

2004

Jason P. Arnell v. Salt Lake County Board of Adjustment, Salt Lake County, and Truman G. Madsen : Brief of Appellant

Utah Court of Appeals

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JASON P. ARNELL,

vs.

Defendants and Appellees.

Supreme Court No. 20040409-CA

Trial Court No.: 020901035

Appeal from the Third District Court, Salt Lake County,
Judge Tyrone E. Medley

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JASON P. ARNELL,

vs.

Defendants and
Appellees.

Trial Court No.: 020901035

**Appeal from the Third District Court, Salt Lake County,
Judge Tyrone E. Medley**

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to §78-2-2(4) Utah Code Annotated and pursuant to Rules 3 and 4, Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Inasmuch as this is an appeal from a Summary Judgment, a correctness standard applies, without according deference to the trial court's decision. State vs. Pena, 869 P.2d 932 (Utah 1994); Mountain States Tel. & Tel. vs. Garfield County, 811 P.2d 184 (Utah 1991); Transamerica Cash Reserve, Inc. vs. Dixie Power and Water, Inc., 789 P.2d 24 (Utah 1990). All facts are to be viewed in the light most favorable to the losing party. The View Condominium Owners Association vs. MSICO, LLC, 2004 UT App. 104, ¶14, 497 Utah Adv. Rep. 3. The correctness standard applies to all issues. All issues are preserved by reason of lower court Memorandum Decision and Order dated April 21, 2004 (R. 990-1008, Addendum No. 1). Issues to be decided on appeal are:

A. Whether Salt Lake County's slope ordinance which prohibits construction of structures on slopes which exceed a 30% grade constitutes an unconstitutional taking when applied to a building lot in a platted pre-existing residential subdivision; and if so, is plaintiff's case ripe for the entitlement of just compensation.

B. Whether appellant is entitled to rescind his purchase contract on the grounds of mutual mistake.

C. Whether appellant is entitled to rescind his purchase contract on the grounds of breach of covenant under a warranty deed, and particularly the covenant against encumbrances.

D. Whether Utah recognizes an implied warranty of fitness for purpose, and if so, whether there that been a breach of said implied covenant.

APPLICABLE COSTITUTIONAL AND STATUTORY PROVISIONS

A. Constitutions:

Amendment V, Constitution of the United States

"nor shall private property be taken for public use, without just compensation".

Article I, Section 22, Utah Constitution

"private property shall not be taken or damaged for a public use without just compensation".

B. Statutes:

§17-27-810

"If the legislative body is satisfied that neither the public nor any person will be materially injured by the proposed vacation, alteration, or amendment, and that there is good cause for the vacation, alteration, or amendment, the legislative body, by ordinance, may vacate, alter, or amend the plat, any portion of the plat, or any street or lot".

C. Ordinances:

Salt Lake County Takings Relief Ordinance

Attached hereto at Addendum No. 2.

STATEMENT OF THE CASE

Appellant Jason Arnell purchased a residential building lot in a platted subdivision from defendant Truman G. Madsen and paid cash in the amount of \$95,000. At the time of the sale neither the buyer nor the seller were aware of a County slope ordinance which prohibited building on any lot with a 30% or greater slope. This lot exceeded the slope limitation, although many other homes existed in the subdivision along the very same slope. Salt Lake County has denied appellant the right to build on the lot, thereby making it valueless for any viable economic purpose. Appellant claims that the actions of Salt Lake County constitute an unconstitutional taking under which it is obligated to pay appellant just compensation. Appellant also claims that he is entitled to rescind the purchase contract under theories of mutual mistake, breach of covenant under a warranty deed, or breach of an implied covenant of fitness for purpose. All parties to this action filed motions for summary judgment Arnell's motion for summary judgment was denied. Salt Lake County and Madsen's motions for summary judgment were granted. This appeal followed.

STATEMENT OF FACTS

Plaintiff's Motion for Summary Judgment was submitted to the trial court on the following undisputed facts.

1. On or about May 4, 1999, plaintiff Jason Arnell purchased a subdivision lot near Brighton, Utah from defendant Truman Madsen for the sum of \$95,000. (Admitted in pleadings; R. 1, 11, 68, 81, 89). The description of the lot is as follows:

Lot 13, Forest Glen, plat "B" according to the official plat thereof recorded in the office of the Salt Lake County Recorder.

2. Arnell purchased the subdivision lot for the purpose of constructing a canyon residence. (R. 135).

3. The property was conveyed from Madsen to Arnell by Warranty Deed. (R. 253, 257).

4. The subject lot is part of a platted subdivision which was approved by Salt Lake County in 1970 after the subdivision developers met all of the County's subdivision requirements. (R. 135).

5. After the approval of the subdivision, Salt Lake County, in August, 1997, enacted an ordinance which prohibits the building of structures on canyon lots having a slope of thirty percent (30%) or more. (R. 212). It is admitted that the subject lot exceeds 30%.

6. Although the lot has a steep slope, there is nothing about the lot or its location that would make it unsafe or unfeasible to build upon. See unchallenged pre-filed testimony of plaintiffs, architect, and engineers (R. 187-193, 201-207) together with County response concurring with such opinions (R. 194).

7. At the time of the purchase of the lot other homes existed along the same slope on other lots in the subdivision. (R. 135).

8. At the time of the purchase of the subdivision lot, neither Arnell nor Madsen had knowledge of the slope ordinance. (R. 135, 255).

9. After learning of the slope ordinance, Arnell made application to the Salt Lake Board of Adjustment for a variance. After a hearing, the variance was denied on February 16, 2000. (Alleged at R. 119 and admitted at R. 264, 324).

10. Salt Lake County has a Takings Relief Ordinance (the Ordinance) which sets out a procedure for obtaining relief where an unconstitutional taking of property is claimed. Plaintiff filed a Petition with Salt Lake County seeking relief under the Ordinance. (Salt Lake County Takings Relief Ordinance, R. 141, attached hereto as Addendum 2; Takings Relief Petition at R. 163).

11. Under the Ordinance, the first step requires a preliminary determination that a takings had occurred. Salt Lake County made a "Preliminary Determination of Taking" on March 28, 2000. (Letter from Salt Lake County of April 6, 2000; R. 185). A Hearings Officer was then appointed to conduct the hearing and make recommendations to the County Commission. Robert A. Thorup of the law firm of Ray, Quinney & Nebeker was appointed as the Hearings Officer. (Letters from Salt Lake County of April 5, 2000 and April 6, 2000; (R. 182, 185).

12. Mr. Thorup thereafter moved forward and conducted two hearings. In doing so, the Hearings Officer requested that the sworn testimony of all witnesses be submitted ahead of time in writing, and that the witness then be available for cross-examination at the hearing. Such written sworn testimony was duly submitted by petitioner. Salt Lake County submitted an unsworn proffer. For the most part there were no significant facts in dispute. (Petitioner's pre-filed evidence in support of Takings Relief Ordinance R. 187-193; letter response from Salt Lake County dated July 25, 2000 R, 194-196; petitioner's rebuttal to pre-filed evidence; R. 201-207).

13. Prior to the hearing Mr. Thorup advised the parties that he intended to make findings on seven factual matters as listed in §19.93.040 of the Ordinance, and that his conclusions

would be based upon these findings. The seven factual determinations were to be:

(1) Whether petitioner had complied with the requirements for providing information to be submitted under the Ordinance.

(2) Whether petitioner had a protectable interest in the property.

(3) The market value of the property considering the existing zoning regulation.

(4) The market value of the property under the proposed use.

(5) Whether there are other economically viable uses that may be made of the property.

(6) The market value that may exist if there is an opportunity for cluster development. (This category is not applicable to the subject case).

(7) Whether construction on the property is feasible. Prior to the hearing, Salt Lake County stipulated that the petitioner had met items 1 and 2 and that 6 was not applicable. (Alleged at R. 120, and admitted at R. 264, R. 415 and Rule 7(c) (3) (B), Utah Rules of Civil Procedure).

14. After taking the matter under advisement, Mr. Thorup rendered his decision on September 11, 2000.

Findings on all seven of the categories were made in favor of petitioner. He found:

(1) That petitioner had complied with all requirements for submitting information. (Finding 14; R. 213);

(2) That petitioner was owner of the property and had a protectable interest. (Finding 15; R. 213);

(3) That the market value of the property if the existing slope ordinance is applied is substantially zero. (Finding 16; R. 213)

(4) That the market value based upon the proposed use without regard to the zoning ordinance is \$95,000. (Finding 17; R. 213)

(5) That there are no other viable uses for the property. (Finding 18; R. 213).

(6) That from an architectural, engineering and soils standpoint, the construction of a residence on the subject property is feasible. (Finding 20; R. 213)

Notwithstanding the sweeping factual findings in favor of petitioner, Mr. Thorup found that petitioner Jason Arnell had no standing to bring the action because he acquired the property after the passage of the zoning ordinance. Because of his perception of a lack of standing, he recommended to the County Commission that the Petition for Relief be denied, (See

Findings of Fact, Conclusions of Law and Recommended Decision is attached hereto as Addendum 3).

15. After the rendition of Mr. Thorup's decision, petitioner submitted a request for rehearing and redetermination. The Request was based primarily upon the fact that petitioner had never been asked, nor had he ever been given the opportunity to address the standings issue. The request was in the form of a five-page letter which thoroughly briefed all of the arguments and authorities on the standings issue. (See letter of October 4, 2000, from David E. West requesting rehearing and reconsideration, R. 216).

16. After receiving counsel's request for a rehearing, Mr. Thorup wrote to Salt Lake County suggesting a date for the rehearing. (See letter of October 6, 2000, from Robert Thorup to Salt Lake County; R. 221). He received a response from the District Attorney's office advising that until the County Commission meets on this matter that the County not be required to respond to any petition for reconsideration. (Letter of October 12, 2000, from Deputy District Attorney Kent Lewis to A. R. Thorup; R. 222). Mr. Thorup therefore did not proceed to hear or rule upon petitioner's request for reconsideration.

17. On July 5, 2001, as a courtesy, Mr. Thorup wrote a letter to both counsel calling their attention to a United States Supreme Court case, Palazzolo vs. Rhode Island, decided

June 28, 2001. That case specifically holds that an assignee or a grantee of property has standing under the United States Constitution to bring a condemnation action for inverse condemnation. That case, with respect to the standings issue, would be controlling here. (See Robert Thorup's letter of July 5, 2001, together with copy of complete Decision in Palazzolo case; R. 223-234).

18. Counsel for petitioner replied to Mr. Thorup's letter by calling his attention to the fact that the request for rehearing and reconsideration had not as yet been ruled upon; reviewing the arguments as previously made; and in light of the Palazzolo decision, requesting Mr. Thorup to amend his recommendation to the Salt Lake County Commission. (See David E. West letter of July 10, 2001 to Robert Thorup; R. 235).

19. Robert Thorup responded to counsel's July 10, letter in the following manner: He sent a one page letter to counsel advising that he could not conduct post-decision proceedings because he had not been authorized to do so by the County. (Thorup letter of July 12, 2001; R. 238). He also wrote a scathing letter to Salt Lake County criticizing the way in which the matter had been handled; expressing his personal offense for having been mislead by the County and having suffered an impairment to his reputation for not being permitted to act independently; and advised the County that the

Palazzolo case overruled his previous recommendation decision.

He further pointed out that as it now stood his "recommended decision found that a taking had occurred without just compensation". (Letter of Robert Thorup to Salt Lake County of July 18, 2001; R. 239; attached hereto as Addendum 4).

20. Following all of the above, the matter was ultimately presented to the Salt Lake County Council. The Council heard oral arguments and elected to totally ignore the recommendation and findings made by its Hearings Officer. Although the Council heard no evidence, it directed the County Attorney to prepare entirely new findings of fact and conclusions of law. These findings and conclusions addressed a multitude of issues outside the scope of plaintiff's Petition of Relief and upon which no evidence was ever presented. The decision denied Arnell's Petition for a building permit or for compensation. (Alleged at R. 124, and admitted at R. 264, R. 415, and Rule 7(c)(3)(B) U.R.C.P.; copy of complete Decision is attached hereto as Addendum 5).

SUMMARY OF ARGUMENTS

Issues Against Salt Lake County

1. The United States and Utah Constitutions prohibit the taking of private property without the payment of just compensation.

2. Where a statute or ordinance denies all economically beneficial or productive use of land, compensation is required under the takings clause.

3. The Salt Lake County slope ordinance deprives appellant of all economically viable use of his subdivision building lot.

4. Salt Lake County has made it clear that it will not permit development of the subject lot, and the case is therefore ripe for the granting of relief.

Issues Against Defendant Madsen

1. At the time of the lot purchase agreement between Arnell and Madsen, there was a material assumption that the lot was buildable.

2. Neither party was aware of the Salt Lake County slope ordinance.

3. The existence of the slope ordinance which makes the lot valueless and unbuildable was a material mistake of fact enabling the buyer to rescind the purchase contract.

4. A second and separate ground for allowing recession is based upon breach of covenant under a warranty deed. The property was conveyed to appellant by warranty deed. The existence of the slope restriction constitutes a breach of the covenant against encumbrances.

5. As a third and separate ground appellant should be entitled to rescind the purchase contract based upon the breach of an implied covenant of fitness for purpose.

ARGUMENT

POINT I

THERE HAS BEEN AN UNCONSTITUTIONAL TAKING OF PLAINTIFF'S PROPERTY

A. The Taking. Amendment V of the United States Constitution and Article I, Section 22 of the Utah Constitution prohibit the taking of property without just compensation. A taking can be in the form of a physical taking or a regulatory taking. A regulatory taking may exist where state or local laws impose unreasonable restrictions upon the use of property. A regulation which falls short of eliminating all economic benefit may constitute a taking depending upon the extent of interference, the type of regulation, and the extent to which reasonable investment backed expectations have been destroyed. Lucas vs. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886 (1992). But these factors need not be addressed here because it is clear that one definite rule has emerged: Where a land use restriction deprives or renders a property valueless for any economically viable use, there is an unconstitutional taking. Palazzolo vs. Rhode Island, 533 U.S. 606, 121 S.Ct. 2448 (2001); Lucas vs. South Carolina Coastal

Council, supra; Agins vs. City of Tiberon, 447 U.S. 225, 100 S.Ct. 2138 (1980); Smith Investment Company vs. Sandy City, 985 P.2d 245 (Utah App. 1998). See also dissenting opinion of Judge Orme in B.A.M. Development vs. Salt Lake City, 2004 UT App. 34, 493 Utah Adv. Rep. 34, ¶38 wherein the subject of regulatory takings is discussed in detail.

In the instant case, the slope regulation of Salt Lake County clearly amounts to a confiscation or deprivation of the property. This is a residential subdivision lot having no other viable purpose than a site for a residence. The County regulation and the actions taken by the County have reduced its \$95,000 value to zero. The lot is otherwise feasible for construction. The County itself made a preliminary determination that a taking had occurred. The matter was referred to an independent Hearings Officer who conducted hearings, took evidence, and made detailed findings concluding that a takings had occurred. Yet in spite of this, the County Council, in not wanting to set a precedent that might apply to others in Arnell's position, ignored its own Hearings Officer, and, without holding further hearings or taking evidence, made its own findings. In doing so, the County completely ignored the seven categories which under its own taking ordinance determined whether a taking has occurred; extolled the virtues and purposes of the slope ordinance; made non-evidentiary

assumptions relating to water availability; and made arguments and assumptions relating to non-existent construction problems which challenge the uncontroverted engineering testimony, including the testimony given by its own County geologist. The Salt Lake County slope ordinance may well be a desirable regulation, but, it cannot usurp the requirement to pay just compensation as guaranteed in the Utah and United States Constitutions.

B. Ripeness. As a result the Palazzolo decision, Salt Lake County no longer challenges plaintiff's standing in which to bring this action. It no longer makes any challenges to the timeliness of plaintiff's claim (a defense raised in the trial court), nor does it seriously dispute any of the legal principles set forth in subsection A above. What it now argues, and what it successfully persuaded the trial court to do, is that relief be denied on the basis of ripeness. In other words, it argues that Salt Lake County has never really and truly denied plaintiff the right to construct a building on the lot. This argument is unconvincing in light of the long history as to what has transpired, and the plain language of the County decision. Nor is it constitutionally supportable.

When plaintiff first made application to the Board of Adjustment he sought only a variance from the slope ordinance. No other relief was even claimed. Plaintiff has never asked to

be relieved of any building codes or safety regulations which may be in place, including any engineering requirements for safe construction or other building restrictions. The meeting Agenda shows only that Arnell was seeking a variance from the slope ordinance. The issue before the Board of Adjustment was the slope ordinance, and the slope ordinance alone.

The County argues that had the plaintiff come to the Board of Adjustment with specific building and site plans, that the result might have been different. They now argue that the County has never said that a variance would necessarily be denied if such detailed information had been furnished. They would suggest that the owner should incur as much as \$10,000 in architectural and engineering fees before appearing before the Board to request a variance from the slope ordinance.¹ But why should any reasonable person ever be required to incur thousands of dollars in expenses before he knows whether he can build anything at all. This would be like committing to a

¹ One of the dissenting members of the Board of Adjustment, Kevin Oakes, raised this very issue. His transcript states: It is unfair to ask someone to spend in excess of \$10,000 on reports until we can grant a variance saying that yes, he can possibly build on that lot with the stipulation that he meet the ordinance and any safety conditions that we would impose upon him . . . I do have some real concerns about the safety issues and it will cost the applicant in excess of \$10,000 to prove or disprove the fact that it is safe or unsafe to build on that lot. It bothers me that we would take away is right to build".

construction contract, or to the purchasing of custom furnishings, before one knows whether a building will be permitted.

The County argues that it wants to control what is built and is unwilling to give variances that run with the land. But the whole point is that plaintiff is entitled to a variance that runs with the land, subject of course, to all other legitimate building restrictions.

The same is true with respect to Arnell's Petition for Relief under the County's taking ordinance. Plaintiff's detailed Takings Relief Petition addressed only the slope ordinance. The hearings and the evidence presented likewise addressed only the slope ordinance. The findings of the hearings officer focused only on the slope ordinance. And although the County Council, in its conclusions, made references to water requirements and other requirements outside the scope of any evidence that was presented, the ultimate denial was based upon the slope ordinance. The conclusions list a whole host of possible problems that conceivably are associated with slopes, and stress that the County does not want to set any precedents that would allow construction on sloped lots. It makes a point to recite that the slope requirement has been in force by the County for twenty-five (25) years, clearly implying that the County is not about to

depart from its policy now. It is very clear from the opinion that the denial is based upon the slope ordinance generally and not upon the failure of the applicant to supply some detailed engineering detail. The whole tenor of the opinion makes it crystal clear that the providing of more detailed plans to the County would have made no difference whatsoever.

What the County now seems to be saying is that it hasn't ever unconditionally stopped Arnell from building, and now, after four (4) years of litigation, tells him that he is certainly free to start over. They would even add that maybe if Arnell spends enough money for detailed architectural and engineering fees, we might reconsider. This carrot is, of course, totally illusory in light of the County's formal decision. And, under the law, Arnell is only required to exhaust his administrative remedies once - not repeatedly.

The argument raised by Salt Lake County that the door is still open for further consideration is the same argument made and rejected in the case of Palazzolo vs. Rhode Island, supra. In Palazzolo a property owner was precluded from developing wetlands. There it was argued successfully to the trial court that the matter was not ripe for decision because even though Rhode Island had denied petitioner the right to fill wetlands, there was still doubt as to the extent of development that would be permitted. Thus, the reasoning went that although

petitioner's grandiose development proposal was denied, there was still the possibility that lesser uses might be permitted, and that the court could not know for sure the extent of the development that would be permitted. This argument was flatly rejected by the United States Supreme Court. The Court acknowledged that a landowner may not establish a taking before a land use authority has had an opportunity to determine the extent of the permitted usage, but government officials may not burden property by the imposition of repetitive or unfair procedures in order to avoid a final decision. In Palazzolo the Council would have been permitted to allow exceptions where "a compelling public purpose" is served, but the Council's decision found that the petitioner did not satisfy the "compelling public purpose" standard. This removed any further discretion as the parties were all in agreement that the ordinance forbids the fill of wetlands for any purpose and with no fill there could be no structures (just at the Salt Lake County ordinance forbids the construction on slopes that exceed thirty percent). The ultimate holding was that when a State agency charged with the enforcement of land use regulations, entertains an application from an owner, and the denial of the application makes clear the extent of the development permitted, federal ripeness rules do not require the submission of further applications.

In the instant case the County has acted. The action includes findings that the granting of any exception or variance would defeat the purpose of the Wasatch Canyons Master Plan (Conclusion Number 8 of Salt Lake County's Decision); would open the door to having to provide similar relief to lot owners similarly situated (Conclusion Number 8); that strict enforcement is a proper exercise of the police power to increase overall safety and value to other property (Conclusion Number 6); that construction on slopes *per se* presents a host of other problems enumerated in Conclusion Number 5; that Arnell's lot may not be able to comply with the requirements of other agencies (Conclusions Number 3 and 4); and concludes that steep lots are nearly impossible to service, protect or develop in an environmentally sensitive manner (Conclusion Number 2). One cannot read these findings and glean any ray of hope that the County would waive the slope requirement under any circumstances. The findings are totally incompatible with any reasonable expectation that Salt Lake County will allow construction if more detailed construction plans are submitted.

C. Penn Central Transportation vs. New York City.

Although the trial court acknowledged that Palazzolo was the controlling authority, it moved to the earlier case of Penn Central Transportation vs. New York City, 438 U.S. 104, 98 S.Ct. 2646 (1978) which it heavily relied upon in denying

plaintiff's Motion for Summary Judgment. Yet, Penn Central isn't remotely similar to Palazzolo, nor to the instant case. In Penn Central the plaintiff's use of a terminal building was designated as a historical landmark, thereby restricting the destruction or the alteration of the building. The U.S. Supreme Court found that the landmark designation was not a "taking" within the meaning of the 5th Amendment. The holding was largely based upon the fact that the landmark law did not interfere with the terminal's present use; that Penn Central was realizing a "reasonable return" on its investment; that the law did not impose any drastic limitations upon the ability of the owner to use the property; and that the preservation of historical buildings was a desirable thing to be encouraged. The fact that these may have brought about some diminution of value, as is the case with ordinary zoning laws, does not of itself constitute a taking. Penn Central does not involve a situation, or even a claim, that the owner has been deprived of all viable economic benefit of the property, and it does not support the holding of the trial court. The court simply does not need to look behind the more recent case of Palazzolo vs. Rhode Island, supra, which, as previously stated, stands for the proposition that ripeness rules do not require repeated applications once the decision of the regulatory authority makes clear the extent of development that will be permitted.

A very recent Utah case appears to be in harmony with the federal ripeness cases. The View Condominium Owners Association vs. MSICO, LLC, 2004 UT App. 104, ¶35, 497 Utah Adv. Rep. 3. Here the town of Alta entered into an agreement with PUD Developers which included the removal of an earlier snow storage designation upon what had been designated as Lot 9. Such action would have serious impact upon owners of property in adjoining lots, as it would limit snow storage space and may require that the town would have to enjoin or limit occupancy of adjoining lots during snow periods. The owners claim for an unconstitutional taking was dismissed by the trial court. On appeal, the Court of Appeals reversed the trial court's decision, holding that there were sufficient facts to establish that government action had substantially lessened the value of the property and interfered with the owner's right to the use and enjoyment thereof. Although the issue of ripeness was not specifically addressed, the facts of the case clearly established that no physical taking, or the extent thereof, had actually yet occurred.

D. Other Flaws in the Decision of the Trial Court. In addition to the inappropriate reliance upon Penn Central, there are other major flaws in the decision of the trial court. Some of these flaws are as follows:

1. At page 15 of the decision, Judge Medley makes reference to the fact that relief may have been denied by the County because it was not clear whether plaintiff could connect to a public sewer or otherwise comply with adequate sewer access. This was never an issue before the Board of Adjustment, nor was it an issue before the Hearings Officer. It is a conclusion that the County made, without taking any evidence, after it directed the County Attorney to disregard the findings of the Hearings Officer and rewrite the findings. It also was an issue specifically addressed in Palazzolo. In Palazzolo the same argument was made that the petitioner may not have been able to satisfy the requirements of other agencies, specifically such as the allowance of individual sewage disposal systems. The U.S. Supreme Court found this argument to be irrelevant and held firm to its holding that repetitive applications are not required after the regulatory agency makes its position clear.

2. Judge Medley suggests at page 16 that there may have been multiple reasons for the County's denial of relief, among which was the plaintiff's failure to supply the County with more detailed information. Plaintiff has always claimed that he supplied the County with information requested, and the record does not reflect

otherwise. But whether he did or didn't becomes rather irrelevant in light of the language of the County decision. The message from the County is not that it would like to see more plan detail before granting permission to build. It is a clear message that we aren't going to allow construction on non-conforming lots, period.

3. Even Judge Medley acknowledges at page 10 that, "the language which the County chose provides at least colloquial support for the contention that the decision precludes any building on the lot, and hence, deprivation of any economic value in the land". He then quotes the broad language of the decision and goes on to say that the language was used after receiving plaintiff's data which the Board of Adjustment had earlier found lacking. He then concludes that the absence of said reports (a fact not in evidence) made it impossible for the County to act knowingly on plaintiff's request to determine whether the requirements for granting a variance had been met. There is no logic at all to this conclusion. One cannot assume that if the County had been satisfied with soil reports and detailed construction plans, that the rest of its decision would be ignored. The County decision is anything but vague. The reasoning for the rejection

applies to all sloped lots, not just those whose owners supply satisfactory soil reports.

4. Throughout Judge Medley's decision he makes reference to the fact that the regulation of homebuilding on mountainous slopes is a proper exercise of the County's police power, and to allow exception would defeat the purpose of the master plan. But this is not justification to deny relief. The mere fact that the County may be acting within its police power does not excuse it from paying just compensation when private property is destroyed. It cannot exercise powers that are forbidden by the Constitution. Coleman vs. Utah State Land Board, 795 P.2d 622 (Utah 1990).

5. At page 6, Judge Medley comments on the undisputed fact that other non-conforming homes are already in existence along the same slope, and argues that this fact actually supports the County, reasoning that it would be in the public interest for the County to mitigate the damage that is already done. Yet there is not a shred of evidence anywhere for the trial court to conclude that the existing homes are causing any damage. And further, such argument wouldn't excuse the County from its constitutional obligation to pay just compensation anyway.

6. At page 7 Judge Medley further comments that after the variance was denied, and during the takings relief process, there were delays in reaching a final decision because the County was giving the plaintiff additional time to bring in studies of the type the County would like to see and so that County officials could evaluate the data. During this period, Judge Medley concludes, that the parties were trying to negotiate a resolution. Judge Medley then speculates that no resolution was reached and that the data supplied apparently did not convince the County that the slope ordinance effected the taking of plaintiff's property. But there is no evidence to support this conclusion. Whatever settlement discussions took place, if any, were privileged. And during this period the County had already been advised by it's duly appointed Hearings Officer, after two evidentiary hearings, that an unconstitutional taking had already taken place. When the County Council elected to disregard the recommendation of the Hearings Officer, and to rewrite his findings without taking new evidence, or without taking part in the evidentiary hearings, it could not pull new facts out of thin air. It elected to base its denial on broad principles that apply to all sloped lots. That being so, the County is in no

position to say to plaintiff that its decision wasn't final.

E. The actions of Salt Lake County in depriving plaintiff of the use of his property have been illegal. Since the inception of this case plaintiff has argued to the County that its actions in depriving him of the right to build is in violation of §17-27-810 Utah Code Annotated. That statute is part of the title and chapter setting out procedures that must be followed in order for the legislative body to vacate or amend a platted subdivision, and provides as follows:

"If the legislative body is satisfied that neither the public nor any person will be materially injured by the proposed vacation, alteration, or amendment, and that there is good cause for the vacation, alteration, or amendment, the legislative body, by ordinance, may vacate, alter, or amend the plat, any portion of the plat, or any street or lot".²

Obviously a finding of no material harm to Mr. Arnell could not be made if the slope ordinance applies.

Strict requirements must be met for subdivision approval. Once the subdivision is platted and approved for residential construction, the lot owners are entitled to rely upon the subdivision approval, and §17-27-810 established a form of

² After the initiation of these proceedings §17-27-810 was amended to eliminate the requirement of no material injury to individual persons. Interestingly the amendment was an innocuous part of an extremely lengthy amendment which amended twenty-two sections of the Utah Code, and the title of the act makes no mention of this specific change.

preexisting rights that came into existence. To later pass an ordinance which prohibits the use of subdivision lots is nothing more than an amendment of the subdivision, which according to State law cannot be done without following the strict procedures for subdivision amendment, including the required finding that no person will be materially injured by the amendment. Salt Lake County cannot circumvent the amendment process by a back door ordinance which ignores the legislative requirements.

Salt Lake County should not be permitted to now benefit from its illegal action by being relieved of its constitutional obligation to pay just compensation.

POINT II

ARNELL WAS ENTITLED TO RESCIND THE PURCHASE CONTRACT BASED UPON A MUTUAL MISTAKE OF FACT

In addition to his claim against Salt Lake County, Arnell sought alternative relief against the seller Madsen to rescind the Purchase Contract based upon a mutual mistake of fact. It is undisputed in this case that Arnell was purchasing the lot for the purpose of building a residence, and that neither party was aware of the County slope ordinance or other restrictions. These are very material assumptions that go to the very core of the Purchase Contract. It has been stated in Mooney vs. GR & Associates, 749 P.2d 1174 (Utah App. 1987) that:

"A party may rescind a contract, when at the time the contract is made, the parties made a mutual mistake about a material fact, the existence of which is a basic assumption of the contract".

The above quote fits the instant case to a "t". The slope ordinance was in place when the contract was made. And it just can't be seriously disputed, either objectively or subjectively, that a basic assumption of the Contract was that a platted building lot in a residential subdivision was in fact a lot upon which a structure could be built. Otherwise there would have been no purpose to the Contract.

The trial court in its decision brushed off the mutual mistake argument with a two sentence statement at page 17 to the effect that there can be no mutual mistake of "an existing fact" and that the County's refusal to grant a variance was a future act, not an existing fact. But this mischaracterizes the facts here. This just isn't a case like Kiahtypes vs. Mills, 649 P.2d 9, (Utah 1992) relied upon by Madsen, where the property was purchased with a specifically described mortgage which the parties knew about and which the seller undertook the obligation to get removed. When he couldn't get the mortgage removed he claimed a mutual mistake of fact in that the parties thought that the mortgage could be removed. The court in Kiahtypes held that the principle of mutual mistake doesn't cover future expectations. But that situation is entirely

different. This isn't a case where plaintiff purchased non-conforming land hoping or expecting to get a variance in the future. When the sale was made, both parties understood that the lot was buildable. Nor is this a case where plaintiff bought property which became the subject of a future zoning ordinance or restriction. The unknown slope limitation was in place at the time of the sale and the parties didn't know about it. Nothing could be more existing.

The trial court further ignored Arnell's authorities which strongly support his position. Three cases closely in point are as follows:

Rancourt vs. Verba, 678 A.2d, 886 (VT 1996) was a case involving a building lot which the buyer purchased for the purpose of building a lakeshore residence. He paid \$112,000 for the lot. He later learned that he could not get a building permit because of federal wetlands restrictions. The buyer was allowed to rescind the contract because of the mutual mistake of both parties believing that it was a buildable lot. It is difficult to see how any case could be closer to the instant case. The only differences are that Arnell's was a canyon lot rather than a waterfront lot; he paid \$95,000 rather than \$112,000 for the lot; and the building restriction was a slope violation rather than a wetlands violation.

In Lovier vs. Meteye, 260 So.2d, 377 (LA 1972) a buyer was permitted to rescind a sale where the sole reason for purchasing the property was for the development of a commercial enterprise, but where the property was zoned residential rather than commercial, and where both the buyer and the seller labored under a mistaken belief.

Millman vs. Swan, 127 S.E. 166 (VA 1925) involved the purchase of a lot which both parties believed to be outside the town fire limits. The distinction was important because if the lot were to be within the limits, there were oppressive building restrictions that would make construction much more costly. Thus, lots outside the limits were more valuable. Both parties were of the mistaken belief that the lot was outside the fire limits when in fact it was inside. Because of this mutual assumption, and because the cost of construction would be much more than contemplated, the vendee was allowed to rescind.

The decision of the trial court makes no reference to any of the above authority. Nor does it make any attempt to distinguish or to otherwise cite any contrary authority. The concept of mutual mistake is simple and straightforward. The trial court simply erred in not applying it.

POINT III

ARNELL IS ALSO ENTITLED TO RESCIND THE PURCHASE CONTRACT
BASED UPON A BREACH OF COVENANT UNDER THE WARRANTY DEED

A second and separate ground to rescind the Purchase Contract is a breach of covenant under seller's Warranty Deed. The property was conveyed by Warranty Deed. §57-1-12 Utah Code Annotated provides that all warranty deeds contain certain covenants, among which the grantor "guarantees the grantee that the premises are free from all encumbrances; and the grantor will forever warrant and defend the title thereof in the grantee". Thus, the question arises as to whether the slope restriction in the instant case is an encumbrance.

Madsen took the position, and the trial court agreed, that a building restriction, as a matter of law, is not an "encumbrance" as that term is used in the warranty deed statute. There is some support for that position in the cases of Flemitis vs. McArthur, 226 P.2d 124 (Utah 1951) and Mortenson vs. Financial Growth, Inc., 456 P.2d 181 (Utah 1969), although both cases are distinguishable and in conflict with more recent Utah case law.

In Flemitis the language relied upon by Madsen is as follows:

"Purchasers of land must take notice of public restrictions restricting the use of the granted premises and such restrictions constitute no breach of covenant or warranty".

The above language, however, must be taken in the context of the case where it was given. Flemitis was not a zoning case. Nor was it a building restriction or building use case. It was a case where a land patent had reserved certain water, mining and easement rights. A subsequent buyer in the chain of title viewed these reservations as encumbrances and refused to pay to seller the full amount of the purchase price. In its decision the court emphasized that the reservations recited in the patent, which were based upon public statutes, were also on record on the county recorder's office. So the holding was based not only on the existence of the public statute but on the additional fact that the document reserving the easements was publicly recorded - a pretty important fact not existing in the instant case. Had the document not been recorded the result may well have been different.

Mortensen vs. Financial Growth, supra, then comes along later and recites the same language from Flemitis. Mortensen likewise was not a zoning case nor a case involving building restrictions. Mortensen involved the sale of a farm at a sales price of \$537,000. The buyer didn't make the first payment of \$152,730. The excuse was that the federal and state government owned mineral rights on the property and it was argued that since this was an encumbrance he was excused from making the payment. The court didn't buy this argument and allowed the

seller to terminate the contract for the failure of the buyer to make payment. In doing so, the court cited Flemitis to the effect that under the circumstances of this case, the fair assumption was that the reservation created by a public law was not an encumbrance. Then in tailoring this comment to the facts of the case made references to multi-recitals in the purchase contract all relating to such things as irrigated land, dry farm land, range land, water rights and similar matters, and pointing out that "there is no reference whatsoever, and indeed no hint concerning mineral rights". It was just not a purpose for which the land was being purchased, so the defaulting buyer was unable to carry the day with his "encumbrance" argument. The reservations in Mortensen and Felmitis, having minimal impact on the property use, are quite different from a restriction that renders the property useless.

The more recent cases define the term "encumbrance" in much broader terms. Most recently, the definition is given in Holmes Development, LLC vs. Cook, 2002 UT 38, 48 P.3d 895, where it is stated:

"This court has defined an encumbrance as "any interest in a third person consistent with a title in fee in the grantee, if such outstanding interest injuriously affects the value of the property", Hancock vs. Planned Dev. Corp., 791 P.2d 183, 183 (Utah 1990), or "constitutes a burden or limitation upon the rights of the fee title holder", Bergstrom vs. Moore, 677 P.2d 1123, 1124 (Utah 1984).

See also Brewer vs. Peatmoss, 595 P.2d, 866 (Utah 1979); Booth vs. Wyatt, 54 Utah 550, 183 Pac. 323 (1919). Thus, if the interest of Salt Lake County in prohibiting development injuriously affects the value of the property, or constitutes a burden or limitation upon the rights of the fee holder, it comes within the above definition. This definition has been recited over and over again in the recent cases. The definition of the rule doesn't make any exception for zoning ordinances. And although plaintiff would acknowledge the existence of authority to the effect that zoning classifications *per se*, and reasonable building restrictions may not be actionable, one would be hard pressed to seriously argue that a restriction such as the one here, which literally makes the property useless for any viable purpose, is not an encumbrance. Even Madsen himself acknowledged that it was his intention to warrant against any outstanding interest that would injuriously affect the value of the property. (R. 254).

The above being true, Arnell is entitled to rescind the purchase contract based upon a breach of warranty and recover his purchase price, plus interest. See Bergstrom vs. Moore, 677 P.2d 1123, (Utah 1984) holding that where there is a breach of the covenant against encumbrances under a warranty deed, the rescission damages are the amounts paid for the property, less

any rental value (the subject lot being unbuildable has no rental value).

POINT IV

ARNELL IS ENTITLED TO RESCIND THE PURCHASE CONTRACT BASED UPON A BREACH OF THE IMPLIED COVENANT OF FITNESS FOR PURPOSE

Under appellant's independent theories of mutual mistake and breach of warranty deed, there is no reason to reach the issue of implied warranty. But if for some reason the court determines that no mutual mistake exists, or that the building restriction is not an encumbrance, there still is, or ought to be, an implied covenant that the building lot is in fact a building lot and can be used for the only purpose to which it is suitable. Such an implied covenant has historically been recognized in sales of personal property. See codification at §70A-2-315 Utah Code Annotated. Although the statute itself does not apply to real estate, the reasoning and policies of the Uniform Commercial Code have been carried over into real estate transactions. At 67A Am. Jur. 2d, Sales, §701 it is stated as follows:

" . . . courts may imply warranties of fitness in connection with the sale and leasing of real estate, viewing the Code's warranty provision as evidencing a trend to warranties of fitness or as a statement of public policy embodying the foremost legal thought in commercial transactions. Thus, the implied warranty of fitness for a particular purpose has been extended to apply to the purchase of a new condominium and to an air-conditioning unit that is an integral part of the condominium".
(Citations omitted).

The Utah courts have established that there is no implied warranty of habitability in real estate sales involving structures. American Towers Owners Association vs. CCI Mechanical, Inc. 930 P.2d, 1182 (Utah 1996). This is because the buyer has an opportunity to thoroughly inspect the property and satisfy himself as to the condition of the structure before he purchases it. A buyer may not even want to inhabit the building. However, American Towers acknowledges that in Utah the doctrine of implied warranty of habitability applies to leases. This was established in Wade vs. Jobe, 818, P.2d 1006 (Utah 1991). Our case, of course, does not involve a building that is subject to inspection. So if the opportunity for an inspection element is removed from the equation we are much closer to the lease than to a sales situation - in which event an implied covenant of fitness for purpose ought to exist. Nobody in this case challenges the proposition that both the buyer and the seller understood that the purpose of the sale was to enable the buyer to build a home.

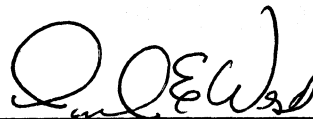
There are other Utah cases that have dismissed implied warranty claims in real estate situations where the sales contract by its terms specifically excludes enumerated warranties such as merchantability, fitness for a particular purpose, and habitability. Fennell vs. Green, 2003 UT App.

291, 77 P.3d 339; Tibbitts vs. Openshaw, 18 Utah 2d 442, 425 P.2d 160 (1967). Such reasoning would have to assume that in the absence of such exclusionary language in the contract, that implied covenants exist. In the instant case there is no contract between the parties which excludes any implied warranties. That being so, there is no reason why the concept of fitness for purpose shouldn't apply. The rationale justifying this concept is no different in the sale of a building lot than it would be in the sale of a motor-home, a furnace, or a refrigerator.

CONCLUSION

Based upon all of the arguments and authorities as contained herein, appellant submits that the Summary Judgment of the trial court be reversed; that appellant's Motion for Summary Judgment be granted; and the appellees' respective Motions for Summary Judgment be denied.

DATED THIS 26 day of July, 2004.



David E. West
Attorney for Plaintiff and
Appellant

ADDENDUM NO. 1

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JASON P. ARNELL	:	MEMORANDUM DECISION AND ORDER
Plaintiff,	:	CASE NO. 020901035
vs.	:	
SALT LAKE COUNTY BOARD OF ADJUSTMENT AND TRUMAN G. MADSEN	:	
Defendants.	:	

Before the Court are the parties' respective Motions for Summary Judgment, pursuant to Utah Rules of Civil Procedure Rule 7. Having considered the Motions, the Memoranda submitted by the parties, and oral argument by counsel, the Court enters the following decision:

BACKGROUND

In 1999 Plaintiff purchased a canyon lot near Brighton, Utah from Defendant Truman Madsen for \$95,000, for the purpose of building a cabin. The lot in question, platted as lot 13 of the Forest Glen subdivision which is within what is called the "Foothills and Canyons Overlay Zone" ("FCOZ"), contains an average grade which exceeds 40%--and portions are at or above 50%. During the planning stages of the project, Plaintiff was made aware that construction upon properties within the FCOZ containing an average grade in excess of 30% is restricted, and so sought a variance. At

a hearing held February 16, 2000, after expressing concern regarding the lack of specific data for plaintiff's proposed use, the Board of Adjustment denied plaintiff's request, and informed plaintiff of his right to seek his remedy from the County's takings board. On March 14, 2000, plaintiff timely filed an action in this Court for review of the Board of Adjustment decision, but the parties later stipulated to dismissal of the action without prejudice, "subject to refiling."

Shortly after the Board of Adjustment decision, plaintiff filed his takings petition with the County. On March 28, 2000, the County preliminarily found that a takings may have occurred, and appointed a hearing officer to conduct further proceedings and issue a recommendation. The hearing officer's September 11, 2000 decision, relying upon the parties' evidentiary proffers, recommended denial of the claim. While the decision was supported by a finding that plaintiff possessed a compensable interest in the property, it held that plaintiff's claim warranted dismissal because he did not have standing to assert it, having purchased the land after the passage of the FCOZ ordinance. Plaintiff sought rehearing, but his request was denied. The Board of County Commissioners took no immediate action upon the recommendation, at least in part to provide plaintiff further opportunity to provide them with site-specific data supporting his plan to build on the

lot. During the interim, on June 26, 2001, the U.S. Supreme Court decided Palazzolo v. State of Rhode Island 533 U.S. 606 (2001). Upon learning of the decision, the hearing officer delivered to counsel for the County and for plaintiff the Palazzolo decision as a courtesy. In his letter of July 18, 2001, the hearing officer opined that "it is clear that the Palazzolo case overrules my recommended decision and will govern subsequent proceedings." On November 13, 2001, the County Council reviewed plaintiff's petition, considered the meaning and scope of Palazzolo, and on January 8, 2002 filed its Findings of Fact and Conclusions of Law, denying plaintiff's petition. This action followed.

ANALYSIS

APPEAL OF BOARD OF ADJUSTMENT ACTION

Timeliness of Appeal

The County initially contested plaintiff's right to now challenge the Board of Adjustment decision. It is undisputed that the plaintiff's first action appealing the Board's decision was filed within the 30-day appeal period. The parties entered into a Stipulation dismissing that action and reserved plaintiff's right to re-file at a later date, which plaintiff did, just a week after the stipulation was signed.

This Court's dismissal of the previous action was expressly without prejudice, "subject to refiling (sic)." Honoring

plaintiff's reservation of, and upholding the County's stipulation to, plaintiff's right to re-file is consistent with Utah Code Ann. § 78-12-40. Based thereon, plaintiff's appeal is timely. Furthermore, defendant Salt Lake County withdrew its challenge to the timeliness of plaintiff's action with regard to the Board's decision.

Denial of Variance Request

Five elements or requirements must be satisfied to qualify for a variance (see, Utah Code Ann., Section 17-27-707). The five elements include: (1) literal enforcement of the zoning ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the zoning ordinance; (2) there are special circumstances attached to the property that do not generally apply to properties in the same district; (3) granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same district; (4) the variance will not substantially affect the general plan and will not be contrary to the public interest; (5) the spirit of the zoning ordinance is observed and substantial justice done.

First, in this case, while it is conceivable that some plan for building might meet the "minimal scarring" purpose, the "prohibition of degradation" purpose, and the "aesthetic" purpose

contained in the ordinance, the recommendation of the staff was that the prohibition, even on lots already in existence at the time of the adoption of the FCOZ ordinances, on construction on slopes greater than 40%, was necessary to carry out the general purposes of the zoning ordinance. On the question of "whether the literal enforcement of the zoning ordinance would cause unreasonable hardship," it is clear hardship is located on or associated with the property for which the variance is sought, but not that the hardship comes from circumstances peculiar to this property. The record supports the conclusion that slope is an issue for nearly all of the lots in the area. The hardship was not self-imposed or economic (the subject of the variance request was plaintiff's ability to build, not how much more it would cost plaintiff to build because of the ordinance). The record supports a conclusion that literal enforcement of the zoning ordinance under the circumstances presented to the Board would not create a hardship that is unreasonable, given that plaintiff did not provide any specific evidence at the time of the hearing that the negative effects the ordinance was designed to ameliorate would be sensitively addressed in plaintiff's development of the property.

Second, there are no special circumstances attached to the property that do not generally apply to properties in the same district. The special circumstance, if any, is the slope, and this

clearly relates to plaintiff's inability under the ordinance to build upon the lot. However, it is not the slope itself that prohibits development of this lot, or any other lot in this subdivision with comparable slopes, but rather the existence of the slope ordinance--and as previously addressed, enforcement of the restriction under the circumstances before the Board was not unreasonable.

Third, it is true that absent a grant of the variance sought here, plaintiff would be denied a right to build upon his lot--the very purpose for creating this subdivision. *Relates to whether other future similarly situated*

Fourth, granting the variance must not substantially affect the general plan or be contrary to the public interest. The plaintiff's argument here is clear that any harm that may result from building upon this lot is minimized because there already exists development in the area which is not in accordance with the plan. However, this observation supports the argument for the County as much as it does plaintiff's contentions, as it would be in the public interest to mitigate the damage already done. *3*

Finally, the spirit of the zoning ordinance must be observed, and substantial justice done. The Board concluded that this element was not met because the very purpose of the ordinance is to prevent construction on slopes of this magnitude. In reaching their decision, it was clear that they were concerned that very little

data had been generated to support plaintiff's claim that the lot was safe to build upon. After this request for variance was denied, a substantial portion of the delay in reaching a decision on the takings petition was because the County was giving additional time for plaintiff to bring studies of the sort the County would have liked to see at the initial hearing to the commission, and so other county officials could evaluate that data. As the time for decision approached, the County represented that they were trying to negotiate a resolution. None was apparently reached, the data supplied did not persuade the County to grant plaintiff's request, and did not convince the County that the ordinance effected a taking of the plaintiff's property.

The decision of the Board is supported in the way that such decisions should be--the information which plaintiff was to provide did not convince the County that the determination that the variance would not comply with the spirit of the zoning ordinance, nor would it comport with the general purpose of the ordinance. This is the specific finding that Boards must make in order to justify denial of a variance request. It is, therefore, clear that the action of the Board cannot be found arbitrary and capricious, or contrary to law.

CONSTITUTIONAL TAKINGS

All analyses regarding the question of whether the Board's denial of plaintiff's request for a variance is a constitutional takings must begin with the Palazzolo decision. At the time the case was first brought to the attention of the parties, the only issue which appeared to concern them regarded whether a property owner in plaintiff's position, (one acquiring ownership after a restrictive ordinance is passed), had standing to maintain a takings claim against the government. However, of equal importance is the Supreme Court's treatment of whether a property-use regulatory board's decision was final for purposes of takings analysis. In other words, the action of the board must be sufficiently final and definite to support a fully ripe takings claim.

Ripeness¹

In Palazzolo, the State of Rhode Island claimed that because there were any number of other uses to which the plaintiff could put his land, the action of the state in denying his request for a

¹More than one location in the record refers to this action as a facial challenge to the slope ordinance, which as stated in Smith Investment Co. v. Sandy City, 958 P.2d 245 (Utah Ct. App. 1998), does not require a ripeness inquiry. However, it appears to the Court that the central premise of the County's argument regarding plaintiff's future ability to obtain a variance is essentially a ripeness argument. Because the procedure prescribed in the zoning ordinances allows for variances to the ordinance, this is an "as applied" challenge.

variance for the specific purpose stated in the variance request could not constitute a ripe takings claim. The state's theory was that some future request to use the land for some other purpose than the one stated in his application, may result in the granting of the variance as requested. The Supreme Court rejected this proposition because it was clear that in that case, the decision handed down by the state Board precluded any other economically viable use for the land. Essentially, the restriction went to the nature of the land which the plaintiff owned, and not to any particular use which he proposed.²

The Supreme Court states:

Under our ripeness rules, a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established.

Id. 533 U.S. 606 at 620-621.

²The plaintiff in that case wanted to fill portions of the marshy, coastal wetland he owned so he could build a beach resort. Without being able to fill the land, the plaintiff would not be able to put most of the land to any use.

In this case, if the County's contention is true--that the plaintiff had merely not presented a petition for variance upon which the County could act--then it follows that the County's denial of this variance does not, without more, show the extent of the restriction on property. However, the language which the County chose provides at least colloquial support for a contention that the decision precludes any building upon the lot, and hence, deprivation of any economic value in the land:

Construction of a home on steep slopes, such as on the Arnell lot, presents a host of other problems and dangers that cannot be readily anticipated or mitigated, including the threat of slope instability, foundation slippage, soil erosion, avalanche, fire, landslide, falling trees and boulders, retaining wall failure, and aesthetic impacts, not to mention off-site impacts such as septic and irrigation runoff.

While engineers can technically design structures on steeper slopes, the 30% slope limitation reflects nationwide standards that balance protection of property rights with protection of health, safety, and welfare of the property owner, adjoining property owners, and the general public. Regulation of home building on mountainous slopes is a common, necessary, and proper exercise of police power that increases overall safety and value in property.

Findings of Fact and Conclusions of Law, p. 5, ¶¶5-6. This decision by the Board of Commissioners, after receiving the data which the Board of Adjustment found lacking in the initial request

for variance (the findings acknowledge receipt of "unsatisfactory site-specific geotechnical data, evidence of water and sewer access, and related structural design." Id. at 3, ¶ 7 (emphasis in original)), states in absolute terms what the Board of Adjustment was initially only prepared to state conditionally. The Board concludes:

The effect of granting an exception to, or compensating Arnell might be that the County is obligated to grant similar relief to other lot owners similarly situated in existing and future subdivisions, effectively rescinding residential building restrictions on slopes that have been accepted by property owners and developers and enforced in the County for well for [sic] over 25 years. Granting an exception would defeat the purpose of the Wasatch Canyon Master Plan and FCOZ and would result in manifest injustice to those who have complied in the past and will do so in the future.

Id. at 5-6 ¶7. This language does not demonstrate the County lacked any opportunity to consider the plans for the site, or that "the extent of the restriction upon the property is not known". However, the failure to provide a report of the actual soils on the site in a form that was sufficient for the County to act knowledgeably upon the request makes it impossible for the County to determine whether the requirements for granting a variance have been met. The case, therefore, is not necessarily ripe. Variance requests regarding the FCOZ zoning ordinance have been, and will

likely continue to be, granted upon the satisfaction of the Board that the requirements for variance are met. However, because this conclusion is based upon information which can be used to support either conclusion, the Court considers, for argument's sake, that plaintiff's takings claim was ripe.

Standing

After reading Palazzolo, the hearing officer recommended that the takings claim should not be denied based upon a lack of standing. The Court agrees that Palazzolo requires that outcome.

The factors ultimately rejected by the High Court, which supported the Rhode Island Supreme Court's determination, "amount to a single, sweeping rule: A purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." The Supreme Court continued, and determined that if Rhode Island's suggestion were the rule,

the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Accordingly, plaintiff is not denied standing merely because he purchased the property after enactment of the FCOZ or its predecessors.

Application of Penn Central

The petitioners in Penn Central sought relief from a historical landmarks statute which singled out some 400 of the more than one million buildings in New York City (see, id. at 138-139 (Rehnquist, dissenting)), and which as applied to the petitioners, restricted their ability to build on top of the existing Grand Central Terminal, which they owned. In holding that so restricting the use of the valuable vertical air-space above the terminal did not constitute a taking, the Supreme Court held that because the terminal itself constituted a valuable economic use of the parcel, it could not be said that the lot had been deprived of all economic value. The Court refused the suggestion of the petitioners that the existing landmark should be considered separately from the airspace above the property.

A "Penn Central" analysis is intensely fact-specific. This has been recognized by the parties to this action, and by the Supreme Court of this State. The Court stated it this way:

[W]e have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely upon the particular circumstances in

that case.

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, see, e. g., United States v. Causby, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978) (internal citations omitted). No one interested in this matter disputes that if the plaintiff is prohibited from making any development at all, the economic impact upon the plaintiff would be significant, nor that plaintiff purchased the property with the expectation that he could build his canyon home thereon. Not unlike in Penn Central, the character of the governmental action is not a physical invasion of the plaintiff's property, but one distinction here is that the statute in question has applicability to many lots in the area where plaintiff's property is situated, instead of the mere 400 properties out of more than one million. Another difference is that the ordinance in question here is not a blanket prohibition placing the burden of public benefit on the

shoulders of so few, but rather, is a conditional prohibition which affects every person who owns property which is above a certain percentage of slope. These differences, including that this zoning statute includes provisions for the safety of the public as well as the aesthetical reasons, weigh against finding a takings here.

The primary difficulty with the manner in which this case is presented on appeal is determining whether there is any room in the rather broadly preclusive language in the findings and conclusions of the Board of County Commissioners to find, as the County urges, that not all economic use, as in Penn Central, has been precluded. If the Court were to rely only upon the data in the record excepting therefrom the findings and conclusions, its determination of this matter would be simple. The record clearly supports that plaintiff was provided multiple opportunities to provide information sufficient for the County to make its decision, but failed to do so. This parcel is on a steep slope. It is clearly not unreasonable for the County to have less than complete confidence in, or refuse to rely solely upon, the opinion of the landowner, or even his architect, that it is safe to build, without more. The Court agrees with the statement at the end of the conclusions of law that state

Regulation of home building on mountainous slopes is a common, necessary, and proper exercise of the police power that increases

overall safety and value in property.

. . . Granting an exception would defeat the purpose of the Wasatch Canyon Master Plan and the FCOZ and would result in manifest injustice to those who have complied in the past and will do so in the future.

Id. at pp.5-6. Regardless of the difficulty, the Court must consider the language of the decision, and must, if possible, read that decision consistent with the proceedings upon which it is based. To that end, there are portions of the decision that speak to the analysis required under Penn Central. Among the reasons for denying the plaintiff's takings petition which relate to the slope ordinance, are a couple of points which would prevent plaintiff from putting his property to the beneficial use he desires regardless if the County had granted his requested variance. In Paragraph 3 of the Conclusions of Law, the County stated that

Due to absorption limitations on steep slopes, state and local health authorities preclude construction of sewer drain fields on steep slopes. Arnell has stated that he can connect to a sewer but has not demonstrated that he has, or can obtain, legal access across other private properties to a sewer line some 800 feet downhill in Big Cottonwood Canyon. Until such time as Forest Glen subdivision is put on sewer, development on steep lots may be unfeasible.

According to this statement, it is not clear that the plaintiff is being denied use of his land by operation of the slope ordinance because even if the variance had been granted, it may be the lack

of adequate sewer accommodations that in the end results in the prohibition against building, or the lack of adequate water supply (see Conclusions at para. 4).

Because the plaintiff cannot demonstrate that the ordinance in question is depriving him of any economically viable use for the property, there has been no takings under Penn Central.

PLAINTIFF AND DEFENDANT MADSEN'S CROSS MOTIONS FOR SUMMARY JUDGMENT


Plaintiff asserts three claims against defendant Madsen: (1) breach of warrant deed; (2) breach of implied warranty of habitability; and (3) rescission based upon mutual mistake. All three claims are without merit and can be disposed of summarily. There can be no breach of warranty deed under the undisputed facts of this case because the warranty deed at issue failed to contain a covenant warranty against government building restrictions. Furthermore, a government building restriction is not an "encumbrance" and purchasers of land must take notice of public statutes restricting the use of granted premises. Utah does not recognize a claim for breach of an implied warranty of habitability in real property sales. (Snowflower, 31 P.3d 576.) There is no mutual mistake concerning an "existing fact." The County's refusal to grant a variance was a future act not an exiting fact and plaintiff's knowledge of the law in the form of the County's slope ordinance is presumed. Based upon the foregoing, plaintiff's

Motion for Summary Judgment against defendant Madsen is denied and Madsen's cross Motion is granted. Defendant Madsen's Motion or Summary Judgment against Salt Lake County is now moot.

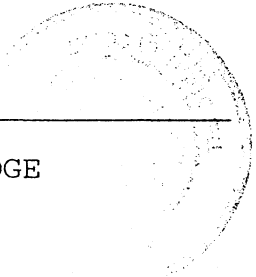
WHEREFORE, based upon the foregoing, plaintiff's Motion for Summary Judgment is hereby DENIED. Salt Lake County's Motion is GRANTED, and Madsen's Motion for Summary Judgment is GRANTED in part (dismissing plaintiff's requested relief from Madsen), and DENIED in part as moot (Madsen's request that the County be required to indemnify him as to any damages he is required to pay to plaintiff).

This constitutes the final order of the Court on the matters referenced herein. No further Order is required.

Dated this 21st day of April, 2004.



TYRONE E. MEDLEY
DISTRICT COURT JUDGE



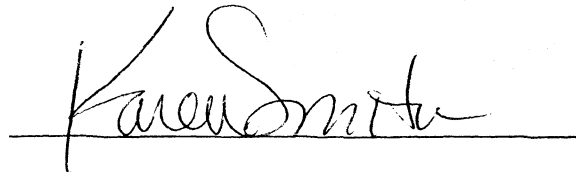
MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision and Order, to the following, this 21st day of April, 2004:

David E. West
Attorney for Plaintiff
3441 S. Decker Lake Drive
Salt Lake City, Utah 84119

Don Hansen
Deputy District Attorney
Attorney for Defendant Salt Lake County
2001 S. State Street, Suite S3400
Salt Lake City, Utah 84190-1200

Barnard N. Madsen
Attorney for Defendant Madsen
4692 North 300 West, Suite 200
Provo, Utah 84604

A handwritten signature in cursive script, appearing to read "Karen Smith", is written over a horizontal line.

ADDENDUM NO. 2

Chapter 19.93

PROCEDURES FOR ANALYZING TAKINGS CLAIMS

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19.93.010 Purpose

The purpose of this chapter is to establish procedures for:

- A. obtaining and analyzing information regarding a claim that the application or enforcement of Salt Lake County zoning ordinances and / or land use regulations to private property within the unincorporated areas of the County constitutes an unconstitutional taking of private property without just compensation; and
- B. determining whether it might be appropriate to grant administrative relief to the claimant in the event it is determined that such application or enforcement constitutes an unconstitutional taking,

19.93.020 Findings

The Governing Body makes the following findings:

- A. To further the public interest in lawful and responsible land development, and promote the health, welfare, and safety of its residents, the County has enacted zoning and other land development regulations applicable to properties within unincorporated areas of the County, including new and revised regulations applicable to properties in the county's canyons and foothills; and
- B. In the event an owner of private property within the unincorporated area of the County claims that the application or enforcement of County zoning ordinances or other land use regulation constitutes an unconstitutional taking of its private property, it is in the best interests of the County to have established procedures for obtaining relevant information for analyzing such claim and determining whether it might be appropriate to grant certain relief to the claimant, rather than conducting such analysis in a more confrontational, expensive, and time-consuming litigation context.

19.93.030 Taking Relief Procedures: Petition & Submittal Requirements

A. Takings Relief Petition

Any applicant, after a final decision on its application is rendered by the Planning and

Development Services Director, Planning Commission, Board of Adjustment, or Governing Body, may file a Takings Relief Petition with the Planning and Development Services Director seeking relief from the final decision on the grounds that it constitutes an unconstitutional taking of the applicant's private property.

B. Affected Property Interest

The Takings Relief Petition must provide information sufficient for the District Attorney to determine that the petitioner possesses a protectable interest in property under Article I, Section 22 of the Constitution of Utah or the Fifth Amendment to the United States Constitution. In the event the Petition does not provide information sufficient for the District Attorney to determine that the petitioner possesses a protectable interest in property under Article I, Section 22 of the Constitution of Utah or the Fifth Amendment to the United States Constitution, the Petition shall be returned to the petitioner.

C. Time for Filing Petition

No later than thirty (30) calendar days from the final decision by the Development Services Director, Planning Commission, Board of Adjustment, Governing Body, or other County review authority on any site plan or other type of zoning application the applicant shall file a Takings Relief Petition with the Development Services Director.

D. Information to Be Submitted with Takings Relief Petition

1. The Takings Relief Petition must be submitted on a form prepared by the Development Services Director, and must be accompanied at a minimum by the following information:
 - a. The name of the petitioner;
 - b. The name and business address of the current owner of the property; form of ownership, (whether sole proprietorship, for-profit or not-for-profit corporation, partnership, joint venture, limited liability company, or other); and if owned by corporation, partnership, or joint venture, or limited liability company, the names and addresses of principal shareholders or partners or members;
 - c. The price paid and other terms of sale for the property, the date of purchase, and the name of the party from whom purchased.

Include the relationship, if any, between the petitioner and the party from whom the property was acquired;

- d. The nature of the protectable interest claimed to be affected, such as, but not limited to, fee simple ownership or leasehold interest;
- e. The terms (including sale price) of any previous purchase or sale of a full or partial interest in the property by the current owner, applicant, or developer prior to the date of application;
- f. All appraisals of the property prepared for any purpose, include financing, offering for sale, or ad valorem taxation, within the three years prior to the date of the Petition;
- g. The assessed value of and ad valorem taxes on the property for the three years prior to the date of the Petition;
- h. All information concerning current mortgages or other loans secured by the property, including name of the mortgagee or lender, current interest rate, remaining loan balance, and term of the loan and other significant provisions, including but not limited to, right of purchase to assume the loan;
- i. All listings of the property for sale or rent, price asked and offers received, (if any), during the period of ownership or interest in the property;
- j. All studies commissioned by the petitioner or agents of the petitioner within the previous three years concerning feasibility of development or utilization of the property;
- k. For income producing property, itemized income and expense statements from the property for the previous three years;
- l. Evidence and documentation of improvements, investments, and expenditures for professional and other services related to property made during the past three years;
- m. Information from a title policy or other source showing all recorded liens or encumbrances affecting the property; and
- n. Information describing all use(s) of the property during the five years prior to the Petition.

2. The Planning and Development Services Director may request additional information reasonably necessary, in his or her opinion, to arrive at a conclusion concerning whether there has been a taking.

E. Failure to Submit Information

In the event that any of the information required to be submitted by the petitioner is not reasonably available, the petitioner shall file with the Petition a statement of the information that cannot be obtained and shall describe the reasons why such information is unavailable.

**19.93.040 Taking Relief Procedures:
Determination of Taking**

A. Preliminary Determination of Taking

1. Prior to the appointment of a Hearing Officer, and based on a review of the Petition and all relevant information submitted by the petitioner, the Governing Body, upon advice of the Development Services Director and the District Attorney, shall make a preliminary determination whether a taking may have occurred. This preliminary determination shall be made within thirty (30) days of the filing of the Petition and submission of all information required to make such determination. In the event the Governing Body makes a preliminary determination that a taking may have occurred, the Governing Body may appoint a Hearing Officer, elect to conduct either formal or informal administrative proceedings, and proceed with a full review of the Petition.
2. If a preliminary determination is made that a taking may have occurred, then the Development Services Director and District Attorney shall recommend whether the hearing shall be formal or informal under the Rules of Procedure adopted by the Governing Body for such hearings.
3. If upon the advice of the Development Services Director and the District Attorney, the Governing Body finds that a taking has not occurred, the Petition shall be denied and no Hearing Officer shall be appointed.

B. Appointment of Hearing Officer

The Planning and Development Services Director shall, within thirty (30) days following a preliminary determination by the Governing Body that a taking may have occurred, appoint a Hearing Officer to review information by the petitioner, to hold a public hearing to determine whether a taking has occurred, and to make a recommendation to the Governing Body concerning the Petition.

C. Qualifications of the Hearing Officer

Every appointed Hearing Officer shall be licensed to practice law in the state of Utah. Prior to appointment, the Hearing Officer shall submit a statement of no potential or actual conflict of interest in connection with the Petitioner or Petition.

D. Notice of Public Hearing

Within ten (10) days following appointment of the Hearing Officer, written notice of a public hearing shall be published and posted in accordance with Section 19.84.040.D. of this Title. The hearing shall be held within thirty (30) days of the final date of written notice, unless a reasonable extension of time is agreed to by both the Development Services Director and the Petitioner.

E. Conduct of the Hearing

The hearing shall be conducted according to the requirements of the Rules of Procedure adopted by the Governing Body for such hearings.

F. Determining the Takings Issue

The Hearing Officer shall consider, among other items, the following information or evidence:

1. Any estimates from contractors, appraisers, architects, real estate analysts, qualified developers, or other competent and qualified real estate professionals concerning the feasibility, or lack of feasibility, of construction or development on the property as of the date of the Petition, and in the reasonably near future;
2. Any evidence or testimony of the market value of the property both under the uses allowed by the existing regulations and any proposed use; and,

3. Any evidence or testimony concerning the value or benefit to the petitioner from the availability of opportunities to cluster development on other remaining contiguous property owned by the petitioner eligible for such clustering as provided elsewhere in Title 19.

G. Burden of Proof

The petitioner shall have the burden of proving by a preponderance of the evidence that the final decision that is the subject of the Takings Relief Petition constitutes an unconstitutional taking.

H. Findings of the Hearing Officer

The Hearing Officer shall, on the basis of the evidence and testimony presented, make the following specific findings as part of his/her report and recommendations to the Governing Body:

1. Whether the petitioner has complied with the requirements for presenting the information to be submitted with a Takings Relief Petition;
2. Whether the petitioner has a protectable interest in the property that is the subject of the Petition;
3. The market value of the property considering the existing zoning regulation.
4. The market value of the property under the proposed use;
5. Whether there are other economically viable uses that may be made of the property;
6. The market value of, or benefit accruing from opportunities to cluster development on other remaining contiguous property owned by the petitioner eligible for such transfer as provided for in Title 19 of the Salt Lake County Code of Ordinances.
7. Whether it was feasible to undertake construction on, or development of, the property as of the date of the application, or in the reasonably near future thereafter;

Whether the final decision that is the subject of the Takings Relief Petition constitutes an unconstitutional taking of private property without just compensation.

I. Report and Recommendations of the Hearing Officer

1. If the Hearing Officer finds that the final decision which is the subject of the Takings Relief Petition constitutes an unconstitutional taking of private property without just compensation, he or she shall remand the matter to the Governing Body with recommendations concerning what relief might be appropriate. In making such recommendations, the Hearing Officer shall consider, among other factors:
 - a. Approval of development on some portion of the property; or;
 - b. A rezoning of the property to a more appropriate classification, approval of an alternative development plan, modification or waiver of normally-applicable development standards, or other appropriate land-use regulatory action;
 - c. An opportunity to cluster development;
 - d. For property subject to the Foothills and Canyons Overlay Zone, transfer of up to ten (10) percent of the maximum allowable density that would otherwise be attributable to areas with greater than thirty (30) percent slope on the subject property to other developable portions of the property;
 - e. A waiver of permit fees;
 - f. Acquisition of all or a portion of the property at market value.
2. Recommendations for clustering within the boundaries of the subject property owned by the petitioner shall require a written finding by the Hearing Officer that such clustering and the resulting increase in development density will be compatible with existing developments and land use patterns on properties surrounding the subject property.
 - a. For purposes of such "compatibility" finding, the Hearing Officer shall compare the petitioner's proposed development incorporating the increased transfer density with existing development on surrounding properties, and take into consideration the following factors:
 - (1) Architectural character;

- (2) Building size, height, bulk, mass, and scale;
 - (3) Building orientation;
 - (4) Privacy considerations in terms of privacy for prospective residents within the petitioner's development and in terms of privacy protection for adjoining land uses;
 - (5) Building materials;
 - (6) Building color; and
 - (7) When applicable, operations of the petitioner's development project, including but not limited to hours of operation; activities that may generate adverse impacts on adjacent land uses such as noise or glare; location of loading/delivery zones; and light intensity and hours of full illumination.
- b. The report and recommendation shall be submitted to the Governing Body and mailed to the petitioner within thirty (30) days following the conclusion of the public hearing.

J. Governing Body Review and Consideration

- 1. The Governing Body shall review the report and recommendations of the Hearing Officer and approve or deny the Takings Relief Petition within sixty (60) days following receipt of the Hearing Officer's report. Provided, however, that the Governing Body may extend this period upon a finding that due to the size and complexity of the development or proposal and similar factors that additional review time is necessary.
- 2. The Governing Body may hold a public hearing and provide notice as set forth in Section 19.84.040.D. of this Title. Only new testimony and evidence shall be presented at any such public hearing.
- 3. The Governing Body may adopt any legally available incentive or measure reasonably necessary to offset the taking, and may condition such incentives upon approval of specific development or site plans.
- 4. The decision of the Governing Body shall not become final until it issues a decision approving or denying the Petition and specifying any relief it may deem appropriate.

K. Time Limits / Transferral of Relief or Incentives

Any relief or incentives adopted by the Governing Body pursuant to this chapter may be transferred and utilized by successive owners of the property or parties in interest, but in no case shall the relief incentives be valid after the expiration date of a specific development approval.

ADDENDUM NO. 3

**BEFORE THE BOARD OF COUNTY COMMISSIONERS
OF SALT LAKE COUNTY**

--- 00000---

*In the Matter of a Takings Petition
Under Chapter 19.93 of the
County Ordinances
Filed by:*

**Jason P. Arnell
3441 South 2200 West
West Valley City, Utah 84119**

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, and
RECOMMENDED DECISION**

*Location of Property Alleged
to be Taken:*

**Lot 13, Forest Glen Plat "B"
Salt Lake County**

--- 00000---

Procedural History

Preliminary Determination of a Possible Taking

Following the County's denial of a discretionary variance to allow construction on his property, Jason P. Arnell ("Petitioner") filed a Takings Petition under new Chapter 19-93. On March 28, 2000, in response to the Takings Petition, the Board of County Commissioners made a finding of possible taking with respect to Petitioner's property in the Forest Glen subdivision in Big Cottonwood Canyon (sometimes referred to as the "subject property"). This finding triggered the application of the hearing procedures of Chapter 19-93. The undersigned was retained as independent hearing officer to conduct the required hearing.

First Hearing and Determining of Hearing Procedures Under Chapter 19-93

On April 26, 2000 this matter first came before the undersigned for hearing pursuant to written notice. Representatives of the County were present, including legal counsel for the County. Petitioner was also present, and was represented by his legal counsel. Mr. William Gordon, a soil engineer, and Mr. Troy McOmber, a licensed architect, also appeared for Petitioner. After an initial presentation by Petitioner, the parties discussed with the Hearing Officer concerning the procedures to be followed in a Chapter 19-93 hearing. After both sides were heard on the matter, the hearing officer ruled preliminarily and procedurally as follows:

1. The Hearing Officer must make findings of fact concerning each of the 7 factors listed in subpart H, as well as making a finding on the ultimate issue: whether a legal taking of property without just compensation has taken place. In doing so, the Hearing

Officer can receive the types of evidence contemplated in subpart F. As to each item of subpart H, the Petitioner has the burden of proof as provided in subpart G.

2. If as a result of the findings called for in subpart H, the Hearing Officer finds that a taking of Petitioner's property by the County without just compensation has or occurred, the Hearing Officer must proceed to make a recommended resolution of the taking as provided in subpart I. If no taking is found under subpart H, no action is required under subpart I.

3. Because Petitioner has the burden of proof, Petitioner is entitled to a fair opportunity to present expert and factual evidence, and to have the County do the same as it chooses. To accomplish this, a procedure for introducing evidence with intervening time for preparation of countervailing evidence was established as follows, and so communicated to the parties:

(a) On or before June 30, 2000, Petitioner shall prepare and deliver to the County and to the Hearing Officer written testimony from Petitioner and such expert and factual witnesses as Petitioner may retain relative to the issues of subpart H. Such written testimony may be in the form of questions and answers or in summary opinion form. Petitioner, having the burden of proof and of persuasion, is in the best position to set the scope of the evidence by being first to file.

(b) On or before July 25, 2000, the County shall prepare and deliver to Petitioner and to the Hearing Officer written testimony from such expert and factual witnesses as the County may retain relative to the issues of subpart H and in response to the pre-filed testimony of Petitioner's witnesses.

(c) On or before August 18, 2000, Petitioner may prepare and deliver to the County and to the Hearing Officer written testimony from Petitioner and such expert and factual witnesses as Petitioner may retain in rebuttal to the pre-filed testimony of the County. This will not be a second opportunity to embellish Petitioner's case, but solely to rebut factual or expert testimony of the County.

(d) On August 28, 2000 at 9:00 AM in Room N3500 at the County Complex, the Hearing Officer will convene a hearing to allow the County to cross-examine the Petitioner's witnesses and to allow Petitioner to cross-examine the County's witnesses. All persons whose testimony was prefiled for either side will be expected to be present at this hearing unless excused by prearrangement. Also at this hearing the parties will each be allowed to make a summary argument at the conclusion of the evidence taking and cross-examination. Such summary argument will go to the issues of subpart H and also to the issues of subpart I, as appropriate.

4. Items 1 and 2 of subpart H were stipulated by Petitioner and the County to be found in favor of Petitioner. It was also stipulated by the parties that item 6 of subpart H was inapplicable to this case, and thus could be deemed found in favor of Petitioner.

The Second Hearing

5. As and when called for under the procedures established at the First Hearing, the following witnesses prefiled written testimony¹ for Petitioner:

- (a) Troy McOmber, architect
- (b) William Gordon, soil engineer
- (c) Jason Arnell, Petitioner

The following witnesses timely prefiled testimony² for the County:

- (a) Calvin Schneller, Director of Planning and Development Services for the County
- (b) Darlene Batatian, geologist

Rebuttal testimony³ was prefiled by Petitioner timely.

¹ Petitioner also proffered the testimony of George Hansen, P.E. as contained in a letter from Mr. Hansen submitted in connection with Petitioner's request for a zoning variance from the County. The undersigned accepts the testimony of Mr. Hansen contained in his letter as evidence and part of the record. The quality of Mr. Hansen's testimony does not depart from that of the other witnesses for the parties.

Both in offering the letter from Mr. Hansen (who also did not do property specific testing) and in the prefiled testimony of his experts, Petitioner chose to offer summary conclusion testimony rather than test-supported detailed testimony. As highlighted in cross examination, none of Petitioner's experts did property specific testing or design work to support their conclusions. However, the County failed to offer opinion evidence based on property specific studies to contradict the summary conclusions of Petitioner and his experts. Therefore the even quality of the evidence on both sides negates the impact of the lack of actual architectural designs and soils and other tests on the subject property by Petitioner's witnesses. Whether detailed architectural designs and site specific soils and engineering testimony ought to be required in Chapter 19-93 hearings is left to the Board of County Commissioners or a future hearing officer to decide in another case.

None of the testimony or other submissions of Petitioner or his witnesses dealt with the ultimate issue of whether a government taking without just compensation took place. Legal argument with respect to this issue was advanced in the Takings Petition. The undersigned has accepted the reviewed such legal argument as part of the record in this proceeding.

² Ms. Batatian offered summary testimony of the same quality as Petitioner's experts, but did not contradict the conclusions reached by the Petitioner's experts. Mr. Schneller offered an argument position paper not directly disputing any conclusions of Petitioner's experts. Whether detailed architectural design criticism and site specific soils and engineering testimony ought to be required of the County in Chapter 19-93 hearings is left to the Board of County Commissioners or a future hearing officer to decide in a future case.

None of the testimony or other submissions of the County or its witnesses dealt with the ultimate issue of whether a government taking without just compensation took place. Oral testimony concerning the existence and timing of the adoption of the current zoning ordinance, as well as scant references to the former zoning ordinances, was summarily offered at the first hearing, but not followed up in the pre-filed testimony nor at the second hearing save in response to a question by the undersigned. The County never introduced into the record copies of the current zoning ordinance or the prior zoning ordinance.

In response to a question from the undersigned, the County testified at the second hearing that the prior zoning ordinance also provided a prohibition against building on a 30% or greater slope angle.

³ Petitioner's rebuttal testimony was a legal counsel summary of the evidence and argument. No new evidence was offered.

6. On August 28, 2000, a second hearing was convened by the undersigned in Room N3500 at the County Complex. The pre-filed testimony of all parties and witnesses was received into evidence. Legal counsel for the County cross-examined Mr. Gordon, Mr. McOmber and Petitioner. Legal counsel for Petitioner chose not to cross-examine the County witnesses. Closing arguments were made by legal counsel for both parties.

Having heard the evidence and arguments, reviewed the applicable law, and otherwise being fully advised and informed in this matter, the Hearing Examiner hereby submits the following:

FINDINGS OF FACT

7. The County has adopted and maintained zoning ordinances since sometime in the 1980's restricting and prohibiting development on property in Big Cottonwood Canyon having a slope angle of 30% or greater, an angle determined by the County to be dangerous for construction of structures, given the potential slide and runoff impacts on surrounding property owners.

8. The County adopted the current zoning ordinance on August 15, 1997, and it expressly prohibits construction of a residence on the subject property because of its 30% or greater slope angle.

9. Petitioner purchased the subject property on May 4, 1999, nearly two years after the current zoning ordinance was effective, and several years after the prior zoning ordinance effectively prohibited construction on the subject property. The subject property has an approximately 50% slope angle, although the specific angle varies along the topography of the subject property.

10. In connection with his purchase of the subject property, Petitioner undertook no examination of the applicable zoning ordinances or other County requirements applicable to the subject property. Petitioner observed the residences then existing on nearby lots in the same subdivision⁴ and assumed that he could also build a similar residence on the subject property.

11. Shortly after purchasing the subject property in 1999, Petitioner retained Mr. McOmber to design a residence for the subject property. Petitioner was informed by Mr. McOmber concerning the current zoning ordinance and its prohibition of construction on the subject property based on its 30% or greater slope angles.

12. Petitioner's property is substantially at or above a 30% slope angle.

⁴ The subject property is a lot in the Forest Glen subdivision. This subdivision was approved by the County long before zoning ordinances prohibited construction on a 30% or greater slope, and long before Petitioner acquired the subject property. Petitioner argues that the current zoning ordinance (and by implication the immediately prior zoning ordinance with a similar prohibition based on the slope) are illegal modifications of the approved Forest Glen subdivision in violation of Section 17-27-810 UCA and the holding in Wood v. North Salt Lake, 390 P.2d 858 (1964). The hearing called for in Chapter 19-93 is to make findings as to specific issues, and to recommend remedial action if an unconstitutional taking by the County has occurred. Chapter 19-93 does not provide a forum for an appeal or general review of, or challenge to, the current zoning ordinance. I take the current zoning ordinance as a legal and valid given in determining the existence of an unconstitutional taking under Chapter 19-93. Petitioner is free to challenge the current zoning ordinances under Section 17-27-810 UCA and/or Wood in another forum, if such an action is now timely. Such issues are irrelevant to the present proceeding under Chapter 19-93.

13. Petitioner sought, and the County denied a variance based on the current zoning ordinance and its prohibition of construction in Big Cottonwood Canyon on property having a 30% or greater slope angle.

14*. Petitioner has complied with the requirements for presenting the information to be submitted with a Takings Relief Petition under Chapter 19-93.2.

15*. Petitioner is the owner of the subject property, and thus has a protectable interest in the subject property. (*But see* conclusions of law, below, as to Petitioner's standing to make a takings claim.)

16. The market value of the subject property, considering the existing zoning regulation, is substantially \$0⁵.

17. The market value of the subject property under the proposed use, without regard to the current zoning ordinance, is \$95,000, based on the recently negotiated price paid by Petitioner, and his testimony concerning other recent sales of other lots in the Forest Glen subdivision.

18*. Given the application of the current zoning ordinance, there are no economically viable uses of the subject property.

19. There is no cluster development opportunity for the subject property as contemplated in H.6. of Chapter 19-93.

20. It is feasible, from an architectural, engineering and soils standpoint, for Petitioner to construct a residence on the subject property, without regard to the current zoning ordinance. The undersigned is making no finding concerning the economic feasibility of such construction, inasmuch as no evidence was provided by any party as to the cost of creating the type of structure required to meet the feasibility requirements of the architect, the structural engineer and the soils engineer.⁶

* These paragraphs make "findings" that are partly factual findings and partly legal conclusions. They are made here as "findings" required by Chapter 19-93.

⁵ The subject property has a value greater than \$0, although that value is impossible to ascertain in the absence of expert testimony or actual offers from willing buyers. Certainly the value of the subject property is severely reduced as a result of the zoning ordinance. I do note that "[m]ere diminution in value is insufficient to meet the burden of demonstrating a taking by regulation." Cornish Town v. Koller, 817 P.2d 305, 312 (Utah 1991). As the U.S. Supreme Court has declared, "'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law . . .'" Penn Central Transp. Co., 438 U.S. at 124, 98 S. Ct. at 2659 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 43 S. Ct. 158, 159, 67 L. Ed. 322 (1922)). Indeed, regulations causing significant diminution in value been upheld against takings challenges. See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384, 47 S. Ct. 114, 117, 71 L. Ed. 303 (1926) (75% diminution in value); Hadacheck v. Sebastian, 239 U.S. 394, 394, 36 S. Ct. 143, 143, 60 L. Ed. 348 (1915) (92.5% diminution); Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023, 1031 (3d Cir. 1987) (89.5%); William C. Haas & Co. v. City of San Francisco, 605 F.2d 1117, 1121 (9th Cir. 1979) (95%); Sierra Terreno v. Tahoe Reg'l Planning Agency, 79 Cal. App. 3d 439, 144 Cal. Rptr. 776, 777 (Cal. Ct. App. 1978) (81%). For this reason I have made a finding of no value under the current application of the zoning ordinance in order to avoid the effect of arguing about how little of the property must remain before a partial taking is transformed into a full taking.

⁶ Petitioner's witnesses exhibited an unabashed "can do" attitude toward the ability to design a residence structure safely and securely on the subject property, and to install the types of sewage system required. No consideration was given or testimony offered as to the cost of the "feasibility".

CONCLUSIONS OF LAW

21. The Takings Clause of the United States Constitution, which applies to the states (and the County) through the Fourteenth Amendment, declares: "Nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

22. The Utah Constitution, Sec. 22 [Private property for public use], similarly provides that "Private property shall not be taken or damaged for public use without just compensation."

23. These constitutional requirements' primary purpose is "'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Dolan v. City of Tigard, 512 U.S. 374, 384, 114 S. Ct. 2309, 2316, 129 L. Ed. 2d 304 (1994).

24. Petitioner makes what is called a "facial" attack on the current zoning ordinance. In other words, the existence of the ordinance itself has the effect of a taking, rather than the way the ordinance is applied. See Keystone Bituminous Coal Assn. V. DeBenedictis, et al., 480 U.S. 470 (1987); Smith Investment Company v. Sandy City, 958 P.2d 245 (Ut. App. 1998).

25. Under a facial challenge and claim of taking, a regulatory taking may be found if:

- (a) There is a denial of economically viable use of the property as a result of the regulatory imposition;
- (b) The property owner has distinct investment-backed expectations; and
- (c) The interest in the property that was "taken" is recognized in state law as an interest not otherwise subject to regulation as a nuisance.

Loveladies Harbor, Inc., et al v. The United States of America, 28 F. 3d 1171 (Fed. Cir. 1994).

26. While the effect of the current zoning ordinance on the subject property would meet the three legal criteria just cited, there is a condition precedent to a valid claim by Petitioner for compensation for a regulatory taking. The taking must be of "previously existing rights of property or contract." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Put another way, Petitioner must have legal "standing" to make any claim for relief. Legal standing requires an actual injury in fact.⁷

27. Petitioner acquired the subject property approximately two years after the current zoning ordinance was effective and had its devastating economic effect on the subject property. If the prior zoning ordinance and its similar prohibition on construction is considered, the regulatory taking of the subject property took place as many as 10-15 years prior to Petitioner purchasing the subject property. In other words, Petitioner has had no property rights that he legally possessed in the subject property "taken" by the County as a result of the application of the current zoning ordinance. He acquired the subject property when it was already burdened by the current zoning ordinance, and the County has not taken any action other than to apply the current zoning ordinance since Petitioner acquired the subject property.⁸ That Petitioner

⁷ See Jenkins v. Swan, 675 P.2d 1145, 1148 (Utah 1983) ("The traditional test for standing [is that a] plaintiff must be able to show he has suffered some distinct and palpable injury which gives him a personal stake in the outcome of the legal dispute."); see also United States v. Richardson, 418 U.S. 166, 172, 94 S. Ct. 2940, 2944, 41 L. Ed. 2d 678 (1974).

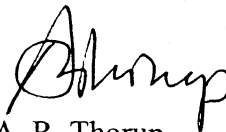
paid more than the true current value for the subject property is irrelevant to his lack of standing to make a taking claim.⁹

28. The denial of Petitioner's request for a variance to construct a residence on the subject property was NOT an unconstitutional taking of private property without just compensation.

**CONCLUSION
AND
RECOMMENDED ACTION BY THE BOARD OF COUNTY COMMISSIONERS**

Petitioner has not suffered a compensable taking of his property under Chapter 19-93, or under the Utah or U.S. Constitutions. The Board of County Commissioners should dismiss the Takings Petition without any compensation or reimbursement to the Petitioner of any kind.

Respectfully submitted as of September 11, 2000.


A. R. Thorup
Hearing Examiner

512196

⁸ The denial of Petitioner's variance request was a discretionary action by the County, and does not transform this case from a "facial" attack to an "as applied" attack for purposes of analyzing Petitioner's standing to claim compensation for a regulatory taking under the Utah or U.S. Constitutions. The County made no additional exactions over what is required in the ordinance itself.

⁹ If a claim for compensation existed for a regulatory taking of the subject property, such a claim would have matured at the effective date of the first zoning ordinance to impose an effective prohibition against constructing a residence on the subject property. The County's testimony places this date sometime in the 1980's or early 1990's. Even if the claim for compensation "ran with the land", a conclusion that I do not make, it would appear that the statute of limitations on such a claim would have long since run.

ADDENDUM NO. 4

RAY, QUINNEY & NEBEKER

PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

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A. Robert Thorup

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BY FIRST CLASS MAIL

July 18, 2001

Calvin K. Schneller
Division Director
Planning and Development Services Division
Public Works Department
Salt Lake County
2001 South State Street
Suite N3600
Salt Lake City, Utah 84190-4200

Re: Takings Petition of Jason Arnell under Chapter 19-93

Dear Mr. Schneller:

As you may recall, I was retained as an independent hearing officer to conduct an evidentiary hearing and to render a recommended decision in the matter of the takings petition filed by Jason Arnell regarding his lot in the Forest Glen subdivision in Big Cottonwood Canyon. Pursuant to this assignment I conducted evidentiary hearings, heard and received legal argument. After consideration of the facts and law, including the inability of the parties to stipulate to basic requirements like jurisdiction and standing, I rendered my recommended decision denying the petition, and delivered my written decision to Mr. Tom Shafer (the person who hired me to conduct the hearing) on September 12, 2000. In my cover letter, I indicated my assumption that a copy would be sent by Mr. Shafer to Mr. Arnell and to Mr. Arnell's counsel. In the package sent to Mr. Shafer, as is my practice with the County, I sent my bill for the costs of the hearings and the decision.

A week later, on September 18, 2000, I write to Mr. Shafer to reduce my fee for the Arnell matter based on a total cap on my contract that I learned about in acting as a hearing officer for the Health Department.

Calvin Schneller

July 18, 2001

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On October 6, I received a letter from David West, counsel for Mr. Arnell, asking for me to reconsider my recommended decision and seeking a hearing on this request. Given my sensitivity to the cost issue raised in my September 18 letter, I wrote to Mr. Shafer on October 6 sending him a copy of Mr. West's letter and asking if the County desired that I conduct further hearings and proceedings in response to Mr. West's letter¹. (I attach a copy of my October 6 letter and Mr. West's October 4 letter).

On October 12, Kent Lewis Esq. of the District Attorney's office wrote to me indicating that the issue was to be on the County Commission agenda on October 18 and that the Commission would decide if it wanted further proceedings on the Arnell matter. (I attach a copy of Mr. Lewis' letter.)

I never heard another word from Mr. Lewis or anyone at the County as to the disposition of the Arnell matter or Mr. West's request by the Commission. Some months after October, 2000, I talked with Pepper Moessinger in your office and asked about the status of the Arnell matter. I believe that I also called Mr. Shafer with the same inquiry. I recall that both Ms. Moessinger and Mr. Shafer told me that the County was working with Mr. Arnell and that a resolution of the case was expected. With the passage of time, I assumed that the case had been resolved and that Mr. Arnell was either building or compensated or on his way to a lawsuit against his seller, or something. In any event, I assumed that I was to conduct no further proceedings.

Mr. West has informed me that during this same time period (since October 2000), he called Mr. Shafer and was told that the County was waiting for me to conduct further proceedings and could not explain my delay in holding a new hearing and reconsidering my decision. Obviously my reputation with Mr. West and others has been unfairly harmed by the County failing to respond to my inquiries while at the same time blaming me for delays in resolving the matter.

Believing that the matter was over, and not being aware of the misinformation being given to Mr. West in the interim, I blithely sent a copy of a new Supreme Court decision to Jeff Thorpe and to Mr. West on July 5, 2001, acting as one lawyer to another in a friendly manner discussing a later development that was germane to an issue we had labored on together in the past. My letter spurred Mr. West to write to me on July 10 chastising me for failing to respond to his October petition for rehearing. (A copy of Mr. West's letter is enclosed.) This letter shocked me and I immediately dashed off a letter on July 12 restating what I thought Mr. West had learned from my letter of October 6, 2000: that I did

¹ As you can see, I intended to send a copy of my October 6 letter to Mr. West. He has informed me that he never received my October 6 letter. My secretary must have fowled up and I apologize to Mr. West.

Calvin Schneller

July 18, 2001

Page 3

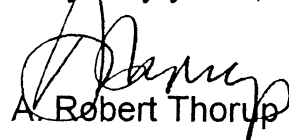
not have the authority to sua sponte order a new hearing, but was waiting for the County to decide if it desired more proceedings at my level or at the Commission (now Council) level (a copy of my letter is attached).

On July 17, 2001 I met with Mr. West in the context of an ecclesiastical relationship that has just recently arisen. In this meeting, I learned of Mr. West's anger over the poor treatment he and his client have received, that Mr. West did not ever receive a copy of my October 6 letter, and that Mr. West had been repeatedly told by the County that I was the cause of delay in not moving ahead with a new hearing on the petition for reconsideration. As I have compared what I learned from Mr. West with my own files and notes, I must agree that since my delivery of my decision to the County, the County has handled this matter poorly at best, and has hurt me in the process.

I am writing this letter for several reasons:

1. You need to be aware of the keystone cops process being employed in this matter, with my calls and letters saying one thing and communications to Mr. West saying another.
2. You need to be aware that I am personally offended by what appears to be harm unreasonably inflicted on my reputation.
3. You need to be aware that because of the ecclesiastical relationship that has recently arisen between Mr. West and me, I cannot take any further role in this matter.
4. You need to be aware that my recommended decision turned on my legal conclusion that Mr. Arnell had no standing to seek redress of a taking claim, because the claim arose when the property was owned by another person. On June 28, 2001 the Supreme Court of the United States issued its decision in Palazzolo v. Rhode Island. The Court held that taking claims arising in an earlier property owner could be asserted by the subsequent owner (a copy of this case is attached). To the extent that the Arnell taking claim is still pending final action in County, or even if it is ripe for judicial review, it is clear that the Palazzolo case overrules my recommended decision, and will govern subsequent proceedings. (My recommended decision found that a taking had occurred without just compensation except for the standing issue.)

Very truly yours,


A. Robert Thorup

(see next page for copied persons)

Calvin Schneller

July 18, 2001

Page 4

Copies with all enclosures:

Kent Lewis Esq., Deputy District Attorney

Jeffrey Thorpe, Esq., Deputy District Attorney

✓ David West, Esq., Counsel for Mr. Arnell

ADDENDUM NO. 5

BEFORE THE SALT LAKE COUNTY COUNCIL

In Re: The Matter of James Arnell	:	FINDINGS OF FACT
	:	AND
	:	CONCLUSIONS OF LAW

Findings of Fact

1. On May 4, 1999, Jason P. Arnell ("Arnell"), a self-described commercial building contractor experienced in hillside development, purchased lot 13, in Forest Glen Subdivision plat "B," ("Arnell's lot") for the purchase price of \$95,000 (*Affidavit of Jason P. Arnell, Takings Relief Petition*). Forest Glen subdivision was created in 1971. Arnell's entire lot is on slopes greater than forty percent.

2. Prior to the issuance of a building permit to construct a home on the lot, staff advised Arnell that a variance to allow development on slopes greater than forty percent would have to be approved by the Board of Adjustment. The Foothills and Canyons Overlay Zone Ordinance ("FCOZ") prohibits the building of a dwelling on slope angles in excess of thirty percent, with an exception provision for lots of record with slopes less than 40%. Petitioner's lot exceeds both the general slope requirement and the special exception for lots of record.

3. The Wasatch Canyons Master Plan, adopted in March 1989, incorporates zoning provisions designed to "mitigate against erosion from development" and discourages development on slopes in excess of 30% (page 15). In fact, development on slopes in excess of thirty percent has been restricted or prohibited in Salt Lake County for twenty seven years under the Forestry and Recreation Zone of 1974, the Hillside

Protection Ordinance of 1980 and FCOZ of 1997. The slope restriction is a key feature of these zoning ordinances.

4. Chapter 19.72 of FCOZ states the purposes for the slope restriction:

- the encouragement of development that fits the natural slope of the land and minimizes the scarring and erosion affects of cutting, filling, and grading related to construction on hillsides, ridge lines, and steep slopes;
- the prohibition of activities and uses that would result in degradation of fragile soils, steep slopes, and water quality;
- the preservation of the visual and aesthetic qualities of (our canyon environs) which are vital to the attractiveness and economic viability of the county.

5. On February 16, 2000, the Board of Adjustment denied Arnell's request for a variance, concluding that the variance did not meet State and County requirements for a variance, namely that the hardship created by the zoning ordinance was necessary to carry out the general purpose of the ordinance and granting the variance would defeat the spirit of the zoning ordinance and would *not* result in substantial justice. (See State and County criteria for granting/denying a variance, section 19.92.042B, County Ordinances; and 17-27-707(2)(a), Utah Code. Annot.)

6. Having been denied a variance, Arnell filed a Takings Relief Petition with the Salt Lake County Commission on March 14, 2000. The Commission appointed a hearing officer, Robert J. Thorup ("Thorup"). After lengthy hearings and consideration of written arguments, Thorup concluded in a non-binding advisory opinion issued to the Salt Lake County Commission on September 25, 2000, that the slope restrictions in FCOZ, section 19.93, did not cause or result in a compensable or unconstitutional taking of Arnell's property under Utah or U.S. Constitutions. Thorup recommended that the

Commission dismiss Arnell's Takings Petition without any compensation or reimbursement of any kind.

7. On November 1, 2000, the Board of County Commissioners continued for six months a final decision on Arnell's Takings Relief Petition, which was again continued by the County Council on June 12, 2001 for six months at Arnell's request, to allow time for the parties to "conduct further investigation" and explore mutually acceptable solutions. Arnell provided general information but unsatisfactory *site-specific* geotechnical data, evidence of water and sewer access, and related structural design.

8. On July 18, 2001, Thorup notified the County by letter of a United States Supreme Court Case, *Palazzola v. Rhode Island* (decided June 28, 2001) that had not been considered in his earlier recommendations. However, in the same letter, Thorup noted that he could not take "any further role in this matter" due to an "ecclesiastical relationship that has recently arisen between counsel for the petitioner and me."

9. On November 13, 2001, the County Council reviewed Arnell's Takings Relief Petition, heard legal arguments concerning the scope and meaning of *Palazzola*, voted down a motion to rehear the matter before another hearing officer, and denied Arnell's petition for a building permit or compensation subject to the approval of findings of fact and conclusions of law to be drafted by the District Attorney's office.

Conclusions of Law

1. The County's master plan and zoning ordinance are designed to protect the watershed, mountainside, property owners, and the public from dangers inherent in building on steep slopes, particularly during times of high precipitation. Any diminution of Arnell's property value is primarily due to the subdivisor's failure to cluster or plat buildable lots consistent with the natural lay of the land. The problems associated with building on steep mountainous terrain were evident in 1971 when the Forest Glen plat was recorded. Moreover, the plat could have been amended at any time in subsequent years to reflect important changes in master plans and zoning regulations.

2. Essentially, Arnell purchased a steep lot that is nearly impossible to service, protect, and develop in an environmentally sensitive manner. Presumably, that is why the lot was not purchased for nearly thirty years after it was recorded. It is a buffer lot or natural view lot that has value especially when connected to a lot with development potential. The County did not mislead Arnell, act in arbitrary or illegal fashion, create the slope, nor cause the development problems associated with steep terrain. The prior developer or Arnell knew or should have known of the problems inherent in steep slope development. However, while Arnell's actual or imputed notice of FCOZ was a basis for Hearing Officer Thorup's recommendation, this Council puts greater weight on the following considerations:

3. Due to absorption limitations on steep slopes, state and local health authorities preclude construction of sewer drain fields on steep slopes. Arnell has stated that he can connect to a sewer but has *not* demonstrated that he has, or can obtain, legal

access across other private properties to a sewer line some 800 feet downhill in Big Cottonwood Canyon. Until such time as the Forest Glen subdivision is put on sewer, development on steep lots may be unfeasible.

4. Arnell proposes to build in a subdivision not currently serviced by a State approved water system in compliance with Utah drinking water standards. While others may have been permitted to build without adequate water in the past, Arnell is nevertheless required by state law to have a year-round supply of safe water for household use and fire protection.

5. Construction of a home on steep slopes, such as on the Arnell lot, presents a host of other problems and dangers that cannot be readily anticipated or mitigated, including the threat of slope instability, foundation slippage, soil erosion, avalanche, fire, landslide, falling trees and boulders, retaining wall failure, and aesthetic impacts, not to mention off-site impacts such as septic and irrigation runoff.

6. While engineers can technically design structures on steeper slopes, the 30% slope limitation reflects nationwide standards that balance protection of property rights with protection of the health, safety, and welfare of the property owner, adjoining property owners, and the general public. Regulation of home building on mountainous slopes is a common, necessary, and proper exercise of police power that increases overall safety and value in property.

7. The effect of granting an exception to, or compensating, Arnell might be that the County is obligated to grant similar relief to other lot owners similarly situated in existing and future subdivisions, effectively rescinding residential building restrictions on

slopes that have been accepted by property owners and developers and enforced in the County for well for over 25 years. Granting an exception would defeat the purpose of the Wasatch Canyon Master Plan and FCOZ and would result in manifest injustice to those who have complied in the past and will do so in the future.

Adoption of Findings of Fact and Conclusions of Law

Based on the foregoing, the Salt Lake County Council hereby approves the above Findings and Conclusions in support of its November 13 motion to deny Jason P. Arnell's petition for a building permit or compensation.

DATED this 8th day of January, 2001

SALT LAKE COUNTY COUNCIL

By [Signature]
Chairman

ATTEST:

[Signature]
Salt Lake County Clerk

Voting:

Councilman Bradley	" <u>Aye</u> "
Councilman Harmsen	" <u>Aye</u> "
Councilman Hatch	" <u>Aye</u> "
Councilman Hendrickson	" <u>Aye</u> "
Councilman Horiuchi	" <u>Aye</u> "
Councilman Jensen	absent
Councilman Skousen	" <u>Aye</u> "
Councilman Wilde	" <u>Aye</u> "
Councilman Wilkinson	" <u>Aye</u> "

APPROVED AS TO FORM
Salt Lake County District Attorney's Office
By [Signature]
Deputy District Attorney
Date Jan 3, 2002

Findings of fact/h/share/tchrste/word

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing brief of plaintiff appellant was mailed postage prepaid by first class mail this 26 day of July, 2004, to the following:

Donald H. Hansen
2001 S State Street, S3400
Salt Lake City UT 84190-1210
Attorney for Salt Lake County

Barnard N. Madsen
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Attorney for Defendant Truman G. Madsen

