

2003

Karen Golay, et al. v. Washington City Corporation, Wheeler Machinery Co. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KAREN GOLAY, <i>et al.</i> ,	:	
Plaintiffs and Appellants,	:	Case No. 20030528-CA
v.	:	
WASHINGTON CITY CORPORATION,	:	
Defendants and Appellees,	:	
WHEELER MACHINERY CO.	:	
Intervenor.	:	
	:	

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE FIFTH DISTRICT COURT

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Plaintiffs/Appellants (the “Citizens”) submit the following Reply Brief in further support of their appeal in this matter.

INTRODUCTION

Nothing in the Briefs filed by either Washington City (the “City”) nor by Intervenor Wheeler Machinery (“Wheeler”) contradicts the central facts of this case: the zoning ordinances of the City required notice to the Citizens of the Planning Commission’s consideration of a conditional use permit for Wheeler, no such notice was given and because of that the Citizens were denied an opportunity to argue to the City Council for different conditions because they didn’t know of the Planning Commission’s decision and thus could not appeal it to the Council.

ARGUMENT

POINT I

THE CITY FAILED TO FOLLOW ITS OWN RULES REGARDING NOTICE AND CITIZENS WERE PREJUDICED BY THIS FAILURE

The plain language of the City’s Zoning Ordinances at issue in this case conclusively establishes the Citizens’ claim. “*Notice of Planning Commission meetings¹ shall be mailed to all property owners . . . within a 300 foot radius of any property for which an action of the Planning Commission is being requested.*” Washington City Zoning Ordinance, Chapter 8, §8-3 (emphasis added).² The Ordinance does not specify whether the meeting is for a hearing or not – only that if a meeting is held where an action may be taken then notice is required.

The City argues that this failure is not significant because the Citizens have not established how the City’s decision would have been different, pursuant to the standard announced in *Springville Citizens for a Better Community v. City of Springville*, 1999 UT 25 at ¶¶ 29-31. The City claims that it is not enough for the Citizens to allege that they could have argued for different conditions. Of course it is, at least under the facts of this case.

¹ Note that the Ordinances do not require notice for only public “hearings” but, instead, for the much more broad term of “meetings” at which “an action [] is being requested.”

² Section 3-6 of the Washington City Ordinances (regarding meetings of the Commission) also has the exact same language regarding and requiring notice.

The point of the Ordinance is to give residents of the City notice of Planning Commission meetings so they can be aware of decisions being made that affect them at least, in part, so that they can appeal such decisions to the City Council. Therefore, since the Citizens were not given notice of the September 4, 2004 meeting of the Planning Commission where Wheeler's conditional use permit was granted they could not have appealed the matter to the City Council where they would have been heard regarding potential conditions to be imposed on Wheeler's conditional use permit. The Citizens have thus been prejudiced by the City's failure to follow its Ordinances.

The City likewise claims that the Planning Commission took the Citizens claims into account when it issued a conditional use permit. Whether that is true or not (and it was established in the Citizens' Initial Brief that it was not true - that the Planning Commission's first set of hearings were all about denial instead of potential conditions) is irrelevant. Had the Citizens known of the Planning Commission hearing and decision they would have appealed the decision and would have been entitled to have their concerns considered by the City Council. The Citizens would have been able to argue to the City Council for conditions that are more conducive to coexistence between the Citizens and Wheeler. It is clear since the Citizens were not given the opportunity to be heard regarding conditions for coexistence that the Citizens have been denied their rights under the City's Zoning Ordinance.

In support of the City's position that the Zoning Ordinance could be disregarded and notice was not required, the City cites *Tolman v. Salt Lake County*, 20 Utah 2d 310 (Utah 1968). However the quote the City uses in reality supports the Citizens reasoning:

*An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. * * * A * * * [sic] and it must afford reasonable time to those interested to make their appearance.*

Id. at 317-318 (emphasis added).

The test in *Tolman* is not met in this case. Because the Citizens were not given any notice of the September 4, 2002 Planning Commission meeting as far as the Citizens were concerned Wheeler's project had been rejected. They deserved notice of the meeting where Wheeler's conditional use was back on the table after the first decision of the District Court so that they could protect their rights.

The City also cites *Harper v. Summit County*, 2001 UT 10, and *Dairy Product Servs., Inc. v. City of Wellsville*, 2000 UT 18, in support of its position that since this was not a public hearing, the Citizens had no right to notice. However, *Harper* compels the opposite conclusion (not to re-mention the fact that the City's Zoning Ordinance absolutely requires the notice):

Because the planning commission is not required to participate in the application or issuance of these documents and because their issuance is merely an

administrative action, the topic is not one required to be discussed on an open meeting . . .

Id. at ¶ 38.

Since issuing a conditional use permit, which is what happened during the September 4, 2002 meeting, requires the input of the Planning Commission, it is not merely an administrative decision; it is one that requires an open meeting (and notice to the Citizens). Moreover in *Wellsville*, the Plaintiff had notice of all the meetings where decisions about their business were made, unlike this case where the Citizens were given no notice of the September 4, 2002 meeting. Thus, neither *Harper* or *Wellsville* are helpful in evaluating the legal merits of this case.

As the City clearly acknowledges, there is no dispute that the Citizens were not given the notice required pursuant to the City's Ordinance. The City makes much of the fact that the Citizens participated in earlier hearings about Wheeler's conditional use permit (which led to the denial of the conditional use permit that was later overturned) claiming that such participation is an adequate substitute for their participation at the Planning Commission hearing. The City's Ordinance simply does not allow for such substitute participation to count as real participation.

The City cites *Naylor v. Salt Lake City Corp.*, 410 P.2d 300 (Utah 1966) in support of its position that participation in one hearing is the same as participation in all subsequent hearings. *Naylor* however does not support that argument and is

not helpful in analyzing the Citizens claim against the City. In *Naylor*, as opposed to this case, the plaintiffs participated in the hearing.

Equally unhelpful in this case is the City's repeated assertion (without any legal support) that the Citizens have a duty to outline what conditions they would request that have not been imposed. The fact is that the Citizens had a right to notice of the Planning Commission hearing so that they could have appealed that decision to the City Council where they could have made their concerns known and argued for different conditions.

All of the arguments by the City attempt to distract this Court from the plain language of the Ordinance. On September 4, 2002 the Planning Commission was making a decision on conditions for Wheeler's conditional use permit, and therefore notice was required to be mailed to the Citizens. *Q.E.D.*

POINT II

THE CITIZENS DID NOT FAIL TO EXHAUST THEIR ADMINISTRATIVE REMEDIES

Because the Citizens were not given notice of the September 4, 2002 Planning Commission meeting and were unaware of the decision the Planning Commission made regarding Wheeler,³ they were unable to appeal that decision to the City Council. It is more than ironic that the City continues to argue that it is okay for it to ignore the Ordinance concerning notice, while at the same time

³ As noted above, as far as the Citizens were concerned the project had been killed when both the Planning Commission and City Council denied Wheeler's conditional use permit.

attempting to hold the Citizens liable for the Ordinance regarding an appeal of the September 4, 2002 Planning Commission decision. It is absurd for the City to claim that it is not liable to follow Ordinances that it wrote, but everyone else is liable to follow the same Ordinances even if they didn't know of any action that affected them.

The City attempts to have this Court believe that the Citizens chose to go to Court instead of appealing the decision of the Planning Commission to the City Council. Since the Citizens were not aware of the Planning Commission's decision within the ten-day timeframe the City imposes for appeals to the City Council the Citizens were forced into the only venue left to protect their rights – the judiciary. The applicability of the ten-day appeal rule outlined in §8-6 of the City Ordinances, and the appeal process detailed in the state code at §10-9-407(2), U.C.A., providing administrative remedies that should be exhausted before filing suit, are logically contingent upon having had notice of the action from which an appeal would be taken.

This case is completely distinct from *Patterson v. American Fork City*, 2003 UT 7, where the plaintiffs made a choice to go to Court rather than follow the administrative remedies specifically provided by American Fork's zoning ordinance. Here the Citizens would have been happy to have appealed to the City Council, and if they had had the notice required under the Ordinance of the Planning Commission's September 4, 2002 meeting they would have done so.

However, since the Citizens did not have the requisite notice they cannot be bound to follow other portions of the Ordinance.

In the same way, the City's citation of *Ralph L. Wadsworth Constr., Inc. v. West Jordan City*, 2000 UT App 49, is unhelpful since the Citizens are not asking the Court to reach the merits of the Planning Commission decision. The Citizens are asking the Court to remand the matter back to the Planning Commission to conduct a meeting with the proper notice so that the Citizens can attend the meeting, and, if the Citizens disagree with the Planning Commission decision, so that they can appropriately appeal to the City Council.

POINT III

THE CITIZENS' CLAIMS ARE NOT MOOT⁴

A decision in this appeal will protect the right of the Citizen's to be heard, and therefore affects the rights of the litigants. However, even if the Court finds that the Citizen's had no right to notice, this case clearly falls within the public interest exception of Utah's mootness doctrine.

The City asserts that the Citizens must explicitly outline the additional restrictions they would ask the Planning Commission and/or City Council for. However, the City offers no legal authority for this position. The Citizens have

⁴ Although the Citizens disagree with many of the positions taken by the City they agree with the City's opinion that Wheeler is incorrect regarding the mootness of this case. Wheeler's arguments regarding the mootness of this case only contain points of view that were fully briefed by the Citizens previously, so this Reply is only to the City's mootness claims.

generally identified the restrictions they would request, but are under no legal duty to inform the City in this appeal of all the limitations they would like placed on Wheeler. When this matter is remanded the Citizens will propose to the Planning Commission and the City Council the restrictions they want imposed.

Next, the City alleges that because the Citizens did not seek injunctive relief that this is somehow fatal to the Citizens appeal though the City offers no Utah precedent for this position.⁵ Utah courts have not required that private Citizens, who may be of limited economic means and unable to afford a bond, must seek injunctive relief.

The City's argument that since Wheeler has built its building the Court should not step in and require that Wheeler change the physical structure is contrary to *Culbertson v. Board of County Commissioners of Salt Lake County*, 2001 UT 108, ¶56. In *Culbertson*, as here, the local government and the party taking the illegal action were on notice of the Citizen's claims prior to the

⁵ The City offers four cases to support its allegation that the Citizens were required to seek injunctive relief and since they did not their claims are moot. *City of New Orleans v. Bd. of Comm'rs*, 694 So.2d 975 (La. Ct. App. 1996) is not analogous to the case at bar since it was a case that involved a city suing a state agency, unlike here where private citizens are suing the city. *Dreikausen v. Zoning Bd. of Appeals*, 774 N.E.2d 193 (N.Y. 2002) is a New York case, which state, unlike Utah, has had a judicial policy requiring injunctive relief in this type of case. Moreover, construction had already begun at the time the Plaintiffs in this case filed their action. *Id.* at 196. *Zoning Bd. of Adjustment v. DeVilbiss*, 729 P.2d 353 (Colo. 1986) is not particularly helpful either since the Colorado Court limited its holding to that case. *Id.* at 360. *Wells v. Lodge Props., Inc.*, 976 P.2d 321 (Colo. App. 1998) supports the Citizens position in that it found that the case was not moot, and reached the merits of the case. *Id.* at 323.

commencement of construction and thus not immunized from the later judicial determination.⁶

In tandem with this argument the City claims that the Citizens made a calculated decision not to seek injunctive relief and that the Court cannot rule because of this choice of the Citizens. In support of this contention the City offers two cases which are distinct from the present case: *Collins v. Sandy Board of Adjustment*, 2000 UT App 371, ¶ 4 and *Collins v. Sandy Board of Adjustment*, 2002 UT 77, ¶ 13.

The Court of Appeals found that the Collinses made a deliberate decision not to appeal a determination of the District Court and await the outcome of another case in front of the Court of Appeals. That Court found that the decision not to appeal their case at the time of the District Court decision barred them from deciding the later appeal their case. The Collinses then turned to the Supreme Court. The Supreme Court found that issue preclusion also barred the Collinses from later appealing the determination of the District Court. Therefore, these cases were disposed of on res judicata grounds and are completely different from the claims of the Citizens here.

⁶ This case is much different from those cited by the City to support its position. In particular in *Mernish v. H.A. Folson & Associates*, 646 P.2d 731, 732 n. 3 (Utah 1982) the only relief requested had already been satisfied, unlike the case at bar. Likewise, in *McRae v. Jackson*, 526 P.2d 1190, 1192 (Utah 1974), and *State v. Sims*, 881 P.2d 840, 841 (Utah 1994) there was no controversy left between the parties, unlike here where the controversy is ongoing.

The City completely ignores the reason that this case “is likely to recur . . . [and] capable of evading review,” *Ellis v. Swensen*, 2000 UT 101, ¶ 26; namely that the City did not follow its own Ordinance. The City has an ordinance that requires notice, and notice was not given to the Citizens, which in turn affected the Citizens right to appeal. If the Court does not rule on whether it is okay for the City to ignore its own ordinance, there is no doubt that another litigant will be back with another case arguing that their right to be heard was likewise thwarted.

CONCLUSION

The City’s failure to give the Citizens notice of the Planning Commission meeting violated the City’s own Zoning Ordinance. This violation, in turn, prevented the Citizens from appealing the Planning Commission decision to the City Council which could have imposed materially different conditions on Wheeler’s CUP. The issues in this case have not been mooted by Wheeler’s completion of its building. The City Council can still impose conditions on the CUP beyond those now in effect. The Citizens’ are entitled to have the decision of the Commission overturned.

DATED this 5th day of August, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of August, 2004, I caused to be mailed, postage prepaid, by First Class Mail, a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF to the following:

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