

1994

Wild Willow Limited Company, a Utah Limited Liability Company v. Town of Francis, a municipal corporation, Brad McNeil, individually and as Mayor of the Town of Francis: Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILD WILLOW LIMITED COMPANY,	:	
a Utah Limited Liability	:	
Company,	:	
Plaintiff/Appellee,	:	Case No. 940311
v.	:	
TOWN OF FRANCIS, a municipal	:	Category No. 10
corporation; BRAD McNEIL,	:	
individually and as Mayor of	:	
the Town of Francis,	:	
Defendants/Appellants.	:	

BRIEF OF APPELLANTS

- - - - -

INTERLOCUTORY APPEAL FROM THE ISSUANCE OF A
PRELIMINARY INJUNCTION, IN THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SUMMIT COUNTY,
STATE OF UTAH, THE HONORABLE DAVID S. YOUNG,
PRESIDING

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UTAH

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BRIEF OF APPELLANTS
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JURISDICTION AND NATURE OF PROCEEDINGS

This case is before the Court on interlocutory appeal of the district court's issuance of a preliminary injunction. The Court has jurisdiction to hear the case under Utah Code Ann. § 78-2-2(3)(j) (Supp. 1994).

STATEMENT OF ISSUES PRESENTED ON APPEAL

AND STANDARDS OF APPELLATE REVIEW

The following issues are presented on appeal:

1. Did the district court err in granting a preliminary injunction where Wild Willow Limited Company neither satisfied nor attempted to satisfy all four requirements of rule 65A(e), Utah Rules of Civil Procedure, the preliminary injunction rule?

An appellate court may disturb a trial court's judgment granting an injunction if the court abused its discretion or the judgment rendered is clearly against the weight of the evidence.

Birch Creek Irrigation v. Prothero, 858 P.2d 990, 993 (Utah 1993). If the trial court bases its grant of an injunction on a misconception of the requirements of the pertinent rule of civil procedure, that decision is necessarily an abuse of discretion. See Gaw v. State, 798 P.2d 1130, 1134 (Utah App. 1990) (because the trial court based its decision to exclude expert testimony on the court's misconception of the law, that decision was necessarily an abuse of discretion), cert. denied (Utah Jan. 11, 1991); Berrett v. Denver and Rio Grande R.R., 830 P.2d 291, 297 (Utah App.) (trial court abuses its discretion when it exceeds the procedural authority granted it by the court rules), cert. denied, 836 P.2d 1383 (Utah 1992).

Citation to record where issue preserved in the trial court: R. 78-79.

2. Did the district court err in not applying the deferential statutory standard for review of a municipality's land use decision in concluding that Wild Willow is likely to prevail on its claim that the Francis Town Council improperly suspended the prior plat approval for Wild Willow's subdivision?

An appellate court independently reviews a district court's interpretation of a statute for correctness. Ward v. Richfield City, 798 P.2d 757, 759 (Utah 1990).

Citation to record where issue preserved in the trial court: R. 73.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Rule 65A(e), Utah Rules of Civil Procedure:

Grounds. A restraining order or preliminary injunction may issue only upon a showing by the applicant that:

- (1) The applicant will suffer irreparable harm unless the order or injunction issues;
- (2) The threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined;
- (3) The order or injunction, if issued, would not be adverse to the public interest; and
- (4) There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

Utah Code Ann. § 10-9-1001 (1992):

(1) No person may challenge in district court a municipality's land use decisions made under this chapter or under the regulation made under authority of this chapter until that person has exhausted his administrative remedies.

(2) Any person adversely affected by any decision made in the exercise of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local decision is rendered.

(3) The courts shall:

(a) presume that land use decisions and regulations are valid; and

(b) determine only whether or not the decision is arbitrary, capricious, or illegal.

STATEMENT OF THE CASE

On April 1, 1994, Wild Willow Limited Company filed suit against the Town of Francis and its Mayor, Brad McNeil, for injunctive and monetary relief based primarily on the Town Council's allegedly wrongful rescission of Wild Willow's previously approved plat for a subdivision development in Francis, Utah (R. 1-23A). It filed an amended complaint on May 19, 1994 (R. 32-56).

On May 20, 1994, Wild Willow filed a motion for a temporary restraining order and/or a preliminary injunction (R. 57-63). That motion sought an order from the trial court restraining the Town and Mayor from enforcing the Town Council's decision to rescind the prior plat approval and a related stop work order served by the Mayor on Wild Willow (id.).

On May 25, 1994, the trial court heard and granted the motion for a preliminary injunction against the Town and Mayor (T. 31-32). The court entered a written preliminary injunction on June 3, 1994 (R. 131-32). The Town filed a motion for suspension of the injunction pending disposition of a petition for interlocutory appeal, which the court denied (R. 142-45, 259-60).

On June 17, 1994, the Town filed a petition for permission to appeal the preliminary injunction in this Court, along with a motion for suspension of the injunction pending disposition of the petition (R. 177-210). On July 15, 1994, this Court granted the motion for suspension of the injunction, and on

July 20, 1994, granted the petition for interlocutory appeal.

STATEMENT OF FACTS

The material facts are not in dispute.¹ Plaintiff, Wild Willow Limited Company ("Wild Willow"), is the owner of property located within the Town of Francis and desires to develop a subdivision² on that property, which will likely double the population of that small town.³ Wild Willow obtained final plat approval of the first of three phases of its development from the Town Planning Commission on December 7, 1993. On December 15, 1993, the Town Council issued its final plat approval for the first phase. Wild Willow recorded the plat with the Summit County Recorder in January 1994. This is the first subdivision plan that was presented to the Town for approval under the Town's new Development Code ("Code").

Subsequently, a newly constituted Town Council reviewed the question of Wild Willow's noncompliance with certain significant requirements of the Code in obtaining final plat approval and the additional question of whether the Council had erroneously given such approval in light of that noncompliance. The Council held a special meeting and rescinded the prior plat

¹ This statement of facts is drawn from the trial court's Findings of Fact and the parties' pleadings in the trial court (R. 57-60, 70-79, 137-38).

² Technically, it seeks to develop a "planned unit development" under the Development Code of the Town of Francis. "Subdivision" is used generically here.

³ Francis is a town of approximately 450 people, which is located about 15 miles east of Park City. Wild Willow's multi-phase development contemplates the construction of 153 homes.

approval on March 15, 1994. The Town's attorney advised Wild Willow of the rescission in a letter dated March 25, 1994.

Having received the March 25th letter and thus fully aware of the Council's rescission, Wild Willow nevertheless began taking bids for construction of the utilities and other improvements for the development on or about March 30, 1994. Thereafter, it entered into construction contracts.

On April 1, 1994, Wild Willow filed suit against the Town and its mayor, Brad McNeil, alleging that the Town Council had wrongfully rescinded the final plat approval. The suit requested injunctive and monetary relief (R. 1-23A). On May 16, 1994, the Town, through the Mayor, issued a stop work order to Wild Willow which required it to cease construction of the development. Wild Willow filed an amended complaint on May 19, 1994 (R. 32-56).

On May 20, 1994, Wild Willow filed a motion for a temporary restraining order and/or a preliminary injunction (R. 57-63). An affidavit of C. Taylor Burton, a principal of Wild Willow, accompanied Wild Willow's four-page motion, but no memorandum of law was submitted. (Copies of Wild Willow's motion and the Burton affidavit are contained in Addendum A). Wild Willow noticed a hearing for May 25, 1994 (R. 68-69).

On May 24, 1994, the Town Council convened a special meeting, fully noticed to Wild Willow and the public, to review its rescission decision and to receive comment from Wild Willow and the public. After hearing comment and discussing the matter,

the Council voted to put the final plat approval "on hold" pending full compliance by Wild Willow with the Code's requirements. The Council also decided that no building permits were to be issued for the development during the period in which final plat approval was suspended.

Of clear concern to the Council were the health, safety and welfare issues of Wild Willow's failure to file, prior to approval by either the Town Planning Commission or the Council and as required by the Code, (1) an Environmental Impact Statement, (2) a letter from the local fire protection district indicating its final approval of the plan for fire protection measures, (3) documentation that sufficient water had been transferred and dedicated to the Town for the development, and (4) a statement from the State Health Department containing recommendations pertaining to the proposed sewage disposal system and treatment facilities.

The next day, the district court held the scheduled hearing on Wild Willow's motion for a temporary restraining order and/or a preliminary injunction. At that hearing, Wild Willow presented no evidence of the basis of the Town Council's decisions of March 15 and May 24, 1994 to rescind the final plat approval and then to put it "on hold," and proceeded solely on its verified complaint, the Burton affidavit, and a copy of the recorded plat (T. 3-32).

The district court granted a preliminary injunction, concluding that (1) "by reason of the final approval of Phase I

and the recording of the plat, plaintiff has a vested right to proceed with the development of the subdivision"; (2) "by reason of the actions of the Town, plaintiff is suffering and will continue to suffer great and irreparable harm in the form of lost lot sales, the loss of the contractor and/or substantial cost of delay, the loss of a building season with attendant costs and expenses, together with the loss of use of property in accordance with the vested rights of plaintiff"; and (3) "the plaintiff has shown a substantial likelihood of success on the merits."

Findings of Fact and Conclusions of Law at 3 (copies of the court's Findings of Fact and Conclusions of Law and the Preliminary Injunction appear as Addendum B).

The injunction, signed by the court on June 3, 1994, enjoins and directs the Town and Mayor McNeil as follows:

1. From enforcing that certain Stop Order Notice dated May 16, 1994.
2. From taking any action which purports to rescind the final approval of Wild Willow Planned Development including any action to put the approval of said project on hold.
3. The Town is hereby directed, by and through the Town engineer, to approve the plans and specifications for the utility improvements and to advise plaintiff as to the method of inspection of such improvements as they are constructed.
4. The Town is hereby directed, by and through appropriate officials, to consider and approve, where otherwise appropriate, the necessary building permits.

Preliminary Injunction at 2 (Addendum B).

SUMMARY OF ARGUMENT

To obtain a preliminary injunction, the applicant must satisfy four distinct requirements set forth in rule 65A(e), Utah Rules of Civil Procedure. In making application for a preliminary injunction, Wild Willow neither satisfied nor attempted to satisfy all four requirements, arguing only two of the four requirements: that if an injunction were not issued it would suffer irreparable harm, and that it enjoyed a substantial likelihood of success on the merits.

The district court granted a preliminary injunction, entering findings only on the two factors argued by Wild Willow. The court failed to consider or make any findings on the other two requirements of rule 65A(e): that the threatened injury to the applicant outweighs whatever damage the injunction may cause the party enjoined, and that the injunction, if issued, would not be adverse to the public interest. In failing to do so, the court committed legal error and necessarily abused its discretion in issuing an injunction. Vacation of the injunction is therefore warranted.

An additional error that justifies vacation of the preliminary injunction is the district court's refusal to apply the statutory standard for review of a municipality's land use decision.

Under the Utah Code, the Town Council's decision to suspend the prior plat approval of Wild Willow's subdivision is presumed to be valid, and a court reviewing that decision may

"determine only whether or not the decision is arbitrary, capricious, or illegal." The trial court ignored this statutory standard of judicial review in concluding that Wild Willow had demonstrated a substantial likelihood of success on the merits. By doing so, it allowed Wild Willow to escape a burden it was required to shoulder and to avoid the in-depth legal analysis that normally would be required to satisfy the "substantial likelihood of success" prong of the preliminary injunction rule. The plain language of the statute simply does not permit such a result.

In short, the court again committed legal error and necessarily abused its discretion in issuing an injunction. Based on this error and the error discussed above, this Court should vacate the preliminary injunction and remand the case to the trial court for a determination of the costs and attorneys' fees, including those incurred on appeal, to be awarded the Town for its defense against the wrongfully issued injunction.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN ISSUING A PRELIMINARY INJUNCTION WHERE WILD WILLOW NEITHER SATISFIED NOR ATTEMPTED TO SATISFY ALL FOUR REQUIREMENTS OF THE PRELIMINARY INJUNCTION RULE, AND WHERE THE COURT DID NOT FIND THAT ALL FOUR REQUIREMENTS HAD BEEN MET

The district court issued a preliminary injunction based on a perceived satisfaction by Wild Willow of only two of the four requirements of Utah's preliminary injunction rule -- rule 65A(e), Utah Rules of Civil Procedure. In that the plain

language of rule 65A(e) and the case law from which the rule derives demand satisfaction of all four requirements of the rule before an injunction may issue, the court committed legal error and necessarily abused its discretion in granting a preliminary injunction.

A. The Legal Standards for Rule 65A(e)

Subsection (e) of rule 65A was completely revised in 1991. Advisory Committee Note to Rule 65A, Para. (e) (hereafter "Advisory Comm. Note"). It now provides:

Grounds. A restraining order or preliminary injunction may issue only upon a showing by the applicant that:

- (1) The applicant will suffer irreparable harm unless the order or injunction issues;
- (2) The threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined;
- (3) The order or injunction, if issued, would not be adverse to the public interest; and
- (4) There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

"The [advisory] committee [on the Rules of Civil Procedure] sought to modernize the grounds for issuance of injunctive orders by incorporating . . . explicit standards . . . derived from Tri-State Generation & Transmission Ass'n. v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986), and Otero Savings & Loan Ass'n. v. Federal Reserve Bank, 665 F.2d 275, 278 (10th Cir. 1981)." Advisory Comm. Note. Accordingly,

federal decisions, particularly those from the Tenth Circuit, will provide much of the road map for this Court's interpretation of revised rule 65A(e). Advisory Comm. Note ("The substantial body of federal case authority in this area should assist the Utah courts in developing the law under paragraph (e)."); Kennecott Corp. v. Utah State Tax Com'n., 814 P.2d 1099, 1102 (Utah 1991) (if the particular rule of civil procedure is taken from the federal rules, the Court "freely look[s] to federal authority interpreting that rule").

In addition, certain decisions from this Court construing the former rule, which do not depend on the specific language of the former rule, are relevant to the interpretation and application of the revised rule.

B. Application of Rule 65A(e) in the Instant Case

In the district court, Wild Willow bore the burden of showing entitlement to a preliminary injunction. Utah R. Civ. P. 65A(b)(3); Systems Concepts, Inc. v. Dixon, 669 P.2d 421, 425 (Utah 1983); Blango v. Thornburgh, 942 F.2d 1487, 1492 (10th Cir. 1991). "[T]o obtain injunctive relief under Utah Rule of Civil Procedure 65A(e), [Wild Willow] must [have] by argument and evidence convince[d] the trial court that the requirements [of the rule] ha[d] been met." Kasco Serv. Corp. v. Benson, 831 P.2d 86, 94 (Utah 1992) (Stewart, J., dissenting). To meet that burden, Wild Willow had to satisfy all four requirements of rule 65A(e). Utah R. Civ. P. 65A(e); Blango, 942 F.2d at 1492. And, because a preliminary injunction is an extraordinary and drastic

remedy, see Systems Concepts, Inc., 669 P.2d at 425; GTE Corp. v. Williams, 731 F.2d 676, 678 (10th Cir. 1984), Wild Willow was obligated to show a clear and unequivocal right to relief. SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991).

The preliminary injunction issued here disturbs the status quo, is in certain respects mandatory as opposed to prohibitory⁴, and affords Wild Willow substantially all the relief it may recover at the conclusion of a full trial on the merits. With this type of injunction, Wild Willow was required to "satisfy an even heavier burden of showing that the four factors [contained in rule 65A(e)] weigh[ed] heavily and compellingly in [its] favor before such an injunction . . . issued." Id.

This heavier burden is justified because "[a] preliminary injunction that alters the status quo goes beyond the traditional purpose for preliminary injunctions, which is only to preserve the status quo until a trial on the merits may be had." Id. at 1099. Further, "[m]andatory injunctions are more burdensome than prohibitory injunctions because they affirmatively require the nonmovant to act in a particular way, and as a result place the issuing court in a position where it may have to provide ongoing supervision to assure that the

⁴ The injunction is mandatory insofar as it directs the Town "to approve the plans and specifications for the utility improvements" and "to consider and approve, where otherwise appropriate, the necessary building permits." Prelim. Inj. at 2, paras. 3, 4 (R. 132).

nonmovant is abiding by the injunction." Id. "Finally, a preliminary injunction that awards the movant substantially all the relief he may be entitled to if he succeeds on the merits is similar to the 'Sentence First -- Verdict Afterwards' type of procedure parodied in Alice in Wonderland, which is an anathema to our system of jurisprudence." Id. (footnote omitted).

In its motion for a preliminary injunction, Wild Willow addressed only two of rule 65A(e)'s requirements for issuance of a preliminary injunction. See Pltf.'s Motion for TRO and/or Prelim. Inj. (hereafter "Pltf.'s Mot.") (R. 57-60) (Addendum A). First, it claimed that it would suffer irreparable injury if an injunction were not issued. Pltf.'s Mot. at 3-4 (R. 59-60); see Utah R. Civ. P. 65A(e)(1). Second, without articulating the point precisely or citing any supporting authority, Wild Willow asserted that there is a substantial likelihood it will prevail on its underlying claim that once the Town Council approved the final plat, Wild Willow had a vested right which could not be disturbed by the Council. Pltf.'s Mot. at 2-3 (R. 58-59); see Utah R. Civ. P. 65A(e)(4).

At the hearing on its motion, Wild Willow did not expand the argument contained in its papers. Again, it requested a preliminary injunction based only on the two claims asserted in writing: (1) irreparable harm, and (2) substantial likelihood of success on the merits (T. 3-15, 25-30).

Adopting Wild Willow's position, the district court's preliminary injunction is based only on a perceived satisfaction

of subsections (1) and (4) of rule 65A(e). It made no findings on subsections (2) and (3) of the rule. Indeed, neither Wild Willow nor the district court even considered those subsections, which require the applicant to show that "[t]he threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined," and that "[t]he order or injunction, if issued, would not be adverse to the public interest."

Even if it were assumed Wild Willow had satisfied subsections (1) and (4), that is insufficient for the issuance of a preliminary injunction. As previously noted, all four subsections must be satisfied before a preliminary injunction may issue. See SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d at 1102. This is obvious from the plain language of the rule, which sets out the four factors conjunctively, not disjunctively. Rule 65A(e). The advisory committee note is equally clear on the point: "Federal courts require proof of compliance with each of the four standards[.]" Advisory Comm. Note.

In sum, the court failed to follow the requirements of the rule, thereby committing legal error and necessarily abusing its discretion in granting a preliminary injunction. See Birch Creek Irrigation v. Prothero, 858 P.2d 990, 993 (Utah 1993) (appellate court reviews a trial court's decision to grant or deny an injunction for abuse of discretion); Gaw v. State, 798 P.2d 1130, 1134 (Utah App. 1990) (because the trial court based its decision to exclude expert testimony on the court's

misconception of the law, that decision was necessarily an abuse of discretion); Berrett v. Denver and Rio Grande R.R., 830 P.2d 291, 297 (Utah App.) (trial court abuses its discretion when it exceeds the procedural authority granted it by the court rules), cert. denied, 836 P.2d 1383 (Utah 1992).

In a similar context, this Court has held that the trial court abuses its discretion in issuing a temporary restraining order without strictly complying with the requirements of rule 65A(b), Utah Rules of Civil Procedure. 858 P.2d at 994-95. That same abuse of discretion exists here; accordingly, this Court should vacate the preliminary injunction.

POINT II

THE DISTRICT COURT ERRED IN NOT APPLYING THE DEFERENTIAL STATUTORY STANDARD FOR REVIEW OF A MUNICIPALITY'S LAND USE DECISION IN CONCLUDING THAT WILD WILLOW IS LIKELY TO PREVAIL ON ITS CLAIM THAT THE TOWN COUNCIL IMPROPERLY SUSPENDED THE PRIOR PLAT APPROVAL FOR WILD WILLOW'S SUBDIVISION

In concluding that Wild Willow had demonstrated a substantial likelihood of success on the merits and therefore was entitled to a preliminary injunction, the district court refused to apply the standard for review of a municipality's land use decision set forth in Utah Code Ann. § 10-9-1001(3) (1992). This error provides an additional ground for vacation of the preliminary injunction.

A. The Trial Court Failed to Apply The Statutory Standard for Judicial Review

The legislature has mandated that a municipality's land use decision is to be presumed valid and a reviewing court "shall

. . . determine only whether or not the decision is arbitrary, capricious, or illegal." § 10-9-1001(3). See also Mantua Town v. Carr, 584 P.2d 912, 913 (Utah 1978); Crestview-Holladay Homeowners Assoc., Inc. v. Engh Floral Co., 545 P.2d 1150, 1151-52 (Utah 1976). Thus, in its suit against the Town, Wild Willow bears the burden of demonstrating that the Council's decision to suspend the final plat approval was arbitrary, capricious, or illegal. To have properly issued the preliminary injunction, the district court must have found a substantial likelihood that Wild Willow will prevail on that issue. See Utah R. Civ. P. 65A(e)(4).

The Town argued the section 10-9-1001(3)⁵ to the district court in opposing Wild Willow's motion for a preliminary injunction. See Defs.' Mem. in Oppos. to TRO and/or Prelim. Inj. at 4 (R. 73). Nevertheless, Wild Willow did not address the standard of review question either in its written motion or during oral argument on the motion (R. 57-63; T. 3-15, 25-30). Indeed, it was not until the Town again noted section 10-9-1001(3) in its objections to the written preliminary injunction (R. 115) that Wild Willow even acknowledged the provision. It then argued that the statute did not place the burden on Wild Willow, but instead required the Town to "show that the actions of the former Town Council were arbitrary and capricious" in

⁵ The Town's papers in the district court erroneously cited Utah Code Ann. § 10-9-1002 (1992), rather than section 10-9-1001(3), as the standard of review provision (R. 73, 115). This was a typographical error.

order to justify the new Council's subsequent actions. Pltf.'s Resp. to Objs. at 3 (R. 125).

Obviously agreeing with Wild Willow's implicit argument that section 10-9-1001(3) did not apply to Wild Willow's request for judicial review, the district court refused to incorporate the statutory standard of review in either its preliminary injunction or findings of fact and conclusions of law. In doing so, the court misconstrued the statute. That section 10-9-1001(3) applies to Wild Willow's judicial attack on the Council's suspension of the prior plat approval (a "land use decision") is clear from the express terms of the statute: "The courts shall: (a) presume that land use decisions and regulations are valid; and (b) determine only whether or not the decision is arbitrary, capricious, or illegal." In short, the burden was on Wild Willow, the party seeking judicial review, to show that the Council acted arbitrarily, capriciously, or illegally in suspending the prior plat approval. The trial court erred in not requiring Wild Willow to meet this burden.

B. The Trial Court Compounded Its Error

Wild Willow's and the district court's fundamental misunderstanding of the allocation of burden created an additional, related defect in the injunction proceeding. Apparently believing the burden was not its, Wild Willow did not present a thorough analysis of the central issue in the lawsuit: whether the Council could properly suspend the prior plat approval.

All that Wild Willow did in the district court was to argue it had a vested right in the former Council's December 1993 approval of the first phase of its development, and that the new Council could not disturb the prior approval. It submitted no memorandum of law to support its position, content to cite only a single case (Anderson v. Judd, 404 P.2d 553 (Colo. 1965) (en banc)) at the preliminary injunction hearing (R. 30) -- a case which does not support Wild Willow's sweeping view that the prior plat approval was essentially immune from reconsideration or modification. See Anderson, 404 P.2d at 557 (a municipal legislative body may reconsider its actions even after the rights of third parties have become vested so long as proper notice and opportunity for hearing are provided).

Contrary to what occurred below, Wild Willow was required to demonstrate that there is a substantial likelihood of success on the issue of whether the Council's suspension action was "arbitrary, capricious, or illegal." To do so, it necessarily had to acknowledge a large body of law relevant to the issue of whether the Town Council could suspend the prior plat approval.

Numerous court decisions recognize a municipality's power to reconsider and then revoke or modify a prior action, including a prior plat approval. See, e.g., Parker v. Bd. of County Com'rs., Etc., 603 P.2d 1098 (N.M. 1979) (upholding revocation of final plat approval based on subdivider's failure to meet county road requirements); Ceresa v. City of Peru, 273

N.E.2d 407, 409 (Ill. App. 1971) (deliberative bodies such as a city council have continuing power and authority to consider from time to time matters within their jurisdiction, and generally, any such reconsideration or renewed consideration may be independent of any action that was taken or not taken in the past). This is so even if rights have become "vested." Anderson v. Judd, 404 P.2d at 557. Further, the Utah Code clearly contemplates that the governing body of a municipality may reconsider and take appropriate action with respect to a previously approved subdivision plat. See Utah Code Ann. §§ 10-9-808(1)(a) (1992) (providing that "the governing body of a municipality may, with or without a petition, consider any proposed vacation, alteration, or amendment of a subdivision plat").

Wild Willow failed to address any of the foregoing legal authority. It also failed to analyze this Court's decisions holding that a municipality must follow its own ordinances in conducting business, something the former Council did not do in approving Wild Willow's plat. See, e.g., West Gallery Corp. v. Salt Lake City Bd. of Com'rs., 537 P.2d 1027, 1028 (Utah 1975) (affirming trial court's injunction against city commission which had failed to follow procedures as set forth in city ordinance); Carter v. Provo City, 6 Utah 2d 154, 307 P.2d 906 (1957) (municipal corporation was required to comply with city charter and could not properly execute construction contract in contravention of charter's requirements).

Additionally, Wild Willow failed to consider another well established principle in this Court's jurisprudence: although local governments have no inherent police power, the legislative grant of general welfare authority to local governments is construed liberally to allow municipalities to provide for the health, safety, and welfare of their residents. See, e.g., Redwood Gym v. Salt Lake County Com'n., 624 P.2d 1138, 1143 (Utah 1981); State v. Hutchison, 624 P.2d 1116, 1126 (Utah 1980). See also Utah Code Ann. §§ 10-1-103 and 10-8-84 (1992). The Council's concern for the Town's health, safety, and welfare was clearly the touchstone of its suspension decision.

Finally, insofar as Wild Willow's "vested right" argument implied that the new Council was estopped from disturbing the prior plat approval, it failed even to acknowledge that Utah's appellate courts have long disfavored application of the equitable estoppel doctrine to a municipality's land use decisions. See Utah County v. Young, 615 P.2d 1265 (Utah 1980); Town of Alta v. Ben Hame Corp., 836 P.2d 797, 803 (Utah App. 1992); Stucker v. Summit County, 870 P.2d 283, 290 (Utah App. 1994).

In sum, Wild Willow failed to advise the trial court of the expansive legal landscape relevant to the core issue in this case. Indeed, it did not give the trial court even a cursory analysis of the pertinent law. Certainly, this is the very least the moving party is required to do for purposes of rule 65A(e)(4). Therefore, the trial court compounded its error


concerning the statutory standard of review by erroneously issuing a preliminary injunction in the face of Wild Willow's woefully inadequate legal analysis and consequent failure to demonstrate a substantial likelihood of success on the merits.

CONCLUSION

Based on the foregoing arguments, the Court should vacate the preliminary injunction and remand the case for a determination of the costs and attorney's fees, including those incurred on appeal, to be awarded the Town for its defense against the wrongfully issued injunction. See Utah R. Civ. P. 65A(c).

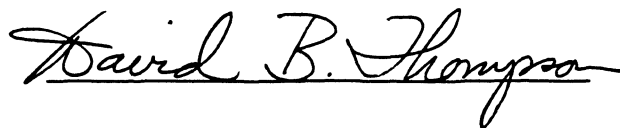
RESPECTFULLY submitted this 3rd day of August, 1994.

TESCH, THOMPSON &
SONNENREICH, L.C.


DAVID B. THOMPSON
JOSEPH E. TESCH
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing Brief of Appellants were hand-delivered to James S. Lowrie and James W. Peters, Jones, Waldo, Holbrook & McDonough, 1500 First interstate Plaza, 170 South Main Street, Salt Lake City, Utah, this 3rd day of August, 1994.



ADDENDUM

ADDENDUM A

Craig G. Adamson (0024)
Eric P. Lee (4870)
DART, ADAMSON & DONOVAN
Attorneys for plaintiff
310 South Main Street, Suite 1330
Salt Lake City, UT 84101
Telephone: (801) 521-6383

FILED
MAY 20 1994
CLERK OF DISTRICT COURT
BY _____

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

---oooOooo---

WILD WILLOW LIMITED
COMPANY, a Utah Limited
Liability Company,

Plaintiff,

v.

THE TOWN OF FRANCIS, a
Municipal corporation; BRAD
McNEIL, individually and as Mayor
of the Town of Francis,

Defendants.

:
: MOTION FOR TEMPORARY
: RESTRAINING ORDER AND/OR
: PRELIMINARY INJUNCTION

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Civil No. 940300048CV

---oooOooo---

The plaintiff, by and through its counsel of record and pursuant to Rule 65A, Utah R. Civ. P., herewith petitions the Court for a Temporary Restraining Order and/or Preliminary Injunction as follows:

1. For an order prohibiting and restraining the defendants, their agents, employees and attorneys from enforcing that certain Stop Order Notice dated May 16, 1994 and signed by the

defendant Brad McNeil, which purportedly seeks to prevent the ongoing construction of the utility improvements for the development known as Wild Willow Planned Development.

2. For an order prohibiting and enjoining the defendants, their agents, employees and attorneys from taking any action which purports to rescind the final approval of the Wild Willow Planned Development except in accordance with local ordinance or state law.

3. For an order directing the Town of Francis, by and through the town engineer, to approve the plans and specifications for the utility improvements on the development known as Wild Willow Planned Development and to advise the plaintiff as to the method of inspection of such improvements as they are constructed.

This motion is made upon the grounds set forth in the Amended Verified Complaint of plaintiff, which establishes the following:

1. Plaintiff is the owner and developer of property located within the boundaries of the Town of Francis and known as the Wild Willow Planned Development.

2. Plaintiff sought and received final approval for the subdivision plat for Phase I of the development from the Town of Francis on or about December 15, 1993. In accordance with such approval a subdivision plat, properly executed and approved by the Town Council of the Town and bearing all other necessary signatures and certifications was recorded with the Office of the Summit County Recorder on January 4, 1994 at 11:24 a.m. as Entry No. 395194.

3. On or about March 25, 1994 the plaintiff received a written notice from attorney Jon C. Heaton, counsel for the Town of Francis, wherein plaintiff was advised that the defendant Town had rescinded the final approval of the plat.

4. Plaintiff has, with the knowledge of the Town, proceeded with the granting of a contract to a contractor for the installation of the utility and road improvements in the project.

5. On or about April 19, 1994 the town engineer was given a complete set of the plans and specifications for the utility and road improvements and was asked for his approval.

6. To date no approval nor disapproval has been given.

7. Plaintiff has executed a construction agreement and has required that the contractor go forward with the utility improvements. On or about May 16, 1994 plaintiff received a document entitled Stop Order Notice, a true and correct copy is attached as Exhibit "A" and by this reference incorporated herein. In Exhibit "A" the Town states its belief that the Wild Willow project has not been approved for commencement of construction.

8. By reason of said Stop Order Notice plaintiff is prevented from continuing with the orderly construction of the utility improvements as is its right. If construction is not allowed to immediately proceed, plaintiff is in danger of not finishing the improvements during this building season, will incur substantial additional costs and will lose, in all likelihood, numerous lot sales.

9. Plaintiff presently suffers and shall continue to suffer great and irreparable injury in that it is prevented from the lawful and proper use of its property in accordance with state and local law.

10. Until an injunction is entered as requested herein, plaintiff has no adequate remedy at law and is prevented from the continued development of its property.

11. The only method by which plaintiff can avoid such irreparable injury is through the issuance of a Temporary Restraining Order and/or Preliminary Injunction whereby the defendant is restrained as requested herein.

12. The issuance of a Temporary Restraining Order and/or Preliminary Injunction in this matter will not result in any injury or harm to the defendants. Accordingly the requirement of a bond should be made nominal or waived entirely.

WHEREFORE, the plaintiff prays that a Temporary Restraining Order and/or Preliminary Injunction be issued restraining and enjoining the defendants as set out above, pending a trial on the merits of this matter and a determination that the issues raised by the Amended Verified Complaint of plaintiff; and that the amount of the bond required by Rule 65A(c), Utah R. Civ. P., be waived or set at a nominal amount.

DATED this 19th day of May, 1994

DART, ADAMSON & DONOVAN



CRAIG G. ADAMSON
ERIC P. LEE

CERTIFICATE OF MAILING

I hereby certify that on the 19th day of May, 1994, a true and accurate copy of the foregoing was mailed, postage prepaid, to the following:

Joseph E. Tesch
TESCH, THOMPSON & SONNENREICH
P.O. Box 3390
Park City, Utah 84060



Pamela K. McDermaid

Exhibit "A"

00003~

FRANCIS TOWN CORPORATION

P.O. Box 668
Kamas, UT 84036
(801) 783-2148

STOP ORDER NOTICE

May 16, 1994

**GRANT HONE - CONTRACTOR -
AND ANY OTHERS TO WHOM IT MAY CONCERN:**

It has come to our attention that your company is preparing to excavate into our streets and intends to connect with our water and sewer systems, apparently to provide service to the Wild Willow PUD development.

This letter shall serve as Notice to you that the Wild Willow project has not been and is not now approved for commencement of construction. No letter of authorization nor permit has been given. There are several unresolved matters which are not in compliance with the Development Code and other Ordinances of Francis Town. Our attorney is working with the Developer to get these items worked out in a manner acceptable to the Town.

In the meantime, no one has authorization nor permission to cut into our streets, nor to connect to any utility systems in Francis Town until further notice. No excavation permits have been issued and no approvals for commencement of the Project have been given. The State Uniform Building Code (SECTION 70) provides for proper permits and authority from the municipality prior to any excavation.

Failure to comply with this Order shall result in prosecution to the full extent allowed by law.

TOWN OF FRANCIS



Brad McNeil - Mayor

cc: Joe Tesch, Attny

000000

Craig G. Adamson (0024)
Eric P. Lee (4870)
DART, ADAMSON & DONOVAN
Attorneys for plaintiff
310 South Main Street, Suite 1330
Salt Lake City, UT 84101
Telephone: (801) 521-6383

FILED
JUL 20 1994
[Signature]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

---oooOooo---

WILD WILLOW LIMITED	:	
COMPANY, a Utah Limited	:	AFFIDAVIT OF C. TAYLOR BURTON
Liability Company,	:	
Plaintiff,	:	
v.	:	
THE TOWN OF FRANCIS, a	:	
Municipal corporation; BRAD	:	Civil No. 940300048CV
McNEIL, individually and as Mayor	:	
of the Town of Francis,	:	
Defendants.	:	

---oooOooo---

STATE OF UTAH)
 :ss
COUNTY OF SALT LAKE)

C. Taylor Burton being first duly sworn upon oath, deposes and says:

1. That Affiant is the managing agent of plaintiff and makes this affidavit on his own personal knowledge and belief.

2. That Affiant has been personally involved in the development of the Wild Willow Project from its inception and has supervised and directed all steps of the approval process.

3. That throughout the approval process Affiant and other agents dealt directly with the Town officials, including the Mayor Paul Mitchell and the Town Planning Commission.

4. That in each step of the process Affiant made adjustments, amendments and revisions to meet and satisfy the concerns of the Town officials and otherwise complied with any and all requirements imposed upon the development by the various Town officials.

5. That to the knowledge of Affiant the Town followed its Development Code as it proceeded through the approval process for the project. Ultimately the first phase was approved and the plat signed by not only Paul Mitchell, as the Mayor of the Town, but by the chairman of the Planning Commission and the Town attorney.

6. That the Town engineer, Mr. Derek Radke, was given a complete set of the drawings for the utility and road improvements on the project on April 19, 1994 by Mr. Jim Kaiserman, project engineer.

7. That despite repeated requests for approval of the plans and specifications so that construction could commence, the engineer has neither approved nor disapproved the same.

8. That in reliance upon the recordation of the final plat for Phase One, Affiant has entered into agreements for the sale of twenty-two lots. Some of these lots have closed, others are pending closing in the next few weeks.

9. That in order to allow the lot owners to commence construction on their individual lots, and in order not to lose the current construction season, and with the knowledge of the


Town, Affiant has entered into a construction contract and has caused the contractor to commence the preliminary work on the utility and road improvements, including the delivery of materials and the staking of the property.

10. That unless construction proceeds immediately, Affiant is in danger of losing the contractor, who will be forced to take on other work and abandon this project. Alternatively, Affiant will be charged a fee by the contractor for each day work is stopped. In addition, Affiant will be in jeopardy of being unable to complete the improvements during this building season, thereby losing the ability to sell the remaining lots.

11. Throughout the entire approval process the defendant McNeil has made his presence known, has voiced his stringent opposition to the project and has publicly vowed to stop the project if possible.

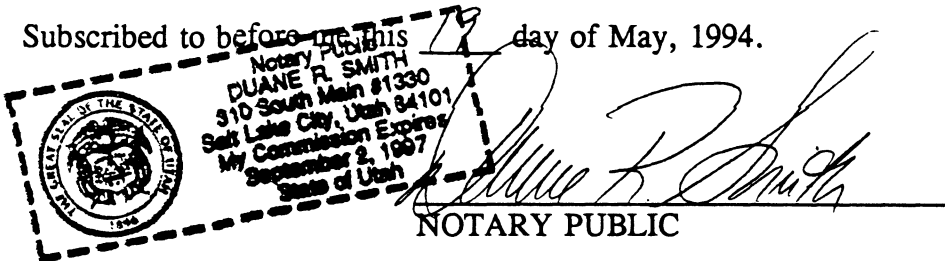
12. Affiant is informed and therefore alleges that since McNeil became Mayor he has continued to voice his opposition to the project, has taken over the duties of the Town Building Inspector with respect to the issuance of building permits, has required that all requests for permits from Wild Willow be processed by him and has denied any requests for permits.

DATED this 19th day of May, 1994.


C. Taylor Burton

STATE OF UTAH)
)
) :ss
COUNTY OF SALT LAKE)


Subscribed to before me this 19 day of May, 1994.



CERTIFICATE OF MAILING

I hereby certify that on the 19th day of May, 1994, a true and accurate copy of the foregoing was mailed, postage prepaid, to the following:

Joseph E. Tesch
TESCH, THOMPSON & SONNENREICH
P.O. Box 3390
Park City, Utah 84060


Pamela K. McDermaid

ADDENDUM B

NO. _____
FILED
 JUN 5 1994
 Clerk of Summit County
 By _____ Deputy Clerk

---oooOooo---

PRELIMINARY INJUNCTION

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Civil No. 940300048CV
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BOOK PAGE 035

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of counsel and having entered its Findings of Fact and Conclusions of Law, and being otherwise fully apprised in the facts and law;

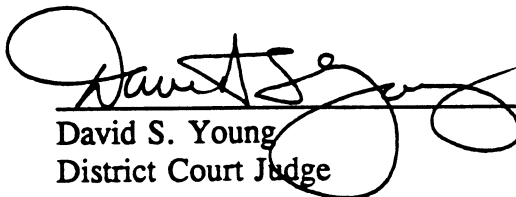
IT IS HEREBY ORDERED that plaintiff's motion for a preliminary injunction is hereby granted, and the defendants and each of them, together with their agents, employees or any independent contractor employed by them, are enjoined, restrained and directed as follows:

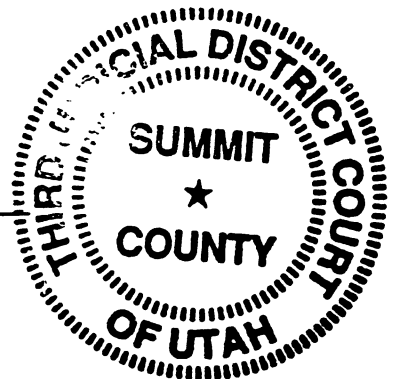
1. From enforcing that certain Stop Order Notice dated May 16, 1994.
2. From taking any action which purports to rescind the final approval of Wild Willow Planned Development including any action to put the approval of said project on hold.
3. The Town is hereby directed, by and through the Town engineer, to approve the plans and specifications for the utility improvements and to advise plaintiff as to the method of inspection of such improvements as they are constructed.
4. The Town is hereby directed, by and through the appropriate officials, to consider and approve, where otherwise appropriate, the necessary building permits.

Nothing in this order shall prohibit the defendants from taking such actions with respect to the further construction of the development which are in accordance with generally accepted and reasonable engineering principals and standards, where appropriate.

DATED this 3rd day of May, 1994.

BY THE COURT:


David S. Young
District Court Judge



Approved as to form:

Joseph E. Tesch

CERTIFICATE OF DELIVERY

I hereby certify that on the 26 day of May, 1994, a true and accurate copy of the foregoing was hand delivered to the following:

Joseph E. Tesch
TESCH, THOMPSON & SONNENREICH
P.O. Box 3390
Park City, Utah 84060

Clerk of the Court, Summit County
50 North Main
P.O. Box 128
Coalville, Utah 84017

A handwritten signature in black ink, appearing to read "D. Allen F. Smith", is written over a horizontal line.

Craig G. Adamson (0024)
Eric P. Lee (4870)
DART, ADAMSON & DONOVAN
Attorneys for plaintiff
310 South Main Street, Suite 1330
Salt Lake City, UT 84101
Telephone: (801) 521-6383

FILED
JUN 3 1994
Clerk of Summit County
By _____ Deputy Clerk *WHL*

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

---oooOooo---

WILD WILLOW LIMITED
COMPANY, a Utah Limited
Liability Company,

Plaintiff,

v.

THE TOWN OF FRANCIS, a
Municipal corporation; BRAD
McNEIL, individually and as Mayor
of the Town of Francis,

Defendants.

:
: FINDINGS OF FACT AND
: CONCLUSIONS OF LAW IN
: SUPPORT OF ORDER GRANTING
: PRELIMINARY INJUNCTION

:
:
: Civil No. 940300048CV
:
:

---oooOooo---

The motion of the plaintiff for a temporary restraining order and/or preliminary injunction having come on regularly for hearing before the above-entitled Court, the Honorable David S. Young presiding on Wednesday, May 25, 1994 at the hour of 1:30 p.m.; the plaintiff being present and represented by its counsel, Craig G. Adamson, and the defendants being present and represented by their counsel, Joseph E. Tesch. The Court having reviewed the

Verified Complaint, Amended Verified Complaint, Motion for Temporary Restraining Order and Preliminary Injunction and Affidavit of C. Taylor Burton, together with the memorandum of the defendants in opposition to said motion; the Court having heard the arguments of counsel and having reviewed the final plat of Phase I of the Wild Willow Planned Development; the Court being otherwise advised in the premises now enters the following:

FINDINGS OF FACT

1. Plaintiff is the owner of the property which is the subject matter of this action and which is known as the Wild Willow Planned Development.
2. The final plat of Phase I of Wild Willow Planned Development was given final approval by the defendant Town of Francis on or about December 14, 1993.
3. The final plat, bearing the necessary approval signatures of the public utilities, the approval signatures of the Town of Francis Planning Commission, the Town of Francis engineer, the Town attorney and the Town of Francis Board was recorded with the office of the Summit County Recorder on January 4, 1994.
4. The defendant Town of Francis purported to rescind the final approval of Phase I of Wild Willow Planned Development by letter dated March 25, 1994 signed by Jon C. Heaton, counsel for the Town.
5. Immediately subsequent to the recording of the final plat for Phase I plaintiff commenced the activity necessary to construct the utility and road improvements including the hiring of a contractor, the execution of a construction contract and the sale of lots.

6. On or about May 16, 1994 the defendant Town issued a document entitled "Stop Order Notice" seeking to stop further construction of the utility improvements.

7. On May 24, 1994 the defendant Town held a special meeting of the Town Council at which meeting a vote was taken to put the approval of Phase I of Wild Willow Development on "hold."

Based upon the foregoing Findings of Fact, the Court now enters its

CONCLUSIONS OF LAW

1. That by reason of the final approval of Phase I and the recording of the plat, plaintiff has a vested right to proceed with the development of the subdivision.

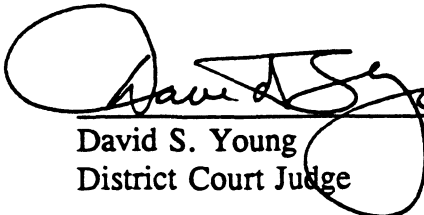
2. That by reason of the actions of the Town, plaintiff is suffering and will continue to suffer great and irreparable harm in the form of lost lot sales, the loss of the contractor and/or substantial cost for delay, the loss of a building season with attendant costs and expenses, together with the loss of use of the property in accordance with the vested rights of plaintiff.

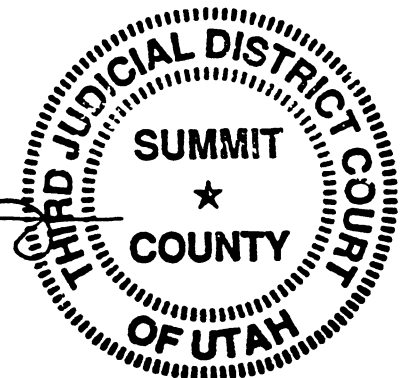
3. That the plaintiff has shown a substantial likelihood of success on the merits.

4. That a preliminary injunction, in accordance with the motion of the plaintiff, should issue, and that the requirement of a bond should be waived.

DATED this 31st day of June, 1994.

BY THE COURT:


David S. Young
District Court Judge



Approved as to form:

Joseph E. Tesch
Attorney for defendants

CERTIFICATE OF DELIVERY

I hereby certify that on the 26 day of May, 1994, a true and accurate copy of the foregoing was hand delivered to the following:

Joseph E. Tesch
TESCH, THOMPSON & SONNENREICH
P.O. Box 3390
Park City, Utah 84060

Clerk of the Court, Summit County
50 North Main
P.O. Box 128
Coalville, Utah 84017

