

1994

Larry Patterson v. Utah County Board of Adjustment : Brief of Appellants

Utah Court of Appeals

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UTAH COUNTY BOARD OF
ADJUSTMENT, GLENN B. SMITH,
MARIANNE M. SMITH, W. GREG
BUTTARS, and LESLIE E. BUTTARS,

Defendants-Appellants.

COURT OF APPEALS

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IN THE COURT OF APPEALS

STATE OF UTAH

LARRY PATTERSON,	:	
	:	
Plaintiff-Appellee,	:	
	:	
vs.	:	
	:	Case No. 940014-CA
UTAH COUNTY BOARD OF	:	
ADJUSTMENT, GLENN B. SMITH,	:	
MARIANNE M. SMITH, W. GREG	:	
BUTTARS, and LESLIE E. BUTTARS,	:	Priority No. 15
	:	
Defendants-Appellants.	:	

BRIEF OF APPELLANTS

APPEAL FROM A DECISION BY THE FOURTH DISTRICT COURT OF UTAH
COUNTY REGARDING A UTAH COUNTY BOARD OF ADJUSTMENT'S DECISION TO
APPROVE APPELLANTS' REQUEST FOR SPECIAL EXCEPTION APPEAL NUMBER
1030, ENTERED APRIL 20, 1993, BY THE HONORABLE RAY M. HARDING,
DISTRICT COURT JUDGE

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IN THE COURT OF APPEALS

STATE OF UTAH

LARRY PATTERSON,	:	
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Plaintiff-Appellee,	:	
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vs.	:	
	:	Case No. 940014-CA
UTAH COUNTY BOARD OF	:	
ADJUSTMENT, GLENN B. SMITH,	:	
MARIANNE M. SMITH, W. GREG	:	
BUTTARS, and LESLIE E. BUTTARS,	:	Priority No. 15
	:	
Defendants-Appellants.	:	

BRIEF OF APPELLANTS

JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to §78-2a-3(2), Utah Code Annotated, 1953, as amended.

- (2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:
 - (a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;
 - (b) appeals from the district court review of:
 - (i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies;....

STATEMENT OF THE ISSUE

The following issue is presented for review:

1. Was the Utah County Board of Adjustment's decision to grant Appellants' request for constructing a private airport

adequately supported by substantial evidence.

The standard of review is set out in U.C.A. §§17-27-708(2),

(6) (1953, as amended):

(2) In the petition, the plaintiff may only allege that the board of adjustment's decision was arbitrary, capricious, or illegal.

(6) The court shall affirm the decision of the board of adjustment **if the decision is supported by substantial evidence in the record.** (emphasis added)

The Utah Court of Appeals should affirm the Utah County Board of Adjustment's decision granting Appellants' application if it finds that there is substantial evidence to support the Board's decision. "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Johnson v. Dept. of Emp. Security, 782 P.2d 965 at 968 (Ut. Ct. App. 1989).

In an appeal from the District Court's judgment after review of the administrative agency's decision, the Court of Appeals reviews the decision as if the appeal had come directly from the agency and there is no presumption of correctness of the District Court decision, since its review is no more advantageous than that of the Court of Appeals. Kline By and Through Kline v. Utah Dept. of Health, 776 P.2d 57, at 60 (Ut. Ct. App 1989). See also Vali Convalescent and Care Institutions v. Division of Health Care Financing, 797 P.2d 438 (Ut. Ct. App. 1990); Matter of License of Topik, 761 P.2d 32 (Ut. Ct. App. 1988), cert. denied 773 P.2d 45 (1989); Weber Memorial Care Center, Inc. v. Utah Dept. of Health, Div. of Health Care Financing, 751 P.2d 831 (Ut. Ct. App. 1988),

cert. denied 765 P.2d 1278 (1988); Technomedical Labs, Inc. v. Utah Securities Div., 744 P.2d 320 (Ut. Ct. App. 1987).

STATEMENT OF THE CASE

On or about February 15, 1991, Defendants-Appellants GLENN B. SMITH, MARIANNE M. SMITH, W. GREG BUTTARS AND LESLIE E. BUTTARS filed Appeal #1030 with the Utah County Board of Adjustments (hereinafter "Board") requesting an appeal for special exceptions to build an airstrip for private use in Cedar Valley, Utah County.

On March 5, 1991, the Board met to decide upon the above request, and after duly considering all relevant safety concerns, granted Appellants' application for special exception to build an airstrip. (T 42, 47) The Board's trained zoning personnel specifically considered the existence of other airport facilities in proximity to the requested airstrip. (T 1-3, 6-10) (R 119-124) The Board concluded that granting the application would not result in the creation of any hazard to other aircraft or people engaged in flying activities in the area.

Plaintiff-Appellee, LARRY PATTERSON, owns and operates the Cedar Valley Airport for commercial purposes, located near the proposed airport. Appellee objected to the Board's decision and filed a Complaint in the Fourth District Court on April 3, 1991. (R 14) The District Court filed a Memorandum Decision on April 20, 1993, and reversed the Board's decision. (R 139-142) The District Court found that the Board acted in an "arbitrary, capricious, and illegal manner in granting Defendants-Appellants SMITH and BUTTARS' application for a special exception to the Zoning Ordinance of Utah

County." (R 142)

Appellee did not have a permit to operate his airport and was in violation of the law at the time Appellants' application was approved by the Board. (R 160-162) Subsequently, Appellants' proposed private airstrip has been analyzed and approved by the Federal Aviation Administration (hereinafter "FAA") as not posing any hazard or safety concerns whatsoever. (R 224-228) The FAA specifically considered the nearby existence of the Cedar Valley Airport in its safety determination and concluded that Appellants' airport will not adversely affect the safe and efficient use of Appellee's airport.

SUMMARY OF ARGUMENTS

The Board is an administrative body which has specialized knowledge to make zoning decisions and such decisions should be given due deference by the reviewing court. The Board thoughtfully considered all of the relevant facts relating to Appeal #1030, including all pertinent safety issues presented at its March 5, 1991, meeting. The Board's decision to approve the appeal is substantially supported by the transcript for the March 5, 1991, meeting.

The reviewing court is only empowered to judge whether the Board's decision is supported by substantial evidence in the record, and cannot substitute its own judgment by undertaking an independent inquiry regarding already established facts. Since the record substantially supports the Board's decision, this Court should affirm the Board's decision.

Appellee did not have a valid license to operate his airport and was operating it illegally in violation of the law at the time of the Board's decision. As such, Appellee cannot challenge the Board's decision and Appellee's claim for airspace is subordinate to Appellants' senior claim.

ARGUMENTS

POINT I

**THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE BOARD'S DECISION,
AND THE BOARD'S DECISION CANNOT BE CHARACTERIZED AS ARBITRARY,
CAPRICIOUS OR ILLEGAL UNDER THE RELEVANT ZONING ORDINANCE.**

A court reviewing the decision of a Board of Adjustment is required to give considerable deference to the Board's interpretation and application of the zoning ordinances. The Supreme Court of Utah has recognized this in validating the importance of deferring to the administrative bodies charged with zoning related powers. In Naylor v. Salt Lake City Corp., the Utah Supreme Court stated:

We recognize, and reiterate, the proposition that courts of law cannot substitute their judgment in the area of zoning regulations for that of a city's governing body. Also, we are more than cognizant of the proposition that the governing body of a city is endowed with considerable latitude in determining the proper uses of property within its confines. 398 P.2d 27, at 29 (Utah 1965).

The Utah Supreme Court reiterated this deference in Cottonwood Heights Citizens Association v. Bd. of Comm'n of Salt Lake County, where the Court said:

In addressing the plaintiff's attack upon the judgment, there are certain rules to be considered. Due to the complexity of factors involved in the matter of zoning, as in other fields where courts review the actions of administrative bodies, it should be assumed that those charged with that responsibility (the Commission) have

specialized knowledge in that field. Accordingly, they should be allowed a comparatively wide latitude of discretion; and their actions endowed with a presumption of correctness and validity which the courts should not interfere with unless it is shown that there is no reasonable basis to justify the action taken. 593 P.2d 133, at 141 (Utah 1979).

From the above, it is obvious that a court reviewing a decision of a Board of Adjustment must give "wide latitude" to the discretion of that Board. While deferring to the Board's "specialized knowledge," the court must determine if the "substantial evidence" requirement of U.C.A. §17-27-708(6) is met. If the "substantial evidence" requirement is met, the court "shall affirm the decision of the Board."

A. The Transcript of the Board's Meeting on March 5, 1991, to Decide Upon Appellants' Application Contains Substantial Evidence to Support the Board's Decision.

In the District Court's Memorandum Decision in this case, the court's two (2) principal concerns were the potential danger posed by the planes using the Cedar Valley Airport and the close proximity of Lake Mountain. A careful review of the transcript from the Board's meeting establishes that there is substantial evidence that the Board thoughtfully addressed the safety issues of the airstrip in making its determination that Appellants' proposal did not pose any safety concerns.

The Zoning Administrator's Office of Utah County prepared and submitted a report to the Utah County Board of Adjustment for review and consideration at the meeting held on March 5, 1991, to act on the application of "Smith & Buttars" for a "special exception" to build an airport. (R 169) The report contained a

thorough "analysis" consisting of nine (9) numbered paragraphs, a section outlining all pertinent ordinances and a recommendation. The report also contained an aerial map and a plot plan. (R 119, 121)

Buck Rose, a trained planner from the Zoning Administrator's staff found that the power lines in the area would not pose a safety problem for the airstrip. (T 2) Mr. Rose also stated:

I found that the other airport was far enough away, there is an airport in Cedar Valley, so I do not see a conflict between the two. And certainly the degree of flying in both these airports would be very small, and this one [the proposed airstrip] would be very small indeed...
(T 3)

Mr. GLENN SMITH answered the Board's inquiries as to the potential danger posed by other aircraft in the airspace near the proposed airstrip by telling the Board that the altitude of aircraft in the area of the proposed airstrip approaching the Salt Lake City Airport, was probably "6,000 or 7,000 feet above ground level" (T 9), while "our pattern in operation would be less than 1,000, but the average pattern height at that point would be about 1,000 feet." (T 10) Mr. SMITH further noted that he, like the pilots of planes that fly into the Salt Lake City Airport, was aware of the jump site to the west of the Cedar Valley Airport and that his operation would be in the same valley and safer than the person "who is unfamiliar with the area who is just flying through." (T 19)

Mrs. MARIANNE SMITH, addressing the issue of air safety with regard to other planes, explained that they would communicate by radio with other planes and probably with the proposed airstrip.

(T 20) Finally, Mr. GREG BUTTARS, confirming Mr. Rose's observation that there would be little traffic using the proposed strip, stated that there would only be about two (2) flights per month or possibly one (1) per week. (T 27)

When Appellee, Mr. PATTERSON, applied to the Board for approval of his Cedar Valley Airport, in June of 1991, his business license for the airport had expired. (R 172) The Board granted approval for his airport, subject to the following condition:

That the operation of Mr. Patterson's airport not interfere with the turning patterns or landing patterns of the **previously approved** Smith airport. (emphasis added) (R 154)

As to any risk Lake Mountain might pose to the operation of the airstrip, Mr. Rose forewarned the Board that if they believed that the airstrip was unsafe, they should not vote for it.

I believe that in your approval, you've got to consider the safety design of the airport. If you feel that it's unsafe because there's a mountain there, if safety is a general commission of special exceptions, in fact 7-21-C-1. If you feel the design is unsafe regardless of this other issue, I believe you've got to not vote for it, but if you feel that it is safe, even though the mountain is there, then you should. (T 6)

Mr. SMITH detailed for the Board the FAA approved and recommended traffic pattern which he would use at the airstrip. (T 11-13) Mr. SMITH also demonstrated how the approved pattern would apply to the proposed airstrip. Id. When Mr. Carlile questioned, "Is there any situation where it would be necessary to be turning toward the mountain?" Mr. SMITH responded:

I don't think so. I can't think of any because it's kind of like having one hundred and eighty degrees to work in

and not a narrow path or one quarter of space, which is not unusual in your bush type or private airstrips out on farms. (T 13)

To further emphasize the importance of safety, the Board, in its motion to approve the special exception, prudently included the condition that "if any building or structure is constructed which intrudes in the elevations of the approach zone, turning zone or transition zone," approval would be rescinded.

The above-cited references are part of the evidence contained in the transcript upon which the Board based its decision. This evidence proves that the Board's decision was not arbitrary and capricious. On the contrary, the Board carefully analyzed an exhaustive list of possible safety concerns and found that the airport proposal still qualified for approval. Not only did the Board take into consideration all existing safety concerns, the Board's approval was also cognizant of prospective safety concerns as well, as evidenced by the stipulated condition.

According to American Jurisprudence, "Evidence is substantial if a conclusion of a trier of the facts can be reasonably based upon it." 83 Am Jur 2d Zoning §1062. Furthermore, "substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Johnson v. Dept. of Emp. Security, 782 P.2d 965 at 968 (Ut. Ct. App. 1989).

The Utah Code sets forth the standard of review in cases of this kind.

(1) Any person adversely affected by any decision of a board of adjustment may petition the district court for a review of the decision.

(2) In the petition, the plaintiff may only allege that the Board of Adjustment's decision was arbitrary, capricious, or illegal.

(3) The petition is barred unless it is filed within 30 days after the Board of Adjustment's decision is final.

(4)(a) The Board of Adjustment shall transmit to the reviewing court the record of its proceedings including its minutes, findings, orders and, if available, a true and correct transcript of its proceedings.

(b) If the proceeding was tape recorded, a transcript of that tape recording is a true and correct transcript for purposes of this subsection.

(5)(a)(i) If there is a record, the district court's review is limited to the record provided by the board of adjustment.

(ii) The court may not accept or consider any evidence outside the Board of Adjustment's record unless that evidence was offered to the Board of Adjustment and the court determines that it was improperly excluded by the Board of Adjustment.

(b) If there is no record, the court may call witnesses and take evidence.

(6) The court shall affirm the decision of the Board of Adjustment if the decision is supported by substantial evidence in the record. (Utah Code Annotated, §17-27-708)

In light of the above-cited references, the cumulative evidence that was presented before the Board and upon which the Board reasonably based its decision to approve Appeal #1030, was substantial, and this Court should affirm the Board's decision.

B. The Board's Decision is Further Validated by the FAA'S Approval of the Proposed Airstrip, and Cannot be Characterized as Arbitrary or Capricious.

Subsequent to the Board's decision to approve Appellants' application, Appellants also received an approval from the FAA. (R 150, 151) The letter clearly states that "the Federal Aviation

Administration (FAA) has no objection to the proposal, it will not adversely affect the safe and efficient use of airspace by aircraft..." (R 151)

The letter specifically referred to the existing Cedar Valley Airport and stated that "In making this determination, the FAA has considered matters such as the effect the proposal would have on the existing or planned traffic patterns of neighboring airports, the effects it would have on the existing airspace structure and projected programs of the FAA,..." (R 151)

Therefore, the Board's decision can hardly be characterized as arbitrary or capricious since it is supported by experts in the field of aviation.

POINT II

THE REVIEWING COURT CANNOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE BOARD WHEN THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE BOARD'S DECISION

In Xanthos v. Bd. of Adjustment of Salt Lake City, plaintiff appealed a Board of Adjustment's denial of his variance. The Utah Supreme Court stated "that the role of the district court in reviewing the Board of Adjustment's decision is to determine whether the action was so unreasonable as to be arbitrary and capricious." 685 P.2d 1032, at 1034-1035 (Utah 1984). The Utah Supreme Court also declared:

The district court undertook to weigh anew the underlying factual consideration. While there may have been some evidence in the record to support the trial judge's findings, it was not his prerogative to weigh the evidence anew. His role was limited to determining whether there was evidence in the record to support the Board of Adjustment's action. The judge went beyond this role and decided the case according to his notion of what

was in the best interests of the citizens of Salt Lake City...However, it does not matter whether the judge agrees or disagrees with the rationale of the Board or the policy grounds upon which a decision is based. It does not lie within the prerogative of the trial court to substitute its judgment for that of the Board where the record discloses a reasonable basis for the Board's decision. Id. (emphasis added).

Although the Xanthos action dealt with a city Board of Adjustment, the rationale is also applicable to appeals from a county Board of Adjustment.

The Utah Supreme Court's rationale in Xanthos is supported by other authorities. Among the requirements for judicial review of zoning decisions enumerated by the Kansas Court of Appeals is the following:

(5) A court may not substitute its judgment for that of the administrative body, and should not declare the action unreasonable unless clearly compelled to do so by the evidence. Martin Marietta Aggregates v. Bd. of Cty. Comm'rs, 625 P.2d 516, at 525 (Kan. App. 1980).

The Oregon Court of Appeals declared:

Our review, then, is of the Commission's order, including the findings and conclusions supporting it. If those findings are supported by the evidence from the record on which the Commission relied, and the conclusions are supported by those findings, we may not disturb the order solely because we might reach a different conclusion. Haviland v. Land Conservation and Dev. Comm'n, 609 P.2d 423, at 425 (Or. App. 1980).

Finally, American Jurisprudence confirms:

While a court reviewing a decision of a Board of Adjustment may not substitute its judgment for that of the board, it will examine the records upon which the Board's decision is based to determine whether the findings of the Board are supported by substantial evidence. 83 Am Jur 2d Zoning §1062.

The District Court's determination that the Board acted in an illegal manner in violation of Utah County Ordinance §3-34 is

clearly a substitution of its own judgment for that of the Board.

§3-34 reads as follows:

It is the intent of this section to avoid or lessen hazards from the operation of aircraft, to avoid creation of new hazards, and to protect the lives of people who use aircraft facilities. Utah County Ordinance §3-34.

Not only is there substantial evidence in the record to support the Board's decision which alone should have precluded such a determination by the District Court, there is clear evidence that the Board considered the safety issues in-depth and came to the reasoned conclusion that there would be no hazards from granting the proposed airport. As in Xanthos:

The record in this case clearly reflects that the Board of Adjustment's action was not arbitrary or capricious and that there was a reasonable basis in evidence to justify it. 685 P.2d at 1035.

As such, the Court of Appeals should confirm the Board's decision on the basis of substantial evidence in the record.

POINT III

APPELLEE DID NOT HAVE A PERMIT TO OPERATE HIS AIRPORT AND WAS IN VIOLATION OF THE LAW AT THE TIME APPELLANTS' APPEAL WAS GRANTED BY THE BOARD. THEREFORE, APPELLEE'S CLAIM TO AIRSPACE FOR HIS AIRPORT IS SUBJECT TO APPELLANTS SMITH AND BUTTARS' CLAIM AS THEY WERE FIRST IN TIME TO OBTAIN APPROVAL FROM THE BOARD

On April 23, 1991, Appellee was cited for operating Cedar Valley Airport without a license in violation of Utah County ordinance. (R 172) As a result of his non-compliance, Appellee was required to receive approval for his airport from the Board before he could obtain a new business license. (R 165)

Appellants SMITH and BUTTARS obtained approval for their airstrip from the Board on March 5, 1991. The Board filed its

approval for Appellee's airport on June 5, 1991, three (3) months after Appellants. (R 154) Between the expiration of his business license in 1989 and the renewal of his business license in 1991, Appellee was operating the Cedar Valley Airport in violation of the law. The approval of Appellee's airport was subject to the following condition: "That the operation of Mr. Patterson's airport not interfere with the turning patterns or landing patterns of the previously approved Smith airport." (R 153)

In general, a person suffering a legal wrong due to an administrative agency action or who is adversely affected by an agency action, is entitled to judicial review of the agency action. 73A C.J.S. Public Administrative Law and Procedure, §190. A "legal wrong" means invasion of a legally protected right, due to an administrative agency action. Braude v. Wirtz, 350 F.2d 702, at 706 (9th Cir. 1965). In this instance, since Appellee's license had already expired and he was operating his airport in violation of the law, he did not have any legally protectable rights at the time of filing his Complaint. A person "adversely affected" is one who has suffered some character of prejudice for which he is entitled to seek redress in courts. Crank v. McLaughlin, 23 S.E.2d 56, at 59 (W. Va. 1942). Appellee could not have been adversely affected with respect to Appellants' proposed airstrip infringing upon any possible rights that Appellee claims he had, since he did not possess the legal right to operate his airport at the time in question. As such, Appellee did not have the proper standing to file a Complaint against the Board's decision.

Appellants SMITH and BUTTARS had first priority to airspace because they received Board approval before Appellee. Recognizing Appellants' first-in-time claim, the Board granted approval for Appellee's airport, subject to the SMITH airport's flight patterns. In a similar manner, this Court should acknowledge that Appellants SMITH and BUTTARS' claim for airspace has priority over Appellee's claim because Appellants were first-in-time to obtain approval. Moreover, since Appellee was operating his airport in violation of the law when Appellants' appeal was granted by the Board, the Board did not have to consider the effect of Appellants' landing strip on air traffic in the area created by Appellee's illegally operated airport.

POINT IV

THE ISSUE OF "SAFETY" OF AN AIRPORT IS PRE-EMPTED BY FEDERAL LAW

After receiving approval of their application for a special exception to construct an airstrip on their property, Appellants SMITH and BUTTARS received a letter from one Barbara Johnson, an airport planner of the Federal Aviation Administration. The pertinent portions of the letter read as follows:

Based on this study, the Federal Aviation Administration (FAA) has no objection to the proposal. It will not adversely affect the safe and efficient use of airspace by aircraft provided at least one clear 20:1 approach slope is established and maintained and you contact an owner of the nearby private use Cedar Valley Airport to advise the owner(s) of your operation....

This determination does not mean FAA approval or disapproval of the physical development involved in the proposal. It is a determination with respect to the safe and efficient use of airspace by aircraft and with respect to the safety of persons and property on the

ground.

In making this determination, the FAA has considered matters such as the effect the proposal would have on the existing or planned traffic patterns of neighboring airports, the effects it would have on the existing airspace structure and projected programs of the FAA, the effects it would have on the safety of persons and property on the ground, and the effects that existing or proposed man-made objects (on file with the FAA) and known natural objects within the affected area would have on the proposal.

The Federal Aviation Act directs the Secretary of Transportation to regulate the use of airspace, "in order to insure the safety of aircraft and the efficient utilization of such (navigable) airspace." 49 U.S.C. §1348(a).

The Federal Aviation Act specifically prohibits states from enacting or enforcing laws relating to "rates, routes, or services of any air carrier...(in) interstate air transportation. 49 U.S.C. §1305(a)(1).

Appellants contend that the federal law pre-empts state or local law on the issue of regulation of airspace and flight patterns to airports. A statute may be construed as pre-emptive under three (3) circumstances. First, Congress, in enacting a federal statute, may express a clear intent to pre-empt state law. Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190 (1983). Second, absent expressed pre-emption, federal law may have an implied pre-emptive effect if Congress revealed this intent by occupying the field of regulation. Silkwood v. Kerr-McGee Corp., 464 U.S. _____ (1984). There is implied pre-emption when there is a "scheme of federal regulation so pervasive as to make reasonable inferences that

Congress left no room to supplement it" or "because the act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Fidelity Federal Savings & Loan Ass'n. v. De la Questa, 458 U.S. 153 (1947). There is a third type of pre-emption when state law actually conflicts with federal law. Such a conflict occurs where "compliance with both federal and state regulations is a physical impossibility." Florida Lime and Avocado Growers, Inc., v. Paul, 373 U.S. 132 (1963).

In the case of City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973), the United States Supreme Court established that Congress' pervasive regulation of aviation pre-empted local attempts to regulate aircraft noise. Lower federal court decisions are consistent with Burbank. See E.G. Blue Sky Entertainment, Inc., v. Town of Gardener, 711 F. Supp. 678 (N.D.N.Y. 1989, Aff'd., 621 F.2d 227) (Local ordinance regulating parachute jumping and attendant aircraft noise pre-empted); Pirollo v. City of Clearwater, 711 F.2d 1006 (11th Cir. 1983) (Non-proprietor imposed curfew pre-empted); United States v. City of Blue Ash, 487 F. Supp. 135 (S.D. Ohio, 1978) (Local ordinance prescribing aircraft flight patterns pre-empted).

In this case, the Federal Aviation Association approved the flight pattern and approach to the private airstrip proposed to be constructed by SMITH and BUTTARS. The FAA considered matters such as the effect the proposal would have on the existing or planned

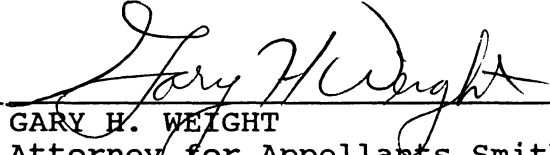
traffic patterns of neighboring airports, the effects it would have on the existing airspace structure and projected programs of the FAA, the effects it would have on the safety of persons and property on the ground, and the effects that existing or proposed man-made objects and known natural objects within the effected area would have on the proposal. The issue of safety of the airport is thus pre-empted by federal law. This leaves only the issue of whether substantial evidence existed in the record supporting the decision of the BOARD OF ADJUSTMENT to permit the construction of the physical facilities on the proposed airstrip site. This issue has been treated

CONCLUSION

For the reasons outlined above, Appellants respectfully request this Court to reverse the decision of the District Court and to affirm the decision of the Utah County Board of Adjustments allowing the Appellants' proposed construction of their airport.

DATED this 22nd day of March, 1994.

ALDRICH, NELSON, WEIGHT & ESPLIN

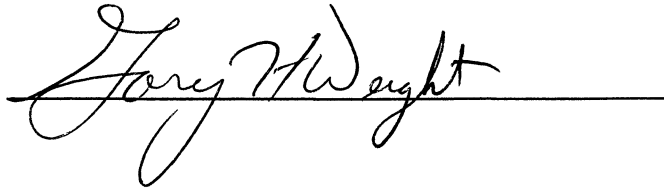


GARY H. WEIGHT
Attorney for Appellants Smith &
Buttars

MAILING CERTIFICATE

I hereby certify that I mailed, postage prepaid, this 22nd day of March, 1994, two (2) copies of the foregoing Brief of Appellants to the following:

George E. Brown, Jr.
Attorney for Plaintiff-Appellee
#6 West Main Street, #B
PO Box 346
American Fork, UT 84003

A handwritten signature in cursive script, reading "Gary H. Wright", is written over a horizontal line.

ADDENDUM

Utah Code Annotated, §17-27-708

Memorandum Decision

FAA letter

MAY 1 1991

(303) 286-5527

Mr. Glenn Smith
1001 Monte Vista Ave
Phelan, California 82371

Dear Mr. Smith:

An airspace analysis (91-ANM/D-026-NRA) of the proposed private use Cedar Fort Airport near Cedar Fort, Utah, has been completed. Based on this study, the Federal Aviation Administration (FAA) has no objection to the proposal, it will not adversely affect the safe and efficient use of airspace by aircraft provided at least one clear 20:1 approach slope established and maintained and you contact the owner of the nearby private use Cedar Valley Airport to advise the owner of your operation. You may want to consider drafting a mutually satisfactory operating arrangement between the two airports. You should also be aware that the proposed runway length of 2600' is less than the minimum recommended 5500' runway length for a group of aircraft. Please review the operational characteristics of your aircraft to ensure it can safely operate off a 2600' runway at an airfield elevation of 5000'. I have enclosed a pamphlet on density altitude for your information and use.

This determination does not mean FAA approval or disapproval of the physical development involved in the proposal. It is a determination with respect to the safe and efficient use of airspace by aircraft and with respect to the safety of persons and property on the ground.

In making this determination, the FAA has considered matters such as the effect the proposal would have on the existing planned traffic patterns of neighboring airports, the effects it would have on the existing airspace structure and projected programs of the FAA, the effects it would have on the safety of persons and property on the ground, and the effects the existing or proposed man-made objects (on file with the FAA) and known natural objects within the affected area would have on the proposal.

The FAA cannot prevent the construction of structures near an airport. The airport environs can only be protected through such means as local zoning ordinances or acquisition of property rights.

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No evaluation of the environmental aspects of the proposal was made in reaching this determination. Therefore, this determination is not to be construed as approval of the proposal from an environmental standpoint under Public Law 91-190 (National Environmental Policy Act of 1969).

When the airport becomes operational, please complete and return the enclosed FAA Form 5010-5, Airport Master Record. If the airport does not become operational within 12 months of the date of this letter, this airspace determination will expire unless you request a time extension.

If in the future you wish to open the airport to public use, new airspace determination will be required. In addition, if the airport changes names, changes ownership, or the owner changes address, please notify the FAA, NFDC on Form 5010-5. If the FAA solicits information on the airport without response, the airport may be considered inactive.

Thank you for your cooperation in this matter. If you have any questions, please contact me at the above number.

Sincerely,

15/
Barbara Johnson
Airport Planner

Enclosure

cc:
AAS-300 w/7480-1 & sketch
ANM-530
State Aeronautics
Wasatch Front COG (Dennis Coombs)

DEN-614:BJohnson:meh:5/1/91:gsmith.er

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FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

APR 22 10 08 AM '93

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

LARRY PATTERSON,

Plaintiff,

CASE NUMBER: 910400188

vs.

UTAH COUNTY BOARD OF
ADJUSTMENT, et al.,

MEMORANDUM DECISION

Defendants.

This case comes before the Court on appeal from a decision of the Utah County Board of Adjustment pursuant to § 17-27-708 U.C.A.. Because a transcript of the proceedings before the Board of Adjustment exists and has been provided to the Court, the Court's review is limited to the record and a hearing in this matter is unnecessary. § 17-27-708(5)(a) U.C.A. After full consideration of the record, including the aforementioned transcript and plaintiff's Memorandum in Support of Motion for Summary Judgement, the Court hereby reverses the decision of the Board of Adjustment. The Court finds that the Board acted in an arbitrary, capricious and illegal manner in granting defendants Smith and Buttars' application for a special exception to the zoning ordinances of Utah County.

First, the Court notes that while plaintiff appears to have standing to bring this action in that he is an individual "aggrieved" by the Board's decision, he did not attend the hearing

of this matter before the Board. As a result, his factual allegations and protests are not part of the record for purposes of the present plenary review. Further, while plaintiff complains that he was given no personal notice of the hearing, he does not contend that the board failed to give public notice as is statutorily required. Therefore, the Court cannot find that plaintiff's due process right to notification has been violated, and the Court must therefore limit its review to those facts contained in the record.

Nevertheless, the evidence contained in the record is sufficient to establish that the Board acted arbitrarily, capriciously and illegally in approving the private airport at issue. It is clear from the transcript of the Board's proceedings that the proposed air strip would be located on the east side of Cedar Valley, "against" the west slope of Lake Mountain (Transcript at 1), making aircraft approach from the East impossible. It is also clear from the record that the proposed airstrip would be within two miles of the existing Cedar Valley Airport. (Transcript at 21). The placement of the airstrip at the proposed location would not allow for an adequate turning radius (two miles) as defined under section 3-34 of the Utah County Zoning Ordinance. Given the close proximity of the mountain and the possibility of overlapping and converging flight patterns with aircraft utilizing the nearby Cedar Valley Airport, the Court must find that the Board violated section 3-34, and that it acted arbitrarily in finding that the proposed airstrip would promote public health, safety, and welfare. The Court finds that the location of the proposed airstrip presents an inherently unsafe situation in contravention of the intent of the Zoning Ordinance:

It is the intent of this section to avoid or lessen hazards resulting from the operation of aircraft, to avoid creation of new hazards, and to protect the lives of people who use aircraft facilities.

Utah County Zoning Ordinance § 3-34.

In making the present ruling, the Court denies defendants Smith and Buttars' Motion to Dismiss. Because this case impacts on public safety, rather than the mere interests of the parties, the Court cannot approve or accept the parties' alleged stipulation purporting to resolve this case by way of compromise. The Court will simply not allow the safety of the public to be compromised in the way that the parties have suggested.

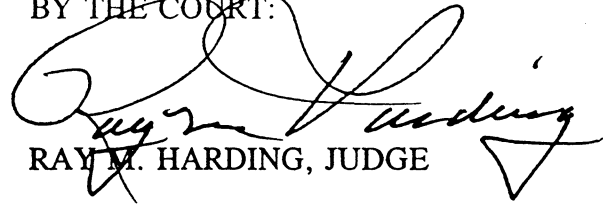
The Court also denies Utah County's motion to dismiss, finding it to be without merit. The Court finds that the reasons set forth in plaintiff's Response in Opposition to Motion to Dismiss constitute "good cause" for failure to file a certificate of readiness within 180 days as required under Rule 4-103(2) of the Rules of Judicial Administration. Furthermore, it is evident from plaintiff's pleadings that the present action is in the form of an appeal seeking plenary review of a decision of the Utah County Board of Adjustment pursuant to § 7-24 of the zoning ordinance. Accordingly, as defendant should be well aware, the undertaking and notice requirements cited by defendant are inapplicable, and the plaintiff's action is in no way barred by principles of governmental immunity.

Finally, the Court finds that plaintiff's Motion for Summary Judgement is moot and inappropriate in that the Court's plenary review pursuant to § 17-27-708 U.C.A. has required full consideration of the evidence presented to the Board.

Counsel for plaintiff is to prepare an order within 15 days of this decision consistent with the terms of this memorandum and submit it to opposing counsel for approval as to form prior to submission to the Court for signature. This memorandum decision has no effect until such order is signed by the Court.

Dated this 20th day of April, 1993.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Ray M. Harding", is written over the printed name. The signature is fluid and stylized, with a large loop at the beginning and a sharp downward stroke at the end.

RAY M. HARDING, JUDGE

cc: George E. Brown, Jr., Esq.
Mark Brady, Esq.
Gary H. Weight, Esq.

17-27-708. District court review of board of adjustment decision [Effective July 1, 1992].

- (1) Any person adversely affected by any decision of a board of adjustment may petition the district court for a review of the decision.
- (2) In the petition, the plaintiff may only allege that the board of adjustment's decision was arbitrary, capricious, or illegal.
- (3) The petition is barred unless it is filed within 30 days after the board of adjustment's decision is final.
- (4) (a) The board of adjustment shall transmit to the reviewing court the record of its proceedings including its minutes, findings, orders and, if available, a true and correct transcript of its proceedings.
(b) If the proceeding was tape recorded, a transcript of that tape recording is a true and correct transcript for purposes of this subsection.
- (5) (a) (i) If there is a record, the district court's review is limited to the record provided by the board of adjustment.
(ii) The court may not accept or consider any evidence outside the board of adjustment's record unless that evidence was offered to the board of adjustment and the court determines that it was improperly excluded by the board of adjustment.
(b) If there is no record, the court may call witnesses and take evidence.
- (6) The court shall affirm the decision of the board of adjustment if the decision is supported by substantial evidence in the record.
- (7) (a) The filing of a petition does not stay the decision of the board of adjustment.
(b) (i) Before filing the petition, the aggrieved party may petition the board of adjustment to stay its decision.
(ii) Upon receipt of a petition to stay, the board of adjustment may order its decision stayed pending district court review if the board of adjustment finds it to be in the best interest of the county.
(iii) After the petition is filed the petitioner may seek an injunction staying the board of adjustment's decision.

History: C. 1953, 17-27-708, enacted by L. 1991, ch. 235, § 93.

Effective Dates. — Laws 1991, ch. 235, § 110 makes the act effective on July 1, 1992.