

2004

Michael Poppert and Lori Poppert v. Michael Woolsey and Heidi Woolsey and South Weber City: Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL POPPERT and)	BRIEF OF APPELLEES
LORI POPPERT,)	MICHAEL WOOLSEY and
)	HEIDI WOOLSEY
Plaintiffs/)	
Appellants,)	Case No. 20040294-CA
)	
vs.)	
)	
MICHAEL WOOLSEY and)	
HEIDI WOOLSEY and)	
SOUTH WEBER CITY,)	
)	
Defendants/)	
Appellees.)	

APPEAL FROM A DECISION OF THE
SECOND JUDICIAL DISTRICT COURT
JUDGE THOMAS L. KAY

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Appellants

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COMPLETE LIST OF ALL PARTIES TO THE PROCEEDING

Michael Poppert and Lori Poppert, Plaintiffs/Appellants

Michael Woolsey and Heidi Woolsey, Defendants/Appellees

South Weber City, Defendant (Not a Party to Appeal)

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APPELLATE COURT JURISDICTION

The Utah Court of Appeals has jurisdiction of this matter pursuant to Utah Code Ann. 78-2a-3(2)(j) as a transfer from the Utah Supreme Court. The judgment being appealed has been certified as a final judgment by the trial court pursuant to Rule 54(b), Utah Rules of Civil Procedure. (See Order Dismissing Case as to Defendants Woolsey, Record, pp. 188, 191.)

ISSUES

Whether or not the District Court was correct in granting Defendants' Motion to Dismiss and alternatively granting Defendant's Motion for Summary Judgment, holding that an individual property owner can have no liability to a neighboring property owner for actions taken in compliance with zoning setback regulations as applied by the governmental entity pertaining to the real property in question.

Defendants do not dispute the standard of review set forth in Plaintiffs' Brief for the issue presented by this case; i.e., that the standard of review for both an order of dismissal under Rule 12(b)(6) and summary judgment under Rule 56(b) is one of correctness, with the Appellate Court granting no deference to the trial court. Stokes v. VanWaggoner, 987 P.2d 602 (Utah, 1999) and Bonham v. Morgan, 788 P.2d 497 (Utah, 1989).

STATEMENT OF THE CASE

Nature of the Case

This is a case in which Plaintiffs filed suit against Defendants seeking alleged damages in the amount of at least

\$100,000.00, also seeking an injunction ordering that Defendants' home be dismantled and removed, and further seeking alleged damages based on fraud.

This is a case involving a dispute arising from the placement of Defendants' home on their subdivision lot located in South Weber City, Davis County, Utah. Plaintiffs contend that the home was placed too close to their common boundary line and within a setback area. Defendants respond, stating that they worked closely with South Weber City Building Department; that the City approved everything that was done as far as placement of the home on the lot and construction of the home.

Course of Proceedings and Disposition Below

Plaintiffs filed suit in Second District Court on or about July 28, 2003. Record, p.1. Defendants then filed a Motion to Dismiss based on Rule 12(b)(6), Utah Rules of Civil Procedure together with a Memorandum in Support. Record, pp. 89 and 95. A hearing was held on Defendants' Motion to Dismiss on March 3, 2004, at which time, the District Court granted Defendants' Motion to Dismiss and, in the alternative, as a Motion for Summary Judgment. Record, pp. 188.

Between the filing of Defendants' Motion to Dismiss and the hearing on Defendants' Motion to Dismiss, Plaintiffs added another Defendant; i.e., South Weber City, pursuant to Court Order dated October 28, 2003. Record, p. 117.

Statement of Facts

The parties hereto both own adjoining properties in a

subdivision known as Cedar Bench Phase 10, located in South Weber City, Davis County, Utah. Record, p. 3. In the spring of 2003, Defendants (Woolseys) obtained a building permit to construct a home on their lot. Record, p. 67. Defendant Woolseys' lot is located in a cul-de-sac, is odd-shaped; i.e., five-sided (four sides with a radius curve at the front), Record, p. 67. Based on the dimensions of the lot, space would not accommodate a standard-size home; i.e., the lot is long and narrow. Record, pp. 67 and 68.

Based on the unusual configuration and dimensions of the lot, City ordinances pertaining to the placement of a home on such lot allow for some leeway to accommodate the building of a home on such lot. Record, p. 68.

Defendants' lot is similar to a corner lot on a radius corner. The ordinances of South Weber City allow the designation of one of the two rear yards of Defendants' lot to be designated as a side yard. Such designation allows for an adequate area for building. Record, pp. 67-72.

Defendants placed their home in a manner consistent with South Weber City's instructions. Record, pp. 68 and 72. Defendants' home as presently situated is approximately 16 feet from the boundary line in common with Plaintiffs' property and well within the ten-foot side yard setback requirement. Record, pp. 68 and 69.

The ordinance requirement of a 30-foot rear setback for the line of Defendants' lot designated as the back yard, or rear

yard, was sufficiently met and approved by the South Weber City Building Inspector. Record, pp. 69 and 72.

Defendants' home is no higher than 32 feet high, well within the maximum structure height allowed by the City ordinance, which allows a maximum height of 35 feet. Record, p. 69.

According to the South Weber City Building Inspector, Defendants are in full compliance with all ordinances and requirements that apply to the construction and placement of their home on Defendants' property. Record, pp. 69 and 70.

Beginning April 2003, Defendants began constructing their home on their property. Record, p. 2.

Approximately three plus months after Defendants began construction of their home and after substantial construction activities had occurred, Plaintiffs filed a Complaint against Defendants to halt construction and require removal of Defendants' home. Record, pp. 1-5. Plaintiffs filed a Motion for Temporary Restraining Order, seeking to restrain Defendants from occupying their home, which Motion was heard and denied on December 5, 2003. Record, p. 155.

Defendants' Motion to Dismiss was heard on March 3, 2004.

The District Court granted Defendants' Motion to Dismiss and alternatively granted Summary Judgment in favor of Defendants.. Record, pp. 188-191. Plaintiffs then appealed the District Court's Order of Dismissal. Record, p. 192.

SUMMARY OF ARGUMENT

Defendants argue that the South Weber City Building Inspector who issued a building permit to Defendants and authorized placement of Defendants' home on Defendants' subdivision lot did so in a reasonable manner that was not arbitrary or capricious and in a way that was supported by substantial evidence.

Defendants also argue that Plaintiffs were well aware of the fact that Defendants were building a home for the reason that it was located immediately adjacent to their lot. Any time after the building permit was issued, and such became apparent by the construction activity on the lot, Plaintiffs could have pursued the administrative remedy of appealing the building inspector's decision to issue a building permit to the South Weber City Board of Adjustment. The Utah Code Ann. precludes the pursuit of a District Court challenge until such administrative remedy has been exhausted. For that reason alone, this case should be dismissed.

Defendants also argue that significant deference should be applied to municipal land use decisions. That unless such decisions are arbitrary, capricious or illegal, such decisions should be upheld, and that such decisions are not arbitrary or capricious if they are supported by substantial evidence, which was considered by the South Weber City Building Inspector prior to the issuance of the building permit to Defendants.

Defendants also argue that the claim of nuisance by

Plaintiffs is untenable. All of the cases presented in support of Plaintiffs' nuisance argument are cases dealing with physical invasion onto or into the real property of the claimant. There is no allegation of physical invasion of any kind in this case; therefore, Plaintiffs' claim of nuisance should be dismissed.

Finally, Defendants argue that the Affidavit of Kerwin L. Jensen submitted by Plaintiffs does not diminish Plaintiffs' duties as set forth above nor bolster Plaintiffs' position in any way. Addressing issues pertaining to zoning decisions is a function entirely within the discretion of the city. Though Mr. Jensen may have a differing opinion, his opinion is irrelevant. The decision by South Weber City's building inspector was an appropriate decision. The District Court's recognition through its Order of Dismissal and Grant of Summary Judgment should be upheld.

ARGUMENT

- I. WHETHER OR NOT THE DISTRICT COURT WAS CORRECT IN RULING THAT AN INDIVIDUAL PROPERTY OWNER CAN HAVE NO LIABILITY TO A NEIGHBORING PROPERTY OWNER FOR ACTIONS TAKEN IN COMPLIANCE WITH ZONING SETBACK REGULATIONS AS APPLIED BY THE GOVERNMENTAL ENTITY PERTAINING TO THE REAL PROPERTY IN QUESTION.

The trial court ruled that an individual property owner should have no liability to a neighbor for actions taken in compliance with zoning setback regulations required by the governmental entity. Record, pp. 189-191.

Even taking the facts alleged in Plaintiffs' Complaint as true as required in a Rule 12(b)(6) analysis, such facts are irrelevant if Defendants simply followed the law, particularly in

light of the fact that Plaintiffs did nothing to stop the construction of Defendants' home until the home was nearly completed.

A. PLAINTIFF'S FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

A Board of County Commissioners is "...empowered to delegate the issuance or denial of such (building) permits to a county building inspector, or 'may authorize an administrative official of the county to assume the functions of such position in addition to his customary functions'....The Board of Adjustment is also empowered to hear an appeal from any individual seeking to set aside the decision of any administrative official or body relating to the zoning resolution." Thurston v. Cache County, et al., 626 P.2d 440, 445 (Utah, 1981).

"(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."

"(2a) 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...." Utah Code Ann. Section 10-9-1001, "Appeals".

The above-referenced Code section as set forth in the Utah Municipal Code, Chapter 9, entitled "Municipal Land Use Development and Management", sets forth the procedure by which a person aggrieved by a decision made pursuant to the land use regulations of the Utah Code may take action.

Utah Code Ann. Section 10-9-703 grants power to the Board of Adjustment to hear and decide "...appeals from zoning decisions applying to zoning ordinance...." Plaintiffs admit that Defendants began constructing their home in April 2003. Record, p. 2. Plaintiffs' Complaint was not filed until at least July 28, 2003 (as indicated by the date on the Complaint). Record, p. 5. At the time Plaintiffs' filed their Complaint, they acknowledged that Defendants' home was significantly constructed as follows:

"7. The rear wall of the home is located approximately 12 feet from the rear lot line of Lot 153.

"8. Construction of the home has caused the home to rise approximately 40 feet into the air....

"10. Many windows which have been cut in the home being constructed on Lot 153 look directly down into the back yard of Lot 155, owned by Plaintiffs." (Plaintiffs' Complaint, Record, p. 2.)

It is clear that the Plaintiffs were well aware of the structure being built on property adjacent to Plaintiffs' property, but they did nothing to address their concerns or attempt to stop construction thereof.

The Code clearly provides for a remedy; i.e., to appeal to the Board of Adjustment regarding zoning decisions (Utah Code Ann. Section 10-9-703) and, in fact, no challenge in a District Court may be made until the person has exhausted his administrative remedies (i.e., appeal to the Board of Adjustment) (Utah Code Ann. Section 10-9-1001).

The District Court's Order dismissing this matter should be upheld if for no other reason than because Plaintiffs

have prematurely filed a Complaint in District Court.

B. MUNICIPAL LAND USE DECISIONS ARE ENTITLED TO A GREAT DEAL OF DEFERENCE.

"...Because zoning ordinances are in derogation of a property owner's common law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner." Patterson v. Utah County Board of Adjustment, 893 P.2d 602, 606 (Utah App., 1995). Because there is a reasonable interpretation of the South Weber City Ordinances that was made by the South Weber City Building Inspector in this case, which was based on the facts and evidence presented to the building inspector, the granting of the building permit and the placement of Defendants' home as placed were reasonable decisions.

Pursuant to statute, "... (3) The court 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." Utah Code Ann. Section 10-9-1001. See also, Bradley v. Payson City Corporation, 70 P.3d 47, 50 (Utah, 2003) (citations omitted). Furthermore, "When a land use decision is made as an exercise of administrative or quasi judicial powers...we have held that such decisions are not arbitrary and capricious if they are supported by 'substantial evidence'." *Id.*, at 51 (citations omitted).

The evidence to support the land use decision in question is set forth in the Affidavit of Mark Larsen, the South

Weber City Building Inspector who granted the building permit in this case. The evidence supporting Mr. Larsen's grant of the building permit is as follows:

"...5...The Defendants' lot located in a cul-de-sac is an odd-shaped, five-sided lot; i.e., four sides and a radius curve at the front....Due to the dimensions of the lot, the space would not accommodate a standard-size home; i.e., the lot is long and narrow....

"7. That Defendants' lot is, in some respects, similar to a corner lot on a radius corner. South Weber Ordinances allow designation of one of the rear yards to be designated as a side yard to allow for an adequate area for building. (See Addendum to South Weber City Ordinances attached hereto as Exhibit "A", particularly referencing the sketch labeled 'radius corner lot', which is similar to the Defendant's lot.)

"8. That Defendants' home is presently situated on their lot in a manner consistent with Affiant's understanding of South Weber City's relevant ordinances....

"9. That the ordinance requirement of a 30-foot rear setback [Section 10-5A-4(c)(3)] was sufficiently met as noted in the attached drawing. Two sides of the Defendants' lot were approved by Affiant for side yard setback requirements of a minimum of 10 feet on each side. Such placement by Defendants' home on their lot was approved by Affiant. The front setback of 30 feet was met and the rear setback of 30 feet was met on the northwestern side of Defendants' property.

"11. That Affiant has personally measured the height of the Defendants' home, and it extends from grade no higher than 32 feet, well within the maximum structure height allowed by the City ordinance (Section 10-5A-6) which allows a maximum height of 35 feet.

"12. That Affiant has been made aware of the dispute between the parties to this lawsuit and has personally inspected the home and verified the placement of the home in relation to the boundary lines of the property.

"13. That Defendants are in full compliance with all ordinances and requirements of South Weber City that apply to construction and placement of their home on the subject lot." Record, pp. 67-72.

The South Weber City Building Inspector's decision to issue a building permit was made for reasons set forth above. Due to the unusual nature of the lot; i.e., long, narrow, and five-sided as opposed to a standard, four-sided, square or rectangular-shaped lot, the building inspector determined one of the property lines to be the rear line, one of the lines to be the front line, and two of the lines to be the side yard lines. The decision to issue a building permit and to allow placement of the home on Defendants' lot in its current configuration was not arbitrary nor capricious and was made only after a thorough review and on the substantial evidence as set forth in Mr. Larsen's Affidavit.

Plaintiffs' reliance on the Harper case is misplaced. Plaintiffs state that in Harper, "...both the municipality and the landowner were named as defendants in a nuisance action, even though the landowner had simply relied on the actions of the municipality in approving the contested use of the land." (Plaintiff's Brief, p. 12.) Though it is true that the municipality and the landowner were both named as defendants, after significant activity at the District Court level and the Court of Appeals, the Utah Supreme Court finally stated as its conclusion as follows:

"In sum, we reverse summary judgment on the development code claim and instruct the Court of Appeals to remand to the trial court with instructions to determine whether the facility is, in fact, an accessory use and thus authorized under the development code. We vacate the Order of Removal (of the building). We affirm the Court of Appeals' reversal of a nuisance per se finding and vacate the jury award based on it. We affirm the

reversal of summary judgment on Harper's due process claim and affirm the denial of fees under 42 USC Section 1988, and finally we affirm the Court of Appeals' reversal of summary judgment on the open meetings claim and vacate the award of attorney's fees made for its violation and affirm the Court of Appeals' reversal of the trial court's denial of the Motion to Dismiss, effectively dismissing the cause of action for failure to state a claim upon which relief can be granted." Harper v. Summit County, 26 P.3d 193, 201 (Utah, 2001).

Therefore, other than to remand the case to the trial court to determine whether the facility constructed was an accessory use under the zoning ordinance, the Utah Supreme Court reversed every order, finding, and award that had been made in favor of the landowner who had filed the lawsuit. If anything, the Harper case favors the position of Defendants herein. The court in the Harper case stated earlier that "...the issuance of certificates of zoning compliance and building permits is an administrative action to be performed by the zoning administrator (or his or her representative) and by the building inspector respectively." *Id.*, p. 201. Such is what occurred in this case; i.e., after a thorough review and based on the evidence available to him, the building inspector of South Weber City issued a building permit, allowing Defendants herein to construct their home.

II. THERE WAS NO NUISANCE COMMITTED BY DEFENDANTS.

Plaintiffs allege that they have sustained private nuisance damages as a result of the placement of Defendants' home and because it has been constructed at too great a height. Record, pp. 156-159. Defendants dispute that a nuisance of any

kind has been created.

The definition of a private nuisance is "...a substantial and unreasonable and nontrespasory interference with the private use and enjoyment of another's land." Sanford v. University of Utah, 488 P.2d 741, 744 (Utah, 1971).

All of the cases cited by Plaintiffs deal with physical invasion of property. The Sanford case (cited supra) dealt with a claim for damages resulting from the flow of surface waters from a University of Utah construction project onto Sanford's property.

The Turnbaugh case, 739 P.2d 939 (Utah App., 1990), cited by Plaintiffs involved a claim by a surviving spouse of an operator of a front-end loader against the owner of the front-end loader and the owner of mineral interests to recover for the death of her husband when the front-end loader rolled into an open pit excavation.

In the Branch case, 657 P.2d 267 (Utah, 1982) cited by Plaintiffs, the property owners sued for damages for pollution to their culinary water wells caused by a percolation of the defendant's formation waters (wastewaters from oil wells containing various chemical contaminants) into the subterranean water system that feeds the wells.

All of the nuisance claims cited by Plaintiffs are for a physical invasion onto the property of the claimant. Plaintiffs have not alleged a physical invasion of any kind.

As the District Court in this case stated:

"There apparently is no Utah case law that either disposes of the issues herein or even assists in addressing the issues herein...." (See paragraph 9 of District Court's Order dismissing case as to Defendants Woolsey, Record, p 190.)

III. THERE ARE NO ISSUES OF MATERIAL FACT IN DISPUTE

Plaintiffs cite to an affidavit by an alleged expert, Kerwin L. Jensen, apparently in an attempt to put "facts" in dispute. Though Mr. Jensen in his affidavit claims to be an expert in planning and zoning and is apparently currently employed as such by the City of Montrose, Colorado, Mr. Jensen's opinion is irrelevant. Municipalities in Utah are allowed to establish and interpret rules and declarations pertaining to their zoning ordinances. Municipal land use decisions as a whole are generally entitled to a great deal of deference. Bradley, supra, p. 50. Furthermore, the Utah Supreme Court has stated that "though a municipality may have a myriad of competing choices before it [pertaining to zoning decisions], 'the selection of one method of solving the problem in preference to another is entirely within the discretion of the [city]; and is not in and of itself evidence of an abuse of discretion " Bradley, supra, p. 54.

The City's authorized representative, its building inspector, made the decision to allow placement of Defendants' home on their lot in a particular manner. Such decision was not a "de facto variance" of applicable zoning rules as alleged by Plaintiffs, but was a reasonable decision based on the evidence. The same principles that apply to determining the rear yard line

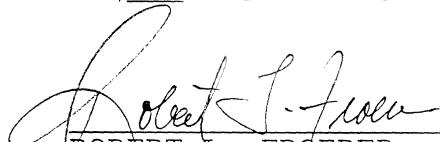
of a corner lot on a radius corner do, in fact, apply to this lot. To declare the entire north side of Defendants' lot a rear yard would in essence make the lot unbuildable in a way not to allow accommodation for a standard-size home. (Paragraph 5, Larsen Affidavit, Record, p. 67.)

The Defendants simply complied with the zoning and building rules as dictated by South Weber City's building inspector. Defendants did nothing wrong or improper. The existing case law supports the actions of the South Weber Building Inspector in this case, even accepting the facts set forth in Plaintiffs' complaint. The Court's grant of dismissal and/or summary judgment was proper in this case.

CONCLUSION

Defendants respectfully request that the District Court's Order of Dismissal and/or Summary Judgment in favor of Defendants be upheld, and that Plaintiffs' Appeal be dismissed.

RESPECTFULLY SUBMITTED this 18th day of August, 2004.


ROBERT L. FROERER
Attorney for Defendants/
Appellees

ADDENDUM

No addendum is necessary.

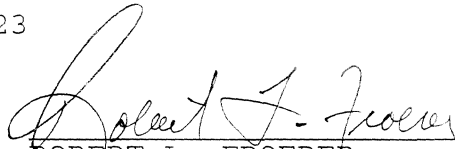
CERTIFICATE OF SERVICE

I, Robert L. Froerer, hereby certify that the 8th day of August, 2004, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing Brief to:

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