioned 26 November 1997 inspection of the TERESA FOY parcel, agents of the Plaintiff WEST VALLEY CITY did not conduct any inspections of the TERESA FOY parcel between the dates of 14 October 1997 and 16 December 1997.

REQUEST FOR ADMISSION # 12. Admit that on 26 November 1997 and on each date thereafter, to and including 16 December 1997, the Plaintiff WEST VALLEY CITY, through its authorized agents and employees, including but not limited to Code Enforcement Officer Cecelia Giorgi, was aware or should have been aware that there were no violations of municipal ordinance upon the TERESA FOY premises.

REQUEST FOR ADMISSION # 13. Admit that the Plaintiff WEST VALLEY CITY, following receipt of the request for a hearing, initially scheduled a hearing to be held on 8 December 1997 in A.C.E. case file 97-5215 (the "Teresa Foy" case).

REQUEST FOR ADMISSION # 14. Admit that on 3 December 1997 Hearing Officer Lohra Miller, without the requested hearing being conducted, signed an "order of abatement" for the TERESA FOY parcel.

REQUEST FOR ADMISSION # 15. Admit that on 8 December 1997 the hearing in case # 97-5215 involving the claimed violations occurring on the TERESA FOY parcel was unilaterally cancelled by the agents and employees of the Plaintiff WEST VALLEY CITY.

REQUEST FOR ADMISSION # 16. Admit that on 8 December 1997 the

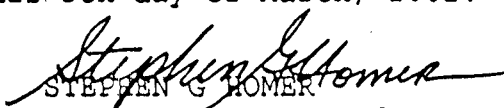
Plaintiff WEST VALLEY CITY held a hearing on case number 97-6058 [the "Jim Decker case"], involving only the Lancer, Incorporated parcel and not the Teresa Foy parcel.

REQUEST FOR ADMISSION # 17. Admit that the December 3rd and the December 16th "administrative orders" and the "administrative fines" assessed thereunder were not based upon first-hand evidence presented to the Hearing Officer, but rather upon the presumption that the claimed violation continues each date until municipal inspectors inspect the property and determine that the claimed violation has been terminated.

REQUEST FOR ADMISSION # 18. Admit that the December 3rd and the December 16th "administrative orders" were contrary to the evidence and contrary to the knowledge possessed by the agents of the Plaintiff WEST VALLEY CITY, including but not limited to Code Enforcement Officer Cecelia Giorgi, from the 26 November 1997 inspection and observations upon and of the Teresa Foy parcel.

REQUEST FOR ADMISSION # 19. Admit that on 16 December 1997 agents of the Plaintiff WEST VALLEY CITY inspected the TERESA FOY parcel and again found the parcel to be in compliance with city ordinances.

Respectfully submitted this 5th day of March, 2002.


STEPHEN G. HOMER
Attorney for Defendant TERESA FOY

Elliot R. Lawrence — Bar no. 6917
Attorney for Plaintiff
WEST VALLEY CITY ATTORNEY'S OFFICE
3600 Constitution Blvd.
West Valley City, Utah 84119
Phone: (801) 963-3271
Fax: (801) 963-3366
Elawrence@ci.west-valley.ut.us

IN THE THIRD DISTRICT COURT, STATE OF UTAH

IN AND FOR SALT LAKE COUNTY, WEST VALLEY DEPARTMENT

WEST VALLEY CITY, a Utah municipal
corporation,

Plaintiff,

vs.

TERESA FOY,

Defendant.

RESPONSE TO DEFENDANT'S
REQUESTS FOR ADMISSIONS

Case no.: 980103590

Judge: Pat B. Brian

PLAINTIFF, WEST VALLEY CITY (the "City"), respectfully submits this Response to Defendant's Requests for Admissions. In doing so, the City does not acknowledge that discovery in this matter has been reopened, and these responses are being submitted with the intent of resolving the matter presently before the Court. The responses to the requests are set forth below, with the numbers corresponding to the requests in the March 5, 2002 document.

RESPONSES

1. The City neither admits nor denies this request. The records of the Salt Lake County Recorder are the best evidence pertaining to this request, and speak for themselves.

2. The City neither admits nor denies this request. The records of the West Valley City Ordinance Enforcement Division, and the records previously submitted in this matter, are the best evidence pertaining to this request, and speak for themselves.
3. The City neither admits nor denies this request. The records of the West Valley City Enforcement Division, and the records previously submitted in this matter, are the best evidence pertaining to this request, and speak for themselves.
4. The City neither admits nor denies this request. The records of the West Valley City Enforcement Division, the records of the Third District Court, and the records previously submitted in this matter, are the best evidence pertaining to this request, and speak for themselves.
5. The City neither admits nor denies this request. The records of the West Valley City Enforcement Division, and the records previously submitted in this matter, are the best evidence pertaining to this request, and speak for themselves.
6. The City neither admits nor denies this request. The records of the West Valley City Enforcement Division, and the records previously submitted in this matter, are the best evidence pertaining to this request, and speak for themselves.
7. The City neither admits nor denies this request. The records of the West Valley City Enforcement Division, and the records previously submitted in this matter, are the best evidence pertaining to this request, and speak for themselves.
8. The City neither admits nor denies this request. The records of the West Valley City Enforcement Division, and the records previously submitted in this matter, are the best evidence pertaining to this request, and speak for themselves.

9. The City neither admits nor denies this request. The records of the West Valley City Enforcement Division, and the records previously submitted in this matter, are the best evidence pertaining to this request, and speak for themselves.
10. The City neither admits nor denies this request. The records of the West Valley City Enforcement Division, and the records previously submitted in this matter, are the best evidence pertaining to this request, and speak for themselves.
11. The City neither admits nor denies this request. The records of the West Valley City Enforcement Division, and the records previously submitted in this matter, are the best evidence pertaining to this request, and speak for themselves.
12. The City neither admits nor denies this request. The records of the West Valley City Enforcement Division, and the records previously submitted in this matter, are the best evidence pertaining to this request, and speak for themselves.
13. The City neither admits nor denies this request. The records of the West Valley City Enforcement Division, and the records previously submitted in this matter, are the best evidence pertaining to this request, and speak for themselves.
14. The City neither admits nor denies this request. The records of the West Valley City Enforcement Division, and the records previously submitted in this matter, are the best evidence pertaining to this request, and speak for themselves.
15. The City neither admits nor denies this request. The records of the West Valley City Enforcement Division, and the records previously submitted in this matter, are the best evidence pertaining to this request, and speak for themselves.
16. The City neither admits nor denies this request. The records of the West Valley City

Enforcement Division, and the records previously submitted in this matter, are the best evidence pertaining to this request, and speak for themselves.

17. The City neither admits nor denies this request. The records of the West Valley City Enforcement Division, and the records previously submitted in this matter, are the best evidence pertaining to this request, and speak for themselves.
18. The City neither admits nor denies this request. The records of the West Valley City Enforcement Division, and the records previously submitted in this matter, are the best evidence pertaining to this request, and speak for themselves.
19. The City neither admits nor denies this request. The records of the West Valley City Enforcement Division, and the records previously submitted in this matter, are the best evidence pertaining to this request, and speak for themselves.

RESPECTFULLY SUBMITTED this 26th day of March, 2002.


ELLIOT R. LAWRENCE
Assistant City Attorney

CHAPTER 11

INSPECTION AND CLEANING

- Section
10-11-1. Abatement of weeds, garbage, refuse and unsightly objects.
10-11-2. Notice to property owners.
10-11-3. Neglect of property owners — Removal by city — Costs of removal.
10-11-4. Costs of removal to be included in tax notice.

10-11-1. Abatement of weeds, garbage, refuse and unsightly objects.

The city commissioners of cities of the first and second class and the city councils of the cities of the third class, and the

board of trustees of towns, may designate, and regulate the abatement of, injurious and noxious weeds, garbage, refuse or any unsightly or deleterious objects or structures, and may appoint a city inspector for the purpose of carrying out the provisions of this chapter. 1953

10-11-2. Notice to property owners.

It shall be the duty of such city inspector to make careful examination and investigation, as may be provided by ordinance, of the growth and spread of such injurious and noxious weeds, and of garbage, refuse or unsightly or deleterious objects or structures; and it shall be his duty to ascertain the names of the owners and descriptions of the premises where such weeds, garbage, refuse, objects or structures exist, and to serve notice in writing upon the owner or occupant of such land, either personally or by mailing notice, postage prepaid, addressed to the owner or occupant at the last known post-office address as disclosed by the records of the county assessor, requiring such owner or occupant, as the case may be, to eradicate, or destroy and remove, the same within such time as the inspector may designate, which shall not be less than ten days from the date of service of such notice. One notice shall be deemed sufficient on any lot or parcel of property for the entire season of weed growth during that year. The inspector shall make proof of service of such notice under oath, and file the same in the office of the county treasurer. 1953

10-11-3. Neglect of property owners — Removal by city — Costs of removal.

If any owner or occupant of lands described in such notice shall fail or neglect to eradicate, or destroy and remove, such weeds, garbage, refuse, object or structure upon the premises in accordance with such notice, it shall be the duty of the inspector, at the expense of the municipality, to employ necessary assistance and cause such weeds, garbage, refuse, objects or structures to be removed or destroyed. He shall prepare an itemized statement of all expenses incurred in the removal and destruction of same and shall mail a copy thereof to the owner demanding payment within twenty days of the date of mailing. Said notice shall be deemed delivered when mailed by registered mail addressed to the property owner's

last known address. In the event the owner fails to make payment of the amount set forth in said statement to the municipal treasurer within said twenty days, the inspector, on behalf of the municipality, may cause suit to be brought in an appropriate court of law or may refer the matter to the county treasurer as hereinafter provided. In the event collection of said costs are pursued through the courts, the municipality may sue for and receive judgment upon all of said costs of removal and destruction together with reasonable attorneys' fees, interest and court costs. The municipality may execute on such judgment in the manner provided by law. In the event that the inspector elects to refer the matter to the county treasurer for inclusion in the tax notice of the property owner, he shall make, in triplicate, an itemized statement of all expenses incurred in the removal and destruction of the same and shall deliver the three copies of said statement to the county treasurer within ten days after the completion of the work of removing such weeds, garbage, refuse, objects or structures. 1963

10-11-4. Costs of removal to be included in tax notice.

Upon receipt of the itemized statement of the cost of destroying or removing such weeds, refuse, garbage, objects, or structures, the county treasurer shall forthwith mail one copy to the owner of the land from which the same were removed, together with a notice that objection in writing may be made within 30 days to the whole or any part of the statement so filed to the county legislative body. The county treasurer shall at the same time deliver a copy of the state-

ment to the clerk of the county legislative body. If objections to any statement are filed with the county legislative body, they shall set a date for hearing, giving notice thereof, and upon the hearing fix and determine the actual cost of removing the weeds, garbage, refuse, or unsightly or deleterious objects or structures, and report their findings to the county treasurer. If no objections to the items of the account so filed are made within 30 days of the date of mailing such itemized statement, the county treasurer shall enter the amount of such statement on the assessment rolls of the county in the column prepared for that purpose, and likewise within ten days from the date of the action of the county legislative body upon objections filed shall enter in the prepared column upon the tax rolls the amount found by the county legislative body as the cost of removing and destroying the said weeds, refuse, garbage or unsightly and deleterious objects or structures. If current tax notices have been mailed, said taxes may be carried over on the rolls to the following year. After the entry by the county treasurer of the costs of removing weeds, garbage, refuse or unsightly and deleterious objects or structures the amount so entered shall have the force and effect of a valid judgment of the district court, and shall be a lien upon the lands from which the weeds, refuse, garbage or unsightly and deleterious objects or structures were removed and destroyed, and shall be collected by the county treasurer at the time of the payment of general taxes. Upon payment thereof receipt shall be acknowledged upon the general tax receipt issued by the treasurer. 1993

EXHIBIT 5

SELECTED WEST VALLEY CITY CODE ORDINANCE PROVISIONS

1-1-102 RULES OF CONSTRUCTION.

In the construction of this Code, and of all ordinances of the City, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the City Council, or the content clearly requires or indicates otherwise.

(3) "May" means the requirement, condition, or action referred to in the sentence is permissive.

(6) "Shall" means the requirement, condition, or action referred to in the sentence is mandatory.

10-1-109 GENERAL RULES OF INTERPRETATION OF ORDINANCE.

For purposes of this Title:

(2) Shall is mandatory, may is permissive.

10-1-110. DEFINITIONS.

(19) "Property Owner" means the record owner of real property based on the County Assessor's records.

(21) "Responsible Person" means a person the City determines is responsible for causing or maintaining a violation of the City Codes or applicable state codes. The term "Responsible Person" includes, but is not limited to, a property owner, tenant, person with a legal interest in real property, or person in possession of real property.

10-2-103. REQUESTING HEARING.

The responsible person has the right to request an administrative hearing. The request must be in writing and must be filed within ten days from the date of service of the notice of violation. Failure to request a hearing as provided shall constitute a waiver of the right to a hearing.

10-2-501. DECLARATION OF PURPOSE.

The City Council finds that there is a need to establish uniform procedures for administrative code enforcement hearings conducted pursuant to the City Code. It is the purpose and intent of the City Council to afford due process of law to any person who is directly affected by an administrative action. Due process of law includes adequate notice, an opportunity to participate in the administrative hearing, and an adequate explanation of the reasons justifying the administrative action. These procedures are also intended to establish a forum to efficiently, expeditiously, and fairly resolve issues raised in any administrative enforcement action.

10-2-503 REQUEST FOR ADMINISTRATIVE CODE ENFORCEMENT HEARING

(2) The request for hearing shall be made in writing and filed with the Director.

(3) As soon as practicable after receiving the written notice of the request for hearing, the Director shall appoint an administrative code enforcement hearing office and schedule a date, time, and place for the hearing.

EXHIBIT 6

IN THE THIRD JUDICIAL COURT, IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH, WEST VALLEY DEPARTMENT

WEST VALLEY CITY, a Utah municipal corporation, Plaintiff,	:	MEMORANDUM DECISION
v. TERESA FOY, Defendant.	:	Case No. 980103590
	:	Honorable PAT B. BRIAN

¶1 The above entitled matter comes before the Court for decision on the Plaintiff's motion for summary judgment. The Court heard oral argument addressing the motion on January 13, 2003. The Court having reviewed all relevant memoranda submitted by the parties, applicable statutes and case law finds no genuine issues of material fact exist and concludes that the Plaintiff is entitled to judgment as a matter of law. Plaintiff's motion for summary judgment is GRANTED.

¶2 The following facts apply to resolve the Plaintiff's motion. This protracted collection suit was filed in 1998 by West Valley City (Plaintiff) against Teresa Foy (Foy) for outstanding fines relating to several ordinance violations of property owned and/or controlled by Foy. After a remand to an Administrative Law Judge and mediation, the collection suit has returned to this Court. In summary, on October 14, 1997, an ordinance enforcement officer on behalf of Plaintiff conducted an inspection of the West Valley property 3247 West 3650 South. That same day, the Plaintiff sent a notice of violation (notice) to Foy in Blanding, Utah, where she was living at the time. Foy admits receiving the notice. Foy admits that she did not respond to the notice and did not attempt to obtain a notice of compliance by October 30, 1997, as required and explained in the notice. Foy contacted her estranged husband, James W. Decker, (Decker) who was living on the property, and told him "this needs to be taken care of."

¶3 The notice stated that: "You have the right to request a hearing to determine if any violations exist on your property or if you have allowed violations to occur for which you are responsible. You must file a written request for hearing within 10 days from the date the notice of violation was issued. If the notice was mailed, the request for hearing must be made within 13 days of the mailing date. Address the request to the attention of 'Administrative Hearing Coordinator.' Please include your name, address, telephone number, case or citation number, and violation address." The notice further emphasized in bold letters and a larger font than the rest of the notice that: *****Failure to file a written request for a hearing within 10 days waives your right to a hearing.*****

¶4 Foy sent a letter dated November 24, 1997, to the Plaintiff to memorialize a conversation she had with them on November 18, 1997, that she was divorcing Decker and that he had been deeded her portion of the subject property.

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¶5 Utah R. Civ. P. 56 provides that the court may grant a motion for summary judgment if no genuine issues of material fact exist and the party is entitled to judgment as a matter of law. All facts are to be construed in favor of the non-moving party.


¶6 Utah Code Ann. § 63-46b-14 provides that: "A party may seek judicial review only after exhausting all administrative remedies available, except that: (a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required; (b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if: (i) the administrative remedies are inadequate; or (ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion."

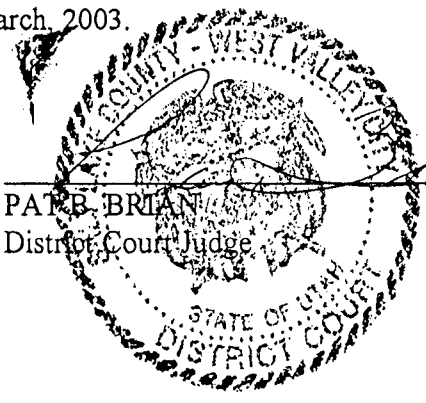
¶7 The Plaintiff argues that Foy failed to exhaust her administrative remedies by requesting a hearing and the Plaintiff is authorized to impose fines upon persons responsible for ordinance violations, therefore, the Plaintiff is entitled to judgment as a matter of law. In opposition, Foy argues that a letter sent by "Renter K. Cooper Request for Hearing." was sufficient to invoke her request for a hearing as Cooper was an agent of Foy.

¶8 The Court concludes that no genuine issues of material fact exist and the Plaintiff is entitled to judgment as a matter of law because Foy failed to exhaust her administrative remedies. Even viewing the facts in a light most favorable to Foy, as this Court must do, the facts show that Foy failed to request a hearing. Foy admits in her own deposition that she received the notice and did nothing about it. Generally, whether there was an agency relationship would be a question of fact that would defeat a motion for summary judgment, however, an agency relationship requires permission either actual or implied that a person is acting as an agent of another. Foy has failed to show that she gave Cooper such permission or implied such permission. In fact, for over a month, until November 18, 1997, the record shows that Foy did nothing, except call Decker, who was living on the property at the time, and telling him "this needs to be taken care of." Furthermore, the notice clearly informed Foy that she had "a right to request a hearing to determine if any violations exist on your property or if you have allowed violations to occur for which you are responsible" and the amount of time for her to do so. At this late juncture, Foy has tried to dispute that the violations existed on her property and that she is responsible for such violations. Foy's remedy at law was an administrative hearing. There is nothing in the record to show that such a hearing request was made by Foy. Moreover, Foy has failed to show that she should be relieved from the exhaustion of remedies rule. There is nothing here to show that a hearing would have been an inadequate remedy or that exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion. Accordingly, the Court concludes that Foy improperly seeks judicial review of facts without exhausting all administrative remedies available, namely a hearing, therefore, the Plaintiff is entitled to judgment as a matter of law.

¶9 Accordingly, the Court GRANTS the Plaintiff's motion for summary judgment and ORDERS the Plaintiff to submit an order reflecting the Court's decision.

It is so ORDERED on this 11 day of March, 2003.


P. B. BRIAN
District Court Judge



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FILED
WEST VALLEY DEPT.

MAY 07 2003

CLERK OF THE DISTRICT COURT
Time _____

IN THE THIRD DISTRICT COURT, WEST VALLEY DEPARTMENT
SALT LAKE COUNTY, STATE OF UTAH

WEST VALLEY CITY,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Plaintiff,	)	AND ORDER
)	
vs.	)	Case No. 980103590
)	
TERESA FOY,	)	Honorable PAT B. BRIAN
)	
Defendant.)	

The above entitled matter comes before this Court on Plaintiff's Motion for Summary Judgment. After reviewing the legal memoranda and oral arguments by both parties, the Court finds that Plaintiff is entitled to judgment as a matter of law because Teresa Foy (Foy) failed to exhaust her administrative remedies; namely, Foy did not request an administrative hearing. The Court hereby enters the following Findings of Facts, Conclusions of Law, and Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On October 14, 1997, an ordinance enforcement officer employed by Plaintiff conducted an inspection of Foy's property in West Valley City and found it was not in compliance with the City Code.
2. That same day, the ordinance enforcement officer sent a notice of violation to Foy's residence in Blanding, Utah.

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3. Foy received the notice, as she admitted, but did not respond and did not attempt to obtain a notice of compliance by October 30, 1997, as required by the notice she received.

4. The notice of violation stated that Foy could request a hearing within 10 days from the date the notice of violation was issued. The notice also stated that failure to file a written request for a hearing within 10 days constituted a waiver of the right to a hearing.

4. Foy did not request a hearing in the allotted time. By failing to request a hearing within the designated time, Foy failed to exhaust her administrative remedies.

6. Foy has failed to show that she should be relieved from the exhaustion of remedies rules because she has provided no evidence that a hearing would have been an inadequate remedy or that exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

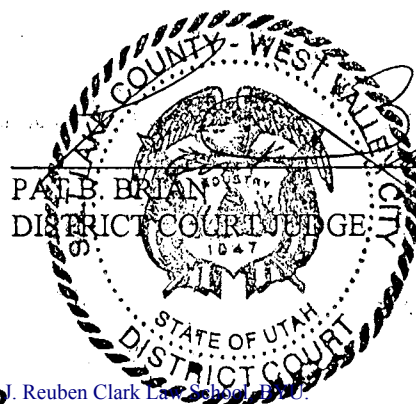
7. Plaintiff is entitled to judgment as a matter of law because Foy failed to exhaust her administrative remedies.

ORDER

NOW THEREFORE, the Court having made its Findings of Facts and Conclusions of Law, and for good cause shown, Orders the following:

Plaintiff's Motion for Summary Judgment is GRANTED.

Dated this 7 day of May, 2003



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