2006

Thomas W. Tolman and Verla F. Tolman v. Logan City, and John and Jane Does, 1-20 : Reply Brief

Utah Court of Appeals

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
Jody K. Burnett, Robert C. Keller; Williams and Hunt; Kymber Housley; attorneys for appellee.
David R. Daines, Chris Daines; attorney for appellants.

IN THE UTAH COURT OF APPEALS

THOMAS W. TOLMAN and
VERLA F. TOLMAN,
Appellants

v.

Appellate Case No. 20060713-CA

LOGAN CITY and JOHN and JANE
DOES, 1-20,
Appellees

REPLY BRIEF OF APPELLANTS

Appeal from the First District Court, Cache County, Judge Low

David R. Daines
Chris Daines
Chris Daines Law
135 North Main Street, Suite 108
Logan, Utah 84321
Attorneys for Appellants

Jody K. Burnett
Robert C. Keller
Williams & Hunt
257 East 250 South, Suite 500
Salt Lake City, Utah 84145

And

Kymber Housley
Logan City Attorney
255 North Main Street
Logan, Utah 84321
Attorneys for Appellee Logan City

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Robert C. Keller
Williams & Hunt
257 East 250 South, Suite 500
Salt Lake City, Utah 84145

And

Kymber Housley
Logan City Attorney
255 North Main Street
Logan, Utah 84321
Attorneys for Appellee Logan City

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

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ARGUMENT

I. DENIAL OF REZONE WAS "REVERSE SPOT ZONING"

Point III of the Brief of Appellee, Pp. 22-32, is an attempt to justify the trial court grant of the summary judgment upholding the City's denial of the upzoning request of the Appellees ("Tolmans") by arguing that the denial was not "reverse spot zoning." However, Appellee ("the City") blends the discussion of spot zoning and illegal reverse spot zoning.

Tolmans claim that the rezone denial was unconstitutional "illegal spot zoning" or created an "island in a sea of less restrictive uses" as those terms are interchangeably used in the cases. This unitary concept that may be labeled "reverse spot zoning" must be and is distinguished from spot zoning that may be permissible. This distinction is extensively addressed and argued in the Brief of Appellants ("Tolmans Brief").

The City claims that Tolmans arguments fail to comprehend the essence of "reverse spot zoning." City Brf. 23. Those arguments reveal that it is the City that fails to comprehend "reverse spot zoning". Tolmans have correctly characterized *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978) by stating that the U.S. Supreme Court *adopted* the *doctrine* of "reverse spot zoning" applicable here. Tolmans Brf. 10. In holding that New York City landmark restrictions are legal, the court distinguishes, defines and adopts the illegal discriminatory "reverse spot" zoning doctrine applicable in this case:

> ...landmark laws are not like discriminatory or 'reverse spot' zoning; that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones.

Id., 438 U.S. at 132.

The analysis in Tolmans brief of case precedents leading to this U. S. Supreme Court *Penn Central* reverse spot zoning doctrine are correct.

Without distinction, the City quotes and argues principles of general "spot zoning" and then erroneously applies them to this "reverse spot" zoning context, City Brf. 24-25, when the principles of legality and illegality of the two types are vastly different. It is true in the context of general spot zoning that "Rezoning individual tracts or small parcels of land will be held invalid when not enacted in accordance with a comprehensive plan". On the other hand, as clearly established by Tolmans arguments, cases and the City's Rathkopf treatise quotes, the essence of illegal "reverse spot" zoning is this: If a lot is surrounded by non-conforming less restricted uses, the denial of a rezone to conform to the surrounding non conforming uses is arbitrary and discriminatory "reverse spot zoning", even if the downzoning scheme is valid and in conformity with the general plan. The City Brief 29-30 essentially repeats this same specious argument in the context of Tolmans cases. All of Tolmans cited cases and quotes on this point expressly or implicitly hold that there was illegal reverse spot zoning on the basis that the underlying downzoning schemes, including the comprehensive plans, were valid and constitutional, unless those cases also held the downzoning schemes were unconstitutional. Tolmans also claim unconstitutionality of the downzoning scheme even though their claim of illegal reverse spot zoning is not dependent on the invalidity of the scheme or plan for this reason.

The City Brief at pages 26-28 makes the disingenuous argument that the Utah cases Tolmans claim recognize and define the illegal "reverse spot zoning" doctrine, and distinguish and define *legal* "spot zoning", are irrelevant. The City ignores the critical doctrine defining *dictum* of those Utah cases, which employ the alternative terminology of a more restrictive island in a sea of less restrictive uses. Many of the other cases employ both terms. These Utah cases correctly hold that their facts do not fit the doctrine, for the reasons detailed in Tolmans Brief. The unchallenged facts in this case do fit the doctrine as defined in the Utah cases. Because these facts fit the doctrine, this will be the first Utah appellate opportunity to apply the "reverse spot zoning" doctrine to case where that doctrine fits. The City attempts to divert the court's attention from the significance of these cases by meandering off into an irrelevant discussion of divergent facts.

On its face, the City's cited case of *Phi Kappa Iota Fraternity v. Salt Lake City,* 212 P.2d 177 (Utah 1949), supports Tolmans position and cases that, unlike non debatable reverse spot zoning where a lot is surrounded by less restrictive uses, spot zoning a lot on the border between zones presents a debatable legislative legal spot zone issue. City Brf. 28. These boader, large tract, and less restrictive use cases the City claims "contain case law both pro and con" (City Brf. 29), in fact properly define and limit the application of the doctrine of reverse spot zoning. Tolmans Brief 13-14 exhaustively explores these limitations in the context of the Utah cases and the ALR article.

II. THE "REVERSE SPOT ZONING" ISSUE WAS PRESERVED

The City, at page 22 of its brief, inserts what it claims is a "threshold issue," that Tolmans did not "adequately" preserve reverse spot zoning as an issue in response to the City's motion for summary judgment. Tolmans begin their memorandum argument with:

> The City's denial of Tolmans' rezone of their single family lot to a multi family zone, so they can use and sell it for the same multi family uses as all his surrounding neighbors, is the most extreme case of illegal, arbitrary and capricious denial of substantive due process found in extensive reported case law. The controlling principles and cases are in...73 A.L.R 5th 223 (titles and sections)

> "B. Where Parcel in Question Zoned or Rezoned More Restrictively Than Surrounding Property... R. 210

This is the same ALR article cited by this Court as a valid source for line drawing between legal and illegal (reverse island-in-a-sea) spot zoning in the unpublished decision in *Donner Crest Condominium Homeowners' Ass'n v. Salt Lake City,* 2005 WL 775306. Tolmans Brief 13. Tolmans memo continues by summarizing and analyzing the application to this case of the ALR cited and analyzed cases to this case:

> Under Sec. 12 (32 Cases) illegal spot zoning was established in every case as this, where a single small lot was more restrictively zoned than all the surrounding lots. Illegal spot zoning was also established where larger tracts not completely surrounded by less restrictive uses were present. Under Sec. 13 (28 cases), there was no case where a small lot completely surrounded by less restrictive uses where illegal spot zoning was not established. Every such case turned on the large size of the tract or adjacent similarly restrictive uses. R. 210.

Tolmans memo continues by excerpting from the Article's analysis of 14 of the 32 cases where illegal reverse spot zoning was held in analogous circumstances. This relevant detailed additional "legal analysis" covered three plus pages of single spaced ALR analytical excerpts.

The memo (R.14) continues with a detailed legal analysis of the application and distinctions contained in four Utah cases that recognize the "reverse spot zoning" doctrine expressed in terms of more restricted "island in a sea" of less restricted uses. Tolmans Brf p. 13.

Contrary to the City's assertion, Tolmans have provided both the court below and this Court with ample legal analysis. The "reserve spot zoning" issue has been well preserved as the central claim of Tolmans from the beginning.

III. THE REZONE AREA DOES NOT LIMIT TOLMANS CLAIM

The City argues on pages 24 and 25 that Tolmans have been inconsistent in advancing their case for "reverse spot zoning." The City relies on Tolmans application including 32 lots rather than the solitary lot owned by Tolmans. The City questions whether the denial of a 32-lot rezone application can be the basis for a claim that the Tolmans' lot is an island.

Tolmans unchallenged affidavit attached to the opposition memorandum (Tolman Brf. Tab 2) provides the detail showing how he was misled by the City Planner Michelle Meachem (Tab 2 p. 2-5) into expanding his intended one lot application to include a large 8 acre area (the 32 lots); delaying his application for about three months, while he got 17 additional co-petitioners owning 31 lots, and: did an extensive survey and analysis detailing the predominant multiple uses in the whole downzoned area (Tabs 2-3). The City planners stated purpose was not only to *improve* Tolmans chances for approval of his rezone, but also to provide proof to support and follow the Planners' promised upzone plan initiative for this area. They failed to initiate the promised plan revision (Tab 2 pg 3 ¶ 5). These facts were summarized and included in the Statement of the Case and Statement of

Facts in Tolmans Brief, and were never challenged by the City. This argument is also in Tolmans memorandum. R. 215.

It would be inequitable to disregard Tolmans one lot original rezone intent and objective that the City planners diverted him from, and deny his rezone on the grounds that he expanded it to include 32 lots, as the City argues in its Brief (pgs. 24-25). These uncontested facts include all the requirements for zoning estoppel as set forth in *Grand County v. Rogers* 44 P 3d 734 (Utah 2002) where the Utah Supreme Court sets out the conditions, present in this case, for invoking zoning estoppel:

> "This court has recognized there are circumstances where it is inequitable to enforce a zoning ordinance." *Xanthos v. Bd. Of Adjustment of Salt Lake City,* 685 P. 2d 1032, 1037 (Utah 1984). To invoke the doctrine of equitable estoppel in a zoning case "the county must have committed an act or omission upon which the developer could rely in good faith in making substantial changes in position or incurring extensive expenses." *Utah County v. Young,* 615 P. 2d 1265, 1267 (Utah 1980). "The action upon which the developer claims reliance must be of a clear, definite and affirmative nature."

Id., at 739.

Under these circumstances it would be a grave injustice to conclude that there would have been a valid single lot rezone but not a multiple. This result would unfairly deny the rezone because Tolman was misled by the City into including the additional lots. He would be compelled to begin and process a single lot rezone application he intended to file in the first place.

Tolmans City-prompted expansion of the application area did not change the character of the multiple-family uses on the ground. The Appendix at Tab 3, pages 2 and 3, shows the rezone application area, the Tolmans' lot, and the multi-family uses surrounding it. The 31-lot expansion added 23 lots that are already in actual multi-family use. Only seven of the additional lots are still in single-family use, and the four islands in which they are found, are each surrounded by multiple family uses, most of them within the expanded area. In other words, the character of the 32-lot application was no different than the character of the single-lot application. See *Shapiro v. City of Cambridge,* 340 Mass. 652, 166 N.E. 2d 208 (1960). These facts turn all the City quotes from Rathkopf's The law of Zoning and Planning on pages 24 and 25 into powerful support for Tolmans claims that there is "reverse spot zoning" whether the focus is on Tolmans solitary lot, or expanded to include a few other small islands the larger sea.

IV. *PALERMO, DAFU,* AND *CHICAGO* SUPPORT TOLMANS

Tolmans Brief at pages 19-20 cited and quoted from *Dafu v. Jefferson Parish,* 200 So.2d 335 (La. App. 4 Cir. 1967), as one among many cases supporting illegal reverse spot zoning in this case. *Dafu* was partially abrogated by the Louisiana Supreme Court in *Palermo Land Co,. Inc. v Planning Comm'n of Calcasieu Parish,* 200 So. 2d 482 (La. 1990), but only insofar as *Dafu* shifted the burden of proof to the municipality in reverse spot zoning cases. The City claimed that *Palermo* totally abrogated *Dafu.* City Brf. 29. The abrogation was only partial, however, and *Palermo* confirmed all the other conclusions in *Dafu*. *Palermo* also cited more recent Louisiana cases supporting *Dafu's* other reverse spot zoning principles. In order to conform *Dafu* quotes to *Palermo,* Tolmans agree that only the paragraph numbered 4 appearing on page 20 of their brief should be stricken.

The City Brief at page.30 erroneously asserts that the challenge in *Trust Co. of Chicago v. City of Chicago,* 96 N.E.2d 499 (Ill. 1951), was to "upzoning", when in fact the challenge was to the unconstitutional "downzoning" amendment of the original Chicago zoning plan and ordinance. This landmark Illinois case on reverse spot zoning is on "all fours" with this case and powerfully supports Tolmans position on all critical points.

V. THE CITY WAS POWERLESS TO DENY THE REZONE

The City argues that the trial court correctly concluded that denial of Tolmans "DOWNZONING" application was not arbitrary, capricious or illegal. City Brief, Point I at pages 10-13. It is critical to understanding the principles involved in reverse spot zoning that Tolmans were denied an "upzone" (really a recognition of the actual uses), not a "downzone" as the City repeatedly misstates. This "DOWNZONING" denial miscue was repeated again in Point III on page 22. The City confirms this critical misconception in the lead to its first argument on page 11: " The City's denial of Tolmans' request for downzoning was an exercise of legislative discretion." This repetition appears to result from a misconception that the City in fact denied a "downzone" when in fact it denied an "upzone." This misunderstanding could explain what otherwise appear to be fundamental logic lapses and conflicts in many of the City's arguments. In this urban context there is nothing downzonable below single family, unless it is to pretend that the City can, by zoning, transform and revert the urban landscape to agricultural. The "downzoning" occurred when the City, in 1989 moved the designation from multifamily to single family.

The City cites *Bradley v. Payson City Corp.* 2003 UT 16, 70 P.3d 47, for the proposition that "reasonably debatable" legislative decisions must be upheld. The City misses the point that in Tolmans case, the decision on Tolman's application was not reasonably debatable – the denial of it was arbitrary and capricious, because otherwise Tolmans were deprived of the right to use their property in the same way as their immediate neighbors. This is the conclusion whether the "reverse spot zoning" situation takes the decision out of the legislative realm and into the administrative, or removes the issue from legislative debate. Either way, the denial must be reversed, and such reversal does no violence to the principles expressed in *Bradley*. The peculiar facts of this case are "extreme" (*See Bradley* at ¶ 24). They are, simply, that Tolmans single family zoned lot is surrounded on all sides by multi family non conforming uses.

VI. TOLMANS PRESERVED THEIR TAKINGS CLAIMS

The City's argues at pages 14-20 that Tolmans have not preserved their takings claims. The City's principal argument centers on the erroneous assumption that the rezone denial taking and 1989 downzone taking was pursuant to a valid fairly debatable legislative act. All of the cases the City cites and relies on are cases that fix standards for takings and damage thresholds that only apply to regulatory takings made pursuant to constitutional fairly debatable *legislative* acts and regulations. The very different rules and standards for takings and damages pursuant to the non-debatable, unconstitutional, arbitrary, capricious, illegal and discriminatory rezone denial, are threaded through cases, quotes and arguments in Tolmans Brief at pages 11 through 22. Those cases and different takings standards are all based on findings and holdings of illegal, arbitrary and discriminatory reverse spot zoning. They either expressly or inherently hold that takings co-exist and occur with acts of reverse spot zoning. They hold that the requisite damages are obvious in reverse spot zone takings acts. The excerpts from the ALR analysis of 15 cases in Tolmans opposition memorandum (R. 211-216, pg. 13-16), includes numerous express and inherent takings-damages findings to this same effect. These same basic takings standards apply to the unconstitutional 1989 downzoning. Tolmans opposition memorandum at R. 215, page 17 states: "The lions share of the City's Argument is based on the erroneous assumption that there is no evidence that the City's denial of the rezone was arbitrary or capricious, when, in undisputed fact and as a matter of law, it is both." This statement had direct application to the City's memorandum argument for a summary judgment on the takings issues and merit-less statute of limitations affirmative defense. Tolmans have preserved their challenge to the City's vague statute of limitations defense in their Brief and by the following argument in their opposition memorandum at R. 215-16: "There is no substance nor authority cited to support the bare claim that any statute of limitations bars this action. The cause of action is based on the denial of his rezone application by the City Council."

The questions of standards for takings damages and proof should be left to further trial court proceedings.

CONCLUSION

Tolmans alleged that the denial of their upzone application was unconstitutional reverse spot zoning. Logan City's motion for summary judgment did not provide any facts that would defeat Tolmans claims, but rather supplied evidence that supported the existence of illegal spot-zoning, and the unconstitutionality of the downzoning amendment in the neighborhood in 1989 that violated the original 1950 plan-ordinance. The trial court erred in ruling that, as a matter of law, Tolmans could not possibly prove a case to support their complaint. The trial court's dismissal should be reversed, and the case remanded for further proceedings. In the interest of judicial economy, instructions as to Utah law on the topic of reverse spot zoning would be helpful.

RESPECFULLY SUBMITTED January 15, 2007.

CHRIS DAINES LAW

David R. Daines
Attorney for Appellants

CERTIFICATE OF SERVICE

On January 16, 2007, I mailed two copies of the forgoing Reply Brief of Appellants, to each of the following:

Kymber Housley
Logan City Attorney
255 North Main Street
Logan, Utah 84321

Jody K. Burnett
Robert C. Keller
Williams and Hunt
257 East 250 South, Suite 500
Salt Lake City, Utah 84145

Holly Haueter
Legal Assistant