2005

Edward B. Rogers v. West Valley City : Reply Brief

Utah Court of Appeals

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Preston S. Howell; Edward B. Rogers; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

EDWARD B. ROGERS, Appellant/Plaintiff, **vs.** WEST VALLEY CITY, Defendant/Appellee,	REPLY BRIEF OF APPELLANT APPEAL Appellate Case No. 20050111 Trial Court No. 040916458 Trial Court Judge J. Dennis Frederick From a Petition for Review of the West Valley City Board of Adjustment Matter B-9-2004

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West Valley City urges this Court to apply a rebuttable presumption standard found in a 2005 Utah law[1] to a 2004 West Valley City Board of Adjustment decision.[2] The City does not provide any authoritative support for its argument to apply the 2005 law. Instead the City reasons the 2005 change "is simply a further refinement of the previous intent of the Legislature." (Brief of the Appellee, p. 6).

The city's argument necessarily fails because the law governing the Board's decision was a West Valley City ordinance.[3] The Utah law did not previously address the loss of a nonconforming use. Moreover, the Utah legislature's ability to draft a rebuttable presumption standard into a nonconforming-use law demonstrates an ability by the West Valley City legislature, had it desired to do so, to draft a similar standard. It did not. The City enacted a bright line, objective test. "If the nonconforming use is discontinued for a continuous period of more than one year it *shall* constitute an abandonment of the use and any future use of such land *shall* conform to the provisions of the zone in which it is located." Id., *emphasis added.*

The City offers one case to support its reasoning, *Rock Manor Trust v. State Road Commission*, 550 P.2d 205 (Utah 1976). (Brief of the Appellee, p. 5). That case, however, supports the opposite conclusion. The Court in *Rock Manor Trust* explained because the landowner rebuilt within the statutory one-year period it did not lose its

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[1] UCA §10-9a-511(4) (2005).
[2] The City fails to explain how a 2005 change in Utah law would turn an illegal 2004 Board decision into a correct, legal decision.
[3] West Valley City Municipal Code, §7-18-106(3)

nonconforming use status. That is the question before this Court: Did the landowner, Cleone Kirby, resume the nonconforming use within the statutory one-year period? She personally answered that question in the negative. (R. 66).

The City also argues a bright line test is too rigid. To be fair, the city contends, discontinuance longer than the one-year period should act only as a rebuttable presumption of abandonment. The City's argument contradicts its own ordinance quoted above, as well as its argument in the 2001 *Castor* case (*see*, Brief of Appellant, Addendum). It is not within this Court's authority to rewrite West Valley City's ordinance in an effort to be fair.

Should this Court be so inclined to consider fairness as an issue, Appellant will briefly address it. The City makes three fairness arguments. First, Edward Rogers removed his fence that borders the Kirby Property. Second, Cleone Kirby believed Edward Rogers would rebuild his fence. Third, due to financial conditions, Mrs. Kirby could not build a fence.

First, multiple Board members declared Edward Rogers was within his rights to remove his own fence, and the responsibility to care for animals on the Kirby Property belonged to Cleone Kirby, not to Edward Rogers. (R. 84, 85). Additionally, the West Valley City ordinance presupposes nonconforming uses may be discontinued, voluntarily or involuntarily, at some point. The plain language of the ordinance turns on whether the use was resumed within one year.

Second, Cleone Kirby explained[4] she believed Mr. Rogers had promised to rebuild his fence based on a statement from two "representatives" (not present at the Board meeting) who were hired by Edward Rogers to cut down some trees. (R. 77). Mr. Rogers never promised Cleone Kirby or anybody else he would rebuild his fence. Regardless, Mrs. Kirby's own finances prevented her from building a fence even if she had not believed Edward Rogers would rebuild his fence. (R. 78).

Third, West Valley City failed to offer an explanation why refusing to allow a landowner to continue a nonconforming use, which use the landowner is financially incapable of continuing, is unfair to the landowner. Consequently, none of the City's fairness arguments withstand scrutiny when compared to the record in this case.

CONCLUSION

This Court must apply the law that was in effect at the time the West Valley City Board of Adjustments originally decided this matter in 2004. Further, the Court must apply the law as it was written, not how West Valley City now wishes it had been written. To do so is fair to every party involved and required by law.

DATED this 16th day of January, 2006

Preston S. Howell
Attorney for Appellant

[4] Cleone Kirby's explanation of two representatives occurred after Edward Rogers objected to previous testimony that he made a promise to rebuild his fence. (R. 74, 77). Mr. Rogers also objected to the hearsay from witnesses at the meeting. (R. 71).

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing **Reply Brief of Appellant** were mailed first-class, postage prepaid to the attorney for Defendant/Appellee:

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this 17th day of January, 2006.