

2003

Karen Golay, et. al. v. Washington City, 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,

v.

WASHINGTON CITY,

Defendants/Appellee,

WHEELER MACHINERY CO.,

Intervenor.

Case No. 20030528-CA

On appeal from a judgment of the Fifth District Court for Washington County
The Honorable James L. Shumate

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FILED
UTAH APPELLATE COURTS

APR 22 2004

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 Christiansen
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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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).

ISSUES AND STANDARDS OF REVIEW

I.

Between the time this litigation commenced and the instant appeal, Intervenor Wheeler Machinery Co. completed construction of the building that is the subject of this action. The threshold question presented is whether such completion has rendered this appeal moot.

This issue was not presented below. Rather, the issue of mootness arose as a result of Wheeler Machinery's Rule 37(a) Suggestion of Mootness. On January 29, 2004, this Court deferred ruling on the Suggestion of Mootness and ordered full briefing of the mootness issue on plenary review of the case.¹

As a result of the procedural posture of this issue, there is no particular standard of review for this Court to apply. Rather, mootness is a matter of judicial policy and therefore whether an issue has been rendered moot and whether a court will consider an issue that is technically moot is left to the discretion of the court. See Ellis v. Swensen, 2000 UT 101, ¶26, 16 P.3d 1233.

¹ This Order is attached at Addendum E.

II.

Whether the trial court correctly ruled that the Planning Commission's failure to mail notice of the meeting at which it approved Wheeler's conditional use permit did not deprive Petitioners of their right to due process because Petitioners cannot show such notice would have resulted in a different outcome.

Standard of Review. The trial court decided this issue on summary judgment. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Utah R. Civ. P. 56(c). In reviewing a grant of summary judgment, this Court reviews the trial court's legal conclusions for correctness. See Springville Citizens for a Better Community v. City of Springville, 1999 UT 25, ¶22, 979 P.2d 332.

Preservation. This issue was presented below and is preserved at R. 183-84.

III.

Whether the trial court correctly ruled that it was without jurisdiction as a result of Petitioners' failure to exhaust their administrative remedies.

Standard of Review. The trial court decided this issue on summary judgment. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Utah R. Civ. P. 56(c). In reviewing a grant of summary judgment, this Court reviews the trial court's legal conclusions for correctness. See Springville Citizens for a Better Community v. City of Springville, 1999 UT 25, ¶22, 979 P.2d 332.

Preservation. This issue was presented below and is preserved at R. 181-82.

DETERMINATIVE LEGISLATION

Statutes and ordinances whose interpretation is determinative or which are of central importance to this appeal include the following:

Utah Code Ann. § 10-9-704 (2003), which provides:

(1) (a) (i) The applicant or any other person or entity adversely affected by a decision administering or interpreting a zoning ordinance may appeal that decision applying the zoning ordinance by alleging that there is error in any order, requirement, decision, or determination made by an official in the administration or interpretation of the zoning ordinance.

(ii) The legislative body shall enact an ordinance establishing a reasonable time for appeal to the board of adjustment of decisions administering or interpreting a zoning ordinance.

(b) Any officer, department, board, or bureau of a municipality affected by the grant or refusal of a building permit or by any other decisions of the administrative officer in the administration or interpretation of the zoning ordinance may appeal any decision to the board of adjustment.

(2) The board of adjustment shall hear and decide appeals from planning commission decisions regarding conditional use permits unless the zoning ordinance designates the legislative body or another body to hear conditional use permit appeals.

(3) The person or entity making the appeal has the burden of proving that an error has been made.

(4) (a) Only decisions applying the zoning ordinance may be appealed to the board of adjustment.

(b) A person may not appeal, and the board of adjustment may not consider, any zoning ordinance amendments.

(5) Appeals may not be used to waive or modify the terms or requirements of the zoning ordinance.

Utah Code Ann. § 10-9-1001 (Supp. 2003), which provides:

(1) No person may challenge in district court a municipality's land use decisions made under this chapter or under the regulation made under authority of this chapter until that person has exhausted his administrative remedies.

(2) (a) Any person adversely affected by any decision made in the exercise of or in violation of the provisions of this chapter may file a petition for review of

the decision with the district court within 30 days after the local decision is rendered.

(b) (i) The time under Subsection (2)(a) to file a petition is tolled from the date a property owner files a request for arbitration of a constitutional taking issue with the private property ombudsman under Section 63-34-13 until 30 days after:

(A) the arbitrator issues a final award; or

(B) the private property ombudsman issues a written statement under Subsection 63-34-13(4)(b) declining to arbitrate or to appoint an arbitrator.

(ii) A tolling under Subsection (2)(b)(i) operates only as to the specific constitutional taking issues that are the subject of the request for arbitration filed with the private property ombudsman by a property owner.

(iii) A request for arbitration filed with the private property ombudsman after the time under Subsection (2)(a) to file a petition has expired does not affect the time to file a petition.

(3) The courts shall:

(a) presume that land use decisions and regulations are valid; and

(b) determine only whether or not the decision is arbitrary, capricious, or illegal.

Washington City Zoning Ordinance § 3-6, attached in full at Addendum B.

Washington City Zoning Ordinance § 8-6, attached in full at Addendum C.

STATEMENT OF THE CASE

A. Nature of the Case

This case involves the propriety of a municipal land use decision where the municipality failed to provide mailed notice to neighboring landowners of the meeting at which the municipal land use decision was made. More specifically, this case requires the reviewing court to consider the parameters of due process and the purpose behind the notice requirement as a prerequisite to municipal land use action in a situation where the landowner challenging such action cannot show that the land use decision would have been different had mailed notice been provided.

Additionally, this case addresses whether a landowner who challenges a land use decision but fails to enjoin the decision from taking effect, necessarily renders his challenge moot by depriving the reviewing court of any opportunity to provide him relief.

B. Course of Proceedings and Disposition Below

In November 2001, the Washington City Planning Commission held a public hearing to consider Wheeler Machinery's application for a conditional use permit. The Planning Commission voted to deny the application. Wheeler appealed the decision to the Washington City Council, which affirmed. Wheeler then sought review in the Fifth District Court for Washington County.

In August 2002, the Fifth District Court entered summary judgment for Wheeler, determining that the City Council's decision was not based upon substantial evidence in the record. The matter then came back before the Planning Commission, which, in November 2002, approved Wheeler's application and issued it a conditional use permit.

Petitioners then filed a new action in the Fifth District Court challenging the Planning Commission's decision. Wheeler intervened in this action. On cross-motions for summary judgment, the trial court granted summary judgment in favor of Washington City and Wheeler, denied Petitioners' motion for summary judgment and dismissed their action.

This appeal followed. Shortly after this appeal was filed, Wheeler filed a Rule 37(a) Suggestion of Mootness. This Court deferred ruling on the motion until plenary review of the case.

STATEMENT OF FACTS

On November 7, 2001, the Washington City Planning Commission (“Planning Commission”) held a public hearing to consider Intervener/Appellee Wheeler Machinery, Co.’s (“Wheeler”) application to the City for a conditional use permit. (R. 178.)

Wheeler applied for the conditional use permit to locate a commercial business in Washington City. (R. 178.)

Representatives and residents of Petitioners the Highlands Homeowners Association and Turtle Creek Homeowners Association were present at and presented their objections to the Planning Commission. (R. 236-237.) The Turtle Creek Homeowners Association also presented a letter objecting to Wheeler’s application. (R. 211.) The general sentiment of these objections was concern with safety, traffic, noise, and fumes from Wheeler’s proposed business. (R. 211, 236-237.)

The Planning Commission voted to deny Wheeler’s application. (R. 178.) Wheeler appealed the Planning Commission’s decision to the Washington City Council (“City Council”).² (R. 178.)

On January 9, 2002, the City Council held a public hearing to consider Wheeler’s appeal of the Planning Commission’s decision. (R. 178.) Again, several named

² The City Council is the municipal body Washington City has designated by ordinance to hear appeals from the Planning Commission’s conditional use permit decisions. See Wash. City Ord. 8-6; Utah Code Ann. § 10-9-407 (2002); see also Ralph L. Wadsworth Constr., Inc. v. West Jordan City, 2000 UT App 49, ¶¶12-13, 999 P.2d 1240 (upholding city council jurisdiction over conditional use permit appeals under section 10-9-407).

Petitioners were either personally in attendance or had representatives in attendance on their behalf. (R. 255-256.) Specifically, Petitioners Karen Golay, Grace Blackburn, and Morgan Bingham voiced their objections to Wheeler's application. (R. 255-256.) Representatives and residents of the Highlands Homeowners Association and Turtle Creek Homeowners Association also presented their objections to the City Council. (R. 255-256.) Once again, the general sentiment of these objections was concern with safety, traffic, noise, and fumes. (R. 255-256.)

After hearing this public comment, the City Council, by a 3-2 vote, affirmed the Planning Commission's denial of Wheeler's application. (R. 178.) On January 14, 2002, Wheeler appealed the City Council's decision to the Fifth District Court for Washington County. (R. 178.) The case, In re Wheeler Machinery Co., Case No. 02050091, was assigned to the Honorable G. Rand Beacham. (R. 178.)

On August 12, 2002, Judge Beacham issued a ruling on a motion for summary judgment filed by Wheeler and, in an extensive opinion, ruled in favor of Wheeler, determining there was not substantial evidence in the record to support the City Council's denial of Wheeler's conditional use permit. (R. 260-277, 179.) Thus, Judge Beacham concluded that the denial was arbitrary, capricious, and illegal, and remanded the matter back to the Planning Commission. (R. 260-277, 179.)

On September 4, 2002, Wheeler's application for a conditional use permit again came before the Planning Commission for consideration. (R. 179.) This time it was not for a public hearing; rather, in light of Judge Beacham's ruling, the Planning Commission

was presented with the mere formality of issuing Wheeler's conditional use permit. (R. 179.)

Public notice of the September 4, 2002, Planning Commission meeting was provided by the City as follows: (a) a true and correct copy of the meeting agenda was posted in a conspicuous place in the Washington City Offices; (b) a true and correct copy of the meeting agenda was posted on the City's website; (c) a true and correct copy of the meeting agenda was provided to the *Spectrum*, a newspaper of general circulation in Southern Utah; and (d) all of such actions were performed at least 24 hours prior to the meeting. (R. 179.)

The public notice of the meeting agenda clearly showed, at item no. 10, that the Planning Commission would consider Wheeler's application for a conditional use permit at the meeting. (R. 179.) Notice of the September 4, 2002, Planning Commission meeting was not mailed to residents living within a 300-foot radius of Wheeler's property. (R. 179.)

Because the September 4, 2002, Planning Commission meeting was not a public hearing no public comment or input was taken. (R. 179.) Rather, the Planning Commission staff advised the Planning Commission that all items of concern had been addressed at the previous two public hearings on the matter (November 7, 2001, before the Planning Commission, and January 9, 2002, before the City Council) and recommended that the Planning Commission approve Wheeler's application. (R. 180.)

The Planning Commission voted to approve Wheeler's application, subject to Wheeler's ability to meet certain conditions recommended by the staff. (R. 180.) These conditions reflected the concerns made by the public (including the named Petitioners) at the previous two public hearings insofar as the Planning Commission imposed, *inter alia*, quiet time hours, entrance and exit traffic prohibitions, surrounding block walls and trees, dust free surfacing, and landscaping. (R. 281-286; see also Add. D.)

None of the Petitioners filed an appeal of the decision to the City Council. (R. 180.) Approximately two weeks later, however, on September 20, 2002, Petitioners filed a motion for leave to intervene in and for reconsideration of Judge Beacham's summary judgment ruling. (R. 180.) Thereafter, on or about October 4, 2002, Petitioners filed the instant action as a "Petition for Review" against the City. (R. 1, 180.) This case was assigned to Judge Shumate. (R. 1.) On November 5, 2002, Judge Beacham denied Petitioners' motion to intervene. (R. 180.)

Wheeler was successful, however, with its motion to intervene in the instant case. (R. 40.) Thereafter, all parties filed cross-motions for summary judgment. (R.177.) The trial court, finding no genuine issue of material fact precluding its ruling on the motions as a matter of law, entered summary judgment in favor of the City and Wheeler, denied Petitioners' motion for summary judgment, and dismissed Petitioners' action. (R.175.)

In its ruling, the trial court determined that: (a) Judge Beacham's prior ruling was a mandate to the City to issue the conditional use permit and therefore there was no requirement for an additional public hearing on the issue of the permit; (b) that the trial

court, pursuant to Utah Code Ann. § 1001(1), was without jurisdiction for Petitioners' failure to appeal the Planning Commission's decision to the City Council; and (c) although Petitioners were not provided mailed notice in accordance with City ordinance, they were not able to show prejudice and therefore were not denied due process. (R. 177-184; see also Add. A.)

Petitioners appealed. (R. 190.) Between the time the Planning Commission issued the conditional use permit and the instant appeal, however, Wheeler moved forward and completed construction of its building.³ On that basis, Wheeler filed a Rule 37(a) Suggestion of Mootness. (Add. E.) On January 29, 2004, this Court deferred ruling on the Suggestion of Mootness and ordered full briefing of the mootness issue on plenary review of the case. (Add. E.)

SUMMARY OF ARGUMENTS

1.

The Utah Supreme Court has a long-standing policy against rendering advisory opinions. Thus, where circumstances arise between the time the litigation begins and appellate review that render the issues moot, the reviewing court should decline to decide the issue and dismiss the appeal.

In this case, Petitioners challenge the City's issuance of a conditional use permit to Wheeler Machinery. However, in the course of challenging such issuance, Petitioners

³ Because this information arose after the trial court litigation, it does not appear of record. However, it was provided to this Court on Wheeler's Suggestion of Mootness and has not been disputed by Petitioners, either in opposition to the Suggestion of Mootness or in their brief.

did not take any action to enjoin Wheeler from, on the basis of the permit, moving forward to construct its building. Thus, between the time Petitioners initiated the litigation and this appeal, Wheeler has completed construction and is now operating its business.

The relief Petitioners seek with this appeal is the opportunity to impose additional restrictions and conditions on Wheeler's conditional use permit. However, completion of the building effectively deprives Petitioners' requested relief of any practical significance as such relief would necessarily require Wheeler to alter permanent structures of cement and steel. Therefore, this appeal has been rendered moot as there is no relief that can be granted that will affect the rights of the litigants.

2.

Second, if this Court determines to address the substantive issues, the trial court must be affirmed. With regard to the Petitioners' due process claims, the trial court correctly reasoned that although the City did not provide mailed notice in accordance with its ordinances, the same has not deprived Petitioners of their right to due process because Petitioners cannot show that such notice would have resulted in a different outcome.

Indeed, Petitioners would not have had the opportunity to present their objections at the subject meeting because it was not a public hearing. Furthermore, Petitioners cannot escape the record in this case which makes clear that, far from being deprived of a meaningful opportunity to be heard, Petitioners had a complete and full opportunity at

two previous hearings on the issue to present their objections to the conditional use permit, which objections were actually addressed in the final permit issued to Wheeler.

3.

Finally, exhaustion of administrative remedies prior to judicial review is mandated by Utah Code Ann. § 10-9-1001(1). Petitioners failed to do so in this case. Therefore, the trial court correctly ruled that it was without jurisdiction to consider Petitioners' petition for review.

ARGUMENT

I. THIS APPEAL HAS BEEN RENDERED MOOT AS THERE IS NO RELIEF THAT CAN BE GRANTED THAT WILL AFFECT THE RIGHTS OF THE LITIGANTS.

“Ordinarily [this Court] will not adjudicate issues when the underlying case is moot.” Ellis v. Swensen, 2000 UT 101, ¶25, 16 P.3d 1233 (citing Burkett v. Schwendiman, 773 P.2d 42, 44 (Utah 1989)). “A case is deemed moot when the requested judicial relief cannot affect the rights of the litigants.” Id. (quoting Burkett, 773 P.2d at 44). Occasionally appellate courts will “consider a technically moot issue if it falls within the ‘public interest exception’ to the mootness doctrine.” Id.

“The public interest exception to the mootness doctrine arises ‘when the case presents an issue that affects the public interest, is likely to recur, and because of the brief time that any one litigant is effected, is capable of evading, review.’” Id. at ¶26 (quoting Burkett, 773 P.2d at 44).

Thus, in determining this issue, the first question is whether this appeal has been rendered moot, and if so, whether it falls within the public interest exception. Addressing these questions in turn, it is clear the issues on appeal are moot and do not fall within the public interest exception.

A. Petitioners' Failure to Seek Injunctive Relief to Prevent Wheeler's Completion of Construction Has Rendered this Appeal Moot.

Wheeler brought its Rule 37(a) Suggestion of Mootness asserting that because it fully constructed its building between the time the Planning Commission issued its conditional use permit and the instant appeal, it has gone from having a conditional use under Washington City Zoning Ordinance 24-1(2)(a) (requiring conditional use approval for development of any vacant parcel of land) to a permitted use under Washington City Zoning Ordinance 24-2(1)(b) (allowing use of existing structure as an automobile or vehicle sales and repair shop). Thus, Wheeler asserts that no further conditions can be placed on its conditional use permit as sought by Petitioners.

The City agrees with Wheeler that completion of its building has mooted this appeal. However, the City asserts this appeal is moot for different reasons.⁴ The relief requested by Petitioners is the opportunity to appear before the Planning Commission and/or the City Council to argue for "additional restrictions" and conditions on Wheeler's conditional use permit. (Br. at 10.) Petitioners have not readily identified what types of

⁴ The City does not agree with and cannot ascribe to the assertion that a conditional use automatically converts to a permitted use upon completion of construction of a building on vacant land. Such a proposition would fundamentally alter municipal authority to regulate zoning issues and the City is otherwise unaware of any authority supporting such a proposition.

restrictions or conditions they would like to advocate but generally assert that they would be in the nature of “restrictions on the hours of operation, noise limitations, etc.” (Br. at 10.)

As evidenced in the record, however, the “additional” restrictions Petitioners seek can be implemented only by actual redesign, alteration, and construction to the premises. (R. 207, 224-226, 243-245, 250, 280-293.) For example, to address noise concerns, the Planning Commission required Wheeler to construct its building with concrete walls, construct a block wall around the premises adjacent to residential homes, and design and plant landscaping to drown out noise. (R. 243-45, 281-293.) Further, entrances and exits were designed and engineered to handle the size of Wheeler’s trucks and machinery and road surfaces were designed to protect the public streets. (R. 224-226, 243-246, 281-293.) Each of these items—undisputedly now in place—required engineering and architectural designs, as well as feasibility studies, all at the cost and expense of Wheeler.

Should Petitioners ultimately prevail on appeal, this Court certainly will not require Wheeler to obtain new engineering plans and otherwise tear down or alter brick, steel, and vegetation to allow Petitioners to appeal the conditions imposed by the Planning Commission in the hopes that the City Council will be receptive to their claims. Particularly in circumstances such as these where Petitioners failed to act to protect their interests by obtaining or seeking some type of injunctive relief to prevent construction pending the outcome of the litigation.

Whatever may be said about Petitioners' notice of the Planning Commission meeting, Petitioners filed the instant action thirty days after the Planning Commission approved Wheeler's conditional use permit application. Petitioners actually began litigation a little over two weeks after the conditional use permit was approved, by filing a motion to intervene before Judge Beacham. Thus, Petitioners had adequate time and opportunity to seek injunctive relief against the construction of Wheeler's building pending an outcome of their challenge to the conditional use permit.

Moreover, contrary to Petitioners' assertions, ample authority exists to support the proposition that a party challenging a zoning action who does not seek injunctive relief to stop construction of a building during the pendency of the litigation risks the possibility of having their claim mooted upon completion of the construction. See City of New Orleans v. Bd. of Comm'rs, 694 So. 2d 975, 977 (La. Ct. App. 1996) (affirming dismissal of case as moot where completion of project prevented court from giving any practical relief); Dreikausen v. Zoning Bd. of Appeals, 774 N.E.2d 193, 198 (N.Y. 2002) (dismissing appeal as moot where challenger's failure to seek preliminary injunctive relief to preserve status quo and prevent construction from commencing or continuing during pendency of litigation prevented court from fashioning any practical relief); see also, e.g., Zoning Bd. of Adjustment v. DeVilbiss, 729 P.2d 353, 358-59 (Colo. 1986) (declaring challenge to zoning decision moot where challenged construction project was completed during pendency of action and plaintiff failed to obtain injunctive relief to enjoin such construction); Wells v. Lodge Props., Inc., 976 P.2d 321, 325 (Colo. Ct. App.

1998) (finding case not moot where plaintiff sought injunctive relief, building was not completed, and action filed before issuance of permit).

As stated by the Colorado Supreme Court, a party who fails to seek injunctive relief “must bear some responsibility for a change in circumstances between the commencement of the action and the ultimate resolution of the case on the merits.”

DeVilbiss, 729 P.2d at 357. Along the same lines, both the Utah Supreme Court and this Court have refused to relieve parties from their choice of litigation strategy when such strategy ultimately works to their detriment—however harsh the result may be. See Collins v. Sandy City Bd. of Adjustment, 2002 UT 77, ¶19, 52 P.3d 1267 (refusing to grant exception to res judicata where party failed to exhaust appeals), *aff’g*, Collins v. Sandy City Bd. of Adjustment, 2000 UT App 371, ¶26, 16 P.3d 1251 (same).

This general policy should certainly be applied here where the remedy sought may require “complete removal or radical alteration of the construction project undertaken and completed at considerable expense and pursuant to governmental permit processes.” DeVilbiss, 729 P.2d at 359.

Furthermore, with regard to those conditions Petitioners seek that do not require alteration of or tearing down permanent structures (such as quiet time), Petitioners have failed, both before the trial court and on appeal, to present any evidence or give any indication as to what *specific* conditions they seek, and how those conditions differ from the conditions presently in force. Indeed, throughout this litigation Petitioners have simply ignored the conditional use permit that was issued and is currently in place. This

Court need not seriously entertain Petitioners' cryptic requests for conditions where they fail to consider the present conditions or otherwise articulate the specifics of the conditions they seek.

In sum, because this Court can grant no relief that will affect the rights of the litigants, this case is moot and any decision from this Court would constitute a mere advisory opinion, the issuance of which would undermine longstanding judicial policy. See Keller v. Southwood N. Med. Pavilion, Inc., 959 P.2d 102, 108-09 (Utah 1998) (Russon, J., concurring in result) (citing Utah Supreme Court decisions on longstanding policy against rendering advisory opinions); Stewart v. Public Serv. Comm'n, 885 P.2d 759, 784-85 (Utah 1994) (Howe, J., dissenting) (stating "it is not the province of this court" to answer "abstract, hypothetical, or otherwise moot cases"); State v. Sims, 881 P.2d 840, 842 (Utah 1994) (stating "[w]hen declaring an issue moot, a court specifically declines to address the merits"); Merhish v. H.A. Folsom & Assocs., 646 P.2d 731, 732 (Utah 1982) ("strong judicial policy against giving advisory opinions dictates that courts refrain from adjudicating moot questions"); McRae v. Jackson, 526 P.2d 1190, 1191 (Utah 1974) ("The function of appellate courts . . . is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation, and it has been held that questions or cases which have become moot or academic are not a proper subject to review.").

B. This Case does not fall within the Public Interest Exception because it is Not Likely to Recur Yet Evade Review.

Petitioners argue that even if this appeal has been rendered moot, it falls within the public interest exception and therefore should be considered by this Court. First and foremost, as set forth above, it should be noted that exceptions to the mootness should not be employed merely to reach an interesting question. Rather, such exceptions should be used “occasionally” and even then only in “extraordinary circumstances”. Merhish, 646 P.2d at 732. Petitioners have provided no valid reason for this Court to depart from this standard.

As an initial matter, while Petitioners generally recite the public interest exception, they fail to give it any meaningful application to this case other than inviting this Court to issue an advisory opinion to other municipalities in Utah. (Br. at 12.) Specifically, Petitioners have made no argument that the situation presented here is likely to recur yet evade review. See Ellis, 2000 UT 101 at ¶26.

As set forth in the statement of facts, this case arrives at this Court having been through two public hearings, an administrative appeal, as well as prior litigation resulting in a well-reasoned opinion by a respected district court judge who mandated issuance of the permit at issue. The procedural posture of this case, therefore, is not likely to recur very often—if at all—and Petitioners have failed to argue otherwise.

Further, the issue here is not likely to evade review “because of the brief time that any one litigant is affected.” Id. Rather, any litigant may seek exactly what Petitioners failed to seek in the instant case: injunctive relief to prevent the case from becoming

moot prior to completion of the litigation. Therefore, it does not fall within the public interest exception to the mootness doctrine.

In sum, this Court should dismiss this appeal as moot.

II. THE CITY'S FAILURE TO MAIL NOTICE OF THE PLANNING COMMISSION MEETING DID NOT DENY PLAINTIFFS DUE PROCESS BECAUSE PETITIONERS WERE NOT PREJUDICED BY SUCH FAILURE.

In addition to the notice requirements of the Open and Public Meetings Act, Utah Code Ann. §§ 52-4-1 to -10 (2002),⁵ Washington City Zoning Ordinance § 3-6 provides that notice of Planning Commission meetings be “mailed to all property owners appearing on the latest ownership plat in the Washington County Records Office within a three hundred (300) foot radius of any property for which an action of the Planning Commission [on a conditional use permit] is being requested.” Wash. City Zoning Ord. § 3-6.

It is undisputed that the City did not provide this mailed notice. Petitioners assert that this failure invalidates the issuance of the conditional use permit and otherwise denied them of their right to due process. This assertion is erroneous. As the trial court correctly concluded, the City's failure to provide mailed notice did not violate Petitioners' right to due process or invalidate the action taken by the Planning

⁵ The City's compliance with the Open and Public Meetings Act is undisputed and was not challenged below or on appeal.

Commission because providing such notice would not have resulted in a different outcome.

The trial court's conclusion relied upon and is consistent with the Utah Supreme Court's decision in Springville Citizens for a Better Community v. City of Springville, 1999 UT 25, 979 P.2d 332. In Springville Citizens, the plaintiffs challenged the city council's approval of a planned unit development on the grounds that the city had failed to follow the requirements of its own PUD approval process. See id. at ¶11. The district court entered judgment for the city on the grounds that the city had substantially complied with its ordinances in the approval process. See id. at ¶13. On appeal, the Utah Supreme Court reversed, holding that the city must follow its mandatory ordinances, not merely substantially comply with them. See id. at ¶29.

However, the supreme court determined that the city's failure to follow its mandatory ordinances did not automatically entitle the plaintiffs to relief. See id. at ¶31. "Rather, [the] plaintiffs must establish that they were prejudiced by the [c]ity's noncompliance with its ordinances or, in other words, *how, if at all, the [c]ity's decision would have been different* and what relief, if any, they are entitled to as a result." Id. (emphasis added). The case was then remanded to the district court for a determination of whether the city's decision would have been different had it complied with its ordinances. See id. at ¶¶32-33; see also 8A McQuillin, MUNICIPAL CORPORATIONS § 25.249 (3d ed. rev. 1994) (stating defects in notice are generally disregarded where they have not prejudiced interested persons).

Petitioners fail to explain how the outcome of the Planning Commission meeting might have been different had they been mailed notice. They claim, in conclusory fashion, that they could have argued to the Planning Commission or, on a timely appeal, to the City Council, for the imposition of “different conditions” of approval for Wheeler’s conditional use permit. (Br. at 8, 10.) Petitioners assert that these conditions would include “restrictions on the hours of operation, noise limitations, etc.” (Br. at 10.)

This argument ignores two essential facts. First, the Planning Commission meeting was not a public hearing and therefore Petitioners would have had no opportunity to argue for different conditions. And, second, that Petitioners have already had the opportunity, both before the Planning Commission and the City Council, to express their concerns and opinions, and, as is clear from the conditional use permit issued by the Planning Commission, such concerns were taken into consideration. Taking these facts in turn, it is clear that Petitioners cannot show they suffered prejudice.

A. As Spectators to the Proceedings, Petitioners could not have affected the Outcome.

According to the Utah Supreme Court, the notice requirement is “to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections” Tolman v. Salt Lake County, 20 Utah 2d 310, 318, 437 P.2d 442, 448 (1968) (citation and quotation omitted); see also, e.g., Harper v. Summit County, 2001 UT 10, ¶38, 26 P.2d 193 (holding open meetings act not implicated where act at issue was ministerial in nature). In other words, as the trial court reasoned, “where an

interested party might have an opportunity to be heard and present his or her objections to a proposed action, due process requires notice to that party.” (R. 183; see also Add. A.). See also Dairy Product Servs., Inc. v. City of Wellsville, 2000 UT 81, ¶49, 13 P.3d 581 (due process in the context of a municipal hearing is concerned with the opportunity of interested parties to express concerns to an impartial decision maker).

As set forth above, in the instant case, the September 4, 2002, Planning Commission meeting was not a public hearing and therefore public comment was not taken by the Planning Commission. Rather, any member of the public attending the meeting was a mere spectator to the proceedings. Thus, Petitioners cannot show that the Planning Commission’s decision would have been different had they been present at the meeting. Therefore, the failure to mail notice did not prejudice Petitioners.

B. Petitioners have Already Presented their Views and Objections to the Planning Commission and the City Council and therefore have had their Voices Heard on this Matter.

Second, Petitioners argue that they have a right to have their voices heard before the City Council. However, Petitioners are quick to forget and their brief entirely ignores the fact that they previously had the opportunity, on two separate occasions, to voice their concerns before both the Planning Commission and the City Council.

As set forth above, Petitioners Karen Golay, Grace Blackburn, and Morgan Bingham presented their objections to the City Council in the January 9, 2002, public hearing. Representatives and residents of the Highlands Homeowners Association and Turtle Creek Homeowners Association also presented their objections to the City Council

in the January 9, 2002, public hearing, and to the Planning Commission in the November 7, 2001, public hearing. The Turtle Creek Homeowners Association also presented a letter objecting to Wheeler's application. The general sentiment of these objections was concern with safety, traffic, noise, and fumes.

The Planning Commission took these concerns into consideration and addressed the same by imposing, *inter alia*, on Wheeler's conditional use permit, quiet time hours, entrance and exit traffic prohibitions, surrounding block walls and trees, dust free surfacing, and landscaping. Indeed, the Planning Commission did an admirable job of addressing the concerns of Petitioners and other local residents in light of the fact that Judge Beacham had previously ruled that such concerns constituted unsubstantiated opinion and public clamor. (R. 270-274.). Thus, it cannot be said that Petitioners were denied the opportunity to participate in this process. Cf. Naylor v. Salt Lake City Corp., 17 Utah 2d 300, 303, 410 P.2d 764, 766 (1966) (holding failure of notice does not invalidate action where party entitled to notice participated in the hearing).

Further, as noted above, conspicuously absent from Petitioners' brief is any mention of what specific conditions Petitioners would seek that are different from what has already been imposed. In essence, what Petitioners seek is a third and fourth bite at the apple without any mention of what they would seek, if anything, that is different from what is already in place.

In sum, the City's failure to adhere to Section 3-6 did not prejudice Petitioners, as the result of such compliance would not have resulted in a different outcome.

III. THE TRIAL COURT CORRECTLY CONCLUDED THAT PETITIONERS' FAILURE TO APPEAL THE PLANNING COMMISSION'S DECISION TO THE CITY COUNCIL DEPRIVED IT OF JURISDICTION.

The Municipal Land Use Development and Management Act, Utah Code Ann. §§ 10-9-101 to -1003 (1999 & Supp. 2002), provides that appeals from municipal planning commission decisions regarding conditional use permits must be heard and decided by the municipal body designated by the municipality's zoning ordinance. See Utah Code Ann. § 10-9-704(2). Washington City Zoning Ordinance has designated the Washington City Council as the legislative body to hear conditional use permit appeals from the Planning Commission. See Wash. City Zoning Ord. § 8-6.

Washington City Zoning Ordinance § 8-6 provides that any person desiring to appeal the Planning Commission's conditional use permit decisions must file that appeal in writing with the City within 10 working days of the decision. See id.

It is undisputed that Petitioners failed to appeal the Planning Commission's decision to approve Wheeler's application for the conditional use permit to the City Council as required by Section 8-6. Instead of adhering to the City's administrative procedure, Petitioners challenged the Planning Commission's land use decision by bringing the instant action directly to the district court.

Utah Code Ann. § 10-9-1001(1) provides: "No person may challenge in district court a municipality's land use decisions made under this chapter or under the regulation made under authority of this chapter until that person has exhausted his administrative

remedies.” This requirement is a jurisdictional prerequisite to judicial review. See Patterson v. American Fork City, 2003 UT 7, ¶¶15-17, 67 P.3d 466.

Therefore, because Petitioners failed to adhere to the appeals procedures of Washington City Zoning Ordinance, they have not exhausted their administrative remedies as required by Utah Code Ann. § 10-9-1001(1). Thus, the trial court correctly concluded it was without jurisdiction over Petitioners’ action.

The City is aware that one of Petitioners’ due process challenges is that failure to provide notice deprived them an opportunity to appeal within the 10-day deadline provided by Section 8-6. However, as the trial court found, the purpose of Washington City Zoning Ordinance § 3-6 “is to give notice to surrounding landowners to provide them with an opportunity to participate in the hearing the process.” (R. 182; see also Add A, Findings & Concs., at 6.) Conversely, Section 8-6 requires that an appeal be taken to the City Council within 10 working days. It contains no exceptions. Thus, Petitioners had no more or less protection under Section 8-6 than any other citizen desiring to appeal the Planning Commission’s decision.

In other words, the trial court correctly disposed of Petitioners challenge to the City’s failure to provide notice on due process grounds as set forth above. The failure of notice was a challenge to the meeting itself. Here, on the issue of the timeliness of an appeal, the concern is the trial court’s jurisdiction to review the substance of the decision made by the Planning Commission at the meeting. Thus, Petitioners’ failure to timely appeal the Planning Commission’s decision to the City Council, deprived the trial court

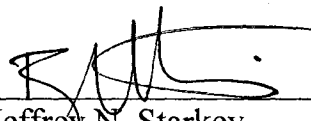
of jurisdiction to review the substance of the Planning Commission's decision and determine, for example, whether the same was supported by substantial evidence in the record. See, e.g., Ralph L. Wadsworth Constr., 2000 UT App 49 at ¶16 (review of municipal land use decision is to determine whether there is substantial evidence in the record to support the same).

In sum, the trial court correctly concluded Petitioners' failure to appeal the Planning Commission's decision deprived it of jurisdiction over the appeal.

CONCLUSION

This Court should affirm the trial court's entry of summary judgment.

Respectfully submitted this 21st day of April 2004.



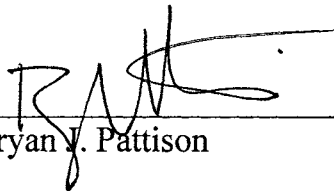
Jeffrey N. Starkey
Bryan J. Pattison
Attorneys for Washington City

CERTIFICATE OF SERVICE

In accordance with Utah R. App. P. 26(b), I, Bryan J. Pattison, certify that on April 22nd, 2004, I served two (2) copies of the **BRIEF OF APPELLEE WASHINGTON CITY** upon counsel for both Appellants and Intervenor in this matter, via first class mail with sufficient postage prepaid, to the following addresses:

Bruce R. Baird
BAIRD & JONES, L.C.
201 South Main, Suite 900
Salt Lake City, Utah 84111-2215

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Bryan J. Pattison

Tab A

FILED
DISTRICT COURT

2003 MAY 19 PM 3:52

WASHINGTON COUNTY

BY 

IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

KAREN GOLAY; *et al.*,

Plaintiffs/Petitioners,

v.

WASHINGTON CITY

Defendant/Respondent,

WHEELER MACHINERY CO.,

Intervenor.

**ORDER GRANTING SUMMARY
JUDGMENT**

Case No. 020501937
Judge James L. Shumate

For the reasons set forth in the Court's Ruling on Motions for Summary Judgment, it is hereby ORDERED that:

1. Defendant Washington City's Motion for Summary Judgment is granted;
2. Intervenor Wheeler Machinery Co.'s Motion for Summary Judgment is granted;
3. Plaintiffs/Petitioners' Motion for summary judgment is denied; and
4. Plaintiffs/Petitioners' Complaint/Petition for Review is hereby dismissed with prejudice and on the merits.

DATED THIS 13 day of May ~~April~~ 2003.


JUDGE JAMES L. SHUMATE

MAILING CERTIFICATE

I hereby certify that on the 30th day of April, 2003, I served an unsigned copy of the foregoing **ORDER GRANTING SUMMARY JUDGMENT** to the following by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

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BAIRD & JONES, L.C.
201 South Main, Suite 900
Salt Lake City, Utah 84111-2215

Joseph C. Rust
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Jaime Gargano

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MAY 19 PM 3:54
WASHINGTON COUNTY

IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

KAREN GOLAY; *et al.*,

Plaintiffs/Petitioners,

v.

WASHINGTON CITY

Defendant/Respondent,

WHEELER MACHINERY CO.,

Intervenor.

**RULING ON MOTIONS FOR
SUMMARY JUDGMENT**

Case No. 020501937
Judge James L. Shumate

This matter came before the Court pursuant to the cross-motions for summary judgment filed by Plaintiffs/Petitioners Karen Golay, et al., Defendant/Respondent Washington City, and Intervenor Wheeler Machinery Co. This is an appeal by Plaintiffs/Petitioners from the Washington City Planning Commission's approval of Intervenor Wheeler Machinery Co.'s application for a conditional use permit.

The Court, after having reviewed the parties' memoranda and the record filed by the City, originally granted Washington City's Motion for Summary Judgment without a hearing. However, at the request of Plaintiffs, the Court agreed to hold a hearing on the matter which hearing was heard by this Court on April 15, 2003. The Court hereby makes the following findings, conclusions, and rulings on said motions.

UNDISPUTED FACTS¹

1. On November 7, 2001, the Washington City Planning Commission ("Planning Commission") held a public hearing to consider Wheeler Machinery, Co.'s ("Wheeler") application to the City for a conditional use permit. Wheeler applied for the conditional use permit to locate a commercial business at 203 North Playa Della Rosita in Washington City, Utah.
2. The Planning Commission voted to deny Wheeler's application for the conditional use permit.
3. Pursuant to Washington City Zoning Ordinance 8-6, Wheeler appealed the Planning Commission's decision to the Washington City Council ("City Council").
4. On January 9, 2002, the City Council held a public hearing to consider Wheeler's appeal of the Planning Commission's decision. After the hearing, in which public comment was taken from area residents, the City Council, by a 3-2 vote, affirmed the Planning Commission's denial of Wheeler's application.
5. On January 14, 2002, Wheeler appealed the City Council's decision to this Court. The case, In re Wheeler Machinery Co., Case No. 02050091, was assigned to the Honorable G. Rand Beacham.
6. Wheeler filed a motion for summary judgment and supporting memoranda and the City submitted memoranda opposing Wheeler's motion. In addition to written memoranda, each party presented oral arguments to the court.

¹ The statement of facts are adapted from both the City's Memorandum in Support of Cross-Motion for Summary Judgment and Wheeler Machinery's Memorandum in Support of Motion for Summary Judgment, which facts were undisputed by the other parties hereto and therefore are deemed admitted pursuant to Rule 4-501 of the Utah Code of Judicial Administration.

7. On August 12, 2002, Judge Beacham rendered his decision, and in an extensive opinion, ruled in favor of Wheeler.

8. In his decision, Judge Beacham found that under the applicable standard of review as set forth by the Utah Court of Appeals in Ralph L. Wadsworth Construction, Inc. v. West Jordan City, 2000 UT App 49, 999 P.2d 1240, there was not substantial evidence in the record to support the City Council's denial of Wheeler's conditional use permit.

9. On September 4, 2002, Wheeler's application for a conditional use permit again came before the Planning Commission for consideration.

10. Public notice of the September 4, 2002, Planning Commission meeting was provided by the City as follows: (a) a true and correct copy of the meeting agenda was posted in a conspicuous place in the Washington City Offices located at 111 North 100 East, Washington, Utah, at least 24 hours prior to the meeting; (b) a true and correct copy of the meeting agenda was posted on the City's website located at www.washington-ut.net at least 24 hours prior to the meeting; and (c) a true and correct copy of the meeting agenda was provided to the *Spectrum*, a newspaper of general circulation in Southern Utah, at least 24 hours prior to the meeting.

11. The public notice of the meeting agenda clearly showed, at item no. 10, that Wheeler's application for a conditional use permit would be considered at the meeting by the Planning Commission.

12. Notice of the September 4, 2002, Planning Commission meeting was not mailed to residents living within a 300-foot radius of Wheeler's property.

13. Item 10 of the September 4, 2002, Planning Commission meeting was not a public hearing and therefore no public comment or input was heard. Rather, the Planning Commission staff advised the Planning Commission that all items of concern had been addressed

at the previous two public hearings on the matter (November 7, 2001, before the Planning Commission, and January 9, 2002, before the City Council) and recommended that the Planning Commission approve Wheeler's application for the conditional use permit with certain conditions.

14. The Planning Commission voted to approve Wheeler's application for the conditional use permit, subject to Wheeler's ability to meet certain conditions recommended by the staff.

15. Pursuant to Washington City Zoning Ordinance 8-6, any person could appeal the Planning Commission's decision to approve Wheeler's conditional use permit application to the City Council by filing an appeal with the City Council within 10 working days following the date of the decision.

16. None of the Plaintiffs/Petitioners ("Plaintiffs") filed an appeal of the decision with the City. In fact, no appeals challenging the Planning Commission's decision were filed with City.

17. On or about September 20, 2002, the Plaintiffs filed a motion for leave to intervene in and motion for reconsideration of Judge Beacham's summary judgment ruling in In re Wheeler Machinery Co. arguing, inter alia, that the City was not adequately represented by counsel.

18. On November 5, 2002, Judge Beacham denied Plaintiffs' motion to intervene on the grounds that final judgment had been entered in In re Wheeler Machinery, that the motion to intervene was not timely, and that the City was adequately represented by counsel.

19. On or about October 4, 2002, Plaintiffs filed the instant lawsuit/petition for review.

ANALYSIS

A.

The Court concludes (as stipulated by all parties) that, under the doctrine of law of the case, it is bound to follow Judge Beacham's Ruling on Motion for Summary Judgment as reflected in In re Wheeler Machinery Co., Case No. 02050091. Therefore, in light of Judge Beacham's mandate that the City grant Wheeler Machinery's application for a conditional use permit, the administrative record for the taking of public comment was closed with regard to hearing additional evidence of the viability of Wheeler's application.

B.

The Municipal Land Use Development and Management Act, Utah Code Ann. §§ 10-9-101 to -1003 (1999 & Supp. 2002), provides that appeals from municipal planning commission decisions regarding conditional use permits must be heard and decided by the municipal body designated by the municipality's zoning ordinance. See Utah Code Ann. § 10-9-704(2). Washington City Zoning Ordinance has designated the Washington City Council as the legislative body to hear conditional use permit appeals from the Planning Commission. See Washington City Zoning Ordinance § 8-6 (attached as Exhibit B).

Washington City Zoning Ordinance § 8-6 provides that any person desiring to appeal the Planning Commission's conditional use permit decisions must file that appeal in writing with the City within 10 working days of the decision. See id.

It is undisputed that Plaintiffs failed to appeal the Planning Commission's decision to approve Wheeler's application for the conditional use permit to the City Council as required by Section 8-6.

Therefore, because Plaintiffs failed to adhere to the appeals procedures of Washington City Zoning Ordinance, they have not exhausted their administrative remedies as required by Utah Code Ann. § 10-9-1001(1). As a result, this Court is without jurisdiction to consider Plaintiffs' Complaint/Petition.

C.

The intent of Section 3-6 of the Washington City Ordinances is to give notice to surrounding landowners to provide them with an opportunity to participate in the hearing process. Once a public hearing has been closed, no further public comment is allowed. This is true whether the ultimate decision approving or denying a request for a conditional use permit is made at the same meeting as the public hearing or continued until a later date.

When the denial of Wheeler's application for a conditional use permit was reversed by Judge Beacham, the matter was sent back down to the Planning Commission for consideration in light of Judge Beacham's ruling. The matter was not remanded to the Planning Commission with an instruction that the Planning Commission begin the entire process over. Rather, the administrative record on the matter was closed, and the Planning Commission thus considered Wheeler's application in light of the record and Judge Beacham's ruling, which ruling was based on that same record.

Thus, with no public hearing taking place, Section 3-6 did not require mailed notice to surrounding landowners. Indeed, pursuant to Utah law, the appropriate notice was provided to

the public by posting as set forth in paragraph 10, above. No other notice under Utah statute was required.

Even if Section 3-6 required mailed notice of the September 4, 2002, meeting, the City's failure to do so did not violate Plaintiffs' right to due process or invalidate the action taken by the Planning Commission because such notice would not have resulted in a different outcome. See Springville Citizens for a Better Community v. City of Springville, 1999 UT 25, ¶30, 979 P.2d 332.

While the Utah Supreme Court in Springville Citizens did not specifically refer to the right of due process, it has previously explained the reason for the requirement of notice as necessary to protect the right to due process. The notice requirement, according to the supreme court, is "to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" Tolman v. Salt Lake County, 20 Utah 2d 310, 318, 437 P.2d 442, 448 (1968) (citation and quotation omitted). In other words, where an interested party might have an opportunity to be heard and present his or her objections to a proposed action, due process requires notice to that party.

The September 4, 2002, Planning Commission meeting was not a public hearing and therefore public comment was not taken by the Planning Commission. Rather, any member of the public attending the meeting was a mere spectator to the proceedings.

Thus, even if Plaintiffs were entitled to mailed notice from the Planning Commission because they lived within a 300 feet of the subject property and failed to attend or otherwise did

not know about the meeting because they were not mailed notice, they cannot show that the Planning Commission's decision would have been different had they been present at the meeting. Therefore, the failure to mail notice did not prejudice Plaintiffs.

CONCLUSION

There are no genuine issues of material fact before this Court, and Defendant Washington City and Intervenor Wheeler Machinery are entitled to judgment as a matter of law. Therefore, Defendant Washington City's Cross-Motion for Summary Judgment is granted, Intervenor Wheeler Machinery's Motion for Summary Judgment is granted, and Plaintiffs/Petitioner's Motion for Summary Judgment is denied.

DATED THIS 13 day of ~~April~~^{May}, 2003.


JUDGE JAMES L. SHUMATE

MAILING CERTIFICATE

I hereby certify that on the 30th day of April, 2003, I served an unsigned copy of the foregoing **RULING ON MOTIONS FOR SUMMARY JUDGMENT** to the following by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

Bruce R. Baird
BAIRD & JONES, L.C.
201 South Main, Suite 900
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Joseph C. Rust
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36 South State Street
Salt Lake City, Utah 84111

Jaime Gargano

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Tab B

CHAPTER 3. PLANNING COMMISSION

3-1 Planning Commission, Number of Members, Appointment.

The Washington City Planning Commission is hereby established for the purpose of developing plans for the physical development of the City, making reports and recommendations relating to the development of the City, administering the applicable provisions of this Ordinance, and to carry out any other activities authorized by the City Council to enable the Planning Commission to perform its functions and to promote municipal planning.

The Planning Commission shall consist of five (5) members and one (1) alternate, appointed by the City Council. All persons appointed to the Planning Commission shall be residents of Washington City and owners of real property therein. At least three (3) of the members shall hold no other public office or position. The City Council shall appoint a representative from among its members to act as a liaison between the City Council and Planning Commission. One (1) member of the Planning Commission shall be a member of the Board of Adjustment. The alternate member of the Planning Commission shall attend all meetings of the Planning Commission and may participate in all discussions and proceedings; however, he or she may vote only in the case where another Planning Commissioner is absent.

3-2 Terms of Office.

The terms of office of the appointed members of the Planning Commission shall be three (3) years and until their respective successors have been appointed. The member terms shall be filled so as to bring about staggered terms so that the terms of two (2) members expire each year. The City Council may reappoint any Planning Commissioner to any number of subsequent terms.

3-3 Vacancies and Removal for Cause.

Vacancies of appointed members occurring other than through the expiration of terms shall be filled for the remainder of the unexpired term by the City Council. The City Council shall have the right to remove any member of the Planning Commission for misconduct or non-performance of duty. Non-performance of duty shall include a repeated failure to attend Planning Commission meetings.

3-4 Compensation.

The Planning Commission shall serve without compensation, except that the City Council shall provide for the reimbursement of the Planning Commission for actual expenses incurred, upon presentation of proper receipts and vouchers.

3-5 Officers.

The Planning Commission shall elect from its members a Chairman, whose term shall be one (1) year. The Planning Commission may create and fill other offices as it may deem necessary.

3-6 Meetings.

The Planning Commission shall conduct regularly scheduled meetings which shall be properly advertised and open to the public. Notice of Planning Commission meetings shall be mailed to all property owners appearing on the latest ownership plat in the Washington County Records Office within a three hundred (300) foot radius of any property for which an action of the Planning Commission is being requested. It shall be the responsibility of the applicant for such action to provide the stamped, addressed envelopes necessary to provide such notice. All other costs involved with processing Planning Commission applications shall be the responsibility of the party or parties making such application.

3-7 Rules and Procedures.

The Planning Commission may adopt such rules and procedures as it may deem necessary for the proper conduct of its business. The Planning Commission shall keep a record of its proceedings, which shall be open to inspection by the public at all reasonable times.

3-8 Quorum and Vote.

A quorum shall consist of three (3) members. Evidence shall not be presented unless a quorum is present. A majority vote of the members present shall be required in order to carry any motion.

3-9 **Employees and Expenditures.**

The Planning Commission may, upon approval of the City Council, employ such staff as it may deem necessary for its work, and may contract with city planners or other consultants for such services as it requires, provided that the expenditures of the Planning Commission shall not be in excess of such sums as may be appropriated by the City Council.

Tab C

CHAPTER 8. CONDITIONAL USES

8-1 Purpose of Conditional Use Provisions.

Certain uses which may be harmonious under special conditions and in specific locations within a district may be improper under general conditions and in other locations. A Conditional Use Permit is intended to allow the proper integration of such uses into Washington City only if such uses are designed and laid out in a manner approved by the Planning Commission. This Chapter describes the process required to obtain a Conditional Use Permit.

8-2 Permit Required.

A Conditional Use Permit shall be required for all uses listed as conditional uses in the district regulations or elsewhere in this Ordinance. A Conditional Use Permit may be revoked by the Planning Commission upon failure to comply with conditions precedent to the original approval of the Permit.

8-3 Application.

Application for a Conditional Use Permit shall be made by the property owner or certified agent thereof at the Washington City Office on forms provided for that purpose twenty (20) working days prior to the regularly scheduled meeting of the Planning Commission at which the application is to be considered. Notice of Planning Commission meetings shall be mailed to all property owners appearing on the latest ownership plat in the Washington County Records Office within a 300 foot radius of any property for which an action of the Planning Commission is being requested. It shall be the responsibility of the applicant for such action to provide the stamped, addressed envelopes necessary to provide such notice.

8-4 Fee.

The application for any Conditional Use Permit shall be accompanied by the appropriate fee as determined by the City Council.

8-5 Site Development Plan Approval.

1) The applicant for a Conditional Use Permit shall prepare a Site Development Plan which meets the following criteria:

- a) Name and address of applicant;
- b) The location and dimensions of all existing and proposed buildings, fences, and other structures located on the proposed site;
- c) Proposed landscaping plan;
- d) The location and dimensions of existing and proposed roads, automobile parking and loading areas, and traffic circulation patterns;
- e) The location and dimensions of existing and proposed drainage facilities;
- f) The lot dimensions and a north arrow;
- g) Necessary explanatory notes; and
- h) Other materials necessary to assist the Planning Commission in arriving at an appropriate decision.

The Site Development Plan shall be submitted with the application for a Conditional Use Permit at least twenty (20) working days before the regularly scheduled Planning Commission meeting at which the application is to be considered.

2) The planning staff shall contact interested department personnel of the City and other public agencies for review purposes. The planning staff shall furnish to the applicant any comments regarding the Site Development Plan which may assist the applicant in preparing the request for presentation to the Planning Commission. If any such department or agency requests additional time for review of the Site Development Plan, the planning staff may recommend to the Planning Commission that deliberation of the application be postponed until the next regularly scheduled meeting of the Planning Commission. The application cannot be postponed for more than two (2) Planning Commission

meetings after the submittal of the application.

3) The Planning Commission may approve, modify and approve, or deny any application for a Conditional Use Permit to be located within any district in which the particular conditional use is permitted by the use regulations of this Ordinance. In authorizing any Conditional Use Permit, the Planning Commission shall impose such requirements and conditions as required by law and any additional conditions as may be necessary for the protection of adjacent properties and the public welfare.

Such conditions of approval may include, but shall not be limited to specifications concerning: structures; landscaping; density; ingress-egress; fencing; parking; or lighting. Height, density and size requirements for structures in each zone are maximum and may be reduced or modified as conditions to the approval of any Conditional Use application.

The Planning Commission shall not authorize a Conditional Use Permit unless evidence is presented showing:

- a) The proposed use, at the particular location, is necessary or desirable to provide a service or facility which will contribute to the general well-being of the neighborhood and community; and
- b) That such use will not, under the circumstances of the particular case, be detrimental to the health, safety or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity; and
- c) That the proposed use will comply with the regulations and conditions specified in this Ordinance for such use; and
- d) That the proposed use will conform to the intent of the Washington City Master Plan.

8-6 Appeal of Decision.¹¹

Any person shall have the right to appeal to the Washington City Council any decision rendered by the Planning Commission in relation to Conditional Use Permit decisions. Appeals to the City Council are made by filing, in writing, the reasons for the appeals to the City Council within ten (10) working days following the date upon which the decision is made by the Planning Commission. After receiving said appeal, the City Council may reaffirm the Planning Commission decision or set a date for a public hearing.

- 1) The City Council shall notify the Planning Commission of the date of said hearing at least seven (7) days preceding the date set for such hearing so that the Planning Commission may prepare to record for said hearing.
- 2) The City Council after proper review of the decision of the Commission and application of the standards listed in Section 8-5 above, may affirm, reverse, alter or remand any action taken by the Planning Commission.

8-7 Expansion of a Conditional Use.

No structure or use allowed by the issuance of a Conditional Use Permit may be expanded without the approval of the Planning Commission. The applicant for such expansion shall follow the same application procedures as are listed above.

8-8 Inspection.¹²

Following the issuance of a Conditional Use Permit by the Planning Commission, the official charged with the enforcement of this Ordinance shall review and approve an application for a building permit pursuant to Section 2-2 of this Ordinance and shall ensure that the development is undertaken and completed in compliance with all conditions and permits pertaining to said development.

¹¹ This section was amended on May 5, 1989 by Ordinance No. 89-11 and was subsequently amended on December 9, 1992 by Ordinance No. 92-37

¹² This section was amended on February 28, 1996 by Ordinance No. 96-07

No Certificate of Occupancy or Business Licence shall be issued by any city employee for any use authorized by conditional use approval, nor shall any structure be occupied until the official charged with the enforcement of this ordinance certifies that all conditions of the permit have been completed, or that the applicant has filed a performance bond with the city which guarantees the completion of all required conditions, and that the applicant has complied with all conditions placed upon the permit at the time of approval of the conditional use permit.

8-9 Time Limit.

All Conditional Use Permits shall expire within a maximum period of one (1) year of issuance, unless there shall have been substantial performance toward the completion of the conditions set forth in the permit. The Planning Commission may grant a maximum extension of six (6) months under exceptional circumstances. In the event that a Conditional Use Permit is granted on a temporary basis, the Planning Commission may issue a permit for six (6) months, with one (1) maximum extension of six (6) months. A Conditional Use Permit shall be non-transferable.

8-10 Revocation.

A Conditional Use Permit may be revoked by the Planning Commission after a hearing is held where the Planning Commission determines that the applicant has failed to comply with the conditions imposed with the original permit. The permit may be reinstated upon the determination of the Planning Commission that the cause for revocation has been corrected and that the applicant has submitted evidence indicating that the Site Development Plan approved by the Planning Commission will be completed in a time frame accepted and approved by the Planning Commission.

Tab D

**Washington City
Planning Commission Meeting
Staff Review**

Hearing Date: *September 4, 2002*
Requested Action: *Request to locate Wheeler Machinery*
Application Number: *C-2001-59*
Applicant: *Steve Wells / Wheeler Machinery*
Location: *203 N. Playa Della Rosita*
Current Zoning: *Commercial - 3*
Reviewed by: *Danice Bulloch*

This request is to approve the Conditional Use Permit C-2001-59, to locate Wheeler Machinery at 205 N. Playa Della Rosita. The site plan before the Planning Commission is the same as was originally submitted on September 11, 2001. Mr. Wells has met with staff to review the submitted site plan. Staff feels that all of the items of concern have been addressed from the September 11, 2001 and November 7, 2001 meetings. Staff recommends approval of this use with the following conditions and recommendations:

1. The elevation of this property drops approx. 28-feet from the rear to Buena Vista Blvd. The area along the east side adjacent to Buena Vista Blvd. will be raised 7-foot to 8-foot and ~~maintain~~^{be} as landscape area. The area in the rear will have a drop of 7-foot to 8-foot. This drop in elevation will maintain a 3:1 slope to be covered by landscape rock. This will need to be shown on the landscaping plan. ~~3 feet~~
2. At the north end of the lot, along the top of the slope, a 4-foot to 6-foot block wall with trees will be installed.
(Trees will be installed to help filter out the sound and breakup the visibility of the use and fence adjacent to the residential area. This needs to be shown on the site plan and ~~be~~^{be} included in the landscaping plan.)
3. The hours of the office are to be from 7:00 A.M. to 5:00 P.M..
4. Quiet time will be from 10:00 P.M. to 7:00 A.M..
5. The building is to be constructed with tilt up concrete walls.
(The elevation shows the building is to be constructed of metal. This is not the case. The building will be concrete but will have the same appearance as shown on the Elevation Plan.)
6. The sign for this use will be of a monument or pole type.
(The exact location of the sign has not been determined at this time but will be located along the Buena Vista Boulevard. Should the sign be a pole type sign, the applicant stated that the pole would have a shroud that would cover the pole base.)
7. The entrance on the west side of this project is to be an *exit only*.

(The entrance has been designed such that if a driver with a 55-foot truck and trailer missed the turn onto Playa Della Rosita, then the vehicle will still be able to enter the site without driving through the adjacent residential area.)

8. The main entrance is to be on the east side, off of Playa Della Rosita.
(After reviewing with the Public Works Director, staff and Mr. Wells, it has been determined that the main entrance should be from Playa Della Rosita. With the entrance on the eastside and exit on the westside this would allow larger trucks with trailers to make left turns into this area. This will eliminate vehicles from driving over and destroying the curbs. This direction will also keep these large trucks with trailers from making wide turns into on coming traffic when entering the property.)
9. The surfacing of the drive area from the entrance to the exit is to be a hard surface. This is to be reviewed in one year to see if this gravel or road base material is being carried out onto the public streets.
(Again after reviewing with the Public Works Director, staff and Mr. Wells, it has been determined that the gravel surface would be preferred. There is an apron of asphalt on the east entrance of approx. 40-foot. The entrance on the west has an asphalt apron of approx. 100-feet. This should keep all gravel off of the streets. Staff is requesting that this be reviewed again ~~on~~ one year *only if* a problem exists).

Mr. Snow said he has reviewed it and thinks it a good idea to send this on to City Council.

Chairman Simmons asked how much water is available in Washington City and how much more building can be done before the City runs out of water?

Mr. Zabriskie said that Chairman Simmons question is a critical one and is addressed in the request.

Chairman Simmons called for a motion.

Commissioner Van Der Heyden *moved to forward this proposal to City Council with Planning Commission's recommendation for approval. Commissioner Wiley 2nd. The motion carried.*

9. Amend Zoning Ordinance Chapter 10-A Design Standards for Single Dwellings outside a Mobile Home Zone; Applicant - Washington City.

Creig Maynes reviewed.

SEE ATTACHED

Mr. Maynes explained that condition number 6 sets a roof pitch requirement and that Number 9 is important in that it addresses the minimum width. He pointed out that Number 11 specifies the lot size and size of the home on the lot.

Commissioner Latschkowski asked if the City currently has an ordinance of this type?

Mr. Maynes said no.

Mr. Snow stated he has some concern about the minimum size requirement and added he would like to review it a little more.

Chairman Simmons called for a motion.

Commissioner Latschkowski *moved to recommend that City Council approve amending Zoning Ordinance Chapter 10-A and instruct the City Attorney to review and possibly revise this amendment before sending it on to City Council. Commissioner Van Der Heyden 2nd. The motion carried.*

10. C-2001-59 Approval of site plan for Wheeler Machinery located at 203 N. Playa Della Rosita; Applicant - Steve Wells/Wheeler Machinery.

Mr. Snow wanted to explain to Planning Commission for the benefit of the public present so they

might be aware of what is going on. The public hearing for this has been closed and would suggest that it not be reopened for discussion by the public.

Danice Bulloch reviewed.

This request it to approve the Conditional Use Permit C-2001-59, to locate Wheeler Machinery at 205 N. Playa Della Rosita. The site plan before the Planning Commission is the same as was originally submitted on September 11, 2001. Mr. Wells has met with staff to review the submitted site plan. Staff feels that all of the items of concern have been addressed from the September 11, 2001 and November 7, 2001 meetings. Staff recommends approval of this use with the following conditions and recommendations:

1. The elevation of this property drops approx. 28-feet from the rear to Buena Vista Blvd. The area along the east side adjacent to Buena Vista Blvd. will be raised 7-foot to 8-foot and be maintained as landscape area. The area in the rear will have a drop of 7-foot to 8-foot. This drop in elevation will maintain a 3:1 slope to be covered by landscape rock. This will need to be shown on the landscaping plan.
2. At the north end of the lot, along the top of the slope, a 4-foot to 6-foot block wall with trees will be installed.
(Trees will be installed to help filter out the sound and breakup the visibility of the use and fence adjacent to the residential area. This item needs to be shown on the site plan and included in the landscaping plan.)
3. The hours of the office are to be from 7:00 A.M. to 5:00 P.M..
4. Quite time will be from 10:00 P.M. to 7:00 A.M..
5. The building is to be constructed with tilt up concrete walls.
(The elevation shows the building is to be constructed of metal. This is not the case. The building will be concrete but will have the same appearance as shown on the Elevation Plan.)
6. The sign for this use will be of a monument or pole type.
(The exact location of the sign has not been determined at this time but will be located along the Buena Vista Boulevard. Should the sign be a pole type sign the applicant stated that the pole would have a shroud that would cover the pole base.)
7. The approach on the west side of this project is to be an *exit only*.
(The entrance has been designed such that if a driver with a 55-foot truck and trailer missed the turn onto Playa Della Rosita, then the vehicle will still be able to enter the site without driving through the adjacent residential area.)
8. The main entrance is to be on the east side off of Playa Della Rosita.
(After reviewing with the Public Works Director, staff and Mr. Wells, it has been determined that the main entrance should be from Playa Della Rosita. With the entrance on the eastside and exit on the westside this would allow larger trucks with trailers to make left turns into this area. This will eliminate vehicles from driving over and destroying the curbs. This direction will also keep these large trucks with trailers from making wide

- turns into on coming traffic when entering the property.)
9. The surfacing of the drive area from the entrance to the exit is to be a dust free surface. This is to be reviewed in one year to see if this gravel or road base material is being carried out onto the public streets.
(Again after reviewing with the Public Works Director, staff and Mr. Wells, it has been determined that the gravel surface would be preferred. There is an apron of asphalt on the east entrance of approx. 40-foot. The entrance on the west has an asphalt apron of approx. 100-feet. This should keep all gravel off of the streets. Staff is requesting that this be reviewed again in one year *only if* a problem exists.)

Ms. Bulloch explained that staff has found Mr. Wells to be very cooperative. She explained the landscaping and pointed out areas of interest and special buffering using trees and block walls.

Mr. Snow asked what 'quiet time' means.

Ms. Bulloch said 'quiet time' is when work will be done indoors or not at all.

Steve Wells representing Wheeler Machinery addressed the Commission and offered to clarify any issues they may have. He addressed the landscaping issue on the north property line and pointed out that the 3 to 1 slope is too steep for trees but they could do one of two things, a straight retaining wall or leave a slope with gravel and some plants. He explained that a retaining wall could present a danger if someone was to fall off the top it would be a 15 foot drop. There is a drainage problem at the top so the chain link fence may have to go. Concerning the entrance being on Playa Della Rosita and the exit on Cactus Lane he explained this will not be exclusive. There may be times when a truck makes the wrong turn and rather than having them go around the north through the neighborhood it would be better to just have them enter off of Cactus Lane. He added that the entrance and exit had been widened.

Mr. Snow stated the previous traffic study showed the turn on Cactus Lane would cause a 55 foot truck to go into the oncoming traffic lane. He asked Mr. Wells if Wheeler Machinery had widened Cactus Lane enough so that a 55 foot truck would NOT go into the other lane?

Mr. Wells said a truck will not run into the other lane when coming out onto cactus lane. A truck WILL run into the other lane when entering from Cactus Lane.

Commissioner Evans said this should be unacceptable.

Commissioner Latschkowski said the Commission's preference is if Cactus Lane can be used mainly as an exit. He asked if there is a sidewalk along Cactus Lane?

Mr. Wells replied there is not a sidewalk along Cactus Lane.

Commissioner Latschkowski said he thought a sidewalk is required.

Ms. Bulloch explained the sidewalk will be required.

Mr. Wells said this is the first time sidewalk has been mentioned.

Ms. Bulloch led Mr. Wells and Mr. Snow to the plat to get a better look. Mr. Snow confirmed that a sidewalk is shown on the plat.

Mr. Snow asked if there will be signage that shows Cactus Lane as an entrance or rental drop off?

Mr. Wells said they could have signage that shows all traffic coming in on Playa Della Rosita.

Doug Jackson also with Wheeler's Machinery said it is better for traffic flow to have everyone coming in and going out of the same areas.

Chairman Simmons asked Mr. Wells if anyone will be able to start their engines during quiet time.

Mr. Wells replied that no one will be working during quiet time.

Mr. Snow wanted to clarify if Mr. Wells meant no one will be working outside during quiet time or no one will be working at all during quiet time.

Mr. Wells said no one will be working at all during quiet time. He added that Wheeler's Machinery does not have a night shift.

Commissioner Evans pointed out that it would be a mistake to put a sign on Cactus Lane saying it is an exit only because trucks may go around the neighborhood rather than going in.

Ms. Bulloch suggested that Public Works may want to check the signage before installing.

Commissioner Wiley moved to approve C-2001-59 with the recommendations of staff and the revision of a.) In item number 2 the block wall will be six feet and the landscaping plan will be approved by staff prior to installation.

b.) The exit only signage recommended in item number 7 will be approved by staff prior to installation.

c.) A review of compliance will be held in six months rather than a year as mentioned in item number 9.

Commissioner Van Der Heyden 2nd. The motion carried.

Tab E

JAN 29 2004

Paulette Stagg
Clerk of the Court

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

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

Petitioners and Appellants,)

v.)

Washington City,)

Respondent and Appellee.)

Wheeler Machinery Co.,)

Intervenor and Appellee.)

ORDER

Case No. 20030528-CA

This case is before the court on Appellee Wheeler Machinery Co.'s Suggestion of Mootness.

IT IS HEREBY ORDERED that Appellee's request that this court dismiss the appeal is denied, and a ruling on the issues raised in Appellee's Suggestion of Mootness is deferred pending plenary presentation and consideration of the appeal. See Utah R. App. P. 10(f).

IT IS FURTHER ORDERED that in addition to briefing the merits, the parties shall brief the issue of whether the appeal is moot. The parties will be notified when a briefing schedule has been established.

DATED this 29th day of January, 2004.

FOR THE COURT


Judith M. Billings,
Presiding Judge

CERTIFICATE OF MAILING

I hereby certify that on January 29, 2004, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

JOSEPH C. RUST
KESLER & RUST
2000 BENEFICIAL LIFE TOWER
36 S STATE
SALT LAKE CITY UT 84111

BRUCE R. BAIRD
BAIRD & JONES
299 S MAIN ST STE 1300
SALT LAKE CITY UT 84111-2215

JEFFREY N. STARKEY
BRYAN J. PATTISON
DURHAM JONES & PINEGAR
192 E 200 N 3RD FLR
ST GEORGE UT 84770

Dated this January 29, 2004.

By Janet Alexander
Deputy Clerk
Case No. 20030528