

2004

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

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Arnell v. Salt Lake County Board of Adjustment*, No. 20040409 (Utah Court of Appeals, 2004).
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IN THE UTAH COURT OF APPEALS

JASON P. ARNELL,)	
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)	Supreme Court No. 20040409-CA
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)	
Plaintiff and)	
Appellant,)	
)	
vs.)	Trial Court No.: 020901035
)	
)	
SALT LAKE COUNTY BOARD)	
OF ADJUSTMENT, SALT LAKE)	
COUNTY, and TRUMAN G.)	
MADSEN,)	
)	
)	
)	
Defendants and)	
Appellees.)	
)	
)	

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

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FILED
UTAH APPELLATE COURTS
OCT 18 2004

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IN THE UTAH COURT OF APPEALS

JASON P. ARNELL,

Plaintiff and
Appellant,

vs.

SALT LAKE COUNTY BOARD
OF ADJUSTMENT, SALT LAKE
COUNTY, and TRUMAN G.
MADSEN,

Defendants and
Appellees.

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Pursuant to Rule 24(c) Utah Rules of Appellate Procedure, appellant submits the within Reply Brief in response to new matters raised by the respective appellees. The issues raised by the two appellees are quite different. Point I of this Brief replies to the arguments raised by defendant Salt Lake County. Point II replies to the arguments raised by defendant Truman G. Madsen.

POINT I

THERE HAS BEEN AN UNCONSTITUTIONAL TAKING OF APPELLANT'S PROPERTY WHICH IS FULLY RIPE FOR THE GRANTING OF JUST COMPENSATION

Salt Lake County has done an excellent job of camouflaging the issues by submitting and arguing a host of irrelevant facts, sideshows and non-issues. A purpose of this Reply Brief will be to distinguish between these non-issues raised by Salt Lake County and the real issue on appeal - namely the issue of ripeness.

A. What This Appeal Is Not About

1. This is not a case that hinges upon subtle distinctions between "facially" or "as applied" takings. This involves a regulatory taking which if applied renders the property useless for any viable purpose. The reduction in value from \$95,000 to zero has never even been challenged. If the property is useless everyone would agree that a taking has occurred no matter what you call it. Of course, Salt Lake

County claims that it has never unconditionally denied appellant a building permit, but this goes to the issue of ripeness as discussed later.

2. This appeal is not about arbitrary or capricious decision-making as argued by Salt Lake County at page 7 and at page 12 of its brief where it asserts that this is to be "the key issue on appeal". It is true that in plaintiff's Complaint he alleged, as a separate ground, that the denial of a building permit was arbitrary and capricious. But the appeal has not focused on that issue (in fact it wasn't even raised as a point). When private property is taken by a governmental entity the taker cannot be relieved of its constitutional obligation to pay just compensation by attempting to show that the taking was not arbitrary or capricious. No authority was offered by Salt Lake County in support of such an outlandish position.

3. This case does not turn upon the sophistication level of Jason Arnell or the lack of diligence in discovering the slope ordinance or in making inquiry before purchasing the property. Salt lake County continues to argue such facts, and at page 1 depicts him as a property "developer" (not true or supported by the record) and as an experienced builder (although it is acknowledged at page 14 that his experience in slope construction was limited to one building in Idaho where

he had no involvement in determining whether a slope ordinance existed). But all of these facts are irrelevant because the case of Palazzolo vs. Rhode Island, 533 U.S. 606, 121 S.Ct. 2448 (2001) laid to rest any question regarding the constitutional rights of grantees. Under Palazzolo a grantee stands in the shoes of his grantor. This is true regardless of whether the grantee knew or did not know of the slope ordinance when he purchased the property. Here it is undisputed that Arnell did not know, but again, this whole area of argument is a diversion having no relevance.

4. This case is not about compliance with building codes or safety regulations. From day one plaintiff has always acknowledged that if he were to have been permitted to build on the sloped lot he would be required to comply with all County building regulations, plan reviews and approvals, inspections, and safety and engineering requirements. There was never any expectation or attempt by plaintiff to be relieved of these requirements and such has been made clear from the beginning.

5. Another non-issue continuously argued by Salt Lake County is that the County Council is not bound to follow the recommendation of its Hearing Officer. Appellant does not dispute the County's position in this regard. Appellant merely argues that the County Council improperly manufactured new findings of fact without taking evidence and without limiting

its findings to those facts in the Hearing Officer's record. That being the case, the County's attempt to justify its findings are rather shallow to say the least. But these findings are very important in understanding the County's position as to the real reasons for its denial of relief.

B. What This Appeal Is About

1. The Issue. The appeal against Salt Lake County involves the issue of ripeness. It is undisputed that appellant has been deprived of the use of his property. Salt Lake County now claims that it has never unconditionally prohibited appellant from building on his subdivision lot, and has only done so because of the lack of site specific design detail that would enable it to determine if the building can be safely built. Appellant has relied upon Palazzolo vs. Rhode Island, supra, and other authorities cited at Point IB of his opening brief for the proposition that a case becomes ripe for the payment of compensation once the governmental agency makes it clear the extent of development that will be permitted; thereafter ripeness rules do not require the submission of repeated applications. It is appellant's position that the reasons given in Salt Lake County's formal decision for the denial of relief are not the same as those argued by counsel in this case. The failure to submit detailed site or architectural plans was only an incidental reason for the use

denial. Salt Lake County purely and simply did not want to set a precedent for the building of structures on steep canyon slopes under any conditions, and this intent is clearly manifest by the plain language of the decision. These reasons are summarized at page 20 of appellant's opening brief (and the full County decision is attached as Addendum 5 of the opening brief). They include reasons that appellant could never comply with, because he cannot change the nature or the topography of his lot. That being so, the ripeness doctrine has been satisfied.

2. Diamond B-Y Ranches vs. Tooele County. The case of Diamond B-Y Ranches vs. Tooele County, 2004 UT App. 135, 91 P.3d 831, came to counsel's attention from the Utah Advance Sheets shortly after appellant's opening brief had been filed. This is a case squarely in point supporting appellant's position. Upon learning of the case, counsel immediately notified the other parties and put them on notice that he intended to rely upon Diamond B-Y Ranches in his reply brief (see counsel's letter of August 6, 2004, attached hereto as Addendum 1). Salt Lake County refers to this case beginning at page 21 of its brief and admits that at first blush it is strikingly similar to the instant case. It then attempts to distinguish the case, but as will be shown, the distinctions actually make appellant's case stronger - not weaker.

The facts of Diamond B-Y Ranches are rather straightforward. In that case Tooele County denied Diamond the right to operate a gravel pit, thereby rendering its property useless. In defense of Diamond's takings claim, Tooele County claimed that the use permit had not been unconditionally denied on the merits, but on procedural grounds. Particularly it was claimed that Diamond never made any meaningful attempt to provide an environmental impact study (EIS) upon which the County could determine the appropriateness of approving the use permit. Diamond had initially sought to obtain an EIS, but, according to the court, understandably determined that it would be futile to spend over \$100,000 for a report in light of the County's opposition. The primary objection to operating the gravel pit had consistently been the property's proximity to the town of Stockton and the resultant health, safety and welfare concerns, which, according to the court, was something that an EIS could not change. Thus, the decision of the trial court was reversed and the element of ripeness was determined to have been met.

Diamond B-Y Ranches and the instant case are very much the same. There, Tooele County denied a use permit and claimed at trial that an EIS had not been provided; its real reason for the denial, as reflected in the minutes of the County Commission, was the proximity of the gravel pit to the town of

Stockton and the potential health and safety concerns. Here, Salt Lake County denied a building permit and claimed at trial that detailed design data had not been provided; the real reasons for the denial as reflected by the decision of the County Council, was its reluctance to depart from the Wasatch Canyon Master Plan, its fear of what it perceived as a bad precedent, and the multiple health and safety concerns as outlined in the decision. The two cases are on all fours.

Salt Lake County has attempted to distinguish the cases by arguing (1) that in Diamond B-Y Ranches there was a good faith effort to obtain the EIS, and (2) the court considered other evidence from minutes of the County Commission to determine the "actual reasons" for the denial of the permit. As to (1) the whole rationale of the opinion has nothing to do with good faith. Further, the facts showed that there was abandonment of follow-up efforts to obtain the EIS because of the cost. Also here, there is no evidence whatsoever that appellant has not acted in good faith.¹

¹ Arnell has always claimed that he fully cooperated with Salt Lake County in providing requested materials, and it is unfortunate that the record certified by Salt Lake County does not contain the materials that were provided. Shafer's Affidavit that materials furnished were of a general or conclusionary nature is itself conclusionary. But all of this is irrelevant in light of the County's ultimate decision and the reasons given therein for the denial of a building permit.

As to (2), in the instant case there is no reason to look for outside intent evidence because here the decision itself goes into great detail describing the reasons for the denial. That is why the instant case is so much stronger than Diamond B-Y Ranches. The 6 page written decision was solemnly signed off by the Chairman of the Salt Lake County Council and concurred in by eight Councilmen. Salt Lake County has made it clear to Jason Arnell that it will not approve development for a multitude of reasons. And most of those reasons have absolutely nothing to do with the submission of detailed architectural plans or structural design proposals. Thus, under both federal (Palazzolo) and state (Diamond B-Y Ranches) law, the case is fully ripe for the payment of just compensation as required by both constitutions.

POINT II

APPELLANT IS ENTITLED TO RESCIND HIS CONTRACT WITH APPELLEE MADSEN

As noted in the prior briefs, appellant has relied upon three grounds in support of rescision. These include (1) mutual mistake of fact, (2) breach of covenant under the warranty deed, and (3) breach of implied warranty of fitness for purpose. Each if these grounds would independently support the rescision, and appellant need prevail on only one. All, however, are meritorious.

A. Mistake. Madsen's one and only argument to rebut appellant's mistake theory is that the doctrine of mistake applies only to mistakes of "existing facts". This statement of law is not disputed by appellant, and in fact appellant relies upon the same authorities as Madsen with respect to the broad concept. But we aren't dealing here with a mistake of some future expectation. We are dealing with a mistake of an existing fact. A basic assumption of the contract was that the lot being purchased was a buildable lot. The trial court mistakenly considered the failure to obtain a building permit as not being an existing fact. But the failure to obtain a building permit was not the mistaken fact; rather, it was the existence of the slope ordinance which made the lot unbuildable, which existed at the time of the contract, and which neither the buyer nor the seller knew about. The failure to obtain a building permit was merely a later event which rather conclusively established the materiality of the mistake.

It is not uncommon for courts to allow rescission in cases where the parties have mutually mistaken beliefs about zoning or building restrictions. Appellant has argued some of these cases beginning at page 30 of his opening brief, and particularly has relied upon Rancourt vs. Verba, 678 A.2d, 886 (VT 1996), Lovier vs. Meteye, 260 So.2d, 377 (LA 1972), and Millman vs. Swan, 127 S.E. 166 (VA 1925), all being directly in

point. The trial court ignored these cases in its decision. Likewise, Madsen totally ignores and makes no reference to them in his brief. Nor does he offer a single contra authority. Appellant's mistake theory is supported by respectable legal authorities, which have been presented to the court completely un rebutted.

B. Breach of Covenant Under Warranty Deed. Appellant's position with respect to this point is fully briefed under Point III of his opening brief. Except as may be noted under D herein, there is nothing new to address. Should the court see any need to reach this point, it simply will have to decide whether to strictly follow some rather narrow language from a couple of cases that are not factually similar, or whether to apply the broader and more modern definition of what constitutes an encumbrance. It is difficult for appellant to understand why a restriction that renders a property useless for any viable purpose is not an encumbrance.

C. Implied Warranty of Fitness. In this case the trial court brushed off appellant's implied warranty of fitness argument in a one line comment that "Utah does not recognize a claim for breach of an implied warranty of habitability in real estate sales" citing Snow Flower Homeowners Association vs. Snow Flower, Ltd., 2001 UT App. 207, 31 p.3d 576. Appellee likewise cites Snow Flower as being controlling. However, Snow

Flower is distinguishable from the instant case. Snow Flower involved a claim for various construction defects and building code violations which it claimed rendered certain condominium units to be uninhabitable. Although the action included a claim for breach of an implied warranty of fitness, the court carefully noted both at footnote 1 and at page 582 of the Opinion, that the claim for fitness, based upon the undisputed facts, was undistinguishable from the claims of inhabitability. Thus, the decision proceeded on a habitability theory, not a fitness theory, and the case of American Towers Owners Association vs. CCI Mechanical, Inc. 930 P.2d, 1182 (Utah 1996) was deemed to be dispositive.

The instant case does not involve the issue of habitability, as no structure is involved in which to inhabit. This is strictly a claim involving the implied warranty of fitness. The property itself was not fit for the purpose in which it was sold - namely to construct a residence. That being so, the habitability cases do not apply and the issue before the court becomes whether Utah recognizes an implied warranty of fitness in connection with real estate transactions. The post-American Towers case of Fennell vs. Green, 2003 UT App. 291, 77 P.3d 339, implies that it does, as do the other authorities cited under Point IV of appellant's opening brief.

D. Other Arguments Raised by Madsen. Madsen has made other arguments throughout his brief which he claims would preclude appellant from the remedy of rescision. These include an argument that the obtaining of a variance is still viable; that appellant failed to make any diligent inquiry regarding building restrictions before purchasing the lot; that the merger doctrine would defeat appellant's claim; that the doctrine of caveat emptor applies; and that there was no contract between the parties to rescind. These arguments will be responded to in the following paragraphs.

The buildability argument is basically the very same argument made by Salt Lake County, namely that its reason for denying a building permit was merely because appellant did not provide detailed design information and that the lot is in fact buildable. That argument is fully addressed under Point I which clearly establishes the real reasons for the denial - reasons that are impossible to comply with. In addition, the authorities relied upon by appellant which support rescision based upon a mistaken belief as to zoning and regulatory matters do not require a party to make heroic efforts to change the zoning or to escape the regulation as a condition of rescision. Appellant has fought this battle against Salt Lake County for more than four years, and is not required to start over.

With respect to the claim that appellant failed to make reasonable inquiry, appellant does not challenge the basic concept that further inquiry may be expected if circumstances exist that would put a reasonable person on notice of a potential problem. The weakness of Madsen's position is that he cannot come up with any fact that would cause a reasonable person to make further inquiry. Indeed, the lot was in a platted residential subdivision. The purchase was accomplished in the usual and customary manner. The closing was handled by a title company and a standard owner's policy of title insurance was issued. Appellant observed other residences already in existence along the same slope in the subdivision. Just because appellant happens to be a builder and knows that one must obtain a building permit before building a home doesn't require him, in the absence of something to put him on notice, to read all of the County ordinances before buying a subdivision lot. Real estate lawyers don't do this and neither does anyone else. Nor is it common practice to apply for a building permit before one buys a residential subdivision lot. Madsen can't point to a single thing Madsen did that was unreasonable except for his bald assertions that because Arnell is a builder he somehow should have known. Madsen himself owned the property for twenty-one years and also owned other lots in the same subdivision. It just isn't very persuasive

for a seller without knowledge of building restrictions who owned the lot for twenty-one years to expect that a buyer should know more than he does. Again, it is undisputed that neither party knew of the slope restrictions and both parties entered into the transaction under the assumption that the subdivision lot was a buildable lot. That being so, and the understanding of both parties being a basic assumption of the contract, appellant is entitled to rescind.

Appellant is somewhat bewildered in attempting to understand how the merger doctrine applies to this case. The merger doctrine is simply to the effect that provisions of a preliminary or antecedent contract are merged into a warranty deed and extinguished. Spears vs. Warr, 2002 UT 24, 44 P.3d, 742. But the whole concept of merger is irrelevant here. Appellant is making no attempt to enforce the terms of a merged or extinguished preliminary agreement. His action is based upon a mutual mistake of fact and upon the Warranty Deed itself. Warranty deeds are routinely rescinded for mutual mistake. Madsen hasn't cited a single authority to the contrary and in the absence of such authority his merger argument should not be given any further credibility.

Nor does the doctrine of caveat emptor apply. Madsen relies solely upon the case of Loveland vs. Orem City Corp., 746 P.2d, 763 (Utah 1987). Loveland involves the wrongful

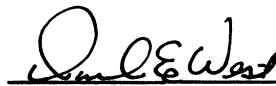
death of a child who drowned in an open canal that bordered on the property. The court merely held under a caveat emptor reasoning that in the absence of express agreements a purchaser of land is expected to make his own examination of the condition of the land and generally is not liable for harm resulting to the purchaser or others from defective conditions that exist at the time of the transfer. Loveland deals only with concepts of tort liability. It has absolutely nothing to do with rescissions of contracts, and under no stretch of the imagination could ever be interpreted to change traditional contract principles of mistake or warranty. Further, Madsen's caveat emptor argument was not raised in the trial court and is inappropriate to raise on appeal.

And finally, Madsen's no contract theory is baffling to say the least. Madsen seems to be saying that because there was no preliminary contract that preceded the cash/deed transaction there was no contract to rescind. In other words, his argument is that an executed contract, as opposed to an executory contract, can no longer be rescinded. If any such principle exists, appellant has never heard of it, and certainly Madsen has offered not authority for such an unorthodox position.

CONCLUSION

As shown under Point I herein there has been an unconstitutional taking of the subject property and the case is ripe for the payment of just compensation. In addition, appellant is entitled to rescind his contract with appellee Madsen on any one of the three grounds shown in this brief. Based thereon, the summary judgment of the trial court should be reversed. In doing so, appellant's Motion for Summary Judgment should be granted and appellee's respective Motions for Summary Judgment should be denied.

DATED THIS 18 day of October, 2004.

A handwritten signature in cursive script, appearing to read "David E. West", is written over a horizontal line.

David E. West
Attorney for Plaintiff and
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ADDENDUM NO. 1

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August 6, 2004

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Re: Arnell vs. Salt Lake County, et al.

Dear Don:

While catching up on my Advance Report reading yesterday, I came across the case of Diamond B-Y Ranches vs. Tooele County, 498 Utah Advance Report 32. I wasn't aware of this case when I prepared appellant's brief. This case appears to be on all fours with our position in Arnell vs. Salt Lake County, and I believe should be controlling in the Court of Appeals.

I obviously will be citing this case when I file my reply brief, but thought I should call it to your attention in the event you wish to address it in your brief.

A copy of the decision is enclosed.

Very truly yours,



David E. West

DEW.cs

cc: Mr. Barnard N. Madsen

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 18 day of October, 2004, to the following:

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