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IN THE UTAH COURT OF APPEALS

EDWARD B. ROGERS,	:	
	:	
Appellant/Plaintiff,	:	
	:	
	:	**Case No. 20050111-CA**
vs.	:	
	:	
	:	
WEST VALLEY CITY,	:	
	:	
Defendant and Appellee	:	

BRIEF OF THE APPELLEE

**Appeal from the Third Judicial District Court,
in and for Salt Lake County, State of Utah;
the Honorable J. Dennis Fredrick, District Judge**

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UTAH APPELLATE COURTS
DEC 1 3 2005

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STATEMENT OF JURISDICTION

Appellate jurisdiction over this case is rested in the Utah Court of Appeals pursuant to §78-2a-3(2)(j), Utah Code Annotated.

STATEMENT OF THE ISSUES

ISSUE I. DOES THE PERIOD OF NONUSE SPECIFIED IN THE NON-CONFORMING USE IN THE PRIOR STATUTE CREATE A REBUTTABLE PRESUMPTION AND DID THE BOARD OF ADJUSTMENT CORRECTLY DETERMINE THAT KIRBY WAS DEPRIVED OF HER USE FOR A TWO YEAR PERIOD BY EVENTS AND CIRCUMSTANCES OUTSIDE OF HER CONTROL?

Standard of review: Since the district court's review was limited to the record of the West Valley City Board of Adjustment (the "Board"), this Court should review the appeal as if it had come directly from the Board and give no deference to the district court. *Wells v. Board of Adjustment of Salt Lake City Corp.,* 936 P.2d 1102 (Utah Ct. App. 1997).

The court shall affirm the decision of the board of adjustment if the decision is supported by substantial evidence in the record. §10-9-708(6), Utah Code Annotated (this was the statute in effect at the time of the hearing, it has since been revised by the 2005 Utah legislature); see also *West Valley City v. Caster,* 2001 UT App 212, ¶4; 29 P.3d 22, 23 (Utah Ct. App. 2001).

The "substantial evidence" standard is "that quantum and quality of evidence that is adequate to convince a reasonable mind to support a conclusion." *Caster,* at ¶4 (quoting *Patterson v. Utah County Board of* Adjustment, 893 P.2d 602 (Utah Ct. App. 1995).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES

Nonconforming uses and noncomplying structures, Utah Code Annotated §10-9a-511 (4). (The 2005 Statute)

(4) (a) Unless the municipality establishes, by ordinance, a uniform presumption of legal existence for nonconforming uses, the property owner shall have the burden of establishing the legal existence of a noncomplying structure or nonconforming use.

(b) Any party claiming that a nonconforming use has been abandoned shall have the burden of establishing the abandonment.

(c) Abandonment may be presumed to have occurred if:

(i) a majority of the primary structure associated with the nonconforming use has been voluntarily demolished without prior written agreement with the municipality regarding an extension of the nonconforming use;

(ii) the use has been discontinued for a minimum of one year; or

(iii) the primary structure associated with the nonconforming use remains vacant for a period of one year.

(d) The property owner may rebut the presumption of abandonment under Subsection (4)(c), and shall have the burden of establishing that any claimed abandonment under Subsection (4)(c) has not in fact occurred.

STATEMENT OF THE CASE
STATEMENT OF THE FACTS

West Valley City accepts Edward B. Rogers ("Rodgers") Statement of the Case and Statement of the Facts.

SUMMARY OF THE ARGUMENTS

I. This state should adopt the "rebuttable presumption" rule for pre-2005 nonconforming use cases. This rule will allow for equitable results in unusual cases such as this where the period of nonuse was caused by the plaintiff Rogers and was outside of the control the landowner Kirby.

This case is brought under the former Municipal Land Use Development and Management Act, §10-9-1-1, et.seq., Utah Code Annotated, which was in effect in 2004 (the "2004 Law"). The Act as since been repealed and replaced by the current Municipal Land Use, Development, and Management Act enacted by the 2005 legislature as §10-9a-101, et.seq.. The City asserts that the proper analysis of the 2004 Law is that the running of a period of nonuse is a rebuttable presumption of the abandonment of a nonconforming use. In this case, it is undisputed that Cleone Kirby ("Kirby") had horses and other animals continuously on her property from approximately 1958 until 2002. There was then a two year gap when horses were not on the property thus creating a presumption of abandonment. However, there is substantial evidence in the record to support the fact that the nonuse period was not voluntary and that Kirby successfully rebutted the presumption. The facts show that the Appellant Rogers disrupted the non-conforming use when he removed the fence from one side of the property, thereby rendering it unusable as horse property. Kirby, who is a widow subsisting on a fixed income believed the Rogers could replace the fence. She also could not afford to immediately replace the fence that had been removed by Rogers until she found someone willing to share the cost and again place horses on the property.

The Board of Adjustment determined, based upon the facts presented at the hearing, that an abandonment had not occurred. The presumed abandonment was involuntary and was rebutted by the evidence. Also, Rogers, who had caused the horses to be removed by destroying the fence, can not now rely on the consequences of his own actions to deprive

Kirby a longstanding non-conforming use. The time period contained in the statute is a rebuttable presumption and the Board of Adjustment relied on substantial evidence in granting the non-conforming use to Kirby.

DETAIL OF THE ARGUMENTS

II. THIS COURT SHOULD ADOPT THE "REBUTTABLE PRESUMPTION" RULE FOR PRE-2005 NONCONFORMING USE CASES. THIS RULE WILL ALLOW FOR EQUITIBLE RESULTS IN UNUSUAL CASES SUCH AS THIS, WHERE THE PERIOD OF NONUSE WAS CAUSED BY THE PLAINIFF ROGERS AND WAS OUTSIDE OF THE CONTROL THE LANDOWNER KIRBY.

The real issue in this case revolves around an undecided point of former Utah law. The courts in Utah never specifically determined whether or not non-conforming use ordinances, enacted (The 2004 Law) pursuant to the 1991 Municipal Land Use Development and Management Act created a subject test, an objective test, or whether the "intent to abandon" is a necessary finding in a non-conforming use case. Essentially there are three different views that the Court could take. First, it could imply a requirement that a Board of Adjustment specifically find that the landowner "intended" to abandon the non-conforming use. Alternatively, it could determine that an ordinance such as West Valley City's provides a presumption of abandonment if the time period is met, but the presumption is rebuttable by objective evidence. Finally, courts could impose a rigid objective standard and rely solely on the running of the required period of nonuse, without any regard to the underlying reasons or circumstances.

The City agrees with Rogers that the "intent to abandon" standard is inappropriate. Such a standard, although is appears to be the majority rule across the county, invites difficult cases and potentially encourages perjury by landowners. The City believes that the appropriate middle ground is the rebuttable presumption standard which provides for the eventual reduction of non-conforming uses while still respecting long standing individual property rights in certain types of cases.

Under the rebuttable presumption standard the running of the non-use time period, in this case one year, may be rebutted by objective evidenced that the discontinuance of the use was not within the control of the landowner. This is not to be confused with the subjective "intent to abandon" standard, which essentially endeavors to read the mind of the landowner. Rather the rebuttable presumption standard must be based upon objective facts that can be presented to the decision makers. There is support for this standard in the case of *Rock Manor Trust v. State Road Commission*, 550 P.2d 205 (Utah 1976). In the *Rock Manor* case, the court determined that a nonconforming advertisement on the side of a barn that had burned could be restored. The court clearly felt that it was unfair to lose a non-conforming use through circumstances outside of the owners control and that the landowner could rebuild. The court stated: "The unfairness of deciding otherwise under the statutory pronouncements in this case forcefully might be reflected in a case where, for example, one of two identical barns owned by neighbor farmers, being used for identical purposes, is

destroyed by the torch of a felonious arsonist, who leaves the other alone." *Rock Manor*, at page 206.

This case is similar in that there was evidence that the neighbors on each side of Kirby still maintain their non-conforming uses and have horses on their property. (R. p.71). The only thing that sets Kirby apart, is that the fence on one side of her property was removed and not replaced by Rogers, thus causing the period of disuse. (R. p. 62, 65, 69, 70, 72). On one point, this case does differ from *Rock Manor*. In the *Rock Manor* decision, the court stated that the landowner did not lose their non-conforming status as long as they rebuilt and resumed the use within the statutory period. In this case Kirby did not rebuild the fence within the one year period. However, there is substantial evidence in the record to excuse this conduct. Kirby and others testified that it was their understanding that Rogers had promised to rebuild the fence and that she was waiting for that to happen. (R. p. 65, 70, 77, 78). She also testified that given her financial circumstances, she could not rebuild the fence on her own. (R. p. 78). The Board correctly took these factors into account as they are further evidence that the discontinuance of the non-conforming use was against her wishes and outside of her control.

The most compelling argument for the rebuttable presumption standard is that it has now been incorporated into the current Utah Land Use, Development, and Management Act by the 2005 legislature (the "2005 Act"). It can be fairly inferred that this new law is simply a further refinement of the previous intent of the Legislature. §10-9a-511(4)(c) and (d) now

read as follows:

> (c) Abandonment may be presumed to have occurred if:
>
> (i) a majority of the primary structure associated with the nonconforming use has been voluntarily demolished without prior written agreement with the municipality regarding an extension of the nonconforming use;
>
> (ii) the use has been discontinued for a minimum of one year; or
>
> (iii) the primary structure associated with the nonconforming use remains vacant for a period of one year.
>
> (d) The property owner may rebut the presumption of abandonment under Subsection (4)(c), and shall have the burden of establishing that any claimed abandonment under Subsection (4)(c) has not in fact occurred.

This case and the facts upon which the West Valley City Board of Adjustment's made it's decision to grant Kirby non-conforming use status, is a good example of the use of the rebuttable presumption. It is undisputed that horses were maintained on the Kirby property for more than forty years. The reason that the horses were removed was that Rogers, the plaintiff and appellant in this case, caused the fence along one side of the property to be removed in 2002. (R. p. 62, 65, 69, 70, 72). Obviously, with no fence on one side of the property, Kirby was precluded from continuing the historic use of the land. This discontinuance in use was not voluntary and was not caused by Kirby, but rather was caused by Rogers who now argues against the Board's decision. Kirby further provided the Board with testimony that she is a widow living on a fixed income. (R. p. 68). Once the fence had been removed by Rogers, Kirby was without sufficient funds to restore the fence until it was restored at the expense of the Spray's and Richin's in 2004. (R. p. 68).

Kirby was truthful before the Board and admitted that there was a two year period during which there was no fence and hence, no horses. (R. p. 66). However it was equally clear, and there was substantial evidence presented that she did not voluntarily discontinue the use, but rather she was deprived of the use by the actions of Rogers. It is entirely likely that had Rogers not removed the fence, or if he had replaced the fence, there would have been no period of non-use and this case would not be before the court.

The application of the rebuttable presumption rule prevents Kirby from losing her long time use through events beyond her control. It will also stop Rogers from benefiting by causing the disuse through removing and not replacing the fence. As the Board correctly discerned, this is the most equitable result in this case. Rogers contention that this Court should "disregard evidence of .... external circumstances" (Appellant's Brief, p. 6) is simply too rigid and harsh a rule when dealing with the permanent deprivation of longstanding property rights. The Utah Legislature certainly understood this basic fairness issue when it included the rebuttable presumption rule in the 2005 Act.

The rebuttable presumption rule, which allows for a certain amount of flexibility in unusual circumstances should be adopted by this Court for pre-2005 Act cases and the decision of the West Valley City Board of Adjustment should be upheld.

CONCLUSION

The West Valley City Board of Adjustment correctly found that the two year period in which Cleone Kirby did not have at least one horse on her property was involuntary and not a

true abandonment of her nonconforming use. Since this case was brought in 2004, it is not subject to the new 2005 Municipal Land Use, Development, and Management Act which specific provides that a period of nonuse is a rebuttable presumption of abandonment. In this appeal and any others occurring under the previous law, the most equitable solution, and the most protective of individual longstanding property rights, is to use the rebuttable presumption standard. At the hearing before the Board, there was substantial evidence presented to rebutt the presumption of nonuse created by the 2 year period and indicate that the circumstances that led to the nonuse were involuntary and outside of the control of Kirby.

The Board reached a correct, sensible and equitable conclusion in this case and its decision should be upheld.

DATED this 13TH day of DECEMBER, 2005.

WEST VALLEY CITY

J. Richard Catten, City Attorney
Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I, J. Richard Catten, certify that on the 13TH day of December, 2005, I served upon Preston S. Howell, Attorney for Plaintiff/Appellant, two (2) copies of the Reply Brief of the Appellee, by causing said Briefs to be mailed to him, by first class mail, with sufficient postage prepaid, to the following address:

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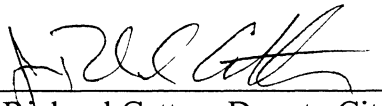
WEST VALLEY CITY



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