1981

Utah County v. Judy Baxter et al : Reply Brief of Appellant

Utah Supreme Court

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Phil L. Hansen; David O. Drake; Attorneys for Appellant;

IN THE SUPREME COURT OF THE

STATE OF UTAH

UTAH COUNTY, a body corporate and politic,	:	
Plaintiff-Respondent,	:	CASE NO.
vs.	:	17039
JUDY BAXTER, SQUAW PEAK, TOM STUBBS, FRANK HORTON and DIANA HORTON,	:	
Defendant-Appellants.	:	

REPLY BRIEF OF APPELLANT, JUDY BAXTER

APPEAL FROM THE JUDGMENT RENDERED IN
THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH
THE HONORABLE J. ROBERT BULLOCK, JUDGE

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REPLY BRIEF OF APPELLANT, JUDY BAXTER

CORRECTED STATEMENT OF THE CASE

Respondents have mischaracterized the nature of the case in their brief. The court granted an injunction in favor of respondent, against Judy Baxter, hereinafter referred to as appellant, wherein appellant was enjoined from further maintaining an eating, beer selling, commercial establishment on the property in question. (T.R. 71,72)

RESTATED DISPOSITION IN LOWER COURT

Respondent did not fully state the disposition in the lower court, since they omitted the fact that the injunction issued by said court, further enjoined appellant from selling

beer out of the single-family dwelling, pursuant to her beer license and enjoined her from using the single-family dwelling for any commercial purpose.

CORRECTED RELIEF SOUGHT ON APPEAL

Respondent has further mischaracterized the relief appellant is seeking from the above-entitled court. Respondent would have this court believe that the relief she is seeking would allow her to only use the property in question for a commercial establishment. That is only half true, since appellant is seeking relief for every license and purpose the injunction has prohibited her from using, which relief would also include the use of a beer license on said property, since prior to this particular action, she did enjoy the benefit of a beer license in addition to a commercial license on the above-referred to property.

CORRECTED STATEMENT OF FACTS

As was stated in appellant's brief, the property in question was never in a commercial zone, yet since 1935 a commercial enterprise has been located on the property. Subsequent to the recently enacted zoning laws, the County Commission allowed appellant's predecessor, as well as appellant, to continue the nonconforming use in said zone, which use included the commercial business, prior to its destruction by fire, as well as the single-family residence, located on said property, which was built solely as a caretaker home for the commercial establishment. Appellant takes issue with the characterization

by respondent that that particular watershed area, at the side of that particular property now is environmentally fragile, with its preservation to be of critical importance to respondent. The fact that a commercial establishment, with its attendant license to sell beer on that property, which has existed since 1935, is really an anomily to the characterization of an environmentally fragile and critical preservation objective of respondent.

Further, the original commercial establishment was destroyed by fire in 1978, not 1977, as is explained in appellant's brief.

Respondent's statement of the facts would imply that apellant completely misrepresented the use to which she was applying, regarding the single-family residence. If, the evidence shows that at the time the building permit was filled out by appellant, both Mrs. Snell and Mr. Parker, employees and agents of respondent, knew that the use would be commercial, which would include the use of a beer license, rather than a single-family residence. (T.R. 45,51,55,57)

Further, respondent implies that appellant submitted a site plan prepared solely on her own initiative. It, Mr. Parker, an employee of respondent, told defendant to draft a site plan.

Even though defendant identified the rooms within the single-family dwelling as those which could be identified to a single-family residence, defendant did tell Mr. Parker that

walls were being knocked out with large closet areas which would be used as coolers, in order that appellant would be able to sell beer out of the property in question. (T.R. 45)

Respondents make an issue of the fact that after completion of improvements to the home appellant made application for a business license for said structure. In reality, appellant applied for a building permit to remodel the caretaker home on November 15, 1978 and Mr. Parker filled out the building permit while appellant apprised him of the fact that she was intending to sell beer from the caretaker home, once it was remodeled into a lounge. The fact to bear in mind is that Mrs. Snell, told appellant that in order to keep the nonconforming use viable, a structural remodel or replacement had to be made within 12 months of the fire, which 12-month period would expire on or about January 17, 1979. Therefore, appellant still had a commercial and beer license on the premises in question.

Respondent states that appellant knew that her commercial use of the home was, at best, temporary. Such is not the case, since respondent interrupted her before she was able to complete her answer. (T.R. 50)

ARGUMENT

I

APPELLANT DOES HAVE STANDING IN EQUITY TO PRAY FOR ESTOPPEL

Respondent cites several cases to the effect that "He who comes into equity must come with clean hands." Further,

"He who has done inequity shall not have equity. The doctrine of unclean hands cuts both ways, especially in this case against respondents. Respondents came to the trial court seeking equity, yet they are the ones who induced appellant to rely to her detriment, which caused her to suffer great financial injury; and respondents were also guilty of laches; therefore, they are the ones who came with the unclean hands; thus allowing respondent to enjoy the fruits of their transgressions.

Respondent argues that appellant would have this court estop the county from exercising its police powers. Yet, since the state or an entity therein is really a creation of the people whom the entity governs, the entity has no right to trammel its citizens rights, in the name of the entity's police powers. Such would be a denial of due process, as is set forth in the Constitution of the United States, wherein the due process clause specifically states "that no state shall". In fact, the state should be more scrupulous in its dealings with its citizens than one citizen should with another.

Respondent would have this Honorable Court believe that appellant falsified her application to respondent, in order to obtain a building permit. However, the evidence deduced at the trial simply showed that that was not the case. Apellant went to Ron Parker, an employee of the county, employed in the building inspection and zoning office (T.R. 33,34) on

November 15, 1978 and applied for a building permit to remodel the caretaker home. Mr. Parker filled out the building permit and appellant apprised him of the fact that she was going to sell beer from the caretaker home, remodeled into a lounge. (T.R. 45) By Iva Snell's own admission, she and Mr. Parker both knew at the time of the application, or shortly thereafter that the purpose for the remodeling was a commercial establishment in which beer would be sold. (T.R. 45,51,55 and 57) Further, Ms. Snell said that she may have told appellant that she could have a commercial business in that remodeled home. (T.R. 55) In addition, Mr. Parker told appellant to submit to him a site plan, wherein she expressed to him that the large closets would be in reality cooler. In light of the above, it is ludicrous to assume that appellant misled the county in any way, since Ms. Snell and Mr. Parker were fully cognizant of the purpose for which the remodeling was done, and that Ms. Snell may have told appellant that she could have a commercial business in that remodeled home.

On page 8 of respondents' brief, they make the statement that "certainly the weight of evidence supported the court's finding: 'That the defendant, Judy Baxter, had no agreement with plaintiff allowing commercial use of the single-family dwelling.'" Respondent does not cite any page in the trial record as to that finding. In fact, appellant is at a loss as to that specific finding, since they have read and re-

read the trial record, hoping to find said finding. If there is no such finding, could it be that respondent is intentionally trying to mislead this court?

Even though appellant's building permit application had all of the markings of a single-family residence, Mr. Parker assisted her in filling out the building permit application and as was before stated he and Ms. Snell were fully cognizant of the commercial purpose for which appellant was remodeling the home. In fact, the fact that respondents, through Ms. Snell and Mr. Parker knew the actual purpose, and that knowing said purpose they allowed her to proceed in the manner in which she did, then most certainly the estoppel argument can best be applied against respondents, since they caused appellant to rely to her detriment, knowing full well that because of their representations or failure to act induced her to so detrimentally rely.

II

RESPONDENT CAN BE ESTOPPED FROM SEEKING A PERMANENT INJUNCTION, EVEN THOUGH SAID INJUNCTION IS BASED ON A VALID EXERCISE OF ITS POLICE POWER

Respondents contend that appellant's contention and reasoning is faulty where a party seeking an injunction must show a clear legal or equitable right and a well-grounded fear of immediate invasion of that right. In support of their contention that appellant's reasoning is faulty, they state that the doctrine of estoppel is not generally applicable

against a government body. Further, they state "only under exceptional circumstances have a few jurisdictions allowed estoppel to be applied." For this sweeping declaration, respondents cite one case, which at best is a Mississippi case, bearing the date of 1977. If the doctrine of estoppel is not generally applicable against a governmental body except only under "exceptional circumstances" and why did not respondent quote a Utah case for that same principle, since respondents would have this court believe that that is the majority rule. Then in support of such an erroneous conclusion, respondent cites the case of Salt Lake County v. Kartchner, 552 P.2d 136,138. The quote by respondent from the Kartchner, supra, is really dicta, and is not part of the ruling. Quoting from another portion of that same case, the court stated:

> "When a municipal corporation seeks vindication of public rights by injunction, in a court of equity, it is on the same footing as any private person or corporation . . . the court will consider the equities between the parties and under some circumstances deny equitable relief, because a grave injury will be suffered by defendant because of a mandatory injunction, with little or no benefit to complainant."

At page 140 of 552 P.2d, the court stated further: "A mandatory injunction will never be granted where it might operate inequitably or oppressively.

It would appear that the case cited by respondents of State v. St. Charles City Board of Adjustment, 553 S.W.2d 729, is not the law in the State of Utah, since the Kartchner,

supra case does not rule that the doctrine of estoppel is to be applied "only in exceptional circumstances and with great caution."

On page 11 of respondents' brief, they state "it is unreasonable to think that a municipality must weigh and consider the 'conveniences' before exercising legitimate police powers in enforcing its zoning laws. That theory is not a 'well established and fundamental rule of law' in the field of zoning enforcement." However, the court in Kartchner, supra, does that vary weighing of the conveniences even when it is dealing with a municipality or a governmental entity? The above cite states that the court will consider the equities between the parties and in effect will balance the fact of a great injury to be suffered by defendant and the benefit to the complainant. Further, when the above court stated that "a mandatory injunction will never be granted where it might operate inequitably or oppressively" in order for the court to reach that conclusion it has to balance and consider the conveniences as well as the detriments involved.

The case of Celebrity Club, Inc. v. Utah Liquor Control Commission, 602 P.2d 689,690,694,695 (Utah 1979), involved a governmental entity and the invocation of the doctrine of equitable estoppel. That particular case is cited in appellant's original brief. In the interest of brevity, only one portion of that case will be cited herein:

> "The conduct of government should always be scrupulously just in dealing with its citizens; and where a public official, acting within his authority and with knowledge of the pertinent facts, has made a commitment and the party to whom it was made has acted to his detriment in reliance on that commitment, the official should not be permitted to revoke that commitment."

Certainly, that is the law of the State of Utah, rather than the Mississippi case, to whom respondent has referred. Further, as was before stated, appellant can invoke the doctrine of estoppel, especially since by the respondent's agents own admissions, appellant did not act fraudulently or in bad faith.

By Ms. Snell's own admissions, she did not act in a manner which exceeded her powers, while dealing with appellant. In fact, there was never any evidence deduced at the trial to show that Ms. Snell was not authorized to grant to appellant the right to have a commercial business license and a beer license in the remodeled single-family dwelling.

Appellant wishes to call the court's attention to page 25 of the trial record, wherein Ms. Snell was directly examined by the attorney for respondents, Mr. Davis. In response to Mr. Davis' question, Ms. Snell said that she is the head of the department for building inspection and zoning enforcement and building regulation for Utah County. When asked what her main duties were in connection with that employment, she stated "to oversee the issuance of building

permits, make sure that the buildings are inspected by the inspectors during construction, the issuance of business licenses, and the doing that we also check them out to make sure everything is okay before they are issued; make sure that permits that are issued comply with the zoning ordinance." Then, Ms. Snell went on to state that she had personal knowledge regarding the building permits issued to the property in question, and that a permit was also given to appellant to remodel the existing family home on the property. Since these facts are undisputed, and by the very nature of Ms. Snell's own admissions that she is the head of that department and is to oversee the issuance of licenses and building permits, then her acts regarding appellant would show that she did not exceed her powers in the issuance of such a building permit or engaging in acts which caused appellant to rely to her detriment thereon. Therefore, the rule in the Celebrity case, would be applicable to the facts set forth in this particular case.

Further, nowhere in the Celebrity case, is there any statement that estoppel is inapplicable, except under exceptional circumstances. Since that case is a 1979 case, it is reasonable to assume that Celebrity, supra, is the latest pronouncement by this court regarding the doctrine of estoppel when dealing with a governmental entity. It is obvious that by making the statement that respondent has on page 11 of his brief, that respondent is not at all familiar with Utah law

regarding the doctrine of estoppel.

The following are cases which hold that when dealing with a governmental entity, such as a municipal corporation, the doctrine of estoppel is applicable and does not have to be applied only in exceptional circumstances.

In City of Long Beach v. Mansell, 91 Cal.Rptr. 23, 476 P.2d 423, 448 (1970), the court stated: "The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any affect upon public interest or policy which would result from the raising of an estoppel."

In State v. Zimring, 566 P.2d 725,737 (Haw. 1977), the court stated "this court has stated that the doctrine of equitable estoppel is fully applicable against the government if it is necessary to invoke it to prevent manifest injustice."

In Glover v. Adult and Family Services Division of the Department of Human Resources, 46 Or.App. 829, 613 P.2d 495,499 (1980), the court stated that "the theory of equitable estoppel is applicable against government agencies in this state." In accord with the above-cited rules, are the following cases: Gray v. Regional Transportation Department, 602 P.2d 879,880 (Colo. 1979); Jones v. Kristensen, 563 P.2d 959 (Colo.App. 1977); Driscoll v. City of Los Angeles, 61 Cal.Rptr. 661,

431 P.2d 245 (1967); Finch v. Matthews, 443 P.2d 833 (Wash. 1968); and Fitzgerald v. Neves, Inc., 15 Wash.App. 421, 550 P.2d 52 (1976).

In addition to the Fourteenth Amendment of the United States Constitution, governmental entities should be treated minimally in the same way as any individual is treated. In support of that proposition is the Utah Constitutional provision that all laws are to be uniformly applied.

III

THE FINDINGS OF THE TRIAL JUDGE OUGHT TO BE DISTURBED IF THE EVIDENCE CLEARLY PREPONDERATES CONTRARY TO HIS DECISION, OR HE HAS ABUSED HIS DISCRETION, OR HAS MISAPPLIED PRINCIPLES OF LAW

In respondents' amended complaint, they stated that "defendant's continued failure and refusal to cease and desist from such violation will result in irreparable harm to Utah County." Yet, because respondent was unable to bring that evidence in over appellant's objections, they are taking the ludicrous position that appellant should now be denied from claiming that respondent failed to establish immediate and irreparable harm to themselves. Since respondent has pled irreparable harm, they have the burden to prove irreparable harm during the trial and if they fail to do so, they have not proven all of the elements necessary to obtain a permanent injunction against appellant. Further, there is no evidence whatsoever that the health officer would have been able to testify to any irreparable harm.

In furtherance of respondents' ludicrous position, they are asking this court to reasonably infer that health and safety deficiencies will affect Utah County residents. How can they do this when there was no evidence deduced which would show that any Utah County residents were affected in any manner by any health and safety deficiencies, especially where appellant was given the opportunity to correct said deficiencies if there were any. If appellant is given the opportunity to correct said deficiencies how can respondent suffer irreparable injury and harm.

Appellant can object to any testimony for any grounds which she feels are necessary and if upheld, respondent cannot now claim that appellant is at fault for respondent's failure to meet its own burden of proof.

It is obvious from appellant's initial brief that the court has clearly misapplied principles of law when it granted an injunction even where respondent failed to show any detriment to the county during their case in chief. Directing the court's attention to pages 53 and 54 of the trial record, when such fact was brought to the attention of the trial court, the judge queried, "Do they have to?", to which counsel for appellant replied, "Well they have pled it." The court then replied "As a matter of fact I've precluded it." In none of the cases cited by appellant, including the Utah cases cited in appellant's brief, is there any principle of law to the effect that an injunction can be granted in absence of a showing of irreparable injury and harm. Such is not the law and

the trial judge has misapplied the principles of law; therefore, he has committed reversible error. (Please refer to the cases cited in appellant's brief regarding that particular issue.)

IV

THE DOCTRINE OF LACHES IS NOT BARRED

Respondent, by making the statement that "Utah County was working with Ms. Baxter's counsel from May, 1979, attempting to resolve the matter," thus making an excuse for their delay in this matter, they are bringing up evidence which is not contained within the trial record and was not made an issue in the trial. In fact, their argument has no merit, since it is not part of the evidence contained within the trial record.

Further, since appellant argued facts which would show that the defense of laches was asserted, respondents cannot now bring to the court's attention the failure of appellant, if any, to assert the defense of laches, when respondents did not object to such testimony at the trial level. Furthermore, in Rule 8(e) of the Utah Rules of Civil Procedure, it states "each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required." Further, in Rule 8(f) it states "all pleadings shall be so construed as to do substantial justice." In other words, pleadings are to be liberal and broad and even though not specifically stated, the factual allegations may give rise to the defense of laches. Certainly, nowhere in the

trial record did respondent object to any testimony which related to the defense of laches and cannot do so now.

Further, since respondent is now stating that appellant was in clear violation of the zoning ordinances at the time she made application for the building permit and the other licenses involved herein, why did respondent have to wait so long to make that determination, if the violation was so clear. Further, since respondent has stated that appellant misrepresented certain facts, of which respondent was aware, why didn't they immediately act to correct the violations, rather than induce appellant either by their action or inaction to rely thereon and thus suffer injury to herself.

Respondent cites the case of Lockard v. Los Angeles, for the proposition that appellant has no vested right to violate a zoning ordinance through any continuing violation. That case can be distinguished on the fact that a nonconforming use was not at issue there but an outright violation of a zoning ordinance. In the instant case, there was a nonconforming use which does this in the user.

Respondent also cites the case of Rockford v. Sallee, for the proposition that mere nonaction by a municipality does not constitute acquiescence. The facts in this instant case show that there is more than mere nonaction by respondent which does in fact invoke the doctrine of equitable estoppel, according to the Celebrity case, supra.

The doctrine of laches would apply just as much as the doctrine of equitable estoppel applies in this particular juris-

diction.

V

RESPONDENT'S FAILURE TO ADDRESS CERTAIN ISSUES RAISED BY APPELLANT

It is curious to note why respondent in their brief did not address point two, raised by appellant, to the effect that "the trial court erred in finding that the transfer of the business to the home enlarged the nonconforming use"; nor did respondent address itself to point three raised by appellant in its initial brief to the effect that "the court erred in not requiring plaintiff to specifically prove irreparable injury and harm and also erred by granting an injunction without requiring plaintiff to prove the same." It is now contended by appellant that point two and point three, raised by appellant, are not controverted and therefore should be admitted by respondent. As a result, the decision reached below should be reversed and appellant should be granted her commercial license as well as her license to sell beer in the remodeled structure, located on the property in question.

CONCLUSION

The appellant has not gone far afield in her arguments. In fact, appellant has zeroed in on the issues to be adjudicated. It is respondent who has gone far afield in his arguments and has not specifically addressed the issues which have been raised as a result of this appeal. Respondent erroneously states "it was not meant to be a review of denial of Ms. Baxter's beer license. Nothing in the pleadings refers to a beer license."

That statement is a total and complete misrepresentation of the issues raised by respondent's amended pleadings, which seeks to obtain a total injunction against appellant, prohibiting her from operating a commercial establishment, which sells beer therein. In fact, the court on page 71 of the trial record stated "I don't think that the nonconforming commercial use in the eating, beer-selling commercial establishment, which still exists, can be expanded to the single-family dwelling. The temporary use of the home for the selling of beer during a period of reconstruction of the other facility, the eating facility and what was prior to the fire also engaged in the selling of beer, does not lawfully enlarge the use of that single-family dwelling. I further believe, Mr. Biljanic, that the evidence does not support an estoppel by the county on the part of the county or that any of the evidence really constitutes a valid agreement to issue a license for the selling of beer in the single-family dwelling, or a license for the use of the single-family dwelling for any commercial purpose." That statement by the court completely shows that the two issues adjudicated in the hearing below were the issues of the license for the selling of beer and the license for the use of the single-family dwelling for any commercial purpose. For respondent to now state that the granting or denial of a beer license is within the exclusive domain of the Board of County Commissioners and that said board has never been joined as a party to this action, is totally ludicrous and inane. Since the court's ruling went

to the beer license and the commercial license and respondent's pleadings also address themselves to those two licenses, then those two licenses are directly affected by the injunction granted in the court below. The relief for which appellant is requesting, is that the injunction be declared null and void and contrary to law, which would necessarily put her into the position of having a beer license as well as a commercial license on the property in question. The court below took away appellant's beer license and commercial license; therefore, if this court reverses that particular decision, then necessarily appellant would again regain her beer license and her commercial license.

At this point, it is a statement couched in pomposity that respondents can state that defendant's counsel has confused the facts considerably. Furthermore, respondent brings up issues which were not even part of the trial record, nor were entered into evidence, in order to cajole this court into ruling in their favor. Such arguments have no place at the appellant level. Furthermore, it is obvious that respondent's so-called advantage of having participated at the trial, has not helped them in meeting their own burdens of proof nor in stating the facts and evidence accurately to this Honorable Court. The next two paragraphs of respondent's conclusion are totally unsupported by law and the facts in this case and have been dealt with in the original brief of appellant.

Finally, respondent enumerates certain alleged facts

which appellant allegedly testifed to or admitted at trial, to which appellant will show the court are totally erroneous, to wit: There is no testimony to the effect that appellant endorsed the building permit claiming the intended use to be residential; in fact, respondent's own witnesses stated that they were totally cognizant of the fact that appellant desired to have a commercial use in the said home as well as a beer license; in fact, Ms. Snell stated that she may have told appellant that she could have a commercial use in that single-family dwelling.

Referring to paragraph 2 in the conclusion of respondent's brief: Appellant did file a site plan with the rooms identified as residential rooms, however said site plan was filed on Mr. Parker's request, and contemporaneous to that filing of said plan, appellant informed Mr. Parker of her true intentions of using the building as a commercial beer-selling establishment.

Referring to paragraph 3 in the conclusion of respondent's brief: The fact that appellant spent between $12,000 and $15,000 goes more in appellant's favor, since her reliance damages are much greater with those two figures.

Referring to paragraph 4 in the conclusion of respondent's brief: Appellant did in fact use the home for a commercial business; but such intent was clearly conveyed to respondent.

Referring to paragraph 5 in the conclusion of respondent's brief: Appellant never did testify that she did not have a business license to conduct a business in that home; rather, she testified that there was no need for her to have a business

license in said home, since she already did have a business license, in the form of a nonconforming use on the property in question.

Referring to paragraph 6 in the conclusion of respondent's brief: Appellant never did state that she intended the commercial use of her home to be temporary, since she was interrupted by respondent's attorney's questioning.

Referring to paragraph 7 in the conclusion of respondent's brief: Appellant did intend to transfer business to the new structure, or in any unforeseen events.

Referring to paragraph 8 in the conclusion of respondent's brief: Appellant did experience problems with her partners and was unable to transfer, but those two issues are in opposite to the instant case.

Referring to paragraph 9 in the conclusion of respondent's brief: The statement by respondent that the problems "were not caused by any misleading on the part of Utah County or its officers is not correct and has been taken out of context. That particular statement just refers to the issue of having two commercial uses on the property and does not refer to the fact that the county, through its officers and agents, did mislead and misrepresent certain facts to appellant, upon which appellant relied to her detriment. There is plenty of evidence and testimony given by appellant, showing that the county and its employees definitely did mislead her. Furthermore, respondent on page 10 of the respondent's brief, is attempting to mislead the court here by stating that the court, "supported by the

evidence at trial, found no misleading by respondent." There was never any finding made to that effect by the trial court. Respondent should not attempt to mislead this court by quoting passages out of context, especially in view of overwhelming evidence to the contrary. Furthermore, at the end of respondent's conclusion, respondent again brings up issues which were not litigated, which are totally and completely unsupported by the trial record, in fact, are not even mentioned in the trial record.

Therefore, appellant again prays that the decision rendered below be reversed by this court, so that the injunction granted be of no force or effect, thus allowing appellant to again sell beer and operate a commercial establishment in the single-family dwelling, now remodeled into a lounge.

Respectfully submitted this 8 day of May, 1981.

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Judy Baxter

By David O. Drake

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing reply brief of appellant upon the Utah County Attorney's Office, at the courthouse, Provo, Utah, 84601, this 8 day of May, 1981.

David O. Drake