

1974

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In the Supreme Court of the State of Utah

THOMAS F. HERR,

Plaintiff and Respondent,

vs.

SALT LAKE COUNTY, a body corporate and politic of the State of Utah; RALPH Y. McCLURE, WILLIAM E. DUNN, PETE KUTULAS, BOARD OF COMMISSIONERS OF SALT LAKE, CLAYNE J. RICKS, Acting Director of Planning and Zoning, and KENNETH JONES, Salt Lake County Zoning Administrator,

Defendants and Appellants.

Case No.
13549

Brief of Defendants-Appellants Salt Lake County, et al.

Appeal from the Judgment of the Third District Court
for Salt Lake County
Honorable S. Mark Johnson, District Judge By Designation

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IN THE SUPREME COURT OF THE STATE OF UTAH

THOMAS F. HERR,

Plaintiff and Respondent,

vs.

SALT LAKE COUNTY, a body
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Utah; RALPH Y. McCLURE,
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KUTULAS, BOARD OF COM-
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Director of Planning and Zoning, and
KENNETH JONES, Salt Lake
County Zoning Administrator,

Defendants and Appellants.

Case No.
13549

Brief of Defendants-Appellants Salt Lake County, et al.

STATEMENT OF THE NATURE OF THE CASE

This is an action for review of a decision by the
Board of County Commissioners for Salt Lake County

denying the application of respondent Thomas F. Herr for a conditional use permit for a planned unit development in Salt Lake County. The decision of the Board of County Commissioners reversed a decision of the Salt Lake County Planning Commission approving the application of the respondent for a conditional use permit.

DISPOSITION IN LOWER COURT

The lower court, the Honorable S. Mark Johnson presiding, District Judge by Assignment, granted respondent's Motion for Summary Judgment and reinstated the decision of the Salt Lake County Planning Commission approving the application of respondent for a conditional use permit. The court held the Board of County Commissioners was without jurisdiction to reverse the decision of the Salt Lake County Planning Commission by its failure to render a decision within seven days after hearing the appeal from the Planning Commission.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the judgment of the lower court granting respondent's Motion for Summary Judgment and for an order reinstating the decision of the Board of County Commissioners of Salt Lake County denying respondent's application for a conditional use permit.

FACTS

Respondent in November of 1972 applied to the Salt Lake County Planning Commission for a conditional use permit authorizing the building of a planned unit development on his property located at the base of Little Cottonwood Canyon. A planned unit development is an integrated design generally for a large scale commercial, residential or industrial development. The proposed development consisted of a 200-unit village of condominium villas accessible by a tramway running up the side of the mountain to the condominiums. After several hearings on the matter the Planning Commission, on February 13, 1973, approved respondent's application for the conditional use permit and instructed the Planning Commission staff to recommend specific conditions to attach to the application which had been granted. On February 21, 1973, the residents of the Granite area of Salt Lake County, through their attorney, Henry D. Moyle, Jr., appealed the decision of the Salt Lake County Planning Commission to the Board of Commissioners of Salt Lake County alleging among other grounds for reversal that the Planning Commission had set a policy of allowing condominiums in the foothills without criteria to judge this type of development contrary to recommendations of the Planning Commission staff; that the proposed development was a resort development in the middle of a residential neighborhood; that the development was contrary to the Salt Lake County Master Plan; and that the development failed to meet the criteria necessary for a conditional use per-

mit. The appeal was heard by the Board of County Commissioners on March 8, 1973, at which time evidence and testimony were taken. On March 19, 1973, the Board of County Commissioners reversed the decision of the Salt Lake County Planning Commission and denied respondent's application for a conditional use permit. On March 27, 1973, respondent petitioned the Board of County Commissioners to rehear the appeal, which petition was denied by the Board of County Commissioners on March 28, 1973. On May 1, 1973, respondents filed a complaint for review of the Board of County Commissioners' decision. A Motion for Summary Judgment was filed by respondent on June 8, 1973, which motion was heard on June 19, 1973. On September 5, 1973, respondent's Motion for Summary Judgment was granted, the court holding that Section 22-31-2(6) of the Revised Ordinances of Salt Lake County required the Board of County Commissioners to render a decision within seven days from the date of hearing the appeal and that the Board of County Commissioners lost jurisdiction over the matter by failing to render its decision within seven days. On September 12, 1973, appellants moved the court to amend its judgment. The motion was denied on December 7, 1973, at which time the court made additional findings of fact, to which appellants also objected. This appeal results from the granting of respondent's Motion for Summary Judgment and the denial of appellants' motion to amend the summary judgment.

ARGUMENT

POINT I

THE LOWER COURT ERRED IN HOLDING THE BOARD OF COUNTY COMMISSIONERS LOST JURISDICTION TO REVIEW THE DECISION OF THE SALT LAKE COUNTY PLANNING COMMISSION BY FAILING TO RENDER ITS DECISION WITHIN SEVEN DAYS AFTER HEARING THE APPEAL.

The only issue before the lower court at the time it granted Summary Judgment was whether the language in Section 22-31-2(6) of the Revised Ordinances of Salt Lake County, stating that the Board of County Commissioners shall render a decision within seven days after hearing an appeal from the Salt Lake County Planning Commission of a conditional use application, is directory or jurisdictional.

Section 22-31-2(6) of the Revised Ordinances of Salt Lake County, as pertinent, reads as follows:

“(b). Determination of Board of County Commissioners. The Board of County Commissioners, after proper review of the decision of the Planning Commission, may affirm, reverse, alter or remand for further review and consideration any action taken by said Planning Commission and shall make such decision within seven (7) days of the hearing of the appeal.”

The well established rule is that statutes describing a time limit within which a tribunal, court or board must

render a decision are merely directory unless the statute itself indicates that the time limitation was intended to be jurisdictional. This rule is stated as follows in 67 C.J.S., *Officers*, Section 114, page 404-406:

“As a rule, a statute prescribing a time within which public officers are required to perform an official act regarding the rights and duties of others, and enacted with a view to the proper, orderly, and prompt conduct of business, is directory unless it denies the exercise of power after such time, where the phrasology of the statute, or the nature of the act to be performed, and the consequences of doing or failing to do it at such time are such that the designation of time must be considered a limitation on the power of the officer. When the legislature prescribes the time when an official act is to be performed, the broad legislative purpose is to be considered in deciding whether the time prescribed is directory or mandatory . . .”

The rule is also stated in Cal. Jur. 2d, § 94, page 180:

“It is elementary that where a tribunal has jurisdiction over the parties and subject matter, the jurisdiction continues until final judgment. Statutory provisions providing that a decision shall be rendered within a defined period after hearing are generally construed to be directory only, and failure to reach a final determination within the prescribed period does not deprive the agency of jurisdiction . . .” *Koehn v. State Board of Equalization, Etc.*, 333 P2d 125 (Cal. App. 1959); *Peak v. Industrial Acc. Commission*, 82 Cal. App.2d 526, 187 P2d 905 (1947).

A similar rule is stated in 8(a) *McQuillin Municipal Corporation*, § 25.270 discussing zoning appeal boards:

“In some instances, the zoning board is required by law to act upon a petition or an appeal within a specified time. Failure of the board to act within such time, however, does not ipso facto divest it of jurisdiction.”

Utah law is in accord. In *Sjostrom v. Bishop*, 15 U2d 373, 393 P2d 472, 474, (1964), the Utah Supreme Court held a statute requiring that elected officers “shall” publish within thirty days after an election a list of campaign expenditures and names of contributors was directory and not mandatory. The court set forth general guidelines to be followed in deciding whether provisions of a statute are directory or mandatory.

“It best serves our purpose here to point out generally that there are at least some guidelines to be followed. The most fundamental one is that the court should give effect to the intention of the legislature; that requires us to consider what the figurative ‘legislative mind’ would have contended had it averted to the particular circumstances we are confronted with for adjudication. This in turn leads to analyze the statute in light of its history and background; the purpose it was designed to accomplish; and what interpretation and application will best serve that purpose in practical operation.”

The court further stated that where a statute required something to be done which could just as well be done after the time prescribed by the statute, the statute is generally construed as directory. In stating the rule the court quoted from *State v. Industrial Commission*, 289 N. W. 769 (Wis. 1940) :

“ ‘When there is no substantial reason why the thing by statute required to be done might not as well be done after the time prescribed as before; . . . nothing in the act itself, or in other acts relating to the same subject matter, indicating that the legislature did not intend that it should rather be done after the time prescribed than not at all—the courts will deem the statute directory merely.’ ” 393 P2d at 475.

The court in *State v. Industrial Commission* held a statute requiring the Wisconsin Industrial Commission to render a decision on a petition for review within ten days after filing such petition was directory and not jurisdictional. A Utah case providing additional guidelines in this area is *Wight v. Park City School District*, 43 Utah 61, 133 Pac. 128 (1913), where the plaintiff sought to prohibit the defendant school district from levying a tax to maintain a separate high school in Summit County on the grounds that the district could not do so because no action had been taken to divide Summit County into two or more districts within the sixty day period the statute allowed to do so after it became law. In rejecting that contention the Utah Supreme Court said:

“The general rule is that a statute, prescribing the time within which public officers are required to perform an official act, is directory only, unless it contains negative words denying exercise of the power after the time specified or the nature of the act performed, or the language used by the legislature shows that the designation of time was intended as a limitation.”

Another Utah case directly in point is *Lynch v. Coviglio*, 17 Utah 106, 53 Pac. 983 (1898) where the Utah Su-

preme Court held that Section 3379 Comp. Laws (1888) which provided that a district court “must” render its decision in writing and file it within 30 days after the cause was submitted for decision was merely directory and not jurisdictional.

In his brief to the lower court, respondent cited several cases which held a time period in which a party may appeal a decision of a court or board is jurisdictional. *Lund v. Cottonwood Meadows Co.*, 15 U2d 305, 392 P2d 40 (1964); *The Estate of Rattiff v. Conrad*, 19 U2d 346, 431 P2d 571 (1967). In citing such cases respondent failed to note a different rule has been applied by the courts in interpreting the time period in which a party may appeal a decision and a statutory period in which a tribunal may reach a decision. In *Davidson v. Board of Education of City of Pikeville*, 225 Ky. 165, 7 S.W.2d 1056 (1928) the court noted this difference:

“A different rule is applied where a privilege is conferred upon a private person to be exercised within a certain period of time as under the statute allowing a motion for a new trial in three days or allowing sixty days in a criminal case for an appeal. In such cases the time limit is part of the right granted. The statute was clearly intended to be mandatory or the right would not have been limited by the legislature. The limitation is part of the right granted to a private person. Not so here. The statute simply imposes a duty upon a public officer and directs him when he must discharge his duty and how he must discharge it. Such statutes from the very nature of the case must be substantially complied with, but to avoid official acts or unsubstantial violation of the stat-

ute would be defeating the plain purpose of the legislature.”

Respondent, in his brief to the lower court, also cited Utah authority which holds that the word “shall” in a statute is generally construed to be mandatory. *Deseret Savings Bank v. Frances, et al.*, 217 Pac. 1114 (Utah 1923). This case did not involve a statutory time period in which an act must be performed by a public officer or tribunal and the rule cited by respondent has not been applied in such cases. The statutes interpreted by the Utah Supreme Court in *Sjostrom v. Bishop*, supra, and *Wight v. Park City School District*, supra, both used the term “shall” but were held not to be mandatory. The statute involved in the case of *Lynch v. Coviglio*, supra, used the term “must” in requiring courts to render a decision within 30 days after the cause was submitted for decision and was held to be directory.

Applying the criteria set forth by the Utah Supreme Court and courts in other jurisdictions for determining whether a statutory time period in which a tribunal must reach a decision jurisdictional or directory to Section 22-31-6(2), it becomes apparent that there is nothing in the wording or nature of the ordinance to support respondent’s contention that the seven day time period is jurisdictional. The ordinance contains nothing either directly or by implication denying the Board of County Commissioners the power to review a decision of the Planning Commission on a conditional use application after the seven day period. Nor does the ordinance involve a situation where the rights of the parties sub-

stantially change seven days after the Board of County Commissioners hears the appeal from which one could conclude the seven day period was intended to be jurisdictional. Respondent does not claim that he was prejudiced in any way by the fact the Board of County Commissioners did not render its decision within seven days. The fact is the Board of County Commissioners substantially complied with the ordinance by rendering its decision within 11 days (seven working days) after hearing the appeal by the Granite residents, a short time considering the important questions concerning our canyons involved. To conclude that the seven day time period is jurisdictional would be to deny the Granite residents the very right of appeal the ordinance intended to grant. It hardly seems arguable the Board of County Commissioners intended the possibility of such a result.

The apparent purpose of the Board of County Commissioners of including the requirement in Section 22-31-2(6) that it render a decision within seven days after hearing a conditional use appeal was to encourage the orderly and prompt review of decisions. Many jurisdictions have enacted similar ordinances or statutes with this object in mind; however, we are aware of no case that has held such a statute or ordinance to be jurisdictional. The long established rule is stated in 336 CYC 1158 as follows:

“ . . . where the directions of a statute are given merely with a view to the proper, orderly and prompt conduct of business the provision may generally be regarded as directory.”

Conditional use applications often involve a substantial development, as was the case in the instant matter, requiring presentation in an appeal to the Board of County Commissioners of numerous documents and testimony. In such cases seven days may not be sufficient time for the Board of County Commissioners to render a decision. Surely the County Commissioners were aware of this fact when they passed Section 22-31-2(6). If the Board of County Commissioners had intended to limit its own jurisdiction on appeals of conditional use applications, the obvious thing would have been to specifically state in the ordinance that the time period was jurisdictional or at least to set a time period which would allow the Board of County Commissioners sufficient time to review the record and render a decision in all cases. The fact the Board of County Commissioners did not do this, but instead enacted a short seven day time period for decision making without reference to any consequences attending the failure to render a decision within this period, is an additional reason to support the conclusion that the Board did not intend the seven day time period in Section 22-31-2(6) to be jurisdictional.

POINT II

THE LOWER COURT ERRED IN ORDERING THE SALT LAKE COUNTY PLANNING COMMISSION TO ISSUE RESPONDENT A CONDITIONAL USE PERMIT WITHOUT

RESPONDENT HAVING MET THE CONDITIONS REQUIRED BY THE PLANNING COMMISSION FOR ISSUANCE OF THE PERMIT.

The decision of the Salt Lake County Planning Commission approving respondent's application for a conditional use permit, subject to certain conditions which were established on March 6th, required the respondent to submit preliminary plans incorporating the required conditions before being entitled to the issuance of a conditional use permit. See Plaintiff's Exhibit "B," Page 6 12-13. However, the lower court decision, in addition to reinstating the decision of the Planning Commission approving respondent's application, ordered the Planning Commission to issue the conditional use permit, thus permitting respondent to obtain a conditional use permit without complying with the conditions required by the Planning Commission. These conditions were not even part of the appeal by the Granite residents from the decision of the Planning Commission; nor were they part of respondent's lawsuit in the lower court. When appellants moved the court to amend the judgment to delete the requirement that the Planning Commission issue a conditional use permit without respondent having complied with the conditions set by the Planning Commission, the lower court not only denied the motion but made an additional finding of fact that counsel for the County had stated the appeal by the Granite residents was premature. This finding of fact was not within the scope of the motion before the court, is not

supported by the record and is improper in any event as parties may not agree to jurisdiction.

Thus, even assuming *arguendo* the seven day time period in Section 22-31-6 (2) is jurisdictional, appellants submit this Court should amend the Judgment and Order of the lower court by deleting paragraph 3 requiring the Planning Commission to issue a conditional use permit to respondent without meeting the conditions set by the Planning Commission for the conditional use permit and by striking the additional findings of fact made by the court.

CONCLUSION

The basic issue before this court is whether the Board of County Commissioners intended by Section 22-31-2(6) of the Revised Ordinances of Salt Lake County to limit its own jurisdiction on conditional use appeals to seven days following hearing of the appeals. Although the issue is rather narrow, the consequences are not. At stake is the question of whether a condominium-resort will be allowed in a residential neighborhood at the base of Little Cottonwood Canyon contrary to the decision of the governing body of Salt Lake County and to the wishes of numerous residents in the Granite area and in the remainder of Salt Lake County. The Utah

State Legislature has placed the responsibility for such decisions upon the County Commissioners. U.C.A. 17-27-1 (1953). In determining what the Board of County Commissioners intended when it enacted the seven day time period in Section 22-31-2(6), this should be kept in mind. It is unreasonable to conclude the Board of County Commissioners intended to impair its ability to make critical zoning and planning decisions in Salt Lake County concerning conditional uses by limiting its jurisdiction to a seven day period—the almost certain result of which would be to lose the jurisdiction to make important planning decisions because of a lack of time to thoroughly review a conditional use application. Rather, it seems clear the County Commission intended the time period as directional to be followed in an appeal of a typical conditional use application.

Utah courts and the courts in other jurisdictions have consistently interpreted similar ordinances and statutes to be directory. For this reason and the reasons set forth herein which demonstrate the Commission intended the seven day time period to be directory, the appellants would submit the decision of the lower court should be reversed, the decision of the Board of County Commissioners reinstated and the case remanded to the lower court for disposition of the other issues raised by respondent. However, in the event the Court upholds the decision of the lower court, appellants ask the decision of the lower court be amended to delete paragraph 3 of the Judgment and Order requiring the immediate issuance of a conditional use permit as respondent has

not complied with the conditions set by the Planning Commission for the issuance of the conditional use permit.

Respectfully submitted,

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