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Utah Supreme Court

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W. Scott Barrett; Attorney for Appellant;
F. L. Gunnell; Attorney for Respondent;

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KEN [illegible]

vs.

CACHE C[illegible]

MICHAEL P. [illegible]

Plaintiff and
Appellant

vs.

CACHE COUNTY, et al.

Defendant and
Respondent

APPELLANT'S [illegible]

Appeal from a Judgment Dismissing [illegible]
In the District Court of the [illegible]
In and For Cache County, [illegible]
The Honorable VeNoy Christoffersen [illegible]

F. L. Gunnell
160 North Main
Suite 203
Logan, Utah 84321

ATTORNEY FOR RESPONDENT

W. Scott [illegible]
300 S. Main
Logan, Utah [illegible]

ATTORNEY FOR APPELLANT

FIL[illegible]

SEP - 5 1979

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

KEN THURSTON,	:	
Plaintiff and Appellant	:	
vs.	:	
CACHE COUNTY, et al.	:	
Defendant and Respondent	:	
MICHAEL P. NIELSEN	:	Civil No. 16544
Plaintiff and Appellant	:	
vs.	:	
CACHE COUNTY, et al.	:	
Defendant and Respondent	:	

APPELLANTS' BRIEF

Appeal from a Judgment Dismissing Plaintiffs' Complaint
In the District Court of the First District
In and For Cache County, Utah
The Honorable VeNoy Christoffersen, Judge

F. L. Gunnell
160 North Main
Suite 203
Logan, Utah 84321

ATTORNEY FOR RESPONDENT

W. Scott Barrett
300 S. Main
Logan, Utah 84321

ATTORNEY FOR APPELLANT

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Plaintiff and Appellant	:	
	:	
vs.	:	
CACHE COUNTY, et al.	:	
Defendant and Respondent	:	

APPELLANTS' BRIEF

NATURE OF THE CASE

These actions, consolidated by the Court because of the similarity of the facts and law and a common Defendant, were brought by the Plaintiffs/Appellants in February of 1979. Plaintiffs' requests for Conditional Use Permits to build homes on one-acre and five-acre parcels had been denied by

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County. The Complaints asked for Mandamus and Declaratory Relief against the Defendant County, alleging Defendant's applicable ordinances were invalid and the Plaintiffs were denied permits because they were not primary-occupation farmers or related to farmers. The Defendant answered in both actions denying, generally, the allegations of Plaintiffs' Complaints and affirmatively alleging that the acts of the Defendants were discretionary and in compliance with valid County Ordinances.

DISPOSITION IN LOWER COURT

The Trial Court, the Honorable VeNoy Christoffersen, District Judge, presiding, heard the Plaintiffs' cases on the 7th day of March, 1979. Both sides presented evidence by testimony and documentation, and submitted the case to the Court by written argument and memoranda of law.

The Court issued a Memorandum Decision on the 28th day of March 1979 denying any relief to Plaintiffs, primarily on the basis that the Court would not substitute its judgment for that of the County Commissioners and on the further ground that discrimination in favor of farmers was permissible and not unconstitutional.

Thereafter, counsel for Defendant submitted Findings of Fact and Conclusions of Law, and Objections to those Findings

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and Conclusions were timely filed by Plaintiffs. On May 21, 1979, the Court issued a Memorandum Decision denying Plaintiffs' Objections to the Findings on the Grounds that the Findings had never been presented to the Court. On June 26, 1979, the Court reviewed the Findings of Fact and found no reason to make any changes.

RELIEF SOUGHT ON APPEAL

Appellants request that the Court reverse the Decision of the lower court and that the relief prayed for by Appellants be granted or that the matter be remanded for further proceedings, including a decision on Appellants' Request for Declaratory Relief.

STATEMENT OF FACTS

Prior to July 1, 1978, Chapter 13 of the Cache County Zoning Ordinance, relative to agricultural zones, provided that all parcels would be either A-10 or A-20. This meant that in those areas respective parcels could not be subdivided under 10 acres or 20 acres respectively without a rezone or variance (EX. 1) Under the old ordinance, a secondary dwelling on a 10-acre or 20-acre parcel was subject to issuance of a Conditional Use Permit.

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Effective July 1, 1978, the agricultural zone ordinance was changed such that no Conditional Use Permit was required for persons engaged in agricultural pursuits as a primary occupation. Such persons no longer needed a Conditional Use Permit, but they or members of their family or their hired help could get a building permit as a matter of course on any half-acre parcel in the agricultural zone. All others, who were not farm related, were required to get a Conditional Use Permit to put up any dwelling in an agricultural zone.

A point system was inaugurated and a general understanding existed that a person would need 650 points in order to get a Conditional Use Permit. (EX. 3a - 3b) However, in practice, the point system was only a guideline and some persons were given Conditional Use Permits though they were below the 650 points and others were denied permits when they had or should have had more than 650 points.

Under those circumstances, Plaintiffs Thurston and Nielsen applied for Conditional Use Permits in an agricultural zone. The facts, as they relate to Thurston and Nielsen, are hereafter separately stated.

<u>THURSTON:</u>

In November of 1978, Plaintiff Thurston attempted to get a Conditional Use Permit to permit him to build on a

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one-acre parcel in an agricultural zone fronting on a county road in Cache County. (TR 18 - 19) His application was denied and he appealed the decision of the Planning and Zoning Board to the County Commissioners. (TR 20 - 21) The Planning and Zoning Board was upheld by the County Commissioners by an oral statement. Nothing in writing was given to Plaintiff Thurston. (TR 21) At the trial, it appeared that one of the reasons Thurston's application was turned down was that he was a builder rather than building a home for himself. (TR 26 - 27) Ultimately he was never given any reason in writing for the County's decision. (TR 33)

At the trial, Don Williams, a member of the Planning and Zoning Commission of the Defendant County, testified that the Commission turned down the application for a Conditional Use Permit because of objections by adjoining property owners (TR 38 - 39) and because it did not meet the "point system". At the meeting, Mr. Williams stated....."if we allow this request, with it not meeting the point system, then we have no way to stop further growth". (TR 39) (EX. 7)

Mr. Williams also admitted that a Paul J. Wheeler was granted a building permit on a single acre of ground just two blocks away from the Thurston property. The Minutes (EX. 8)

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quote Mr. Williams as follows: "Don stated that he is familiar with this site and the ground is of no farm value." (TR 42) Mr. Williams admitted that the two parcels both had about 500 points on the point system and the only difference is that Mr. Thurston's property had a little grass on it. (TR 43) Mr. Williams also admitted that Mr. Call, the land owner adjacent to Mr. Thurston's property had removed the top soil from the Thurston property to build the home next door. (TR 44) Mr. Williams also admitted that the Wheeler property was actually classified as "prime", the same as Thurston's. (TR 45) The fact that Wheeler was going to live in the house rather than build it for someone else was a factor in making the decision, according to Mr. Williams (TR 45)

NIELSEN:

Plaintiff Nielsen requested permission to divide ten (10) acres he owned into two five-acre parcels for building lots. The property was zoned agricultural. His application was turned down by the Planning Commission and the Commission was subsequently affirmed on appeal by the County Commission. The Planning Commission turned down the application on the primary ground that the request did not meet the point system due to the fact that it did not front on a county road. The land was agriculturally marginal. (TR 49 - 51)

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FACTS APPLYING TO BOTH THURSTON AND NIELSEN:

A summary of the testimony of the witnesses follows, establishing facts undisputed which apply to both Plaintiffs' positions.

Don Williams:

Mr. Williams established that whether or not property was classified prime was of no real importance since, as a matter of their own judgment, whether or not the members of the Planning and Zoning Commission had looked at the property, they could re-classify it any way they wanted. For example, with reference to the Shaw property, classified on the soil maps as "prime", at (TR 58) the following appears: "Bruce stated that there was a question on the soil, whether it was prime or not. The county map shows it as prime......Ray made the motion with Aaron seconding that, in considering the soil type, they designate it as non-prime and that it would meet the point system; we approved the application". The following question was then asked of Mr. Williams: "So, although the property was shown on the application as prime, the motion was made to change it to non-prime so that it would meet the point system at that time; is that correct?" Answer: "It looks like it." (TR 59)

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Donald Drage:

Mr. Drage testified that the Thurston lot was not classified as prime land according to the county soil survey (TR 65) and that he sent a letter to the Planning Commission pointing this out and contending that the 200 point deduction should not have been considered. (TR 67)

Kenneth Sizemore:

Kenneth Sizemore, an employee of the Planning Commission, testified that the Planning Office issues building permits without a Conditional Use Permit when the applicant states that he is an employee or a member of the family of an owner whose primary occupation is farming. No check is made as to whether or not that assertion is true except in checking the name on the deed to the property. The property need not be any particular size and it makes no difference whether the building permit is issued on a small parcel to the son of a farmer even though the father's farm may be miles away. (TR 79 - 80)

Mr. Sizemore further testified that it was possible to get a permit in an agricultural zone without the Conditional Use Permit by simply showing that there was an earnest money agreement in existence for the purchase of the property prior

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to July 6, 1978, when the new point system and zoning law went into effect. In at least three instances, building permits were issued without a Conditional Use Permit when earnest money agreements were produced dated June 30, 1978. (TR 81 - 84) In connection to issuing permits to farm-related persons without a Conditional Use Permit, Sizemore was asked the question: "What do you do to determine whether or not a person is engaged as a primary occupation in dairying or farming in connection with these applications?" Answer: "We ask the person when they come for the permit." Question: "You just take their word for it?" Answer: "Yes, sir." (TR 91) Mr. Sizemore testified also that there is no restriction on a farm-related person who gets a secondary dwelling permit without a Conditional Use Permit against them selling to a third-party stranger at any time. (TR 94)

Gaylene Carson:

Gaylene Carson, an employee of the Planning and Zoning Board, testified that both Thurston and Nielsen were turned down simply because they did not have enough points under the point system. (TR 129 - 130)

Darrell Kunzler:

Mr. Kunzler testified that he sold a four-acre parcel to Michael Call who subsequently sold the one acre to Mr. Thurston (TR 143 -146) He then appeared and objected to Mr. Thurston's

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application for a Conditional Use Permit on the ground that he sold four acres to Call for $2,000.00 an acre and Call had orally promised not to sell any part of the land. (TR 155) Kunzler did not object to the Wheeler application, also adjacent to his property, because Wheeler worked for him. (TR 156)

Joseph Cowley:

Mr. Cowley, a neighbor, testified that he objected to the Thurston application primarily on the ground that he was fearful about how people would feel about such things as the smell of manure and his bulls. (TR 170 - 171)

Mr. Leishman:

Mr. Leishman, a member of the Planning Commission, testified that the Ordinances permitting farmers to get building permits on agricultural land without Conditional Use Permits were passed pursuant to a questionnaire that went out to the entire county. He testified that all of the residents wanted Cache Valley to remain primarily as an agricultural valley (TR 202 - 203) However, it was established that the questionnaire only received 80 responses. (TR 205) (EX. 24)

Commissioner Theurer:

Commissioner Theurer testified that one of the reasons why the Thurston permit was denied and the Wheeler permit granted was that people complained about Thurston's permit and the only other reason for denial were the reasons given

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in Mr. McKell's letter. (TR 214)

Commissioner Chambers:

Commissioner Chambers testified that, "those who are related to agriculture have had theirs (permits) approved and those who have not been related to agriculture, I think, have not had theirs approved, generally speaking." (TR 228)

STATEMENT OF POINTS

I

THE DENIAL OF PLAINTIFFS' APPLICATIONS FOR CONDITIONAL USE PERMITS WAS ARBITRARY, DISCRIMINATORY, UNREASONABLE, AND UNCONSTITUTIONAL.

II

THE APPLICABLE COUNTY ORDINANCES, EVEN IF VALID, ARE ADMINISTERED IN AN UNCONSTITUTIONAL MANNER.

III

THE COUNTY COMMISSIONERS VIOLATED THEIR OWN PROCEDURAL RULES BY NOT SUPPLYING EITHER PLAINTIFF WITH WRITTEN NOTIFICATION OF THEIR DECISION, GIVING REASONS THEREFOR.

IV

PURSUANT TO DEFENDANT'S ORDINANCES, A ONE-HALF ACRE LOT IN AN AGRICULTURAL ZONE IS UNRESTRICTED.

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V

THE APPLICABLE COUNTY ORDINANCES ARE CONTRARY TO THE STATE ENABLING ACT.

VI

BOTH DEFENDANT AND THE TRIAL COURT TACITLY ADMITTED DISCRIMINATION EXISTED AND ATTEMPTED TO JUSTIFY OR RATIONALIZE THE DISCRIMINATION.

VII

THE COURT ERRED IN DISREGARDING PLAINTIFFS' OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW.

VIII

CONCLUSION

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ARGUMENT

I

THE DENIAL OF PLAINTIFFS' APPLICATIONS FOR CONDITIONAL USE PERMITS WAS ARBITRARY, DISCRIMINATORY, UNREASONABLE, AND UNCONSTITUTIONAL.

The Planning and Zoning Board and the Commission both stated as primary reasons for the denial of the Thruston permit the opposition of neighbors in the vicinity. However, the opposition was not supported by any factual data upon which the Planning and Zoning Board and County Commission could validly base a denial of the permit.

"Public notice of a hearing of an application for an exception to the zoning laws is not given for the purpose of polling the neighborhood on the question involved, but to give interested persons an opportunity to present facts from which the Board may determine whether the particular provision of the ordinance as applied to the applicant's property is reasonably necessary for the protection of public health. The Board should base their determination upon facts which they find to have been established, instead of upon the wishes of persons who appear for or against the granting of the application." Sundland vs Zoning Board 50 RI 108, 145a 451 (1929) Anderson American Law of Zoning §19.27.

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A use which is permitted by the zoning ordinance may not be denied on the ground that there is community pressure against allowing additional uses of the kind proposed. Fox vs. Buffalo Zoning Board, 401 NYS 2d 649 (1978)

As to Plaintiff Nielsen's property, it was down-graded on the point system because it did not abut on a county road. It was established, however, that a right of way existed from the county road which would not be a maintenance problem to the County.

The standards by which the Planning Commission, as the delegated authority, is permitted to grant or deny special permits are far too vague. The Planning Commission has almost unlimited discretion to approve or deny special permits whether or not they qualify under the point system which, in itself, is a very sparse standard.

Where a zoning ordinances permits officials to grant or refuse permits without the guidance of any standard but merely according to their own ideas, it does not afford equal protection of the law. Osius vs. St. Clair Shores, 344 MICH. 693, 75 NW 2d 25 (1956)

Standards are generally enumerated in the municipal ordinance in order to control the discretion of zoning boards of appeals and to provide the judiciary with an adequate basis for judicial review of any board decision. In the absence of such standards, the court will invalidate the ordinance. Rohan, Zoning and Land Use controls §44.02(1)

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The Defendant County Commissioners have reserved to themselves as a legislative body the final power to grant or deny special permits in Cache County. Assuming an appropriate enabling statute, the legislative authority may specifically retain authority to issue permits by spelling out such reservations in the zoning ordinances. When permit-issuing authority is retained by the legislative body, the granting or denying of special permits by that body is regarded by the courts as an administrative rather than a legislative function. When the legislative body is acting in an administrative capacity, it must follow the zoning regulations and its actions are reviewable and subject to judicial reversal if they are without support in the record or are otherwise arbitrary or unreasonable. Golden vs. St. Louis Park, 266 MINN. 46, 122 NW 2d 570 (1963) Anderson, American Law of Zoning, §19.10.

The County's explanation of the point system (EX. 18) states: "While it is generally recommended that 650 points are needed for approval, a use which can earn 650 points is not automatically approved, although it may be looked on more favorably than a use which earns less than 650 points." In practical usage, however, the point system means almost nothing other than its use as an excuse for arbitrary action for other reasons. It was clearly established at the trial that a farm oriented application for a Conditional Use Permit with less than 650 points would be approved, while a non-farm oriented application would be disapproved.

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The power to grant or withhold special permits must be limited by standards sufficient to contain the discretion of the board of adjustments or other reviewing board and provide the court with a reasonable basis for judicial review of board decisions. Tandem Holding Corp. vs. Board of Zoning Appeals, 43 NY 2d 801, 373 NE 2d 282 (1977)

The only rational standard the Defendant County imposed was the point system and they compromised even that standard by considering it only a general guideline which they could ignore for reasons of their own. Thurston showed that his land was not prime and that he therefore exceeded the required 650 points. Nothing was introduced by the Defendant to show that Mr. Don Drage's letter was in error. Therefore, Thurston was entitled as a matter of right to his Conditional Use Permit. "Where an applicant for a special permit has met all of the standards imposed by the ordinance for such issuance, it is the duty of the issuing authority to approve the permit." Pleasant Valley Home Construction vs. Van Wagner, 53 AD 2d 863, 385 NYS 2d 253 (1976).

It was established at the trial that persons not related to or working for a primary-occupation farmer or dairyman were discriminated against in that they must get a Conditional Use Permit whereas a farmer need not. It is submitted that these provisions are invalid as being unconstitutional in that they deny equal protection of the law. State law requires that

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zoning regulations shall be uniform. UCA §17-27-11. This has been held to mean that the delegation of power to grant a special permit must apply a single rule equally to all property and all property owners in the district to which it applies. Anderson, American Law of Zoning, § 19.05

In the application of equal protection, it has generally been held that the restrictions or standards must apply to the land itself and not the person nor the business of the person who owns or occupies it. Olevson vs. Zoning Board 71 RI 303, 44A 2d 720 (1945)

Most ordinances today provide adequate and substantial standards to guide the board's discretion in issuing or denying special permits. The uniformity requirement, therefore, appears to be satisfied if the delegation of authority to issue special permits applies equally to all land owners in the same zone. Rohan, Zoning and Land Use Controls §44.01(4)

On its face, then, the Cache County Ordinance is invalid inasmuch as it provides that a primary-occupation farmer or his family and employees may obtain building permits for residences on his agricultural property whereas others may not. Thus, concievably, a farmer could get 15 - 20 building permits for residences on his farm property or for his family on lots even far from his farm property. Others

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who own land in an agricultural zone, regardless of the size, who are engaged in another primary business or occupation, could get no such permit.

The Courts have repeatedly said that the board should be interested only in the land in question and not the person who occupies it. To deny a special use or conditional use permit because of the occupation or the non-rural tendencies of the person who owns the land is a denial of equal protection. Beckish vs. Planning and Zoning, 162 CONN. 11, 291 A 2d 208 (1971) Hickerson vs. Flannery, 42 TENN. APP. 329, 302 SW 2d 508 (1956)

The zoning ordinance clearly permits primary=occupation farmers to build one-family dwellings without number provided they are for family members of employees, on their property on one-half acre parcels. The ordinance also states that others must get a conditional use permit. Thus, if the ordinance is interpreted not to discriminate against persons because of their occupation, then it is ambiguous. "If a zoning ordinance is ambiguous, one section permitting a proposed use and another section prohibiting such use without a special permit, the ordinance will be strictly construed in favor of the landowner. Henderson vs. Zoning Appeals Board, 328 SO. 2d. 175 (1975, LA APP) 331 SO. 2d, 474.

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II

THE APPLICABLE COUNTY ORDINANCES, EVEN IF VALID, ARE ADMINISTERED IN AN UNCONSTITUTIONAL MANNER.

Even if the County Ordinances enacted to become effective in July, 1978, are constitutional, they are, nevertheless, administered in an unconstitutional manner. Defendants and their employees seem to disregard the point system which is really the only objective standard Defendants could follow in granting or denying building permits in agricultural zones. Planning Commission employees are not determining definitely that family members and employees of land owners who may get building permits are related to a primary-occupation farmer or dairyman. No check is made of that assertion even though many of the permits are issued on very small parcels. The conduct of the Defendant in granting or denying permits does not comply with their policy plan. (EX. 2) This plan clearly states, as to agricultural land use, that the purpose of the Commissioners is to promote an agricultural industry that efficiently produces and markets high quality food and fibre; is profitable to farm operators; and contributes a high income flow to the local economy. It has nowhere been shown by the County that denying permits on small non-economic agriculturally zoned parcels could possibly accomplish that objective.

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The Constitution not only forbids discriminatory laws making distinction without a rational basis, but it also forbids the discriminatory enforcement of nondiscriminatory laws. People vs. Utica Drug Co. 225 NYS 2d 128; 4 ALR 3d 393

III

THE COUNTY COMMISSIONERS VIOLATED THEIR OWN PROCEDURAL RULES BY NOT SUPPLYING EITHER PLAINTIFF WITH WRITTEN NOTIFICATION OF THEIR DECISION GIVING REASONS THEREFOR.

§7-2(6) of the County Ordinance (EX. 1) provides that, in connection with appeals to the Commission from decisions of the Planning and Zoning commission, the Board of Commissioners may affirm, modify, or reverse the decision of the Planning Commission. However, the Board of Commissioners shall present, in writing, the reasons for its action. In the case of Plaintiff Thurston, no written decision at all was ever given to him. In the case of Plaintiff Nielsen, a written decision was given to him, but no reasons therefor were given. Further, at the Planning and Zoning meeting, Nielsen was asked why he even bothered to come. An unidentified member of the Commission stated: "All you've got to do is say you're a farmer". (TR 113)

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IV

PURSUANT TO DEFENDANT'S ORDINANCES, A ONE-HALF ACRE LOT IN AN AGRICULTURAL ZONE IS UNRESTRICTED.

Exhibit 19 (Defendant's explanation of the effects of the new agricultural zone) clearly states that "all existing land parcels, except for restricted lots, will still be eligible for one building permit for a single dwelling after the amendment is adopted". §1-6 (79) of the County Ordinance defines a restricted lot as "a parcel of land severed or placed in a separate ownership after August 20, 1970, and which does not meet all area, width, yard, and other requirements of this ordinance for a lot...." It is significant that the definition of a restricted lot was not changed, although the area requirement for lots was changed to one-half (1/2) acre from ten (10) acres or twenty (20) acres. Thus it is submitted that, since a restricted lot has to be one which was severed after August 20, 1970, and which does not meet area requirements, that any lot whether or not severed after August 20, 1970, is not a restricted lot if it is one-half acre or larger. (County Ordinance §13-5)

It follows that since the point system and the conditional use requirement applies only to restricted lots that, as a matter of logic, the County Ordinances cannot apply to lots one-half acre or more in an agricultural zone.

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V

THE APPLICABLE COUNTY ORDINANCES ARE CONTRARY TO THE STATE ENABLING ACT.

Any power the Defendant Commission has to enact zoning ordinances and issue special permits is granted by enabling legislation in the Utah Code §17-27-1 et. seq. A careful analysis of the enabling legislation does not reveal any authority of the County Commission to reserve to itself the power to issue or deny special permits. On the contrary, the County Commissioners are mandated to create a Board of Adjustment. The Board of Adjustment by state law is to handle all "appeals....taken by any person agrieved by his inability to obtain a building permit or by the decision of any administrative officer or agency based upon or made in the course of the administration or enforcement of the provisions of the zoning resolution". UCA §17-27-15; §17-27-16.

"The customary method of providing for the issuance of special permits is for the legislative authority of a municipality to delegate issuing power to a Board of Adjustment subject to standards spelled out in the regulations. Where such a delegation of power is made, the legislative authority is without power to issue special permits. Depue vs. Clinton, 160 NW 2d, 860 (1968).

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"In the absence of some provision in the enabling statutes for the issuance of permits by the legislative body, or some specific retention of this power in the zoning ordinance, a municipal legislative authority is without power to grant special permits. Anderson, American Law of Zoning, §19.10. Section 7-2 of the County Zoning Ordinance specifically bypasses the Board of Adjustment on appeals from the Planning Commission on the issuance or denial of the special permit. The Commissioners have reserved to themselves this power. There is a serious question as to whether it is permitted by the state enabling legislation.

VI

BOTH DEFENDANT AND THE TRIAL COURT TACITLY ADMITTED DISCRIMINATION EXISTED AND ATTEMPTED TO JUSTIFY OR RATIONALIZE THE DISCRIMINATION.

In Finding of Fact Number 9, the Court found that the evidence introduced "shows no discrimination against the Plaintiff on an intentional basis...."

In Defendant's Answer to Plaintiff's Reply Memorandum filed subsequent to the trial, Defendant's counsel stated on page 2 thereof that, even though the Wheeler and the Thurston properties were both classified as prime, the Wheeler land was apparently not of the same quality and, therefore, Wheeler was granted the permit and Thurston was not. No evidence supports such a conclusions.

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In the Court's Memorandum Decision dated the 28th of March, 1979, the Court tacitly admitted that there was discrimination but attempted to justify or rationalize it the discrimination by stating that "both Plaintiffs were provided hearings and the opportunity to appear and present their views...." The granting of procedural due process has no bearing upon whether or not Plaintiffs were discriminated against on the basis of substantive due process. The Court went on to say that "no situations were presented showing that Defendant discriminated against either Plaintiff on an intentional basis". It is submitted that whether or not discrimination is intentional is immaterial.

As to the obvious advantage of farmers under the present County Ordinance, the Court attempted to justify by pointing out that farmers do not pay gas tax for off road gasoline. The primary reason for that being a bad analogy is that farmers do not pay gas tax for off-road gasoline because they don't use the roads and the gas tax is for road building and maintenance. The classification is off-road vehicles, not occupation. The Court concludes in its opinion that preference on the use of agricultural land is given to anyone who desires to use the land for agricultural purposes and for no other reason. It is submitted that this is not the

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case. The evidence clearly establishes that one had to be related to or work for a Primary-occupation farmer or dairyman. One otherwise employed could own a thousand acres of land and, if someone else was operating it for him, the owner's children and employees would not be entitled to permits under the present County Ordinances without conditional use approval.

In a rather curious "confession and avoidance argument", Defendant, in its trial brief, substantially admitted that Defendants have discriminated and have denied equal protection of the law. They attempt to avoid the impact by arguing that discrimination exists in other areas of life. Defendant then argued, in effect, that residents of Cache County could avoid the discrimination by becoming full time farmers themselves. That same specious argument could apply to any discrimination and the constitutional requirements of equal protection would be annulled if one were to assume that any citizen could avoid discrimination by leaving the class being discriminated against.

VII

THE COURT ERRED IN DISREGARDING PLAINTIFFS' OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The Plaintiffs filed, on April 25, 1979, Objections to Findings of Fact and Conclusions of Law. Specifically, Finding Number 4 was objected to on the ground that it assumed

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the validity of the County Ordinances and assumed also that the County Policy Plan established the goals recited in the Findings. The uncontradicted evidence was to the contrary. The Ordinance, on its face, permits discrimination in favor of primary-occupation farmers and farm oriented persons as does the testimony of the County Commissioners.

It was also established without contradiction that one who had insufficient points but who was, nevertheless, "farm-oriented" would be granted a Conditional Use Permit. Plaintiffs also asked that Findings Number 7 and Number 8 be amended on the ground that Plaintiffs' applications were not denied for the reasons stated. No adequate reasons for the denials were given nor was any reason given by the Defendant Commission in writing.

It is further submitted that the other objections mentioned in Plaintiffs' filed objections are valid and that the Findings should have been amended and supplemented accordingly.

VIII

CONCLUSION

It is submitted that the only reason of any substance for the denial of the Thurston permit was objections by neighbors and the fact that Mr. Thurston was not "farm-oriented".

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It is submitted that these reasons are not constitutionally valid. Further, the opposition voiced by Thurston's "neighbors" was not supported by any factual data upon which the Planning and Zoning Board could validly base a denial of a Conditional Use Permit.

One objection to an ordinance which delegates a broad special permit authoirty is that it opens the door to discrimination not based upon valid differences. Smith vs. Board of Appeal, 319 MASS. 341, 65 NE 2d 547 (1946)

The standards under which the County Defendant operates are far too vague and far too flexible to provide substantive or procedural due process. The County has almost unlimited discretion to approve or deny Conditional Use Permits since they can pay heed to or disregard their own standards which consist primarily of the point system. It is therefore respectfully submitted that the Judgment should be reversed and the relief prayed for by Appellants be granted.

DATED this 31st day of August, 1979.

W. Scott Barrett
Barrett & Mathews
Attorney for Plaintiffs/
Appellants

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