2007

Steven McCowin v. Salt Lake City Corporation, Barry Rasmussen, Mark Hammond : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STEVEN McCOWIN, Plaintiff/Appellant, vs. SALT LAKE CITY CORPORATION, BARRY RASMUSSEN; MARK HAMMOND, Defendants/Appellees.	Case No. 20061114-CA

BRIEF OF APPELLEE SALT LAKE CITY CORPORATION

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE GLENN K. IWASAKI

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STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-2(3)(2)(j).

ADOPTION BY REFERENCE OF BRIEF OF APPELLANTS PROPERTY RESERVE, INC. AND THE SOUVENIR STOP, INC.

The position asserted by Salt Lake City Corporation (the "City") in this appeal is virtually identical to the position asserted by Appellants Barry Rasmussen and Mark Hammond (hereinafter "Rasmussen/Hammond"). For that reason, the City hereby adopts by reference and joins in the Brief filed by Rasmussen/Hammond in its entirety. For the convenience of the parties and the Court, the City will not attempt to reiterate all the issues and arguments already addressed by Rasmussen/Hammond, but the City does wish to highlight several of the key facts and arguments which are central to the City's position in this appeal.

STATEMENT OF ISSUES PRESENTED

The City adopts and joins in the statement of issues set forth in Rasmussen/Hammond's Brief, particularly issues 2 through 5.

DETERMINATIVE STATUTES AND ORDINANCES

The City adopts and joins in Rasmussen/Hammond's citations to determinative statutes and ordinances. However, in addition to the ordinances identified by Rasmussen/Hammond in their Brief, the following city ordinance is also determinative of this appeal:

> Appeal of Historic Landmark Commission decision to Land Use Appeals Board: The applicant, any owner of abutting property or of property located within the same H Historic Preservation Overlay District, ...aggrieved by the Historic Landmark Commission's decision, may object to the decision by filing a

written appeal with the Land Use Appeals Board within thirty (30) days following the decision.

Salt Lake City Code § 21A.34.020.F.2.h

STATEMENT OF THE CASE

The City joins in and incorporates by reference Rasmussen/Hammond's Statement of the Case.

STATEMENT OF FACTS

The City hereby joins and incorporates by reference Rasmussen/Hammond's Statement of Facts as set forth in their Brief. However, the City wishes to draw attention to several critical facts in this case.

1. On September 13, 2005, Rasmussen/Hammond submitted an application to the Historic Landmark Commission for a permit to construct a new garage. [R.247.]

2. Consistent with City ordinances, the City mailed a notice of a public hearing to be held on November 2, 2005 at 4:00 p.m. in Room 126 of the City and County Building relative to Rasmussen/Hammond's application to build a garage. The notice described the application as follows:

> Case No. 027-O5 at 446 South Douglas Street by Barry Rasmussen and Mark Hammond, requesting to construct a new garage with access to the abutting alley. This property is located in the University Historic District.

[R.6, 256-257, 369, 396, 480-81.] The notice also gave the name and phone number of the City staff member to contact for more information. [R.6, 256-57.]

3. Appellant. Steven McCowin, received the notice shortly after September 15, 2005, read the notice, and elected not to attend the public hearing, or to inquire further about the plans for the garage. [R.130, 369, 396-97, 481.]

4. On November 5, 2005, the Historic Landmark Commission issued a Certificate of Appropriateness, and the City issued a building permit, for the construction of the garage. [R.292-93.]

5. On July 27, 2006, over 7 1/2 months after the issuance of the building permit, and after substantial construction had been completed, McCowin filed his administrative appeal of the City's decision. [R.372, 399.]

SUMMARY OF ARGUMENT

The City hereby joins in and incorporates by reference Rasmussen/Hammond's Summary of Argument. However, the City also asserts that this Court should affirm the District Court's dismissal of McCowin's Complaint based upon alternate grounds which were argued before the District Court, but which were not the central focus of the District Court's decision. Those additional arguments are as follows:

1. McCowin has failed to produce any evidence that the notice which he received was misleading in any way.

2. Even assuming for the sake of argument, that there was some defect in the notice, pursuant to Utah Code Annotated § 10-9a-209, since no objection to the notice was filed within 30 days, that notice is now deemed "adequate and proper" by operation of law.

3. McCowin's claims are barred due to his failure to exhaust his administrative remedies by either filing an appeal with City Land Use Appeals Board or the City Board of Adjustment.

4. McCowin's complaint is untimely because pursuant to Utah Code Annotated § 10-9a-801(2), any person adversely affected by an administrative decision must file a petition for review with the District Court within 30 days after the local land use decision is final.

ARGUMENT

The City joins in and incorporates by reference the argument set forth by Rasmussen/Hammond in their Brief. The City also wishes to highlight the following specific arguments:

I. McCowin has failed to demonstrate any deficiency in the notice sent by the City.

McCowin argues that any notice sent by the City must identify the substance of the matter at issue. In the present case, Rasmussen/Hammond filed an application to build a garage, the dimensions of which are allowed under the Salt Lake City Code. The notice sent to McCowin indicated that the property owner was seeking permission to build a garage. The notice did not attempt to set forth all of the particulars of the application, including the square footage of the garage, the number of cars it might hold, whether it would have windows, the height of the building, or the pitch of the roof. Instead, the notice provided the name and phone number of a City Planning staff member who could address any of those types of questions.

It is undisputed that McCowin received the notice, and that he declined to attend the scheduled hearing or even to call and inquire as to the parameters of the proposed building. It is also undisputed that the building constructed by Rasmussen/Hammond is in fact a garage, which

is defined in the City Code as "a building, or portion thereof, used to store or keep a motor vehicle." (See Salt Lake City Code § 21A.62.040.)

Nothing in the City Code, or in any other authority cited by McCowin suggests that every notice must contain every relevant detail of a proposed structure, or a description of every activity which may occur within a proposed structure. Thus, homes may be single or two story, they may have attached or detached garages, they may include hobby shops or home offices, and garages may have storage lofts. The mere fact that every detail of every proposed application is not set forth in every notice does not make the notice defective or misleading. Indeed, given the volume of building applications received and processed by the City, it would be virtually impossible for City staff to attempt to identify every relevant detail of every building application in every notice. Instead, as required by the City Code, City notices identify "the substance of the application" with the name and phone number of an individual who may provide additional details upon request.

Thus, McCowin has failed to demonstrate any deficiency in the notice he received and chose to ignore.

II. McCowin's objection to the form of the notice is untimely and barred by Utah law.

Utah Code Annotated § 10-9a-209 states that "if notice given under the authority of this part is not challenged... within 30 days after the meeting or action for which notice is given, the notice is considered adequate and proper."

It is undisputed that McCowin did not contest the adequacy of the notice within that 30 day period. Instead, McCowin has argued that the time period for contesting the notice should be tolled based upon equitable principles. However, in order to prevail on that argument,

McCowin must first demonstrate that the notice provided was misleading (which he has not) and that he acted with reasonable diligence. In Russell Packard Development Inc. v. Carson, 108 P.3d 741(Utah 2005), the Court stated that before a plaintiff may invoke the equitable discovery rule, there must also be "a demonstration that the parties seeking to exercise the rule has acted in a reasonable and diligent manner." 108 P.2d at 747. More specifically, the Court stated that "whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it." First American Title Insurance Company v. J.B. Ranch, Inc., 966 P.2d 834, 838 (Utah 1998), cited in Russell, supra, at 750.

Based upon the facts of this case, McCowin simply cannot claim that he acted with reasonable diligence when, after having received notice from the City of the proposed construction of a garage, McCowin neglected to either attend the hearing or to inquire further concerning the details of the proposal. Thus, McCowin's Complaint is barred by U.C.A. § 10-9a-209.

III. McCowin's claim is barred due to his failure to exhaust administrative remedies.

It is well established under Utah law that "no person may challenge in District Court, a municipality's land use decision made under this chapter, or under regulation made under the authority of this chapter, until that person has exhausted the person's administrative remedies..." U.C.A. § 10-9a-801(1).

Under the Salt Lake City Code, the appropriate administrative appeal for the decision approving the Certificate of Appropriateness for Rasmussen/Hammond's garage and the issuance

of the building permit for that garage would have been either to the Salt Lake City Land Use Appeals Board or to the Salt Lake City Board of Adjustment. McCowin did not file an appeal with either body. Instead, in July 2006, McCowin filed an appeal of the City's administrative decision directly with Third District Court, in contravention of the Utah Statute.

Utah case law clearly indicates that absent extraordinary circumstances, a Plaintiff must exhaust applicable administrative remedies as a prerequisite to seeking judicial review of an administrative decision. See Johnson v. Utah State Retirement Office, 621 P.2d 1234, 1237 (Utah 1980). This requirement must be strictly enforced. See Patterson v. American Fork City, 2003 Utah 7, ¶ 17, 67 P.3d 466. For that reason, McCowin's Complaint is barred in its entirety.

IV. McCowin's Complaint is not Timely Filed.

Even if McCowin were somehow able to overcome all of the other defects discussed above, his Complaint is still untimely because it was not filed within 30 days following the City's decision. U.C.A. § 10-9a-801(2)(a) states:

> Any person adversely affected by final decision made in the exercise or in violation 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 land use decision is final."

There is no dispute that McCowin's Complaint in this action was not filed until approximately 7 1/2 months after the City's decision approving the construction of the garage. Based upon those clear facts, McCowin's Complaint is untimely and must be dismissed.

There are sound policy reasons for this filing deadline. Allowing a disgruntled neighbor to contest the legitimacy of the City's notice and decision making process for a building, several months after the issuance of a building permit and several months after construction has

proceeded would create substantial prejudice to the property owner, and would seriously impair the City's ability to approve development projects and issue building permits. At some point, a property owner is entitled to rely upon the permit issued by the City, and if the time period for challenge as provided by State law has lapsed, the property owner should feel free to proceed without the risk that that approval will later be second guessed or overturned by the court.

In this case, where McCowin received notice, but deliberately neglected to attend the hearing, or even to inquire regarding the nature of the project, he cannot be heard to complain simply because the building constructed was different than he might have expected. The Utah Statutes providing firm deadlines for raising such complaints are intended to protect the public against precisely this kind of delayed challenge.

Conclusion

For all of the reasons discussed above, this Court should affirm the District Court's Judgment dismissing McCowin's Complaint with prejudice.

DATED this 2ND day of July, 2007.

LYNN H. PACE
Attorney for Defendant
Salt Lake City Corporation

CERTIFICATE OF SERVICE

I hereby certify that on the 2ND day of July, 2007, a true, correct and complete copy of the foregoing was delivered upon the following as indicated below:

Steven E. McCowin
435 South 1200 East
Salt Lake City, UT 84102

X U.S. Mail
____ Hand Delivered
____ Overnight
____ Facsimile
____ No Service

Peggy Tomsik
Kristopher S. Kaufman
Tomsik & Peck
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Salt Lake City, UT 84111

X U.S. Mail
____ Hand Delivered
____ Overnight
____ Facsimile
____ No Service