

2003

Karen Golay et al. v. Washington City Corporation and Wheeler Machinery Co. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KAREN GOLAY, et al.,

Plaintiffs/Appellants,

vs.

WASHINGTON CITY,

Defendant/Appellee,

WHEELER MACHINERY COMPANY,

Intervenor/Appellee.

BRIEF OF
INTERVENOR/APPELLEE

Case No. 20030528-CA

APPEAL FROM THE FIFTH DISTRICT COURT IN AND FOR WASHINGTON
COUNTY, STATE OF UTAH
JUDGE JAMES L. SHUMATE

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UTAH APPELLATE COURTS
APR 28 2004

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PARTIES TO THE PROCEEDING

The caption of the case does not contain the names of all parties to the proceeding before the district court; therefore, in accordance with Utah R. App. P. 24(a)(1), such parties are listed separately as follows:

Plaintiffs/Appellants:

Karen Golay
Grace Blackburn
Eileen Blake
Brian Christansen
Morgan Bingham
Dave Stark
ETC/TB Daycare, Inc.
Gary Westfall
David Beagley
Washington-Ridgeview Associates
Terry Campbell
The Highlands Homeowners Association
Turtle Creek Homeowners Association

Defendant/Appellee:

Washington City

Intervenor/Appellee:

Wheeler Machinery Co.

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STATEMENT OF JURISDICTION

The Utah Supreme Court transferred this appeal to the Utah Court of Appeals. Therefore, the Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2002).

STATEMENT OF THE CASE

In accord with Rule 24(b)(1) of the Utah Rules of Appellate Procedure, Intervenor/Appellee Wheeler Machinery Company ("Wheeler") submits the following additional statements concerning the case which were not included in the Appellants' Brief:

1. The Zoning Ordinance under which Appellee Washington City ("City") granted Wheeler its conditional use permit makes a distinction between vacant land and land on which there is an existing structure. The former requires a conditional use approval whereas the latter is granted permitted use status. (See Washington City Zoning Ordinance, Chapter 24 attached in the Addendum.)
2. Subsequent to Washington City's approval of Wheeler's conditional use permit and during the pendency of this appeal, Wheeler has erected and now utilizes a structure from which it conducts its sales and repair activities. (Washington City Certificate of Occupancy, attached in the Addendum.)
3. Vehicle sales and repair is one of the uses specifically identified in the City's Zoning Ordinance as both a permitted and a conditional use, depending upon the presence of

an existing structure. (Washington City Zoning Ordinance at ¶ 24-2(1)(b) and 24-2(2)(a).)

4. As a private citizen and an owner of neighboring property to the Wheeler property, Mr. Hans Latschkowski attended the Planning Commission hearings on September 11, 2001 and November 7, 2001 and the City Council meeting on January 9, 2002, and voiced his objections to the Wheeler application at all three meetings. (R.at 217, 236 - 237, 255.)
5. Mr. Latschkowski was subsequently made a member of the Planning Commission and in that capacity he attended and voted at the Planning Commission meeting held on September 4, 2002, which is the subject of the present appeal. (R. at 285.)
6. Mr. Latschkowski was one of the proposed Interveners in the Judge Beacham Case, No. 020500091 (identified in the Appellants' Brief as the First Action). (R. at 180; See Judge Beacham Case No. 020500091)
7. All of the proposed Interveners in the First Action became the Appellants in the instant case except for Mr. Latschkowski. (R. at 1, 180; See Judge Beacham Case No. 020500091).
8. Appellants Karen Golay, Grace Blackburn, Morgan Bingham and representatives of Appellants The Highlands Homeowners Association, and Turtle Creek Homeowners Association all registered their objection to Wheeler's application at one or both of

the Planning Commission meetings held in 2001 and/or at the City Council meeting in January of 2002. (R. at 217, 236 - 237, 255 - 256.)

SUMMARY OF THE ARGUMENT

Appellants Golay, Blackburn, Blake, Christiansen et al. ("Golay, Blackburn") base their present appeal on the assertion that they were not provided proper notice of the September 4, 2002 Planning Commission hearing on the matter of Wheeler's conditional use application. Golay, Blackburn speculate that if such notice had been given, they would have participated and the City "could have imposed materially different conditions on Wheeler's proposed use than those adopted by the Commission Decision." Golay, Blackburn's argument is based on the premise that although all property owners within 300 feet of the Wheeler property were mailed notices of the Planning Commission hearings in September and November of 2001, they were not given a written notice of the September 4, 2002 Planning Commission hearing. It is the position of Wheeler that no additional written notice was required inasmuch as the hearing in September of 2002 before the Planning Commission was simply a continuation of the whole process which was started in September of 2001 and for which the appropriate mailings of notice were made. However, even if mailings were required for the September 4, 2002 meeting, it would have made no difference to Golay, Blackburn. The record was closed prior to the Planning Commission meeting in September 2002 and no public input was taken nor would have been received. In addition, there was

no appeal of the Summary Judgment granted to Wheeler in the First Action which resulted in a decision requiring the City to provide Wheeler a conditional permit. Furthermore, the City Ordinance requiring a conditional use permit for the property at issue only applies to vacant land. Now that a building has been built on the land, even if the conditional permit were denied for any reason Wheeler could simply get a permitted use of the same through the Planning /Zoning Administrator without having to go through the conditional permit use process. Finally, had Golay, Blackburn wanted to prevent Wheeler's building from being built, they would have had to seek a stay or injunction and put up an appropriate bond. They did neither and therefore are precluded from complaining about the fact that the property is no longer vacant.

ARGUMENT

THE PLANNING COMMISSION HEARING ON SEPTEMBER 4, 2002 WAS A CONTINUATION OF THE PREVIOUS APPLICATION FOR A CONDITIONAL USE PERMIT AND THEREFORE DID NOT REQUIRE A NEW MAILING OF NOTICE

The City's action relative to the final issuance of a conditional use permit was simply the last step in the procedure which commenced with the filing of an application for a conditional use permit in August of 2001. The applicable Ordinance requires that all

applicants for a conditional use permit supply stamped and addressed envelopes to all property owners within 300 feet of the applicant's property twenty days prior to the hearing on the application. The Ordinance requires the application be made on a form prepared by the City. That form also restates the mailing requirement. (R. at 203.) In this case the required envelopes were submitted by Wheeler prior to the September 11, 2001 hearing. However, some names had been left off of the mailing list supplied to Wheeler. The initial hearing on September 11, 2001 was therefore declared invalid because not every property owner within 300 feet was given a written notice. Wheeler was required to submit new envelopes for a second hearing in November, 2001. Thus, there were actually two mailings of the notice of the commencement of the conditional use permit process on Wheeler's application. Moreover, the minutes of the Planning Commission meeting held on September 11, 2001 reflect a number of neighbors and other concerned citizens in attendance, including some of the Appellants. The important matter is that at least by the November 2001 hearing, the process had met all of the requirements of notice. At the November 7, 2001 hearing, once again many members of the neighborhood and other members of the public, including some of the Appellants, were in attendance and gave their opinion.

After the denial of the Planning Commission by Wheeler's application, the matter was appealed by Wheeler to the City Council. This did not require a new mailing, and none was made. The matter was noticed on the agenda for the City Council and otherwise met the

other notice requirements for the holding of public meetings, and particularly City Council meetings. And once again many of the Appellants were in attendance. After the City Council decision, the matter was then appealed by Wheeler to the District Court which issued its ruling favorable to Wheeler. The decision to return the matter to the Planning Commission after the court ruling for the actual issuance of the building permit was not required by Judge Beacham, by City ordinances, or by Utah law. Rather, it was done as way of wrapping up the process. That hearing also occurred with notice being given in the typical way for public meetings being held in Washington City.

In short, the action before the Planning Commission in September of 2002 was simply a continuation of the original application process started in September of 2001. Nothing in the City's ordinances requires providing additional mailings of notice after the first mailing for the same application. Those who were provided the initial notice had constructive notice of all subsequent proceedings.

**MAILED NOTICE OF THE SEPTEMBER 4, 2002 PLANNING COMMISSION
MEETING WOULD NOT HAVE MADE ANY DIFFERENCE**

Had the notices Golay, Blackburn are claiming not to have received been mailed prior to the September 4, 2002 Planning Commission meeting, and even if as a result many citizens had attended that September 4, 2002 hearing, the results would not have been any different. At the outset of the meeting, the public was specifically instructed it would not

have the opportunity to give input. (R. at 283 - 284). Nor would the public have been given an opportunity to give input at a subsequent City Council meeting, had the matter been appealed. The time for public input before the Planning Commission had already occurred in 2001 and early 2002. By the time the matter went to the trial court, the record was closed. And it stayed closed. The public has had more than ample opportunity to give input to the process and cannot complain that it in any way has been deprived of due process. Not only were there many participants at the Planning Commission hearings in September and November of 2001, and at the City Council meeting in January of 2002 (including comments by a number of Appellants) but also there were a number of letters sent to both bodies which were made part of the record. Thus had written notice been sent individually to all property owners within 300 feet of Wheeler's property concerning the September 4, 2002 Planning Commission hearing, as required when Wheeler made its initial application for a conditional use permit, the result would have been the same because no public input was received in the September 4, 2002 hearing.

Furthermore, whatever procedures were followed or not followed at the Planning Commission in September 2002, Golay, Blackburn did not appeal to the City Council within the time specifically provided by City Ordinances § 8-6. (R. at 180.) That 10 day requirement is an absolute one. The claim that Golay, Blackburn did not know about the September 4, 2002 hearing and therefore did not have time in which to appeal to the City

Council is unavailing for a number of reasons, most of which have already been discussed. In addition, it should be noted that one of the citizens who lent his name to seek to overturn the First Action was Han Latschkowski, one of the Planning Commission members at the time of the Planning Commission hearing to which the objection is being raised. Although his name was dropped in the instant case (his being the only one dropped), it is nevertheless a telling point that he was working with all the current Appellants in that effort to intervene and he had full and actual knowledge of all matters of which Golay, Blackburn are complaining were hidden from them. Whatever Golay, Blackburn's reasons for not appealing the Planning Commission decision to the City Council, that failure cannot be based on Golay, Blackburn not having actual knowledge of the meeting of the Planning Commission and its outcome.

**THE DECISION OF JUDGE BEACHAM IS FINAL AND WAS NEVER
APPEALED**

The First Action ended with an award of summary judgment in Wheeler's favor. On that basis alone, there was no need for the parties to return to the Planning Commission. Wheeler had sought and obtained from the court a decision which held that a conditional use permit should have been granted to Wheeler. That decision became final after the time for appeal had elapsed with no appeal filed. The First Action decision determines forever Wheeler's right to a conditional use permit. Thus even if the Planning Commission meeting

were to be held again with all of the notices claimed by Golay, Blackburn being given, and setting aside whether the public had the right to give input into the meeting, the trial court decision granting the conditional use permit remains unchanged and unchallenged.

THE CASE IS MOOT

Wheeler was seeking a permit for a proposed conditional use on vacant land. Once the permit was issued, Golay, Blackburn still had the opportunity to seek a stay or injunction of the permit issuing until their appeal could be decided. They did not. The land at issue is no longer a vacant lot. Rather, it now contains a fully constructed structure in which Wheeler presently carries on its activities of construction vehicle sales and repair. Pursuant to the terms of the relevant zoning ordinance, and as a matter of law, Wheeler's use is now a permitted use as opposed to a conditional use. The specific language of Zoning Ordinance 24-2 says:

- 1.) Permitted Uses. The following principal uses may be allowed in existing structures which have received site development plan approval and have obtained occupancy review and approval from the Zoning Administrator.

* * *

- b.) Manufacturing, processing, creating, repairing, renovating, painting, cleaning or assembling of goods. Examples of such uses include, but are not limited to the following: Automobile repair shop, Bottling works, Lumber yard, Transfer agency, Electronic instruments assembly, and Vehicle sales and repair shop.

In a letter sent to Wheeler on March 30, 2001, the Planning/Zoning Administrator stated: "If Wheeler Machinery Company's intended use is for machinery sales, leasing, and repair, this type of activity is permitted under this specific zoning." (Item No. 1 of Record in Judge Beacham Case No. 020500091, attached in the Addendum.) The only caution was that because the land was then vacant, it was subject to the conditional use process. The land is no longer vacant and is being used precisely for the activities the Planning/Zoning Administrator said were permitted. As such, Golay, Blackburn no longer have a basis for seeking to change, modify or prevent a use that is permitted rather than conditional. Given that Golay, Blackburn's appeal was premised on opposition to a conditional use that Golay, Blackburn hoped to change, modify or prevent, their appeal is effectively rendered moot when that conditional use becomes a permitted use allowed as a matter of course by the relevant zoning ordinance. A case is deemed moot when the requested judicial relief cannot affect the rights of the litigants. Burkett v. Schwendiman, 773 P.2d 42, 44 (Utah 1989). Here, Golay, Blackburn's requested relief cannot affect the rights of Wheeler since the contested use at issue is now a permitted use as opposed to a conditional use. Golay, Blackburn have no basis on which to oppose, modify or reverse a permitted use. To do so would require this Court to rewrite or override a municipality's legislative prerogative and clear legislative intent. Moreover, as noted, because Golay, Blackburn never sought a stay

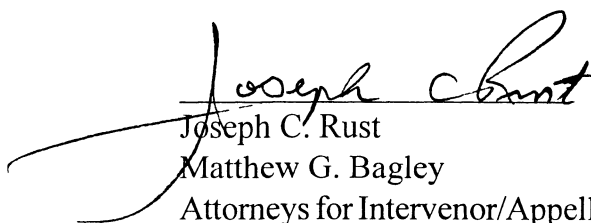
against the construction of the Wheeler building, they cannot complain of the consequences of its having been built.

CONCLUSION

Golay, Blackburn's Appeal, based on the premise of lack of input into a public meeting of which they claim to have had no notice must fail. They received both the notice prescribed by City Ordinance and actual notice. But even so, the meeting was closed to public comment. In any case, Judge Beacham's ruling in the First Action granting the conditional use stands unchallenged. Finally, their claim became moot the moment that the use became a permitted use. Because Appellants' appeal in its entirety has become moot, this Court should dismiss the appeal.

DATED this 27 day of April, 2004.

KESLER & RUST

A handwritten signature in black ink, appearing to read "Joseph C. Rust", is written over a horizontal line. The signature is fluid and cursive.

Joseph C. Rust
Matthew G. Bagley
Attorneys for Intervenor/Appellee Wheeler
Machinery Company

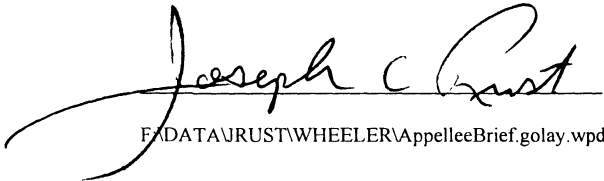
CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered by the method indicated below two true and correct copies of the foregoing BRIEF OF INTERVENOR/APPELLEE, in Case No. 20030528-SC, postage prepaid, this 27 day of April, 2004, to:

☐ FEDERAL EXPRESS
☒ U.S. MAIL
☐ HAND DELIVERY
☐ TELEFAX TRANSMISSION

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ADDENDUM

CHAPTER 24. GENERAL COMMERCIAL (C-3) ZONE²⁷

24-1 Purpose.

To provide appropriate locations for the development and operation of general commercial activities where a wide range of retail and service activities may be established in locations indented to serve a regional market.

24-2 Use Regulations.

1) **Permitted Uses.** The following principal uses may be allowed in existing structures which have received site development plan approval and have obtained occupancy review and approval from the Zoning Administrator.

a) Any permitted use listed in the AP, C-1 or C-2 zones.

b) Manufacturing, processing, creating, repairing, renovating, painting, cleaning or assembling of goods. Examples of such uses include, but are not limited to the following: Automobile repair shop, Bottling works, Lumber yard, Transfer agency, Electronic instruments assembly, and Vehicle sales and repair shop.

c) Auction Sales.

d) Mail order houses, not to include warehousing.

e) Accessory uses and buildings, customarily incidental and subordinate to an approved permitted use.

f) Any combination of the above uses which meets all other provisions of this Ordinance.

2) **Conditional Uses.** The following uses are subject to the conditional use approval process outlined in Chapter 8 of this Ordinance.

a) The development of any vacant parcel of land for any of the principal uses listed in Section

²⁷This chapter was amended on April 13, 1994 by Ordinance No. 94-9

24-2-1 (Permitted Uses).

b) Any conditional use listed in the AP, C-1, or C-2 zones.

c) Other uses that are determined by the Planning Commission to be compatible and in harmony with the intent of this zone, according to the designated and approved development plan.

24-3 Site Design Regulations.

All site design elements for the above listed conditional use are subject to review and approval of the Planning Commission, who shall apply the standards and provisions found in Chapter 8 of this Ordinance, as well as the following provisions:

1) All uses shall be free from objectionable odor, noise, dust, smoke, vibration or other such factors and

2) All advertising signs shall comply with the provisions of Chapter 11 of this Ordinance.

24-4 Height Regulations.

Refer to applicable sections of the Uniform Building Code.

24-5 Area, Width and Yard Regulations.

		Yards in Feet			
District	Area in Square Feet	Width	Front	Side	Rear
C-3	None	20	20	20	See modifying regulations for details

24-6 Modifying Regulations.

1) Side Yards.

A ten (10) foot side yard shall be required where a side yard abuts an agricultural or residential zones. Side yards abutting a street require a twenty (20) foot side yard.

2) Rear Yards.

A ten (10) foot rear yard open and accessible for emergency access will be required where a rear yard abuts a residential or agricultural zone.

Certificate of Occupancy

Washington City Department of Building Inspection

This certificate issued pursuant to the requirements of Section R 110.1 the Uniform Building Code certifying that at the time of issuance this structure was in compliance with the various ordinances of the city regulating building construction or use. For the following:

Use Classification	<u>Commercial Building</u>	Building Permit No.	<u>6886</u>
Group	<u>R3-U1</u>	Type Construction	<u>VB</u> Use Zone <u>C3</u>
Owner of Building	<u>Wheeler Machinery</u>	Address	<u>900 North Redwood Road</u>
Building Address	<u>203 North Playa Della Rosita</u>	Locality	<u>Buena Vista</u>
		By:	<u>Joseph C. Maynes</u>
		Date:	<u>July 30, 2003</u>

Joseph C. Maynes
Building Official

Terrill Clowe
MAYOR

Ralph J. McClure
CITY MANAGER

Carla Mitchell
CITY TREASURER

Washington City

111 North 100 East
Washington, Utah 84780

Office: (435) 656-6300
FAX (435) 656-6370

March 30, 2001

Mansell & Associates
Attn: Chris Chapman, Sales Executive
St. George, Utah

Re: Parcel in Washington (Tax ID#: W-BV-3-307-A-1)

To Whom It May Concern,

It is understood that your client, Wheeler Machinery Co., is in the process of purchasing a 3.8 acre parcel of vacant land owned by SLC Equities (W-BV-3-307-A-1), which is located between Cactus Lane and Playa Della Rosita on Buena Vista Boulevard. The referenced parcel has C-3 Commercial Zoning. If Wheeler Machinery Company's intended use is for machinery sales, leasing, and repair, this type of activity is permitted under this specific zoning.

Please be reminded, however, of Section 24-Z, 2a of the Washington City Zoning Ordinance, which states in part that "the development of any parcel of vacant land for any of the allowable uses must go through the Conditional Use approval process outlined in Chapter 8 for this ordinance."

I hope that the information provided above will assist you and your client in concluding your real estate transaction.

Respectfully,



Craig Maynes

Planning/Zoning Administrator
Chief Building Official

cc: Neil Biggs, Sales Executive
Wardley, GMAC Real Estate