

2007

# Jeffrey R. Gittins v. Smithfiled City : Brief of Appellee

Utah Court of Appeals

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James C. Jenkins; Bruce L. Jorgensen; Olsen & Hoggan.

Chris Daines; Chris Daines Law.

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## Recommended Citation

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**ADDENDUM TO  
BRIEF OF THE APPELLEE**

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Tab A

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IN THE UTAH COURT OF APPEALS

JEFFRY R. GITTINS,  
 Plaintiff/Appellant,

vs.

SMITHFIELD CITY,  
 Defendant/Appellee.

)  
 )  
 ) **APPELLEE'S MOTION FOR**  
 ) **SUMMARY DISPOSITION AND**  
 ) **MOTION FOR ATTORNEY'S**  
 ) **FEES**

) Case No. 20070289 -CA  
 )  
 )  
 )

COMES NOW Defendant/Appellee, Smithfield City, by and through counsel, James C. Jenkins of Olson & Hoggan, P.C., and pursuant to Rule 10(a)(1) of the Utah Rules of Appellate Procedure submits the following Motion for Summary Disposition.

Rule 3(a) of the Utah Rules of Appellate Procedure provides that an appeal may be taken from a district court to the appellate court with jurisdiction over the appeal from all final orders and judgments by filing a notice of appeal with the clerk of the trial court. (Emphasis added.)

On March 27, 2007, the trial court entered a Declaratory Judgment on this matter. This judgment was not a final adjudication of the action. The issue of attorney fees was still pending. On March 28, 2007, Plaintiff filed a Notice of Appeal with the trial court appealing the

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Declaratory Judgment entered on March 27, 2007. On April 4, 2007, the trial court filed an Order for Payment of Attorney's Fees and Costs to Defendant (Appellee). Utah case law provides that matters involving attorney fees are not appealable until the amount of attorney fees to be awarded has judicially been determined and ordered.

WHEREFORE because the trial court's judgment was not final and, thus, not appealable until attorney fees were ordered on April 4, 2007, the Notice of Appeal filed by Plaintiff/Appellant on March 28, 2007 was untimely and should be dismissed for lack of jurisdiction. Appellee also seeks an award for its attorneys fees incurred in this appeal.

This motion is supported by an accompanying memorandum and the certified record.

DATED this 31 day of July, 2007.

OLSON & HOGGAN, P.C.

By   
James C. Jenkins  
Attorney for Defendant/Appellee

**MAILING CERTIFICATE**

I hereby certify that on the 31 day of July, 2007, I mailed a true and correct copy of the foregoing **MOTION FOR SUMMARY DISPOSITION AND ATTORNEY FEES**, postage prepaid in Logan, Utah, to the following:

Chris Daines  
Attorney for Appellant  
135 North Main, Suite 108  
Logan, UT 84321



Tab B

**MINUTES**  
**SMITHFIELD CITY COUNCIL MEETING**  
**January 25, 2005**

The Smithfield City Council met in a regular scheduled meeting at 375 Canyon Road, Smithfield, Utah on Wednesday, **January 25, 2005**. The following were present constituting a quorum.

Mayor	Chad E. Downs
Council Members	Brent Buttars Deon G. Hunsaker Kris Monson Dennis Watkins Dee Wood
City Manager	James P. Gass
City Recorder	O. Dean Clegg
Chief of Police	Johnny W. Mc Coy

Mayor Downs called the meeting to order at 6:30 pm.

Dee Wood offered a prayer and led the Pledge of Allegiance.

**Visitors:** Jesica Elwood, Glade Smith, Adam Zitterkopf, Justin Bennett, Scott Wilkinson, Bev Wilkinson, David Marshall, Deon Dixon, Jalee Greer, Jim Marshall, Roger C. Cantwell, Burke Smith, Adrian Lundgren, Kent Lundgren, Carlene Umpleby, Michael Harris, Jeff Barnes, LaMont Poulsen, Connie Poulsen, Emilie Wheeler, Joseph Gittins, Jacob Gittins, Lyle Coleman, Di Lewis, Mike Monson, Rolf Neugebauer, Jon Wells, Mark Robinson, Kristy Poulsen, Scott Poulsen, Lana Robinson, Jay Green, Taci Godfrey, Mick Perry, Kirsten Jerome, Duane Smith, Kim Datwyler, Theo Hepworth, Annette Hepworth, Char Izatt, Jason Poulsen, Nathan Dent, Amber Dent, Denise Reeder, Ryan Osborn, Ryan Coats, Kevin Allen, Marie Grover, Lori Robinson, Allison Covington, Derek Poulsen, Mary Kay Hunsaker, Ellis Christensen, Jay Downs, John Fitzgerald, Michelle Downs, Dixie Neugebauer,

**Agenda:**

Welcome and Opening Ceremonies

1. Citizen Input
2. Consideration of Consent Agenda  
Minutes of January 11, 2006 City Council Meeting



**Continuation of Minutes of City Council Meeting held January 25, 2006**

- 3 Consideration of request from Justin Bennett for approval of a two (2) lot minor subdivision located at approximately 700 West 200 South. Zoned RA-2
- 4 James Marshall, Chairman of Planning and Zoning will report on the P&Z Meeting held January 18, 2005
- 5 Public Hearing to begin at 7:00 p.m. to receive public comment for consideration of **Ordinance 06-01**, "A request from Neighborhood Nonprofit Housing Corporation to re-zone property located from approximately 600 West 200 North from A-10 (Agricultural 10- acre), A-5 (Agricultural 5-Acre), RA-1 (Residential Agricultural, 1-acre) to R-1-12 (Single Family Residential, 12,000 square foot)"
- 6 Presentation by Fire Chief Jay Downs on the Mortimer Pallet Fire
- 7 Public Hearing to begin at ~~7:15~~ **8:30 pm** to receive Public Input for consideration of **Ordinance 06-03** "Annexation of Stafford Property"
- 8 Council to have Discussion on Impact Fees
- 9 Consideration of CV Ranch Contract for water rights transfers
- 10 City Manager Items
- 11 Mayor and Council Reports
- 12 Adjournment

**Citizen Input**

Jesica Elwood, Youth Council Mayor, gave a report of the activities that the Youth Council have been involved in during the past two months. Thirty bags of food items were gathered and delivered to the Food Bank, cheese boxes were taken out to senior residents, visits were made to Green Briar residents, reading at Sunrise Elementary School on Fridays, a night at the yurt on Beaver Mountain, and planning for the Youth conference at Utah State University.

Council Member Monson asked that the Youth Council be able to "job shadow" various city employees on February 9<sup>th</sup> from 3:00 pm to 5:00 pm.

**Consideration of Consent Agenda**

**Minutes of January 11, 2006 City Council Meeting**

Mayor Downs declared the Consent Agenda approved.

**Consideration of request from Justin Bennett for approval of a two (2) lot minor subdivision located at approximately 700 West 200 South. Zoned RA-2**

Justin Bennett met with the Council. City Manager Gass gave an explanation of Mr. Bennetts's request to sub-divide four (4) acres on 200 South at 700 West. The Planning Commission gave a favorable recommendation for approval with consideration being given that the boundary lines for roads be defined, the curb, gutter, and sidewalk be waived, and the under ground utilities be waived.

**Continuation of Minutes of City Council Meeting held January 25, 2006**

Council Member Monson asked if Mr. Bennett had any problems selling the second lot. Mr Bennett said no.

**Motion:** Council Member Monson moved to approve the request from Justin Bennett for a two (2) lot minor subdivision located at approximately 700 West 200 South Zoned RA-2 with the requirement for curb, gutter, sidewalk and underground utilities being waved, seconded by Council Member Hunsaker. Unanimously approved.

City Manager Gass reminded Mr. Bennett of the requirement to provide 2 acre feet of water to the City before any building permits will be issued.

**James Marshall, Chairman of Planning and Zoning will report on the P&Z Meeting held January 8, 2005**

James Marshall discussed some concerns related to growth with the Council:

- 1) The General Plan. Changing some of the land use designations back to agricultural to roll back the rate of growth. Referred to the citizen survey taken in preparation of the General Plan that asked for preservation of agricultural land and foot hills and maintain a rural atmosphere.
- 2) Culinary Water Supply: It may not be an immediate concern but does the City have the water to allow for the anticipated growth. What will the future cost of water be. Would recommend a study that defines now and the future. Publish the results so that citizens can answer questions about the water supply.
- 3) Secondary Water Supply: Make secondary water available on the east bench. Establish an impact fee for secondary water. Developers need to bring water or pay for the right to use what's available.
- 4) Impact Fees: New housing does not pay for itself. Need to control growth by being reasonable with the rate of growth.
- 5) Limit Annual Growth: Need to limit growth to an annual rate of 3%. Schools cannot accommodate a higher rate. There is a need to provide special services. Need necessary funding.

Mr Marshall is not opposed to growth but wishes that it be dealt with it in an orderly manner.

**Public Hearing to begin at 7:00 p.m. to receive public comment for consideration of Ordinance 06-01, "A request from Neighborhood Nonprofit Housing Corporation to re-zone property located from approximately 600 West 200 North from A-10 (Agricultural 10-acre), A-5 (Agricultural 5-Acre), RA-1 (Residential Agricultural, 1-acre) to R-1-12 (Single**

**Continuation of Minutes of City Council Meeting held January 25, 2006**

**Family Residential, 12,000 square foot)**

Mayor Downs explained the public hearing process. Forms are provided for those who wish to address the Council. Please fill out the form and give to the City Recorder. Mayor Downs asked that those who address the Council speak clearly and come forward to the podium.

Mayor Downs declared the Public Hearing open at 7:03 pm.

City Manager Gass presented an overhead with the proposed re-zone request highlighted.

This Planning Commission voted not to approve this re-zone request by a vote of 4 to 2.

Mayor Downs requested public input.

Jalee Greer: In Favor: Works with Neighborhood Nonprofit Housing and is a realtor. Has worked with five property owners to get a package of land for this development. Asked the rights of the property owners be considered. Suggested that this request is in keeping with the General Plan.

Carlene Umpley: Not in Favor: Is with Arvella Watts Trust. Their land borders the requested re-zone. Understood there was to be a buffer at 400 West for residential zones to zones with animal rights. Asked what are the City's plans for agriculture. This is excellent farm ground. Has been in the family for years.

Nathan Dent: In Favor: Hopes to build in this development. Low income. Asked the Council to approved the re-zone.

LaMont Poulsen: Not in Favor: Lives on 800 West. Moved out there to be out of the City limits because agriculture brings flies, smells, dust, and lights. Referred to the Jensen Dairy on 1000 West in Logan and the advertised concerns from neighboring residents. Why is the City wanting agricultural water from residential use.

Kevin Allen: In Favor: Represented the Michaelson Family that own much of the land being considered for a re-zone. The use of this land was discussed during the preparation of the General Plan. It is important that the City stick to the Plan. Farmers are trying to force a buffer zone without paying for the property. Farmers want to make a living from their land. Developers pay a lot of dollars to be able to develop. Nice project; re-zone should be approved.

**Continuation of Minutes of City Council Meeting held January 25, 2006**

- Jeff Barnes: Not in Favor: Works for Natural Resource Conservation Service. Need to maintain open space. Farm Land is important. Soils in this area are good land best suited for farming. The soil is well drained and would recommend the Council follow the recommendation of the Planning Commission.
- Jay Green: In Favor: Felt his concerns had been presented.
- Scott Poulsen: Not in Favor: This is high density. The proposed access to 300 North is too narrow. There is currently homes on both sides of 300 North and no good way to widen the road. Would like large lots with animal rights. Recommend the Council follow the recommendation of the Planning Commission.
- All of the Poulsen property East of 800 West was in an R-1-12 zone prior to the adopting of the previous General Plan but was moved back to A-10.
- Traci Godfrey: In Favor: Young families need affordable housing. Would like to build in Smithfield City.
- James Marshall: Would like to clarify the P&Z decision. Wants to preserve agricultural land. Access on 300 North is too narrow. Was not clear as to how many of the homes to be built were for Non-Profit and how many were not. Need to phase the growth of that area and find some way to extend 200 North. The Planning Commission was not unanimous. The vote was 4 to 2.
- Duane Smith: In Favor: Works for LeGrande Johnson Construction. Voted for each of the council members. Need to deal with these people without the East Bench mentality. The reason the soils in Cache Valley are graded high is because of irrigation. That area is marginal soil, at best.
- Adrian Lundberg: In Favor: Growth will happen. Is pro Affordable Housing; if not in this area where will they go. The participants in the Non-Profit Housing have been screened with good credit and willing to work hard to build their homes. The road issue needs to be dealt with now or it will need to be dealt with in the future. Gave City Recorder Clegg a series of signed petitions.
- Mark Robinson: In Favor: Is one of the land owners involved. His property has been zoned R-1-12 for 14 years. Has lost the right to have animals with the R-1-12 zone but unable to develop. Asked "what is my rights?" The property owners are working together for a common goal.

**Continuation of Minutes of City Council Meeting held January 25, 2006**

Kim Datwyler: In Favor: Works for Neighborhood Non-Profit Housing. A portion of the land they would like to use is already zoned R-1-12. They feel this would be a good buffer zone. They have released a portion of the north property from contract so that it could remain as agricultural land. The need for another road out of the sub-division can be addressed. Was at the meeting that the Planning Commission vote against this re-zone but they approved a 59 lot subdivision on Crow Mountain. Traffic in Nibley City has not been an issue. The Non-profit are willing to help solve the 300 North concerns. Some of the area needs to meet the 80% or less and some the 80% to 100% designation of affordable housing. Smithfield may not qualify for the Non-Profit Housing on the next census.

Theo Hepworth In Favor: Would like to build in that area. Manages an apartment complex and would like to stay in Cache Valley. Homeowners will work and grow with the community.

Mayor Downs declared the Public Hearing closed at 7:40 pm.

Mayor Downs discussed the options the Council could consider. 1) Accept the recommendation of the Planning Commission, 2) Reject the recommendation of the Planning commission, 3) Modify the recommendation, and 4) Table for further discussion or information.

Council Member Watkins:

Master Plan already shows this area for housing. Why?

Council Member Monson:

Read from the Master Plan Section 5 Land Use page 5-10, first paragraph. When the General Plan was being developed the Committee suggested that the areas along the sewer and power lines be proposed as housing. Intended this stop to at 400 West. Justin Bennett has had a number of calls for his large lot.

Discussed Section 8 of the Master Plan on Affordable Housing. The area was zoned for housing in 1997 but put back to agricultural in 2005.

The City is losing control of development. Need to scale back to a 3% per year rate.

Council Member Watkins:

Expanding to the west is controlled growth. Growth is a result of economics. Low interest rates. Only 3% of those who build in the valley are from out of the area.

**Continuation of Minutes of City Council Meeting held January 25, 2006**

Council Member Hunsaker:

Tough issue. Has concerns of impact on water. Need affordable housing and the east bench is too expensive. There are 178 children in the fifth grade at Summit Elementary. How to propose the stopping of growth. The noise issue is a concern. Was contacted by the Airport Authority as this area is in the flight path for takeoffs and landings.

Council Member Wood.

Interesting experience. Not to be taken lightly. Gave a list of homes for sale in Smithfield that meet the "affordable housing" criteria. Not many. This is not "low income housing" but "affordable". If not now, when. If not here, where. Two acre lots are not affordable. There is a time and a place to move forward.

Council Member Monson:

Not against growth. Needs to be in the right place. Planning Commission do a good job without pay, should not take them lightly. The Council were elected by the citizens not developers. Expressed concern that at the last P&Z Meeting the Non-Profit tried to present a little emotional drama by having the room full of young people who have been promised they could build in this area. They don't own the land. Moved next to a gravel company and has not like it. All the area proposed for re-zone is not to be used by the Non-Profit Housing. Was never brought up. This was sneaky. Scott Lyman's property is not part of this re-zone. Mr Lyman was misled until the morning of the last City Council Meeting. This is only the first of a number of "phases"

Council Member Buttars:

Most all in the room have moved here. The City is growing from the center out. Can't stop growth. The General Plan points housing developments this direction. There is a need to accommodate affordable housing. There needs to be a compromise.

Kevin Allen: Discussed the use of the lots to the north along with the southern lots to make the Non-profit program affordable. Mr. Allen's company will help with the roads and other infrastructure. This makes the development possible.

Kim Datwyler: The Non-profit plan is for three to five years.

Council Member Watkins:

Asked about the development of 300 North. The City currently has a 33 foot right-of-way on 300 North.

**Continuation of Minutes of City Council Meeting held January 25, 2006**

Council Member Monson:

If the re-zone is approved anything that fits the R-1-12 zone can be built there.

Motion: Council Member Wood moved to approve Ordinance 06-01 as presented, seconded by Council Member Watkins.

Question on the motion:

Council Member Monson asked that a modification be considered. Move the line south. Then Ms. Monson would like to re-open the General Plan and put the balance of that area back in the agricultural zone.

The northern line of the re-zone request be moved south to the point directly in line with the south boundary of the Lundberg, Johnson, Jacobson property on the west side of what would be 600 West. This would eliminate four rows of proposed houses.

Council Member Hunsaker asked about just one egress from the development.

Council Member Wood and Council Member Watkins agreed to the modification.

Voted yea: Buttars, Hunsaker, Monson, Watkins, Wood.

Voted nay: -

*(Note: On Thursday, morning a called was placed to David Church, Legal Council for the Utah League of Cities and Towns by Jim Gass and Dean Clegg asking for clarification as to the correct way to handle the modified ordinance.. The Mayor did not sign the Ordinance Wednesday night due to the proposed changes not being in writing. Mr Church explained that the Council must have the final written ordinance in front of them to pass any ordinance. Therefore the modifications must be made and presented to the Council in a final form before a to vote is taken to pass or deny the ordinance.")*

**Presentation by Fire Chief Jay Downs on the Mortimer Pallet Fire**

Fire Chief Jay D. Downs and Assistant Fire Chief John Fitzgerald presented a power point presentation of the Mortimer Pallet Fire that happened on November 15, 2005. The fire was handled under the new inter-local agreements signed by Smithfield City and other Cache Valley communities at the close of 2005. The presentation was very well done. Chief Downs complimented the Police Department for their part in the control of the scene. Doug Peterson from the Public Works Department, the water department and the water system were also complimented.

**Continuation of Minutes of City Council Meeting held January 25, 2006**

Mayor Downs requested the Council adjourn and begin the Redevelopment Agency Meeting.

**Motion:** Council Member Buttars moved to adjourn, seconded by Council Member Wood. Unanimously approved. Adjourned at 8:59 pm.

Reconvened at 9:22 pm.

**Public Hearing to begin at 7:15 pm to receive Public Input for consideration of Ordinance 06-03 "Annexation of Stafford Property"**

City Manager Gass gave an explanation of where the property being considered is located. This property was previously owned by Robert Toolson. Ryan Peterson, agent for Mr Stafford was unable to attend.

Mayor Downs declared the Public hearing open at 9:26 pm and asked for public comment.

Dixie Neugebauer: "Annexing from what?"

Mayor Downs declared the Public hearing closed at 9:28.

City Manager Gass explained the annexation of property is from the county into the city.

No vote was taken. This will be considered at the February 8, 2006 meeting.

**Council to have Discussion on Impact Fees**

Council Member Monson suggested that the impact fees for Parks should be raised to the maximum rate. (\$1620.00 per unit)

This will be considered at the February 22, 2006 meeting. A public Hearing will need to be held.

**Consideration of CV Ranch Contract for water rights transfers.**

Council Member Hunsaker reviewed the agreement with CV Ranches. Hyrum City, Millville City, Welssville City and Smithfield City are the communities that have been selected to receive this water transfer. The transfer of water will be a first come first serve basis. The price set by the CV Ranches is \$2000 per acre foot. The City had previously signed agreement for this transfer of water but the agreement expired on July 31, 2005.

**Motion:** Council Member Hunsaker moved to authorize the Mayor to sign the agreement with CV Ranches, seconded by Council Member Buttars. Unanimously approved.



## **Continuation of Minutes of City Council Meeting held January 25, 2006**

Council Member Buttars asked if the water shares from the intra-block development done by Don Barringer on 300 West had ever been transferred to the City. The answer was no. The council gave a consensus that City Manager Gass contact the City Attorney about getting this done.

### **City Manager Items:**

#### **RDA Request:**

Rigo Chaparro has asked to have a discussion with the Board about a loan for commercial development possibilities for property on the east side of the street at 100 South Main.

This will be part of the February 8, 2006 RDA Meeting

#### **Mayor Winn and Council Member Mikkelsen Recognition**

Discussed having a recognition dinner at the Golf Course Club House and having it catered. More information will be presented at the next meeting.

#### **Storage Tank Design**

Discussed the need to negotiate for property in Dry Canyon for the building of the water storage tank. Would like to get the project done in one contract year. Asked for permission to discuss financing with Zions Bank. Consensus for favorable.

#### **Main Street Construction**

UDOT is still planning on the project starting in the spring of 2006.

#### **Meet Legislators**

A meeting is planned for Friday, February 3, at the Olive Garden in Salt Lake City to meet with the Legislators from Cache County. Would encourage all to attend, and say something. Mayor Downs requested a list of items of concern.

### **Mayor and Council Reports**

#### **Council Member Wood's Report:**

Reported that Nibley City waives on half of the sewer impact fee for Neighborhood Non-Profit Housing projects. If the homes are sold the money is recaptured. This is done by way of a recorded title.

#### **Council Member Watkins' Report:**

Reported on the Library Board Meeting. The Staff have prepared definition of job assignments.

**Continuation of Minutes of City Council Meeting held January 25, 2006**

The Library Board would like their building done "last Friday"

**Council Member Monson's Report:**

Asked that the Council be provided with new shirts prior to the Utah League meetings in April. Ms. Monson will make arrangement for these.

Asked Council Member Hunsaker to join the Youth Council starting January 26, at 8:00 pm in the City Council room.

Requested a letter from the Mayor supporting the Youth Council efforts to receive an Award of Excellence.

**Council Member Hunsaker's Report:**

Reported on House Bill 16. This will require the recording of all public meetings.

**Mayor Downs Report:**

Asked that the Council select a date to have a study session for buildings. Also to discuss financing. Would like this on the February 8<sup>th</sup> agenda.

Informed the Council of a request being considered, but not yet presented, for annexation of property south of the City limits.

Thanked the Council for their participation and commitment during tonight's meeting.

**Adjournment:**

Motion: Council Member Monson moved to adjourn, seconded by Council Member Wood, Unanimously approved. Adjourned at 10:40 pm.

Approved and signed this 8<sup>th</sup> day of February, 2006.

SMITHFIELD CITY CORPORATION

ATTEST:

\_\_\_\_\_  
Chad E. Downs, Mayor

\_\_\_\_\_  
O. Dean Clegg, Recorder

Tab C

**MINUTES**  
**SMITHFIELD CITY COUNCIL MEETING**  
**February 8, 2005**

The Smithfield City Council met in a regular scheduled meeting at 375 Canyon Road, Smithfield, Utah on Wednesday, **February 8, 2005**. The following were present constituting a quorum.

Mayor	Chad E. Downs
Council Members	Brent Buttars Deon G. Hunsaker Kris Monsen Dennis Watkins Dee Wood
City Manager	James P. Gass
City Recorder	O. Dean Clegg
Chief of Police	Johnny W. Mc Coy

Mayor Downs called the meeting to order at 6:30 pm.

Dennis Watkins offered a prayer and led the Pledge of Allegiance.

**Visitors:** Jessie Datwyler, Glade Smith, Don Barringer, Connie Poulsen, LaMont Poulsen, Kristy Poulsen, Tina Poulsen, Jon Wells, Kathrine Hullinger, Shanae Andersen, Roger Cantwell, Gwen Cantwell, Deon Dixon, Di Lewis, Kim Hawkes, Derek Poul;sen, Matt Regen, Scott Wilkinson, Valoy Taylor, Rocky Taylor, Jackie Thompson, Jeff Spence, Darins Joyner, Thayden Nilson, Owen Buttars, Margatet Smith, Matthew Smith, Scott Datwyler, Jalee Greer, Amy Keepers, Scott Argyle, Kim C. Datwyler, Ray Winn, Tamara Grange, Kevin Allen, Jared Nielson, Val Hubit

**Agenda:**

Welcome and Opening Ceremonies

1. Citizen Input
2. Consideration of Consent Agenda  
Minutes of January 25, 2006 City Council Meeting
3. Presentation of Award to Rocky Taylor, Tri-City Animal Control Officer
4. Consideration of **Ordinance 06-03** "Annexation of Stafford Property"  
(Located at approximately 50 North 1000 East)
5. Consideration of request from Don Corbridge for approval of a two (2) lot minor subdivision located at 107 East 200 North. Zoned R-1-10
6. Consideration of **Resolution 06-02**, "Resolution expressing strong Opposition to Senate

## Continuation of City Council Meeting Minutes of February 8, 2006

Bill 170, Land Use Amendments, and Requesting that our Senators and Representatives vote Against this Bill.”

- 7 Consideration of **Ordinance 06-02**, “A request from Jared Nielson representing Horizons Construction for consideration of a re-zone of property located at approximately 600 East and Crow Mountain Road from RA-1 to R-1-12.
- 8 Discussion of Children’s Theater matching grant, local participation and fees.
- 9 Consideration of **Ordinance 05-18** “A request from Scott Lyman for a re-zone of property located at approximately 10 North and 600 West from RA-1 (Residential Agricultural-1 Acre) to R-1-12 (Single Family Residential 12,000 sf)”  
(Public Hearing held December 14, 2005)
- 10 Consideration of **Ordinance 06-01** “A request from Neighborhood Nonprofit Housing Corporation to re-zone property located from approximately 600 West 200 North from A-10 (Agricultural 10- acre), A-5 (Agricultural 5-Acre), RA-1 (Residential Agricultural, 1-acre) to R-1-12 (Single Family Residential, 12,000 square foot)”  
(Public hearing held January 25, 2006)
- 11 City Manager Items:
  - Storage Reservoir
  - Capital Improvement List
  - Budget Dates
  - Trails Project Update.
- 12 Mayor and Council Reports
  - Request from Smithfield Implement for Crazy Days Ad
- 13 Adjournment

**Citizen Input:** Jackie Thompson expressed appreciation to the City for including a flyer for Chance Godderidge in the utility billing . Mr Godderidge is having health problems.

### **Consideration of Consent Agenda**

#### **Minutes of January 25, 2006 City Council Meeting**

A correction was made to the motion regarding Ordinance 06-01 in the January 25<sup>th</sup> meeting . Council Member Wood made the motion and Council Member Watkins made the second.

Mayor Downs declared the Consent Agenda approved.

### **Presentation of Award to Rocky Taylor, Tri-City Animal Control Officer**

Kim Hawkes, Chief of Police for North Park, presented Rocky Taylor, Tri City Animal Control Officer, with the State of Utah Animal Control Office’s Association’s award as the “Outstanding Animal Control Officer” for 2005. Mayor Downs thanked Mr. Taylor for the work he does for Smithfield City.

### **Consideration of Ordinance 06-03 “Annexation of Stafford Property” (Located at**

**Continuation of City Council Meeting Minutes of February 8, 2006**

**approximately 50 North 1000 East)**

This property, approximately 17.5 acres, is located east of 1000 East and borders the property that was annexed in August of 2004 at Mr Peterson's request.

The Public Hearing for consideration of this annexation request was held on January 25<sup>th</sup>, 2006.

Jackie Thompson representing Ryan Peterson, agent for Kelly Stafford, stated there are no water rights associated with this parcel of property. Council Member Hunsaker reported his findings to be the same on the issue of water.

Motion: Council Member Wood moved to approve Ordinance 06-03, seconded by Council Member Buttars.

Voted yea: Buttars, Hunsaker, Monson, Watkins, Wood

Voted nay: -

**ORDINANCE 06-03**

(Stafford Annexation)

**WHEREAS**, the owners of certain real property, described below, desire to annex such real property to the corporate limits of Smithfield City, Utah; and

**WHEREAS**, said real property is located within the area proposed for annexation and covers a majority of the private land area within the area proposed for annexation; and

**WHEREAS**, said real property is equal in value to at least one-third (1/3) of the value of all private real property within the area proposed for annexation; and

**WHEREAS**, said real property is a contiguous, unincorporated area contiguous to the boundaries of Smithfield City and the annexation thereof will not leave or create an unincorporated island or peninsula; and

**WHEREAS**, said property is undeveloped and covers an area that is equivalent to less than five percent (5%) of the total land mass of all private real property within Smithfield City; and

**WHEREAS**, said owners have caused a Petition for Annexation to be filed with the city, together with an accurate plat of the real property which was made under the supervision of a competent, licensed surveyor; and

**WHEREAS**, on 14<sup>th</sup> day of December, 2005, the Smithfield City Council received the required Notice of Certification from the City Recorder certifying that the annexation petition

meets the requirements of State law; and

**WHEREAS**, the City Council published and mailed notice of the Certification, as required by law and no timely protests have been filed in accordance with the provisions of Section 10-2-407, Utah Code Annotated, 1953, as amended; and

**WHEREAS**, the City Council held the required public hearing after giving notice as required by law, and has determined the referenced annexation is desirable;

**NOW THEREFORE**, pursuant to Section 10-2-407, Utah Code Annotated 1953, as amended, the City Council of Smithfield City, Utah, hereby adopts, passes, and publishes the following:

**AN ORDINANCE AMENDING THE MUNICIPAL ZONING MAP, ANNEXING CERTAIN REAL PROPERTY AND EXTENDING THE CORPORATE LIMITS OF SMITHFIELD CITY, UTAH.**

**BE IT ORDAINED**, by the City Council of Smithfield City, Cache County, State of Utah, as follows:

1. The real property, more particularly described in Paragraph 2, below, is hereby annexed to Smithfield City, Utah, and the corporate limits of the City are hereby extended accordingly.
2. The real property which is the subject of this Ordinance is described as follows:

PART OF THE SOUTHEAST QUARTER OF SECTION 26, TOWNSHIP 13 NORTH, RANGE 1 EAST OF THE SALT LAKE BASE AND MERIDIAN DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHWEST CORNER OF THE SOUTHEAST QUARTER OF SAID SECTION 26 SAID POINT BEING ON THE EXISTING CORPORATE LIMIT LINE OF SMITHFIELD CITY; AND THENCE NORTH 89°58'46" EAST ALONG THE NORTH LINE OF THE SOUTHEAST QUARTER OF SAID SECTION 26, 1181.22 FEET (72 RODS BY RECORD); TO THE EXISTING SMITHFIELD CITY CORPORATE LIMIT LINE; THENCE ALONG THE EXISTING SMITHFIELD CORPORATE LIMIT LINE IN THE FOLLOWING THREE COURSES: 1). SOUTH 01°07'57" EAST, 634.21 FEET (40 RODS BY RECORD); 2). SOUTH 89°01'47" WEST, 1183.03 (72 RODS BY RECORD); 3). NORTH 00°57'17" WEST, 653.78 FEET (40 RODS BY RECORD) TO THE BEGINNING; CONTAINING 17.48 ACRES+/-.

3. The real property described in Paragraph 2, above, shall be classified as being in the A-10 District of the Agricultural zone in accordance with the provision of Section 17.08.050 of the Smithfield Municipal Code, and the Zoning Map of Smithfield City shall be amended to include the real property described above.
4. A certified copy of this Ordinance and an original plat describing the property so annexed shall be filed with the Cache County Recorder within thirty (30) days after the date this Ordinance is adopted.

**Continuation of City Council Meeting Minutes of February 8, 2006**

5. This ordinance shall be effective upon the posting of three (3) copies in each of three (3) public places within the corporate limits of Smithfield City.

**ADOPTED AND PASSED** by the Smithfield City Council this 8th day of February, 2006.

SMITHFIELD CITY CORPORATION

By: /s/ Chad E Downs  
Chad E. Downs, Mayor

ATTEST:

/s/ O. Dean Clegg  
O. Dean Clegg, City Recorder

**Consideration of request from Don Corbridge for approval of a two (2) lot minor subdivision located at 107 East 200 North. Zoned R-1-10**

Mr Corbridge was unable to attend the meeting.

The Council discussed a fence line between Mr. Corbridge and Ed Hdye, a shed and an old garage, and the set backs for such buildings. Council Member Hunsaker stated the addresses shown on th map were wrong.

**Motion:** Council Member Hunsaker moved to approve the request from Don Corbridge for a two (2) lot minor subdivision located at 107 East 200 North. Zoned R-1-10, seconded by Council Member Monson.

Voted yea: Buttars, Hunsaker, Monson, Watkins, Wood.

Voted nay: -

**Consideration of Resolution 06-02, "Resolution expressing strong Opposition to Senate Bill 170, Land Use Amendments, and Requesting that our Senators and Representatives vote Against this Bill."**

City Manager Gass gave an explanation as to the intent of the Resolution being considered. House Bill 170 would limit the abilities of a city to control development.

Mayor Downs read the Resolution.

**Motion:** Council Member Monson moved to adopt Resolution 06-02, seconded by Council Member Wood.



**Continuation of City Council Meeting Minutes of February 8, 2006**

Voted yea: Buttars, Hunsaker, Monson, Watkins, Wood  
Voted nay: -

**RESOLUTION NO. 06-02**

A RESOLUTION OF THE SMITHFIELD CITY COUNCIL EXPRESSING STRONG OPPOSITION TO SENATE BILL 170, LAND USE AMENDMENTS, AND REQUESTING THAT OUR SENATORS AND REPRESENTATIVES VOTE AGAINST THIS BILL

WHEREAS, in the 2005 legislative session, the Cities joined efforts with a large consortium of stake holders to make significant changes to the State's municipal and county land use code, under the sponsorship of Senator Greg Bell; and

WHEREAS, those who were represented in this undertaking, mutually agreed that any subsequent changes in the land use code should be made on a consensus basis, through an undertaking by these same stake holders; and

WHEREAS, on the 23rd of January, of 2006, Senate Bill 170 Land Use Amendments, was proposed for passage in this years legislative session in contradiction of the intent of the stake holders involved in the drafting of last years Land Use Bill; and

WHEREAS, Senate Bill 170 has received no input in the drafting from the Cities or Counties of this State; and

WHEREAS, among the many objections that may be raised in the language of this bill, the following are issues in the bill that are strongly opposed by this City and its Citizens. Senate Bill 170:

1. Takes away and disregards the opportunity for public input to the City's elected officials on a zone change, on an individual parcel of land, even though such a change may have a significant effect on neighbors and adjacent landowners.
2. Seriously compromises the ability of local elected officials to balance the interests of developers and neighbors in making essential land uses decisions.
3. Gives the development community the ability to control the development process in our community and establishes intimidating penalties for officers and employees of the City, both criminal and civil, for failure to comply with that process.
4. Presents difficult to impossible time lines for the City's consideration of a land use decisions under pressure of an automatic approval if those time frames are not met.
5. Eliminates the City's ability to plan long term, through its General Plan.

Continuation of City Council Meeting Minutes of February 8, 2006

6. Eliminates the City's ability to provide for the protection of surrounding property values, by imposing conditions for such protection according to the development proposal.

7. Gives a complete presumption of validity to the decisions of experts used by the developer to validate a development request, unless rebutted by a City expert.

8. Requires the reevaluation and drafting of all the City's Capital Facilities Plans for all impact fees in 6 months from that date of the passage of the bill to include new requirements regarding infrastructure valuation.

NOW THEREFORE be it resolved by the City Council of Smithfield City, as follows:

1. That Smithfield City hereby expresses in the strongest terms possible, its opposition to Senate Bill 170, Land Use Amendments, Sponsored by Senator Alma Mansell.
2. That Smithfield City hereby requests that our legislative delegation consisting of Senators Hillyard and Knudsen, along with Representatives Ferry, Buttars, Wyatt, and Hunsaker oppose this piece of legislation.

DATED this 8th day of February, 2006.

ATTEST:

/s/ O. Dean Clegg  
CITY RECORDER

/s/ Chad E. Downs  
MAYOR

Council Member Hunsaker expressed his dissatisfaction with the meeting held with the State Legislators held on February 3, 2006. The League took too much of the time.

**Consideration of Ordinance 06-02, "A request from Jared Nielson representing Horizons Construction for consideration of a re-zone of property located at approximately 600 East and Crow Mountain Road from RA-1 to R-1-12."**

This rezone request was given a favorable recommendation by the Planning Commission.

The Council discussed a number of issues: future trails in this area, width of the road right-of-way, access on to Upper Canyon Road.

Motion: Council Member Hunsaker moved to approve Ordinance 06-02, seconded by Council Member Watkins.

Voted yea: Buttars, Hunsaker, Monson, Watkins, Wood

Voted nay: -

**Continuation of City Council Meeting Minutes of February 8, 2006**

**ORDINANCE NO. 06-02**

**AN ORDINANCE AMENDING TITLE 17, ZONING OF THE SMITHFIELD MUNICIPAL CODE, BY AMENDING THE ZONING MAP OF SMITHFIELD CITY.**

BE IT ORDAINED by the City Council of Smithfield City, Utah as follows:

That certain map or maps entitled "Zoning map of Smithfield City, Utah" is hereby amended and the following described property is hereby rezoned from A-10 (Agricultural 10-Acres) to R-1-12 (Single Family Residential, 12,000 sq. ft.)

Property Location: Part of the Northeast Quarter of Section 26 and part of the Northeast Quarter of Section 27, Township 13 North, Range 1 East, Salt Lake Base and Meridian described as follows:

Beginning at the Southeast Quarter Corner of Section 22 monumented with a Cache County Surveyor Brass Cap and running thence South 81.36 feet (74.04 feet By Record) to the north line of Upper Canyon Road; thence along the north line of said road to its intersection with the current Smithfield City Corporate line, said line being the west line of the Northeast Quarter of the Northeast Quarter of said Section 27; thence South along said west line, 625 feet more or less; thence leaving said right-of-way and running northeasterly more or less along the brow of a hill the next eighteen courses: 1) S 83°34'12" E, 106.49 feet; 2) thence N 54°20'20" E, 74.89 feet; 3) thence N 52°12'39" E, 122.44 feet; 4) N 51°13'46" E, 29.65 feet; 5) thence N 41°01'20" E, 34.57 feet; 6) thence N 31°35'19" E, 133.23 feet; 7) thence N 47°08'34" E, 52.27 feet; 8) thence N 51°14'53" E, 88.73 feet; 9) thence N 67°20'55" E, 84.09 feet; 10) thence N 45°28'40" E, 182.33 feet; 11) thence N 52°27'25" E, 152.95 feet; 12) thence N 64°37'23" E, 296.21 feet; 13) thence N 54°18'31" E, 237.12 feet; 14) thence N 65°19'43" E, 271.07 feet; 15) thence N 83°49'06" E, 275.70 feet; 16) thence N 87°42'31" E, 446.50 feet; 17) thence N 79°47'08" E, 87.57 feet; 18) thence N 56°41'55" E, 352.42 feet more or less to the east line of the Northwest Quarter of the Northwest Quarter of said Section 26; thence North to the north line of Upper Canyon Road; thence Southwesterly along the north line of Upper Canyon Road to the point of beginning.

APPROVED by the Smithfield City Council this 8<sup>th</sup> day of February, 2006.

SMITHFIELD CITY CORPORATION

/S/ Chad E. Downs

Chad E. Downs, Mayor

ATTEST:

/s/ O. Dean Clegg

O. Dean Clegg, Recorder

**Continuation of City Council Meeting Minutes of February 8, 2006**

**Discussion of Children's Theater matching grant, local participation and fees.**

Jessie Datwyler reported that she was able to secure a \$1400.00 grant for funding of the Children's Theater. The City is required to match the amount. The council gave a favorable consensus to open the budget and match the grant.

The performance will be presented in the Smithfield Stake Center on Friday night, May 5, 2006. There will be no charge for children to participate and only children from Smithfield will be invited. It was suggested that the children participate in the Health Days Parade in their costumes.

**Consideration of Ordinance 05-18 "A request from Scott Lyman for a re-zone of property located at approximately 10 North and 600 West from RA-1 (Residential Agricultural-1 Acre) to R-1-12 (Single Family Residential 12,000 sf)" (Public Hearing held December 14, 2005)**

Mayor Downs explained the Public Hearing required for this item was held on December 14<sup>th</sup>. This is not a Public Hearing and there will be not time for public comment. The Council may ask questions.

Council Member Monson read a portion of a letter from Scott Lyman sent to the Council on December 18, 2005. Mr Lyman requested the City not to consider or approve the re-zone request. Ms. Monson is not in favor of a rezone in this area.

City Manager Gass explained the Planning Commission had given a favorable recommendation for the re-zone and the Council must take an action on the recommendation.

Matthew Regan, Scott Lyman's Accountant, stated that Mr Lyman was in support of the re-zone at this time. Mr Lyman would like to go through with the agreement made with Neighborhood Non Profit Housing.

City Manager Gass explained that this request for a rezone to R-1-12 would not prohibit Mr. Lyman from requesting the property be zoned back to agricultural at a future time if he chooses to do so.

**Motion:** Council Member Wood moved to approve Ordinance 05-18, seconded by Council Member Watkins.

Voted yea: Buttars, Hunsaker, Watkins, Wood.

Voted nay: Monson

**ORDINANCE NO. 05-18**

**AN ORDINANCE AMENDING TITLE 17, ZONING OF THE SMITHFIELD**

**Continuation of City Council Meeting Minutes of February 8, 2006**

**MUNICIPAL CODE, BY AMENDING THE ZONING MAP OF SMITHFIELD CITY.**

BE IT ORDAINED by the City Council of Smithfield City, Utah as follows:

That certain map or maps entitled "Zoning map of Smithfield City, Utah" is hereby amended and the following described property is hereby rezoned from RA-1 (Residential Agricultural 1-Acre) to R-1-12 (Single Family Residential, 12,000 sq. ft.)

Property Location: Part of the Northwest Quarter of Section 28, Township 13 North, Range 1 East, Salt Lake Base and Meridian described as follows:

Beginning at a point 8.22 chains North of a point 19.25 chains West of the Southeast Corner of the Northwest Quarter of Section 28, Township 13 North, Range 1 East of the Salt Lake Base and Meridian, thence running West 39 Rods; thence North 18 rods and 8 feet; thence East 39 rods more or less, to a point due North of the place of beginning; thence South 18 rods and 8 feet to the place of beginning. Containing 4.5 acres.

APPROVED by the Smithfield City Council this 8<sup>th</sup> day of February, 2006..

SMITHFIELD CITY CORPORATION

Chad E. Downs

Chad E. Downs, Mayor

ATTEST:

/s/ O. Dean Clegg

O. Dean Clegg, Recorder

**Consideration of Ordinance 06-01 "A request from Neighborhood Nonprofit Housing Corporation to re-zone property located from approximately 600 West 200 North from A-10 (Agricultural 10- acre), A-5 (Agricultural 5-Acre), RA-1 (Residential Agricultural, 1-acre) to R-1-12 (Single Family Residential, 12,000 square foot)" (Public hearing held January 25, 2006)**

*(Note: At the last City Council Meeting an amendment to the motion to approve this request as presented was made and agreed on. However the proper language of the motion was not in writing and the Council is required to have a correct copy of the Ordinance in front of them to make a decision. The corrected language of the amended Ordinance has been made and is present again for consideration.)*

City Manager Gass presented four copies of what members of the Council felt was the northern boundary line that had been agreed on in the last meeting. This request is in an area with agriculture activities on the north and west sides. The Gittins' Dairy is within a few hundred feet of the proposed re-zone. There are concerns about the use of 300 North to access this area. There is an irrigation line buried along what would be the west boundary of this property.

## Continuation of City Council Meeting Minutes of February 8, 2006

The Planning Commission made a recommendation that this re-zone not be approved.

Council Member Watkins asked if the previous motion was gone. Yes.

Council Member Monson stated she had received a number of phone calls opposed to this families are likely to lose their livelihood. The P&Z did a lot of work for the Council to say "it doesn't matter". The Council should be more concerned about those who live here. Ms Monson had been on the internet and an individual can get the same type of loan that is being offered by the Non Profit Housing. When Mayor Winn encouraged the Non Profit Housing to look at Smithfield he was expecting they would build a couple of house in various neighborhoods. Ms Monson stated that when she made her amendment to the motion last week is was to have included all the land not in the rezone would be put back in an agricultural zone.

Council Member Buttars asked where are our children to live?

Council Member Monson stated that 40 percent of the homes built in the City last year were affordable housing. She had been to Nibley to view the Neighborhood Non Profit Housing Development there and was told that the problems come in five years or more.

Council Member Watkins expressed the need for low income families to have homes. Mr Watkins is new to the Council and has read the General Plan. It is to be a guide.

Council Member Hunsaker presented a report about how much land is used if developments are set at different sized lots. The best way to grow a community is with higher density and inter block developments. Mr Hunsaker referred to a letter received mid week and gave an explanation of his views.

Council Member Wood stated he accepted the amended motion last week because he understood that the Non Profit Housing had release all of the Lundberg, Johnson, Jacobson property being considered. Mr Wood has concerns about using 300 North. There should be no exit or entrance to the possible development from this road.

**Motion:** Council Member Wood moved to approve Ordinance 06-01 as requested, seconded by Council Member Watkins.

Question on the motion: Council Member Monson moved to amend the motion to end the re-zone at the "blue line".

Council Member Wood was asked if he would amend his motion. Mr Wood asked for a vote on the original motion:

Voted yea: Buttars, Hunsaker, Watkins, Wood  
Voted nay: Monson.

Continuation of City Council Meeting Minutes of February 8, 2006

ORDINANCE NO. 06-01 Requested

AN ORDINANCE AMENDING TITLE 17, ZONING OF THE SMITHFIELD MUNICIPAL CODE, BY AMENDING THE ZONING MAP OF SMITHFIELD CITY.

BE IT ORDAINED by the City Council of Smithfield City, Utah as follows:

That certain map or maps entitled "Zoning map of Smithfield City, Utah" is hereby amended and the following described property is hereby rezoned from RA-1 (Residential Agricultural 1-Acre), A-10 (Agricultural 10-Acre) and A-5 (Agricultural 5-Acre) to R-1-12 (Single Family Residential, 12,000 sq. ft.)

Property Location: Part of the Northwest Quarter of Section 28, Township 13 North, Range 1 East, Salt Lake Base and Meridian described as follows:

Beginning at a point 12.84 chains North of a point 9.58 chains West of the Southeast Corner of the Northwest Quarter of Section 28, Township 13 North, Range 1 East of the Salt Lake Base and Meridian, thence running North 1150 feet to a point 145 feet North of the current 300 North centerline; thence West 840 feet; thence South 1150 feet; thence East 220 feet; thence South 18 rods 8 feet; thence East 5.06 chains; thence North 18 rods 8 feet to a point 286.26 feet West of the point of beginning; thence to the point of beginning. Containing 24.5 acres.

APPROVED by the Smithfield City Council this 8<sup>th</sup> day of February, 2006.

SMITHFIELD CITY CORPORATION

/s/ Chad E. Downs

Chad E. Downs, Mayor

ATTEST:

/s/ O. Dean Clegg

O. Dean Clegg, Recorder

The Council took a ten minute recess at 8:00 pm..

Reconvened at 8:10 pm.

**Motion:** Council Member Wood moved to adjourn the meeting to go to an RDA Meeting, seconded by Council Member Watkins. Unanimously approved.  
Adjourned at 8:10 pm.

Reconvened at 9:15 pm

## Continuation of City Council Meeting Minutes of February 8, 2006

### City Manager Items:

- **Storage Reservoir**

Discussed meeting with Zions Bank to get information for possible bond. Handed out a map showing the proposed location of the storage tank in Dry Canyon east of Smithfield. The tank will be mostly buried. Water lines to the tank will need to be installed and prefers they be along what would be a straightening of 300 South. Will need to work with the property owners in that area. A Parameters Resolution being prepared by Ballard Spahr Bond Attorneys will be presented at the next City Council Meeting.

- **Capital Improvement List**

Asked the Council to look at a list of Capital projects and rate them from 1 to 5. More discussion and decision at the next meeting. The Gazebo at Heritage Park is being constructed.

- **Budget Dates**

Set the following dates to work on the budget for FY 06/07:

Tuesday, March 14<sup>th</sup>, at the Senior Citizen Center to begin at 6:30 pm

Wednesday, March 29<sup>th</sup>, at the Senior Citizen Center to begin at 6:30 pm

- **Trails Project Update**

Reported on the trail from 300 South to 600 South and the retaining wall and walk on the north side of the cemetery using Federal Funds. This is creating additional costs as UDOT is will have an oversight role in the project.

- **New Street Lights on North Main**

Asked that the Council authorize the Mayor to sign a contract for the cost of the new street lights from 500 North to 750 North on Main Street. The cost is \$850.00. The monthly cost will be \$5.40 per light per month for the electricity to operate them. The Council gave a favorable consensus.

- **TERACON Contract**

Asked that an agreement be signed with TERACON to have geo-technical work done for the size of the trench and the sub surface work. A cost of \$6300.00 will be charged for the work.

- **Banner Requests**

Presented a request from Second Chance Fun Run to hang a banner from April 1 to April 8 and from Bridgerland Outdoor Coalition to hang a banner from April 14 to April 22. The council gave a consensus to do so but did not waive the \$25 fee for either group.



## Continuation of City Council Meeting Minutes of February 8, 2006

### Mayor and Council Reports

#### **Mayor Downs' Report:**

##### **Request from Smithfield Implement for Krazy Days Ad**

Read a letter from Bart Roylance requesting permission to display a playhouse during thier Krazy Day Sale. Consensus was favorable.

Reported that Nancy Bartell from Sunrise Elementary School called with a request from the PTA to help with new playground equipment.

Asked about having a "Sister City"

Asked for clarification of the process for opening and discussing the General Plan.

Reported that times for walking at the Armory had been set. Those without children with them, 8:00 to 9:30 am. Those with children with them 9:30 to 11:00 am.

#### **Council Member Buttars Report:**

Asked if the City would consider holding "dog days" to encourage more rabies vaccinations. City Recorder Clegg asked this not be done. A special rate is given to the citizens of Smithfield by the Cache Meadow Clinic during February each year.

#### **Council Member Monson's Report:**

Asked for names for the Joint Advisory Committee at the Recreation Center.

Reported the Youth Council will be doing "job shadowing" on Thursday, February 9<sup>th</sup> from 3:00 to 5:00 pm.

Reported that the Planning Commission agreed to meet with Beth Booton, Jack Greene and other citizens in a meeting on Friday, February 10, at the Council Room to begin at 6:00 pm. Would like to have the City Council attend.

Asked that the City require homeowners have liability insurance coverage for dangerous dogs. Would like to have that put back in the animal ordinance.

The Planning Commission is working to open the General Plan with the intent to put back land that was taken out of an agricultural use.

#### **Council Member Watkins' Report:**

Requested names for the Library Board.

**Continuation of City Council Meeting Minutes of February 8, 2006**

Discussed the new format for the Newsletter. The deadline to Watkins Printing is the 20<sup>th</sup> of each month. The City will need the information by the 15<sup>th</sup> of the month. Information is to be emailed to Connie Gittins. ([cgittins@smithfieldcity.org](mailto:cgittins@smithfieldcity.org))

**Adjournment**

**Motion:** Council Member Wood moved to adjourn, seconded by Council Member Watkins. Unanimously approved. Adjourned at 10:20 pm.

Approved and signed this 22<sup>nd</sup> day of February, 2006.

SMITHFIELD CITY CORPORATION

ATTEST:

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Chad E. Downs, Mayor

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O. Dan Clegg, Recorder

Tab D



hearing. Said Ordinance was drafted for the purpose of rezoning the real property which is the subject of this legal action to R-1-12(Single Family Residential, 12,000 sq. foot) zone, if adopted, the amount of the real property proposed for rezoning being approximately 24.5 acres.

5. The initial motion was to approve the rezoning of the entire 24.5 acre parcel to the R-1-12 zone, but the original motion was amended to reduce the size of the area to be rezoned.

6. To the best of my knowledge, Robert's Rules of Order were not strictly followed at any time during said meeting of January 25, 2006. To the best of my knowledge, Robert's Rules of Order have not ever been followed strictly during the time I have served as the City Manager and City Engineer.

7. At the time of the City Council's action at the said meeting of January 25, 2006, the only written Ordinance before each member of the City Council was the Ordinance to rezone the entire parcel proposed for rezoning. There was no written Ordinance before the members of the City Council which would have provided for rezoning any area less than the entire parcel proposed for rezoning.

8. As noted above, the January 25, 2006, City Council meeting was held at the City's Senior Citizen's Center, and not at the City Office building. City Council meetings, which include a public hearing, are often held at the Senior Citizen's Center as there is a larger room in the center which will accommodate a larger crowd of people. As a result, I was not near any computer equipment on which to make any changes to the Ordinance which was before the City Council; and in any event, given the fact that a new legal description needed to be prepared and included in any Ordinance which would rezone less than all of the proposed parcel, there would not be sufficient time for a new Ordinance to be prepared while said City Council meeting was in session.

9. The morning after said City Council meeting on January 26, 2006, I intended to draft a new Ordinance which contained the legal description of the area I had understood was to be rezoned to the R-1-12 designation by the City Council at the meeting the previous evening. Within approximately two to three business days after

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said meeting and as I attempted to determine exactly what the legal description should be and draft a new ordinance, I was contacted by at least two members of the City Council, at different times, both of whom had questions about exactly where the northern boundary of the area to be rezoned was to be located. We had different understandings in that regard.

10. In those first few days that followed the said January 25, 2006 meeting, I also spoke with both the Mayor and the City Recorder and, to the best of my recollection, another member of the City Council, and it soon became clear that none of us could say for sure where said boundary line was to be drawn. As a result, it was not possible to create a legal description for the area to be rezoned, as there was no clear understanding of where said boundary line should be drawn.

11. As a result of such confusion, it was determined that contact should be made with David Church, the attorney for the Utah League of Cities and Towns, as well as with Bruce Jorgensen, the City's attorney. Both of said attorneys advised us that the law required an Ordinance to be in writing and before the members of the City Council before a vote was taken on any motion to adopt such Ordinance.

12. Given the advice received, it was determined that the next step to take would be to present a proposed Ordinance again to the City Council at its next meeting on February 8, 2006. Given the confusion as to where the said borderline of the area to be rezoned should be, it was determined to prepare several Ordinances with different northern boundary lines and present them to the City Council at the next City Council meeting, in order to comply with state law; and further, in order to have an Ordinance in writing before the City Council members which would describe the area to be rezoned, if any, and so that whichever Ordinance was adopted, it could be signed and posted in order to make it effective.

13. To assist the City Council members in their deliberations, it was decided to prepare four Ordinances and color-code them to a plat map in order that the Council members could see exactly what was the area to be rezoned with each of the proposed Ordinances by matching the color designated on the Ordinance with the colored,

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northern line on the plat showing the entire area proposed for the rezone action. The original Ordinance which would provide for the rezoning of the entire parcel was also included as it had been presented to the Council at the prior meeting.

14. Prior to the meeting on February 8, 2006, I was contacted by the Plaintiff, Jeffry Gittens, who expressed to me the same concerns that had been expressed in the two public hearings that had been held on January 18 and January 25, 2006, respectively. He asked that I convey these concerns to the City Council during their deliberations regarding the proposed Ordinance 06-01. Mr. Gittens was not able to attend said meeting, and for this reason, he had contacted me. As I had promised, when the time came during the February 8, 2006 meeting to discuss and take action on the proposed Ordinance 06-01, I raised and discussed the concerns of Mr. Gittens with the City Council members. The City Council members were aware of said concerns, and they were raised by City Council members themselves, as they had been thoroughly discussed at the previous public hearings just referenced.

15. After discussion by the City Council, a motion was made and seconded to adopt the original Ordinance 06-01, which rezoned the entire parcel in question to the R-1-12 designation. An Amendment to the original motion was made to rezone less than all of said parcel, but it was not accepted. Said Ordinance was subsequently signed by the Mayor and the City Recorder and posted.

16. During the more than twenty-three years that I have served as the City Engineer and City Manager for Smithfield City, I have never attended any meeting of any body or board of the City at which Robert's Rules of Order have been strictly followed. Further, I have never been told of or learned about any meeting of a body or board of the City at which said Rules have been strictly followed. Rather, the City Council and other bodies and boards of the City generally follow a rather informal set of rules that have developed over time and which involved primarily the making of motions, seconds, discussions, and then finally a decision by vote.


17. In this regard, Mr. Gittens, the Plaintiff in this action, served for six (6) years on the City Council; and to my knowledge, he never once raised the issue of the

need to follow strictly Robert's Rules of Order in the conduct of City Council or other City meetings. Rather, he participated fully as a member of the City Council and followed the informal rules of procedure that had been and continued to be followed by the City Council without objection or question.

18. While the meeting of the City Council held on February 8, 2006, was not a public hearing, it was a public meeting, the agenda for which was posted as required by law, and provided to the Herald Journal as provided by law, and the agenda fully disclosed the intent of the City Council to discuss and act on the proposed rezoning of the real property previously discussed at the Planning Commission meeting, as a public hearing, on January 18, 2006, and at the City Council meeting, as a public hearing, on January 25, 2006. The agenda, as posted and provided to the newspaper, fully disclosed the intent of the City Council with respect to the proposed rezone action. In addition, all of the concerns previously discussed in the two referenced public hearings were discussed again at the February 8, 2006 meeting of the City Council. The concerns of Mr. Gittens and of any others who had previously voiced concerns were considered by the City Council as a part of their deliberations and action on February 8, 2006.

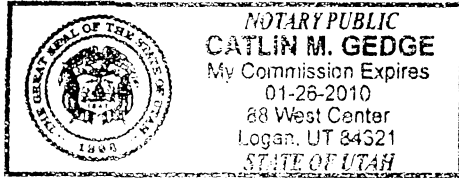
19. After the said January 25, 2006, City Council meeting, I was approached by City Council members individually, as stated above. I am not aware of any meeting held by members of the City Council between said January 25<sup>th</sup> and February 8<sup>th</sup> regular meetings of the City Council.

DATED this 19<sup>th</sup> day of January, 2007.

  
\_\_\_\_\_  
James P. Gass



SUBSCRIBED AND SWORN to before me on January 19, 2007.



*Catlin M. Gedge*  
 \_\_\_\_\_  
 NOTARY PUBLIC

CERTIFICATE OF PERSONAL DELIVERY

The undersigned hereby certifies that a true and correct copy of the foregoing **AFFIDAVIT OF JAMES P. GASS, SMITHFIELD CITY MANAGER** was personally delivered to Plaintiff's Attorney, Chris Daines, at 135 North Main, Suite 108, Logan, Utah 84321, this 19<sup>th</sup> day of January, 2007.

*Chris Daines*  
 \_\_\_\_\_

J:\BLJ\SMITHFIELD\gittens.affidavit of jim gass.doc

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Tab E

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IN THE FIRST JUDICIAL DISTRICT COURT

CACHE COUNTY, STATE OF UTAH

JEFFRY GITTINS, )  
)  
Plaintiff, )  
)  
vs. )  
SMITHFIELD CITY. )  
)  
Defendant. )

Case No. 060100558  
Transcript of Videotape.

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Transcript of Motion Hearing.  
Honorable Gordon J. Low presiding.  
First District Court Courthouse  
Logan, Utah  
February 21, 2007

\* \* \*

APPEARANCES:

For the Plaintiff: CHRISTOPHER L. DAINES  
Attorney at Law

For the Defendant: BRUCE L. JORGENSEN  
Attorney at Law

RODNEY M. FELSHAW  
Registered Professional Reporter  
First District Court

ORIGINAL

1           **THE COURT:** Jeffry Gittins versus Smithfield City,  
2 060100558. This is a continuation of oral arguments on this  
3 matter for summary judgment. How do you want to proceed this  
4 morning?

5           **MR. DAINES:** Your Honor, we have two motions for  
6 summary judgment now.

7           **THE COURT:** Cross motions.

8           **MR. DAINES:** I think have you received the reply  
9 from Mr. Jorgensen?

10          **THE COURT:** I read the pleadings last week. I don't  
11 think that was in yet.

12          **MR. JORGENSEN:** I have it here now, Your Honor.

13          **THE COURT:** All right. Give me a minute. I think  
14 I'm familiar with what the arguments will likely be in this  
15 reply. Let me just review it.

16          (Pause in the proceedings.)

17          **THE COURT:** Once again, how do you wish to proceed  
18 given the cross motions?

19          **MR. DAINES:** Your Honor, maybe the way to do that is  
20 for me to argue first our motion for summary judgment, if  
21 that's a way that would make sense.

22          **THE COURT:** That would be fine.

23          **MR. JORGENSEN:** I believe he filed the first motion  
24 so that would be appropriate. My response and reply on the  
25 cross motion covers the same territory for the most part.

1           **THE COURT:** Procedurally Mr. Jorgensen makes a point  
2 that I think at least ought to be kept in mind. That is,  
3 though we're here on cross motions for summary judgment, the  
4 underlying action is really one for a declaratory judgment.  
5 The result would be, in a decision by this court, declaring  
6 the actions by the city counsel lawful or otherwise. That's  
7 the long and short of it.

8           **MR. DAINES:** That's what it boils down to, Your  
9 Honor.

10           **THE COURT:** I think procedurally that background  
11 needs to be kept in mind. This isn't a summary judgment in  
12 the typical form because there is a presumption in favor of  
13 the city relative to ordinances passed with respect to  
14 presumed validity. That presumption needs to be overcome by  
15 Mr. Gittins.

16           Proceed, Mr. Daines.

17           **MR. DAINES:** Thank you, Your Honor. I think in a  
18 sense a way to conceptually go through this is to review what  
19 happened in the context of determining whether what happened  
20 was legal or illegal. There are, I guess, many different  
21 versions. 165 facts are perhaps too many to review  
22 individually, so I thought perhaps a good way to put those  
23 facts of what happened in relief is to refer to Mr. Gass's  
24 letter of March 3rd, 2006. It's tab 12 in the burgundy  
25 binder.

1           On the second page -- the first page deals principally  
2 with what the situation is and what the role of the Board of  
3 Adjustments is. This letter was written a day or two after  
4 Mr. Gittins filed a handwritten appeal to the Board of  
5 Adjustments. The first page kind of deals with that.

6           On the second page he gets to discussing what happened at  
7 the counsel meetings. In the first paragraph he describes  
8 what the requirements are for zoning and rezoning. And as  
9 far as he states them there, they're correct. He lays out  
10 the requirements section by section about what the procedures  
11 are that are required in the event of a rezone application.

12           One thing he doesn't mention there, and maybe it didn't  
13 need to be mentioned, but he says toward the end of that  
14 first full paragraph on page two, "the city counsel is then  
15 required to hold a public meeting and notice the meeting at  
16 least 24 hours before the meeting on the city's website. In  
17 the case of the request by Neighborhood Nonprofit, the city  
18 council took an extra step and held an unrequired public  
19 hearing that was noticed 15 days before the hearing."

20           Well, the public hearing was not required under state  
21 law. The notice of 15 days in advance was not required under  
22 state law and in that sense he's correct that it was extra  
23 under state law. But the city ordinances are very clear in  
24 requiring that on any request for rezone, and if you'll turn  
25 to tab 36 in the burgundy binder. That section of the --

1 that section of the code -- I'm sorry, of the municipal  
2 ordinance, the zoning code for Smithfield, clearly requires  
3 that the Smithfield City council have a public hearing, not  
4 just a public meeting, and that the notice be at least 15  
5 days in advance of the hearing before they hold --

6 **THE COURT:** In your position is there a definitional  
7 difference between a public hearing and a public meeting?

8 **MR. DAINES:** No. Our position is that on February  
9 8th they did not hold a public hearing. They did not give 15  
10 days advance notice of that hearing. And that's the import  
11 of that ordinance in the context of this case. They did give  
12 the 15 days notice before the January 25th meeting. They did  
13 hold a public hearing at the January 25th meeting that Mr.  
14 Gass said is extra, but it was required under Smithfield City  
15 ordinances.

16 **THE COURT:** One of the principal differences, as I  
17 read the pleadings between your position and that of the  
18 city, is that -- I don't have it. Is January 25 the first  
19 meeting and February 8 the second?

20 **MR. DAINES:** Yes.

21 **THE COURT:** Is it your position that on January  
22 25th, properly noticed and properly conducted, a hearing was  
23 held and the change of zoning occurred for the 25 acres  
24 rather than the full 35? Ten acres was exempted, deleted,  
25 left out, something like that?

1           **MR. DAINES:** That's correct.

2           **THE COURT:** The decision was made on the 25. In  
3 order to reconsider the ten, the applicant needed to start  
4 over and the city needed to renotice it?

5           **MR. DAINES:** Correct.

6           **THE COURT:** The city's position, as I understand it,  
7 is that's not the case because what really happened on the  
8 25th was a decision to rezone the 25, but that did not become  
9 a zoning law. It was not entered into law. It was not a  
10 decision with respect to the ordinances requiring them to  
11 renotice the matter, because by the time the 8th came they  
12 simply reconsidered it and decided to go with the full 35.

13           The difference is I think the city suggests that because  
14 it was never reduced to a written ordinance, therefore on the  
15 25 no zoning change had actually occurred, but was only  
16 approved on the 25 acres on the 25th. But reconsidered and  
17 modified later on the full 35. Am I stating your position?

18           **MR. JORGENSEN:** Actually, Your Honor, the original  
19 request was 25 and a half to 24 and a half. It's actually  
20 basically 24-and-a-half acres that was proposed for the  
21 entire parcel. The one acre difference was that there was  
22 one acre that had already been rezoned.

23           **THE COURT:** You're correct. I'd forgotten about  
24 that.

25           **MR. JORGENSEN:** And it was reduced by an amendment



1 to the motion to rezone the entire parcel to approximately  
2 two-thirds of that.

3 **THE COURT:** I'm using the wrong numbers. But there  
4 is a ten acre differential?

5 **MR. JORGENSEN:** That's correct. Our position is  
6 that there was no written ordinance for the amended motion  
7 and therefore there could be no (unintelligible).

8 **THE COURT:** I'm using the wrong numbers. It's 25  
9 and 15 rather than 25 and 35. I knew there was a ten  
10 differential there, but I'd forgotten which way it went.

11 If we boil this thing down, that's largely, I think, the  
12 distinction between your position and that of the city. And  
13 you're suggesting not only that, but the Robert's Rules of  
14 Order, as well as perhaps provisions of the city council, or  
15 of the ordinances, were not met with compliance?

16 **MR. DAINES:** Yeah.

17 **THE COURT:** All right. Go ahead. I wanted to make  
18 sure -- I apologize for -- I was reviewing this this morning  
19 with our law clerk and I was using 25 and 35. Somehow that  
20 got etched in my mind. I recognize that there's an acre  
21 variance there too.

22 **MR. DAINES:** I guess, kind of on a broader basis,  
23 when is the decision of the city a decision is kind of part  
24 of that.

25 **THE COURT:** When you really microscope this thing

1 down, that's really the gravamen of this thing. There's some  
2 suggestion made by you, and I'm not suggesting it's at all  
3 improper, but there is a suggestion made by you and I would  
4 like to focus on that, that what occurred during that two  
5 week interim may have may have been ultra vires, if you will.  
6 It may have been -- I don't want to use the term secret  
7 meeting, but perhaps did not comply with the Sunshine laws.  
8 But there's a suggestion of that. Mr. Jorgensen takes some  
9 umbrage over that suggestion because he says there's lack of  
10 any proof, and in fact says the affidavit suggests to the  
11 contrary.

12 **MR. DAINES:** Very much so. That's worth pausing a  
13 minute on.

14 **THE COURT:** If you think I'm directing your  
15 argument, I intend to.

16 **MR. DAINES:** That's fine. I'm happy to address your  
17 concerns. If you'll look at the most recent filing by  
18 Smithfield City, this one that just came in, the reply  
19 memorandum, if you take a look at page four. This is the  
20 part of the segment that you might be referring to. It's a  
21 theme that has been hit a time or two by the city.

22 **THE COURT:** It's raised a little later in the same  
23 memo?

24 **MR. DAINES:** Yes. In fact, if you look it's there  
25 in the middle of page four and it appears again at page six.

1 At the same time, the petitioner, that's Mr. Gittins, is  
2 quick to insinuate and imply that four council members  
3 determined to vote on February 8th, '06, for rezone of the  
4 entire proposed parcel must have been the result of secret  
5 meetings, conspiratorial planning or some other illegal or  
6 unethical scheme on the part of the four council members.

7 Then back on page four he says, no evidence has been nor  
8 can be presented that shows members of the city council held  
9 secret or conspiratorial meetings outside of the two regular  
10 public meetings referenced and in which some plot was hatched  
11 to magically bring the rezone issue back before the council  
12 on February 8th, 2007. That's what Your Honor is referring  
13 to, isn't it?

14 **THE COURT:** It is.

15 **MR. DAINES:** Those implications.

16 **THE COURT:** Because I would agree with you without  
17 hesitation that if in fact secret meetings were held, not in  
18 conformance with the state statutes on open meetings and also  
19 with respect to the ordinances of the city, that ought to  
20 bear some attention.

21 **MR. DAINES:** We never claimed that there were secret  
22 meetings. We claim that a decision was made somewhere in  
23 between those two meetings. That either the decision was  
24 valid and held in secret meetings, or the decision never  
25 occurred and could not result in a vote on February 8th. We

1 didn't pick which of those poisons it was for the city.

2 Take a look at page five of this memorandum. This is the  
3 problem that the city has put itself in. Page five of the  
4 memorandum, the last full paragraph, the last sentence. "The  
5 council was correct in its decision to take the time in  
6 between the two meetings to make certain that a correct legal  
7 description was included in the ordinance that was finally  
8 adopted."

9 Take a look at Mr. Gass's letter, tab 12. In the first  
10 full paragraph on page two he says, "Immediately following  
11 the public hearing the city council was in a position to make  
12 a decision on the request or to defer the decision to another  
13 meeting." Which of those two did the counsel do, Your Honor?  
14 They made a decision on the request.

15 As you know, there was a motion made that night to  
16 approve the request with modification. That was the  
17 decision. There was no decision to defer it. There was no  
18 confusion expressed at the meeting. There is a whole bunch  
19 of details about how -- in the record about how there was  
20 this sequence of things and everybody seemed to be certain.

21 Now, it says -- then it says there was this defect. And  
22 in this letter he says that the reason why it was brought  
23 before the city council, again, was because they discovered  
24 this defect.

25 Turn to his chronology on tab 15, Your Honor. January

1 26th, 2005. It's on page two of tab 15. January 25th, "the  
2 council voted unanimously to approve the modification of the  
3 request. Only approximately two-thirds being requested for  
4 rezone was approved. Balance to remain as currently zoned."  
5 That sounds like a decision, just like the minutes reflect.

6 January 26th, considerable confusion surfaced over where  
7 the line was being drawn. You go down and they have  
8 discussions with counsel. The city was informed that it was  
9 not proper. Motion to represent an area different than what  
10 appeared on the prepared rezone ordinance before the counsel.  
11 And then down in the last sentence, "it was therefore  
12 necessary to reconsider the ordinance with the area to be  
13 rezoned being properly described."

14 **THE COURT:** What's wrong with that?

15 **MR. DAINES:** Because whether it's Robert's Rules of  
16 Order or not, Your Honor --

17 **THE COURT:** Let's disregard Robert's Rules of Order  
18 for a minute. I want to ask some questions about that, but  
19 let's just go to the procedure followed here.

20 **MR. DAINES:** It has to be the council's decision  
21 whether to reconsider. The decision to reconsider is made  
22 here in between meetings without the council.

23 **THE COURT:** I'm not so sure that's the case, Mr.  
24 Daines.

25 **MR. DAINES:** The city staff doesn't get to decide.

1           **THE COURT:** That may be true, but I'm not so sure  
2 you have yet to define the term decision. We mix in this  
3 discussion, and Mr. Jorgensen is guilty of the same thing,  
4 the two terms decision and ordinance. They're a world apart.  
5 A decision by the city council is one thing. An ordinance by  
6 the city council is something altogether different. I would  
7 suggest we need to take those two terms and see how they  
8 measure in this decision. To me, that's the focus. There's  
9 a number of focus points here and that's one of them.

10           You argue that the city made a decision on the 25th,  
11 which they did. I don't disagree. But was an ordinance  
12 passed also?

13           **MR. DAINES:** Yes.

14           **THE COURT:** Was an ordinance created?

15           **MR. DAINES:** Yes.

16           **THE COURT:** No it wasn't. Under the rules and  
17 ordinances of the city and under state law an ordinance is  
18 passed and becomes effective when signed. There's a world of  
19 difference between the two. You may be absolutely right for  
20 these purposes that they're the same. I'm not suggesting  
21 otherwise. But I think this is an area of focus. It's  
22 really an area of focus between these two parties.

23           Your suggestion is that a decision made is an ordinance  
24 created. Mr. Jorgensen suggests no, a decision made is a  
25 decision to create the ordinance, which comes later. And

1 this interim between the 25th and February 8th was a time  
2 which, according to that timeline you just referred to, there  
3 was a concern raised relative to the legal boundaries, the  
4 legal description. I don't disagree with that. I think it's  
5 one thing to make a decision that we're going to rezone this  
6 ten acres. That cannot become an ordinance until in fact  
7 that property is defined and described. Now, whether that's  
8 a justification for a revisit, if you will, I think is  
9 problematic. So do you.

10 MR. DAINES: Your Honor, first of all, we can set  
11 that aside for later, but I don't agree with you that there  
12 was not enough specificity in there.

13 THE COURT: I don't know whether there was or not.  
14 That's one problem is I don't know.

15 MR. DAINES: It wasn't a problem --

16 THE COURT: See, if there's an issue of fact here,  
17 it strikes me that may be one. That timeline you just read  
18 suggests there was. And the city engineer suggests, yeah,  
19 there's a problem with the description here. We don't know  
20 what we've got. When we delete ten acres off, what are we  
21 left with? I don't know if there was sufficient description  
22 or not.

23 MR. DAINES: There would be --

24 THE COURT: Let me finish. You suggest that there  
25 was. There was enough there to make the decision to become

1 an ordinance. Mr. Jorgensen suggests there wasn't. There  
2 was a problem and that's one of the reasons, perhaps the only  
3 one, but at least one reason that the matter was readdressed  
4 on the 8th. To me that -- you have to focus between decision  
5 or ordinance and what the facts are relative to the  
6 description sufficiently provided to define an ordinance.

7 MR. DAINES: Can I focus on that for a minute?

8 THE COURT: Please.

9 MR. DAINES: Take a look at tab 23. Now, that is an  
10 overlay. The pink outline is the boundary of the property  
11 between the Lundberg, Johnson and Jacobsen and Michelsen  
12 investments. And the darker dotted line is the boundary line  
13 of the proposed subdivision.

14 Just as a note, some of this land that's within the  
15 proposed subdivision was already zoned the way they wanted it  
16 to be zoned, so not everything to the south of that pink line  
17 was needing to be rezoned. But it all was to be included in  
18 that subdivision.

19 THE COURT: Let me see if I can get oriented on this  
20 for a minute here.

21 MR. DAINES: Do you have the binder, Your Honor?

22 THE COURT: Yeah.

23 MR. DAINES: I went to some trouble putting it  
24 together. It's the burgundy one.

25 THE COURT: I've got them both. You described these



1 as courtesy copies. I'll make the observation that anything  
2 this big is really a discourtesy. Go ahead. What tab again?

3 MR. DAINES: Tab 23.

4 THE COURT: All right. This is better.

5 MR. DAINES: So, the decision was everything south  
6 of the property line was to be rezoned.

7 THE COURT: The pink line?

8 MR. DAINES: Everything south of the pink line was  
9 to be rezoned. Like I say, there's some parts of this to the  
10 extreme south that were already rezoned. This was the  
11 boundary --

12 THE COURT: All right. Go ahead.

13 MR. DAINES: Now, as pointed out in our memorandum,  
14 all they had to do was to write in the ordinance -- it would  
15 have been sufficient as a legal description to say everything  
16 south of the line. They could have used the very language in  
17 the minutes and had a sufficient description. And before you  
18 comment on that --

19 THE COURT: Just a minute. Let me stop you. Who  
20 makes that decision ultimately as to whether or not it's,  
21 using your term, sufficient? The city engineer or you? Mr.  
22 Gittins, the Board of Adjustments or the court? Who does  
23 that? The county recorder's office? Who finally has the  
24 decision as to whether or not that description is sufficient?

25 MR. DAINES: By ordinance Smithfield City has

1 provided means for this to happen. Look at tabs 39 and 40.  
2 I'm sorry. It's 40 and 37. 37-E, duties and powers of the  
3 board. They shall hear and decide to interpret zoning maps.

4 **THE COURT:** Where are you?

5 **MR. DAINES:** Tab 37, Your Honor.

6 **THE COURT:** All right.

7 **MR. DAINES:** The board interprets zoning maps. Tab  
8 40, rules for locating boundaries. The first phrase in that  
9 ordinance, where uncertainty exists as to the boundary of any  
10 zone, under the city's construction this ordinance would  
11 never come into play. There would always be absolute  
12 certainty as to where the boundaries are.

13 **THE COURT:** I think you're on a different parallel  
14 here, Mr. Daines. This ordinance has application in locating  
15 boundaries, not in creating the ordinance to start with.

16 **MR. DAINES:** Correct.

17 **THE COURT:** The city engineer suggests I needed to  
18 resolve this thing in order to, at least to his satisfaction  
19 and therefore in behalf of the city, satisfactorily describe  
20 the property. This has nothing to do with that. This is  
21 entirely unrelated, this ordinance. This ordinance is to  
22 interpret zones at a later time after the ordinance has been  
23 passed.

24 **MR. DAINES:** So wouldn't the city manager's duty in  
25 trying to create a legal description be to create something

1 faithful to the decision of the council?

2 **THE COURT:** Okay. If the council had in mind --

3 **MR. DAINES:** They expressed what they had in mind.

4 **THE COURT:** -- a description of what they wanted to  
5 have done.

6 **MR. DAINES:** Let's look at the minutes.

7 **THE COURT:** I'm not arguing with you, I'm just  
8 saying that's true. If in fact they know what the city had  
9 in mind. Let's assume the engineer is given the job of  
10 drafting this thing into the ordinance. He says, you know,  
11 I'm not sure what to do with this thing. I don't like it. I  
12 want the city council to talk to me about what they want.

13 What happens if he does that? Let's assume that  
14 happened. Let's assume after January 25th he says I sat down  
15 with my computer, and I was going to say slide rule, and  
16 started to work this thing out. I need to come back and talk  
17 to the city about it. Let's assume that happened. You're  
18 telling me he can't do that without renoticing this meeting,  
19 without republishing this matter and reconducting a public  
20 hearing?

21 **MR. DAINES:** Absolutely not. There's procedures in  
22 place for that.

23 **THE COURT:** What are they?

24 **MR. DAINES:** All right. We laid it out in our  
25 memorandum.

1           **THE COURT:** Tell me now.

2           **MR. DAINES:** He would create a draft of what he  
3 thought was appropriate, bring it back to the council either  
4 in terms of -- there's a place on the agenda for his report  
5 to the counsel. He would bring it up in that part of the  
6 agenda.

7           **THE COURT:** Where are the ordinances that require  
8 that procedure to be followed?

9           **MR. DAINES:** They don't require that procedure. You  
10 asked me what could he do.

11           **THE COURT:** No. I said what's required. Why can't  
12 he simply come back and do what he did as opposed to what you  
13 suggest was improper? What requirement is there that he do  
14 something any different than what he did?

15           **MR. DAINES:** What requirement is there that he did  
16 what he did?

17           **THE COURT:** Here's the question. Let's keep focus  
18 here for a minute. If I understand it, the engineer comes  
19 back later and says I'm having difficulty drafting this  
20 thing, a description to be recorded, let's talk about it.  
21 Anything wrong with that?

22           **MR. DAINES:** No.

23           **THE COURT:** Isn't that what he says he did?

24           **MR. DAINES:** No. He says it winds up -- he didn't  
25 bring it before the council that way.

1           **THE COURT:** What difference does it make how he  
2 brings it? Let's assume he comes back and says, you know  
3 what, I need some clarification here folks. Are you telling  
4 me that that's ineffective unless he follows a certain set of  
5 rules? And if that's the case what are they?

6           **MR. DAINES:** If the decision that had been reached  
7 following his bringing it before the council had been  
8 faithful to the original decision, or any of the suggestions  
9 that he had come up with as a result, fine.

10          **THE COURT:** What is the procedure that requires  
11 that? Show me the ordinance, the set of rules, that requires  
12 that kind of application. Why can't he come back in the next  
13 city council meeting and say I'm having difficulty with this  
14 thing, can you straighten me out?

15          **MR. DAINES:** He can.

16          **THE COURT:** Isn't that what he said he did?

17          **MR. DAINES:** Well, regardless of what he said he  
18 did, that's not what the council did with his --

19          **THE COURT:** I know. I haven't gone to that next  
20 step yet. You're taking umbrage and citing these rules  
21 relative to what he should have done. My response is, okay,  
22 show me a rule that says he should have done this in a  
23 certain way. The city says, look -- the city engineer says I  
24 got a problem with this thing. I'm suggesting, okay --

25          **MR. DAINES:** It's not the city engineer that --

1           **THE COURT:** Then when he did this the city took a  
2 look at this and said okay, we're going to go the whole 25  
3 acres.

4           **MR. DAINES:** There's the problem.

5           **THE COURT:** Isn't that what happened here?

6           **MR. DAINES:** That's exactly what happened.

7           **THE COURT:** Okay. The question is, then, back to  
8 what I focused on before, is the city's -- is the city  
9 council's action on the 25th, a decision to rezone 15 as  
10 opposed to 25, final? Or can it be looked at again after the  
11 engineer comes back and says I got a problem with the legal  
12 description? You're suggestion is that that's final and they  
13 can't reconsider that two weeks later without going through  
14 the notice process.

15           **MR. DAINES:** They can't reconsider it at all. That  
16 meeting -- when the gavel fell on that meeting they were done  
17 with that decision. They can't go back and make a different  
18 decision.

19           **THE COURT:** Because the ordinance is passed or  
20 because a decision was made?

21           **MR. DAINES:** Because the decision was made.

22           **THE COURT:** Okay. Show me the statute or rules that  
23 says they can't reconsider it as long as it's not yet an  
24 ordinance.

25           **MR. DAINES:** Robert's Rules of Order.

1           **THE COURT:** Okay. Is there anything aside from  
2 that, any ordinances or state statutes, which preclude the  
3 procedure followed by the city in reconsidering the original  
4 request for the 25 acres? You keep deferring to the Robert's  
5 Rules. I want you to cite me, if you can, any other  
6 ordinance or any state statute which precludes the city from  
7 doing what it did absent the previous decision having been  
8 reduced to an ordinance?

9           **MR. DAINES:** The ordinance is 2.08.030 that  
10 establishes Robert's Rules of Order as the city's procedures.

11           **THE COURT:** You keep bringing me back to that and I  
12 want to defer from it for a minute. Do you know of any other  
13 statute, any other ordinance, which precludes the city from  
14 doing what it did other than your interpretation and  
15 application of Robert's Rules?

16           **MR. DAINES:** One other thing in relation to that is  
17 the state statute that allows cities to establish their rules  
18 of procedure by ordinance.

19           **THE COURT:** Okay.

20           **MR. DAINES:** Other than that, no.

21           **THE COURT:** Let's go to Robert's Rules at this  
22 point. What tab is that?

23           **MR. DAINES:** It's a series of tabs. We start with  
24 tab 41. But the rule on reconsideration itself --

25           **THE COURT:** The rule adopting -- the ordinance

1 adopting Robert's Rules?

2 MR. DAINES: That's 2.08.

3 THE COURT: The tab number?

4 MR. DAINES: Tab 28. Sorry, no, I have it wrong.

5 Tab 26. Number 26, page three.

6 THE COURT: It's your position, if I understand it,  
7 that by this rule of procedure, not an ordinance --

8 MR. DAINES: That's an ordinance.

9 THE COURT: 2.803 is that by this rule of procedure,  
10 or this ordinance relative to the rules of procedure, that  
11 the Robert's Rules of Order are elevated to the status of a  
12 city ordinance?

13 MR. DAINES: It says shall govern.

14 THE COURT: I know. And a violation of those rules  
15 equates to a violation of city ordinance?

16 MR. DAINES: That's correct. And the terms of  
17 Robert's Rules also say so. Once a deliberative body has  
18 adopted rules they have to live by them. That's under tab  
19 43.

20 THE COURT: Okay. Go ahead.

21 MR. DAINES: The city can't turn back on itself and  
22 issue a new decision after it has made a decision on what to  
23 rezone without going through the process. This is aside from  
24 Robert's Rules, Your Honor. They made a decision. If Mr.  
25 Gittins had had a problem that he wanted to address having to



1 do with the decision of January 25th, and he had some  
2 problems with it, but if he felt that there was something  
3 amiss in that decision I can guarantee you that the city  
4 wouldn't be sitting here arguing that the decision wasn't  
5 really final until it was expressed in an ordinance. They  
6 would be saying you had 30 days from January 25th to --

7 **THE COURT:** I don't think that's a fair argument,  
8 because you don't know what they're going to do or not.  
9 That's speculative at best. I don't disagree with you that  
10 that's probably exactly what happened, but I think you would  
11 agree with me that that's really not a fair argument to make  
12 in court because it doesn't bear on the legalities. We're  
13 not talking about necessarily fairness here, we're talking  
14 about specific legalities.

15 **MR. DAINES:** That's right.

16 **THE COURT:** So though I don't disagree with you,  
17 that's probably exactly what happened, probably, but you'd  
18 have to agree with me in the same breath that that's not what  
19 we're focusing on here. We're not concerned about that kind  
20 of conjectural fairness.

21 **MR. DAINES:** In a sense we are.

22 **THE COURT:** I can't decide this case in your favor  
23 because I think they are going to argue the opposite.

24 **MR. DAINES:** No, no. But here's the thing. Nobody  
25 took exception to the decision of January 25th in the way

1 that the law requires.

2 THE COURT: Okay. I'm with you there. I'm  
3 suggesting that your argument --

4 MR. DAINES: It was unfair.

5 THE COURT: Tit for tat doesn't cover it.

6 MR. DAINES: Yes. But nobody came to the -- nobody  
7 sought a different decision than the January 25th decision in  
8 the means that they had available to them.

9 THE COURT: Until they reconvened on February 8th.

10 MR. DAINES: Until they reconvened on February 8th.  
11 And then the old decision was wiped out. Whoever might have  
12 had a problem with the old decision, they don't have to do  
13 anything anymore.

14 THE COURT: Well, people having problems isn't the  
15 issue. The question is whether or not the city council was  
16 satisfied that everything was before them. That's one  
17 question that Mr. Jorgensen raises is, well, where is the  
18 prejudice here. The hearing was conducted, the hearing was  
19 held, information was supplied, the city council had it at  
20 its disposal. What's the problem here?

21 MR. DAINES: Do we want to go to the prejudice or  
22 shouldn't we deal with the illegality first?

23 THE COURT: Well, if it's not illegal, there's no  
24 prejudice. If there's no prejudice, you have no standing.  
25 So take either one. They dovetail together.

1           **MR. DAINES:** There's a problem, though, in terms of  
2 the question of uncontested facts when it relates to  
3 prejudice.

4           **THE COURT:** That's true and we'll get to that. But  
5 what I'm saying, if you suggest there's no prejudice we have  
6 nothing to do here.

7           **MR. DAINES:** There's prejudice. There's definitely  
8 prejudice. The prejudice is that had the procedures been  
9 followed, the decision of February 8th to rezone the entirety  
10 of it could never have been made. It wouldn't be before the  
11 council capable of voting contrary to their January 25th  
12 decision.

13           **THE COURT:** The council could have in the January  
14 25th hearing, meeting, however you want to describe that,  
15 could have rezoned the full 25 acres?

16           **MR. DAINES:** They could have.

17           **THE COURT:** They had all the information before them  
18 sufficient to do so?

19           **MR. DAINES:** Absolutely. And had they done so it  
20 would have been an exercise of legislative discretion, no  
21 question.

22           **THE COURT:** Okay.

23           **MR. DAINES:** And Mr. Gittins wouldn't have had an  
24 action had that happened. They exercised their legislative  
25 discretion on January 25th. To put themselves back into a

1 position of re-exercising their legislative discretion to  
2 rezone property, they would had to have -- it's a new rezone.  
3 It's a re-rezone and they have to go through all the  
4 procedures all over again.

5           **THE COURT:** You come back to where I started in the  
6 first place and where you differ in large fashion from Mr.  
7 Jorgensen? It wasn't a re-rezone because the rezone hadn't  
8 occurred in the first place. A decision to rezone had, but  
9 the ordinance had not been passed. It may be a minor  
10 distinction, but it becomes a major focal point here. We  
11 need to keep our eye on the ball here of what really  
12 happened.

13           The reason I asked you about the January 25th hearing is,  
14 if I understand your pleadings and those of Mr. Jorgensen,  
15 the information was sufficient before that legislative body  
16 to make a decision rezoning all or part of the 25 acres.  
17 They made a decision to rezone part. And then changed that  
18 decision on the 8th.

19           **MR. DAINES:** And that's the problem, they changed  
20 the decision.

21           **THE COURT:** I don't think anybody argues that.

22           **MR. DAINES:** And again, had the matter been brought  
23 before them and they, I guess, memorialized, would be the  
24 word, their decision of January 25th with a written ordinance  
25 that was not different overtly from the January 25th one,

1 that could and have should been done and would have been done  
2 by unanimous consent and then noh problem. No problem under  
3 any of the rules of construction.

4 **THE COURT:** Let me change the focus for a minute.  
5 There's two things I'd like you to address. One, is there  
6 anything about this which you suggest is capricious?

7 **MR. DAINES:** We haven't argued arbitrary or  
8 capricious. They really boil down to the same thing.

9 **THE COURT:** No, they don't. Arbitrary and  
10 capricious are far -- they're distinct principles. They have  
11 an application here relative to the city council's actions  
12 and one of them is -- goes to prejudice again. Would you  
13 agree with me that had the city, instead of doing what they  
14 did on February 8th, did what you think they should have done  
15 and renoticed this thing for a hearing, would they have  
16 received any other information they didn't have before?

17 **MR. DAINES:** Absolutely.

18 **THE COURT:** From whom?

19 **MR. DAINES:** From my client.

20 **THE COURT:** Why would they receive that from your  
21 client? Wasn't he there on the 25th? Didn't he have input?

22 **MR. DAINES:** No.

23 **THE COURT:** Why not?

24 **MR. DAINES:** He was out of the country.

25 **THE COURT:** What claim does he have, then, to

1 suggest that if he wasn't there he gets another hearing?

2 MR. DAINES: The prejudice is --

3 THE COURT: No. Answer my question. He wasn't  
4 there. He had an opportunity to be there, but didn't appear,  
5 nor anybody in his behalf apparently, to protest this thing.  
6 Why does he get an opportunity to redo?

7 MR. DAINES: No. On February 8th?

8 THE COURT: No. I asked you before if in fact the  
9 city council had before it sufficient information upon which  
10 to make a decision to rezone the full 25 acres. You answered  
11 in the affirmative.

12 MR. DAINES: Yes.

13 THE COURT: And he wasn't there. His input could  
14 have been made then but it wasn't. Why does the city have to  
15 reconsider his opportunity for input?

16 MR. DAINES: Because they have to provide the  
17 hearings. They made a decision on January 25th and exercised  
18 their legislative discretion. Whether he was there or not is  
19 irrelevant to the question of whether they -- whether that  
20 was a proper exercise of legislative discretion, Your Honor,  
21 or whether they had followed the right procedures to get to  
22 that point where they could make that decision. His presence  
23 or not at that meeting is irrelevant for that issue.

24 THE COURT: Well, I'm not so sure that's true. One  
25 of the things this court has to decide is whether or not what

1 they did was arbitrary, capricious or illegal. If you're  
2 waiving any claim relative to arbitrary or capricious, and I  
3 suggest there's a world of difference between the two, then  
4 we're only dwelling on whether it was legal. Are you willing  
5 to waive any claim relative to arbitrary or capricious  
6 behavior on behalf of the city council?

7 **MR. DAINES:** No.

8 **THE COURT:** Then what is it about their activity  
9 that was either arbitrary or capricious?

10 **MR. DAINES:** That they made decision A. It's the  
11 very definition of arbitrary and capricious. They make  
12 decision A and two weeks later they make decision B.

13 **THE COURT:** Where is that arbitrary? If they had  
14 all of the information sufficient on the 25th to make the  
15 decision, why is changing their mind arbitrary?

16 **MR. DAINES:** I'm sorry. I didn't bring my  
17 dictionary with me, but that's the very definition of  
18 arbitrary is you can't figure out on what basis they make a  
19 decision.

20 **THE COURT:** I disagree with your definition. Let's  
21 go to capricious. Is there something about their behavior  
22 which you suggest was capricious?

23 **MR. DAINES:** Yes.

24 **THE COURT:** What?

25 **MR. DAINES:** That they launch off into a whole

1 different decision.

2           **THE COURT:** Capricious requires a certain mens re,  
3 if you will. Is there evidence of some kind of malice, some  
4 evil intent on behalf of any of the city council members  
5 which you can define which resulted in capricious behavior?

6           **MR. DAINES:** No, I don't see that. Nor have we  
7 argued that, Your Honor.

8           **THE COURT:** Then you waive any claim relative to  
9 capriciousness?

10           **MR. DAINES:** I want to be direct with you.

11           **THE COURT:** I do too. I want to hone this thing  
12 down and get rid of all the chaff here and find out what the  
13 grain is.

14           **MR. DAINES:** I agree. We should keep to the kernel.  
15 The thing about arbitrary and capricious, I looked at that  
16 very carefully here. Ludma, the recent revisions that  
17 happened before this case was in, changed a lot of the  
18 language having to do with arbitrary, capricious and illegal.  
19 And they -- and the arbitrary and capricious element kind of  
20 got taken out of the statute.

21           **THE COURT:** Kind of?

22           **MR. DAINES:** It did. I mean, I didn't bring -- I  
23 wasn't thinking that we'd get into the arbitrary and  
24 capriciousness because we didn't argue it. The reason it  
25 didn't get argued, Your Honor, is because Ludma has, with



1 respect to the legislative decisions, you're honed down to  
2 illegal. The arbitrary and capricious, when it comes to  
3 legislative decisions, is out the window according to the  
4 statute in Ludma.

5 I just want to be direct with you. That's a change in  
6 how the law has been structured and that's the reason we  
7 didn't argue about arbitrary and capricious. We can only get  
8 into that in some kind of a very remote constitutional law  
9 sort of context about arbitrary and capricious being contrary  
10 to the police power in exercising some kind of zoning thing.  
11 We didn't even go there, Your Honor. That's why we didn't  
12 argue arbitrariness and capriciousness. Not that we don't  
13 think it was arbitrary, but because the statute doesn't have  
14 that any more as a standard when it comes to legislative  
15 decisions. We're strictly limited to whether it was legal or  
16 illegal.

17 **THE COURT:** Let's go to the Robert's Rules for a  
18 minute. You suggest those should be considered by the city  
19 as law and that a violation of the same results in a  
20 nullification of the city's action in this instance?

21 **MR. DAINES:** Yes.

22 **THE COURT:** Okay.

23 **MR. DAINES:** Here's the thing, Your Honor. When the  
24 gavel falls the meeting is over. The meeting is its own  
25 session. If you're going to do a reconsideration, and this

1 is aside from Robert's Rules, this is sensible.

2 THE COURT: Let me --

3 MR. DAINES: In order to do a reconsideration you  
4 have to --

5 THE COURT: You've argued that, Mr. Daines. I'm not  
6 trying to disregard the argument you've made. What I'm  
7 trying to do here is focus on the legality of the city's  
8 actions if they in fact violated their -- Robert's Rules of  
9 Orders they adopted as you suggest.

10 MR. DAINES: Tab 48, Your Honor.

11 THE COURT: I was just thumbing through your  
12 memorandum relative to any citations of appellate law  
13 overturning city actions for being in violation of Robert's  
14 Rules.

15 MR. DAINES: It's not.

16 THE COURT: Do you have any?

17 MR. DAINES: No.

18 THE COURT: Do you know of any appellate case law  
19 which suggests that a city's violations of Robert's Rules,  
20 adopted to govern its procedures, is tantamount to a  
21 violation of the ordinance and therefore nullifies the  
22 activity undertaken?

23 MR. DAINES: Not specifically.

24 THE COURT: Why not?

25 MR. DAINES: I mean, there aren't any that say the

1 city can disregard its own rules that it adopts.

2 THE COURT: I know. I'm trying to focus, and I  
3 didn't recall any citation of case law.

4 MR. DAINES: Springville Citizens and Perry versus  
5 Gardner City.

6 THE COURT: Any citation of case law which holds  
7 that Robert's Rules of Order, if adopted by ordinance, takes  
8 on the same gravity, if you will, and that's a poor term but  
9 that's all I can think of right now, of city ordinances and a  
10 violation of them nullifies a city action?

11 MR. DAINES: No appellate law on that very limited  
12 question.

13 THE COURT: Are you telling me, then, that as far as  
14 you know that issue is a case of first impression throughout  
15 the entire United States, and even in England for that  
16 matter, since these are adopted universally in the common law  
17 countries?

18 MR. DAINES: Honestly I didn't search beyond Utah to  
19 answer that question. Springville Citizens and Perry versus  
20 Gardner is so much on point on that issue that there was no  
21 need to look anywhere else in the country. I mean, if the  
22 city -- let me read the quotes in my memorandum, tab three in  
23 the white binder. Page two, the middle of the page. "While  
24 substantial compliance with matters in which a municipality  
25 has discretion may indeed suffice, it does not when the

1 municipality itself has removed any such discretion.  
2 Municipal zoning authorities are bound by the terms and  
3 standards of applicable zoning ordinances and are not at  
4 liberty to make land use decisions in derogation thereof.  
5 Stated simply, the city cannot, quote, change the rules  
6 halfway through the game."

7           **THE COURT:** I couldn't agree with you more. I think  
8 that's Black letter law at this point.

9           **MR. DAINES:** All right.

10           **THE COURT:** But that's not the question. The  
11 question is when a city adopts the Robert's Rules of Order to  
12 govern its procedures, as its ordinance says, does a  
13 deviation from those Robert's Rules of Order negate any  
14 action taken by the city in derogation of the rules?

15           **MR. DAINES:** Yes.

16           **THE COURT:** That case doesn't tell me that. That  
17 case says in fact if they violate -- deviate from the  
18 ordinances. My question is are the Robert's Rules of Order,  
19 when adopted for governing the procedure to be followed,  
20 given the same deference as city ordinances? That's a simple  
21 question. Do you know any case law which so suggests or so  
22 holds? I don't. This one doesn't. The Springville City  
23 case is absolutely correct as a matter of law even without  
24 the citation. A violation of its own ordinances, if not  
25 illegal as defined in Springville, is certainly -- could

1 certainly be considered arbitrary and in some conditions  
2 likely capricious.

3           **MR. DAINES:** But the rules were adopted by ordinance  
4 and the language --

5           **THE COURT:** Listen. Let's not continue to argue  
6 with me. I'm just asking the question. Do you know of any  
7 case law in this state or elsewhere which elevates the  
8 Robert's Rules adopted for governing city meetings to the  
9 legal of an ordinance, violation of which would negate the  
10 action by the city council?

11           And I have a follow up. I would suggest to you, Mr.  
12 Daines, that if that is the case, there is not a city in this  
13 state, let alone this country, which follows to the letter  
14 Robert's Rules of Order in any of its meetings. I've been to  
15 a lot of city council meetings and a lot of other meetings,  
16 including the state legislature, which by reference adopts  
17 the same. I don't know of any case law which suggests this  
18 to be the case, because if it was I suspect you can negate  
19 almost ever action by every city council, county commission,  
20 county council, state legislature, throughout this country.

21           **MR. DAINES:** If you bring a challenge within 30  
22 days --

23           **THE COURT:** That's right. My concern is given the  
24 complexity of this -- of the laws of this country, I'm a  
25 little bit perplexed when you cite as a gravamen, or at least

1 one gravamen of your argument, that a violation of Robert's  
2 Rules occurred and therefore the action by the city council  
3 is negated. Yet you cannot cite one case, or haven't cited  
4 one case, as authority for that proposition. I'm not  
5 unsympathetic with are argument, I'm just a little bit  
6 surprised. I have never seen the Robert's Rules of Order  
7 elevated to a level of law.

8 **MR. DAINES:** Maybe you've never run into a case  
9 where the city adopted them.

10 **THE COURT:** I am frankly probably naive with respect  
11 to it. But I'm willing to be taught. This is a school room,  
12 teach me.

13 **MR. DAINES:** Let's look at Mr. Jorgensen's last  
14 reply memorandum. Take a look at page eight. There's a  
15 quote from the Powers and Duties, a guide for municipal  
16 officials, which I think is published by the Utah League of  
17 Cities and Towns on this point. It says, there is no  
18 mandatory set of rules of procedure for city or town council  
19 meetings. That happens, Your Honor, not to be true in  
20 Smithfield's case.

21 **THE COURT:** Do you know whether, Mr. Daines, the  
22 ordinance of Smithfield adopting Robert's Rules is unique to  
23 Smithfield?

24 **MR. DAINES:** I don't know. I know they've changed  
25 it since this lawsuit was instituted.

1           **THE COURT:** I don't blame them for that. I think  
2 you'd advise them to do the same.

3           **MR. DAINES:** They can change, but they can't change  
4 them during the game.

5           **THE COURT:** My question -- I'm not -- you have  
6 argued this case extremely well in your pleadings. I've told  
7 you this before, you write extremely well.

8           **MR. DAINES:** Thank you.

9           **THE COURT:** You do. You're a very skilled writer.  
10 Your arguments are well set out. My questions are not  
11 arguments, my questions are very clear. Do you know any  
12 other cities, counties, which have adopted Robert's Rules in  
13 the same fashion that Smithfield did?

14           **MR. DAINES:** The answer is no. And I haven't looked  
15 for them either.

16           **THE COURT:** Okay.

17           **MR. DAINES:** A city or town does not have to follow  
18 Robert's Rules or anyone else's rules of order.

19           **THE COURT:** I know. You suggest that has no  
20 application here because they did so by ordinance. That  
21 argument is not lost on me. I can follow that argument.

22           **MR. DAINES:** A city or town can adopt any rules of  
23 procedure that is consistent with state law.

24           **THE COURT:** And once it does it's bound?

25           **MR. DAINES:** Right.

1           **THE COURT:** Okay.

2           **MR. DAINES:** Normally cities, and especially towns,  
3 operate under an informal set of traditional rules that have  
4 been developed over time. That's what the city suggests  
5 happened and they want to ignore that ordinance adopting the  
6 rules.

7           **THE COURT:** I understand.

8           **MR. DAINES:** So did they do this inconsistently or  
9 consistently?

10          **THE COURT:** I don't know. I'm just bothered by the  
11 fact -- I'm willing, for purposes of this argument, to agree  
12 with you that they didn't comply. Maybe Mr. Jorgensen has an  
13 argument to the contrary, but they did not comply with their  
14 own rules adopted under the ordinance, i.e. the Robert's  
15 Rules.

16          But that's not my concern. My concern is does a  
17 violation of its rules of procedure, Robert's Rules, and  
18 procedures specifically for management of its meetings and so  
19 forth, equate to a violation of the zoning ordinances or  
20 ordinances designed to adopt zone changes?

21          **MR. DAINES:** Yes. And the two citations,  
22 Springville Citizens, Perry versus Gardner. I don't have  
23 anything specific, nor did I look for anything specific  
24 around the country about the adoption of Robert's Rules.  
25 Gardner versus Perry and Springville Citizens amply covers



1 that.

2 Your Honor, I argued Gardner versus Perry to the Court of  
3 Appeals. I was standing in front of the three judges.  
4 Springville Citizens was -- I mean, it's like if you screw up  
5 on the rules it doesn't matter how small the screw up is. In  
6 this case, if you've adopted them and they're mandatory --  
7 zoning is important enough. People's property rights are --  
8 the legislature and the city have set up means by which these  
9 property rights can be protected by public input into the  
10 process. If the city isn't willing to hold itself to the  
11 procedures that it adopts to protect those citizen rights,  
12 then zoning is meaningless.

13 You know, the problems with all of these arguments are --  
14 it's like the fact that it doesn't get -- it doesn't get  
15 adopted in writing, the fact that -- the question can we go  
16 back now, by the way, and invalidate every single ordinance  
17 that was ever signed and adopted if we can show that it  
18 wasn't before the council? You know, do we punch giant holes  
19 in the ordinance that way?

20 **THE COURT:** You can if you were within the time  
21 period, perhaps, the 30 days. But let's back this up for a  
22 second and then I'll defer to Mr. Jorgensen.

23 The zoning ordinances of a city are replete with  
24 procedures to be followed for changes or adoption of new  
25 zones. The ordinances of the city are also replete with

1 procedures to be followed to notify, broadcast, give notice  
2 of meetings, so forth. Absent any reference to Robert's  
3 Rules, if you took the Robert's Rules and disregarded them  
4 entirely, there are sufficient ordinances in Smithfield City  
5 as to what notice must be given, what publication must be  
6 made, how the ordinance is to be passed and considered and so  
7 forth.

8 Mr. Jorgensen's argument strikes me as suggesting that  
9 these are sufficient and Robert's Rules are simply to govern  
10 for convenience the operation of the city council or county  
11 commission or state legislature or perhaps boards of  
12 adjustments, so forth, but do not carry the weight of law.

13 **MR. DAINES:** I understand. May I --

14 **THE COURT:** Let me just ask you if you agree with  
15 me? Would you agree if we took the Robert's Rules of Order  
16 out, which apparently you suggest they did and I wasn't aware  
17 of that, and took the book and put it on shelf, where it  
18 generally stays unread anyway. It's kind of like the family  
19 Bible, it just sits there and collects dust.

20 **MR. DAINES:** According to the city staff it didn't,  
21 apparently.

22 **THE COURT:** They can still function, can still pass  
23 ordinances and still notify the public relative to proposals  
24 and so forth and get along just swimmily?

25 **MR. DAINES:** Yes.

1           **THE COURT:** But once they adopt those Robert's  
2 Rules, a violation of them negates any action, despite  
3 compliance with all the other ordinances, correct?

4           **MR. DAINES:** Yes.

5           **THE COURT:** Okay.

6           **MR. DAINES:** Your Honor, if I may. One of the ways  
7 to try and figure out how this operates is to say, well, what  
8 if the city's argument is correct. What if the city is right  
9 that it's not that important a rule, all of these strictures  
10 about reconsideration. We don't have to vote to reconsider  
11 and then have a vote on the reconsideration. We don't -- it  
12 doesn't have to be at the same meeting. Talking about these  
13 other rules that are in place, other laws that protect  
14 citizens, you know, property rights by having them come in,  
15 how long, how many meetings later -- if it doesn't have to be  
16 done in the meeting of a reconsideration of this zoning  
17 ordinance, how many meetings later can they come back and fix  
18 this problem?

19           **THE COURT:** How about defining that, which I think  
20 Mr. Jorgensen would say, how about defining that on a basis  
21 of what is arbitrary and capricious and what's illegal?

22           **MR. DAINES:** That's the question. Would it be  
23 illegal for them to not get their act together as far as the  
24 written ordinance and --

25           **THE COURT:** A lot of things can't be done in a

1 single meeting. The question is whether or not they say at  
2 that meeting we'll reconsider this at the next meeting.

3 MR. DAINES: They didn't say that.

4 THE COURT: But absent that being said, does that  
5 preclude them from doing so?

6 MR. DAINES: Under the city's construction no, but  
7 it wouldn't preclude them from doing so five months later,  
8 does it? If they haven't got that ordinance signed and  
9 before the council, what prevents them from waiting two years  
10 after that initial meeting and coming back and saying, oops,  
11 sorry, we didn't have --

12 THE COURT: I can tell you right now.

13 MR. DAINES: What would preclude that?

14 THE COURT: This court, because I think that would  
15 be arbitrary, capricious, certainly unreasonable.

16 MR. DAINES: But not illegal?

17 THE COURT: Perhaps not, but I don't think my  
18 discretion, or my jurisdiction is limited. I think if I find  
19 it arbitrary and capricious, entirely unreasonable, which  
20 deprives others of due process, I can set it aside. I didn't  
21 campaign for that jurisdiction, but I think I have it.

22 MR. DAINES: All right.

23 THE COURT: That's why I have to take a look at this  
24 thing. One of the problems of being a judge and reviewing  
25 these things, it's not an equitable issue, but it has

1 equitable facets to it. It's a nonjury issue. The judge has  
2 discretion to make a decision and I have to make a decision  
3 without abusing that discretion. To me it's an ominous  
4 responsibility.

5 You raise a good question, what happens if five months  
6 passes? I can tell you what would happen. I'd exercise my  
7 discretion and say that's not appropriate, that's not fair.  
8 It's arbitrary and capricious. Two weeks later, when all the  
9 information was supplied on the 25th, I don't know. That's  
10 what we're talking about here today.

11 You notch that up one by suggesting no, it's not just  
12 that, Judge, it's also a violation of the Robert's Rules  
13 adopted by the city which now becomes the law of operation of  
14 meetings. That's where we are.

15 **MR. DAINES:** And I understand. So you're -- the  
16 question of arbitrary and capricious becomes the escape  
17 valve?

18 **THE COURT:** I think it can be. I think it has to  
19 be. I think this court has to exercise its discretion and  
20 its jurisdiction. The scenario you've begin me of five  
21 months later, I wouldn't have any reservation at all about  
22 that if it's oops, we forgot about this five months ago.

23 But that's not what happened here. What happened here  
24 was a 25 acre rezone request was made and it was discussed  
25 and addressed in open meeting. It was not reduced to a

1 written ordinance and then was reconsidered two weeks later.  
2 My question is is that in fact appropriate, proper, legal,  
3 nonarbitrary and capricious? I don't know.

4 There's another problem here. That is, you bring this  
5 action trying to negate the action of the city council. Mr.  
6 Jorgensen suggests, wait a minute, the city council has a  
7 presumption of correctness. No, it doesn't. Ordinances have  
8 that presumption, not actions by the city council.

9 That brings us back to this focus, is a decision and  
10 ordinance the same? I don't think so. But there's the  
11 difference. Those are the kinds of things I have to  
12 consider. As I reviewed these pleadings in preparation for  
13 the hearing, that's what I focused on. I think that's where  
14 I'm continuing to focus. That's why I asked you the question  
15 relative to any appellate court addressing the issue of the  
16 adoption of Robert's Rules.

17 **MR. DAINES:** I don't have any citations.

18 **THE COURT:** Mr. Jorgensen, you've been remarkably  
19 patient while Mr. Daines and I have been bantering,  
20 discussing, dialoguing. Why don't you have your input here.

21 **MR. JORGENSEN:** I gave you a document, Your Honor,  
22 that is entitled basic issues to address and petition for  
23 review.

24 **THE COURT:** I have it.

25 **MR. JORGENSEN:** I think that you have struck at the

1 heart of what I've put in that document. With everything  
2 that's been said, I believe that the focus needs to be on  
3 what was done leading up to these decisions and how were  
4 people's rights affected.

5 The two cases, the Springville and Gardner cases that  
6 were cited, they go a step further and involve the  
7 application of zoning rules.

8 **THE COURT:** I've already said I think they're solid  
9 law, but I don't think they necessarily answer the question  
10 before me. They're correct as appropriate citations and I  
11 frankly congratulate Mr. Daines on citing them because I  
12 think they're applicable here. But they go here and here,  
13 but don't take the next step.

14 **MR. JORGENSEN:** I cited them in my memorandum as  
15 well.

16 **THE COURT:** I know you have.

17 **MR. JORGENSEN:** They do go a step further. And with  
18 respect to zoning laws, in the Gardner case there was a  
19 requirement that the recommendation of the planning  
20 commission be adopted in total by the city council. If they  
21 didn't, then it was illegal. The court said that's correct,  
22 if they didn't follow their own ordinance, send it back for  
23 that determination to see if they adopted it in total.

24 **THE COURT:** Do you know of any case law, Mr.  
25 Jorgensen, which suggests that adoption by ordinance by a

1 city of the Robert's Rules of Order can be disregarded?

2 MR. JORGENSEN: No, I don't. I couldn't find any  
3 cases in that regard.

4 THE COURT: Don't you think that's the issue here?

5 MR. JORGENSEN: I do.

6 THE COURT: Why do you think the city can adopt the  
7 Robert's Rules of Order and then disregard them, where at  
8 least constructively citizens of that city, and in fact  
9 anybody else, would be operating on reliance on those rules?  
10 They can rely on the city council to follow it's own rules.  
11 When it doesn't why can't they be relieved of any action by  
12 the city if they appeal within the appropriate time?

13 MR. JORGENSEN: I think based on the two cases  
14 involved, the standard to look at is whether or not someone  
15 was harmed or prejudiced because the city didn't follow.  
16 I'll grant you, in all the years that I've worked with  
17 Smithfield, since 1990, and with other cities since 1977,  
18 I've never once seen anyone argue that failure to follow  
19 Robert's Rules of Order is a basis for rescinding an action.

20 THE COURT: Let me ask you the same question I asked  
21 Mr. Daines. I think probably you trump both Mr. Daines and  
22 myself relative to involvement with the representation of  
23 cities and towns. As far as I know, you've had a  
24 considerable monopoly in that area in the valley for a long  
25 time. I defer to that for purposes of expertise.



1 Do other cities and towns in this community have the same  
2 type ordinance adopting the Robert's Rules?

3 MR. JORGENSEN: They do.

4 THE COURT: Is it fairly universal?

5 MR. JORGENSEN: It was at one point in time.

6 THE COURT: Anything atypical at this point in time  
7 in Smithfield City having adopted it?

8 MR. JORGENSEN: A little history would be helpful.  
9 Back in the early 1970s the state legislature tightened the  
10 regulations regarding ordinances, how they're adopted, what  
11 has to be in them, how you post them, who signs them, when  
12 they become effective. They have to be in writing. All of  
13 those things became law at that point in time.

14 THE COURT: I'm aware of the concept. Maybe not the  
15 details as you talk about.

16 MR. JORGENSEN: They began with laws that were  
17 adopted in 1979. Just prior to that, and during that period,  
18 the League of Cities and Towns prepared a uniform code book  
19 that most cities in the state adopted. Many of those cities  
20 had this very regulation in it.

21 THE COURT: The uniform code book did?

22 MR. JORGENSEN: Yes. The procedures for councils  
23 being Robert's Rules of Order.

24 THE COURT: My experience is that most uniform code  
25 books are adopted from uniform proposed code books used

1 nationwide. Is that the case here?

2 **MR. JORGENSEN:** Not necessarily. To my knowledge it  
3 was based in part, but it was refined so that it dealt  
4 specifically with Utah law.

5 **THE COURT:** Do you know whether this provision  
6 relative to the adoption of Robert's Rules was a fairly  
7 universal uniform law?

8 **MR. JORGENSEN:** At that time it was, yes, but it was  
9 not known -- the councils that adopted it didn't read that  
10 section. I've not found any council that follows them.

11 **THE COURT:** That was my experience. That was my  
12 suggestion to Mr. Daines. I try to avoid any city council  
13 meetings and have for the past 20 years. I've never found  
14 them to be pleasant experiences, even when I was council and  
15 represented parties before them or the city themselves. My  
16 experience has been as yours, that Robert's Rules are  
17 generally honored in the breach rather than the application.

18 **MR. JORGENSEN:** Correct. As I pointed out in my  
19 memoranda, the fact that the motion to reconsider was not  
20 made in the meeting on the 25th of January and not dealt with  
21 on the 25th of January --

22 **THE COURT:** And not reserved on the 25th of January.  
23 That's really -- I think that's the term Mr. Daines would  
24 have loved to have seen in those minutes.

25 **MR. JORGENSEN:** Nobody thought about it or talked

1 about it until it was raised later by Mr. Daines in his  
2 appeal. It's something that cities and towns just simply  
3 don't -- if it's in their book they don't know it. If it's  
4 in their book they often don't follow it because nobody --  
5 good grief, it's 704 pages in paperback form. You have to  
6 have a parliamentarian from the legislature or national  
7 congress to tell people how it applies.

8           **THE COURT:** On some Wall Street pinstriped suited  
9 lawyer.

10           **MR. JORGENSEN:** You've got it. It's a very  
11 difficult thing to deal with. So the issue is was there  
12 prejudice? In that regard, on January 18th, a week before  
13 this meeting, the planning and zoning commission held a  
14 meeting that discussed this proposal in a public hearing that  
15 was properly noticed in accordance with the new Ludma law.  
16 It changed -- the old law said that the city council had to  
17 have a public hearing. The new Ludma law, adopted in May of  
18 2005, required that the planning and zoning commission hold a  
19 public hearing. They did that on January 18th.

20           Then on the 25th, because the city's ordinance had not  
21 yet been amended, they had another public hearing with 15  
22 days notice because city ordinance required that. And then  
23 the idea that there wasn't a motion to reconsider, there  
24 wasn't specifically, no, in the January 25th meeting, but on  
25 February 8th --

1           **THE COURT:** There wasn't a reservation on the 25th?

2           **MR. JORGENSEN:** No. And we will concede, as I've  
3 done, the Robert's Rules of Order regarding reconsideration  
4 was not observed by the city in the January 25th meeting.

5           But the confusion over where the boundary line should be  
6 was dealt with in a way I thought was very appropriate. In  
7 as much as there was not an ordinance in front of the council  
8 on the 25th in writing that contained a description of the  
9 suggested amended area, the city manager, the city engineer,  
10 attempted to draft one, but found in talking with a couple of  
11 city council members and the city recorder, they were not  
12 clear.

13           I'd like to point out -- if you go with me to tab nine in  
14 the exhibits, you have the minutes for -- excuse me, tab six.  
15 The minutes of the meeting on January 25th. On page 6-8,  
16 council member Monson's request for modification is mentioned  
17 in the middle. If you come down, you'll see a question on  
18 the motion. And then council member Monson asked that a  
19 modification be considered to move the line south.

20           Then if you jump to the next paragraph it says the  
21 northern line of the rezone request be moved south to a point  
22 directly in line with the south boundary of the Lundberg,  
23 Johnson, Jacobsen property on the west side of what would be  
24 600 West.

25           If you go back to exhibit 23, it has the pink line drawn.

1 If you take that statement, the northern line of the rezone  
2 request be moved south to the point directly in line with the  
3 south boundary of the Lundberg, Johnson, Jacobsen property on  
4 the west side of what would be 600 West. So you go west of  
5 what would be 600 West and you'll notice that that south line  
6 is just north of the corner of the lot.

7 That can be read certainly to mean the south line of  
8 the -- the north line of the rezone should go directly east  
9 from that point of the south boundary line of the Lundberg,  
10 Jacobsen and Johnson property. It doesn't say anything about  
11 jogging to the south and then going east. It says at a  
12 point -- the south line would be in line with a point  
13 directly west of what would be Sixth West, the south line.  
14 So confusion arose, does it go straight east of that, does it  
15 jog south? Where should it be?

16 Mr. Gass, in approaching the city council, did not  
17 approach them with the idea of telling them this is where the  
18 line is going to be, this is where I've decided it's going to  
19 be. He drafted four ordinances that were color coded with  
20 four different potential northern lines for that rezone area  
21 and included it with the original ordinance that covered the  
22 entire area.

23 It was put on the agenda for the February 8th meeting.  
24 The city council had every right, if they had wanted to, to  
25 say we've dealt with that, this is where the line should be,

1 we're done. There was no objection. It was brought before  
2 them and they made a motion.

3 **THE COURT:** How did it evolve from an adjustment or  
4 determination of that line to five more acres?

5 **MR. JORGENSEN:** Approximately ten more acres.

6 **THE COURT:** I'll get the numbers down yet. I  
7 haven't really focused on what they are. How did it move  
8 from figuring out where that south line was to five more  
9 acres, ten more acres, whatever it is?

10 **MR. JORGENSEN:** Well, we're talking about a  
11 different line is the point. It moved in that direction  
12 because council member Wood, who made the original motion in  
13 the January 25th meeting to have the entire parcel rezoned,  
14 when it came back in the next meeting he made the motion to  
15 rezone the entire parcel again. And made the comment in the  
16 minutes that he'd understood that they were nonprofit and had  
17 released its interest entirely in the Lundberg, Johnson  
18 Jacobsen property, but apparently had misunderstood that. He  
19 made the motion to rezone the entire parcel.

20 Council member Monson again made a motion to restrict it.  
21 This time her suggested restriction was further south, to one  
22 of the colored lines that was further to the south. Council  
23 member Wood said I'd like a vote on the original motion and  
24 it was taken and the entire parcel was rezoned.

25 **THE COURT:** You've taken some umbrage in your

1 memoranda, perhaps unjustified, suggesting that Mr. Daines  
2 has suggested that some clandestine meeting occurred?

3 **MR. JORGENSEN:** I did.

4 **THE COURT:** Tell me why you did in light of Mr.  
5 Daines's response that they never accused you of that?

6 **MR. JORGENSEN:** I'm looking in his reply memorandum,  
7 tab four, the white binder. Excuse me, 14 in the white  
8 binder.

9 **THE COURT:** Incidentally, I do very much appreciate  
10 the two binders, and particularly the white binder. It is so  
11 nice to be able to address the motions in that fashion. The  
12 only thing better would be to have it on a disk.

13 **MR. DAINES:** It's kind of trying to follow the  
14 Golden Rule.

15 **THE COURT:** It's the rule of courtesy copies. The  
16 next step is going to be to reduce the matter to a disk. I  
17 would love to see that. Scan them in. Unfortunately, I  
18 probably won't live long enough to see that happen.

19 **MR. JORGENSEN:** I hope you do.

20 **THE COURT:** So do I, but the probabilities aren't  
21 there. Judicial change is not for the short-winded. It  
22 takes a long time to change procedures in court. Go ahead.

23 **MR. JORGENSEN:** I'm looking on page six of the reply  
24 memoranda. In the second full paragraph, to petitioner's  
25 assertion that the February 8th rezone was not legal, the

1 city admits that its rules were breached by the council and  
2 then responds with a deafening so what. The city yawns twice  
3 at the fact that the council broke the rule of law.

4 And then he says the city claims astoundingly that it's  
5 past practice was to ignore the rules. Under this bizarre  
6 view of its own actions, any coincidence between the city's  
7 past actions and its rules of procedure are accidental. This  
8 construct puts the council and mayor and manager in the  
9 position to pick, choose, or fabricate whatever rule suits  
10 them at the time and to require others to comply with the  
11 city's made up rules and to exempt the city from the same  
12 requirements by situational interpretation. This nonsystem  
13 is one step beyond the hypocrisy of the Roman emperor who  
14 would enforce laws inscribed on stone columns where they were  
15 illegible to common citizens.

16 I'm offended by that.

17 **THE COURT:** Okay. I'm not sure offense was  
18 intended. I follow the policy that none should be taken  
19 intended or no. Aside from that, there's no inference there,  
20 or insinuation there, that ultra vires city council meetings  
21 were conducted. It's colorful language and I'm not sure  
22 suggesting hypocrisy is appropriate, but I don't think any  
23 offense was intended. And even if it was, and I'm confident  
24 it wasn't, but none should be taken. It doesn't help resolve  
25 the issue here.



1 My suggestion is that I don't find anything in Mr.  
2 Daines's argument that clandestine meetings were conducted.

3 **MR. JORGENSEN:** Well, his statements -- I can't  
4 point to every one of them.

5 **THE COURT:** Let me digress for a minute. You filed  
6 a motion for summary judgment and you've been careful to  
7 point out that it's really a declaratory judgment, suggesting  
8 the facts aren't in dispute. I don't know that they're in  
9 dispute either. Neither of you have really cited any facts  
10 in dispute. In fact, both of you have said look, Judge, you  
11 have before you everything you're going to see. It's purely  
12 a matter of law, an issue to be decided by this court.

13 Do you know of any facts suggested by Mr. Daines, and I  
14 neglected to ask him the same question and I intend to, but  
15 do you know of any facts suggested by Mr. Daines with which  
16 you would take issue? Not argument, but facts?

17 **MR. JORGENSEN:** Not really.

18 **THE COURT:** Do you, Mr. Daines, know of any facts  
19 suggested by Mr. Jorgensen with which you would take issue?

20 **MR. DAINES:** Yes.

21 **THE COURT:** What? And if so why doesn't it preclude  
22 your summary judgment motion from being granted?

23 **MR. DAINES:** Because the facts that he -- well, he  
24 put in seven affidavits in connection with his response to  
25 the motion for summary judgment and in support of his --

1           **THE COURT:** What assertions there do you take  
2 exception with?

3           **MR. DAINES:** Much of what was there we say is  
4 irrelevant.

5           **THE COURT:** I think you're right. I would agree  
6 with you.

7           **MR. DAINES:** But not being able to stand on that,  
8 and not being so presumptions as to decide how you're going  
9 to rule, we have to say if he puts facts forward that he  
10 thinks are relevant, that you might find are relevant --

11           **THE COURT:** That's why the rules suggest material  
12 facts.

13           **MR. DAINES:** I understand. But I can't presume that  
14 you're going to buy my arguments about what is material or  
15 not. So we've responded to those facts, in spite of the fact  
16 that we believe they're immaterial, and put them in contest.

17           **THE COURT:** Assuming I agree with you that the facts  
18 which you take issue are immaterial, do you know of any  
19 material facts which are in issue?

20           **MR. DAINES:** Yes.

21           **THE COURT:** What?

22           **MR. DAINES:** They relate to Mr. Jorgensen's counter  
23 motion for summary judgment. Those facts, he states -- well,  
24 first of all, it was a little hard to follow -- I mean, we  
25 had eight facts and they went all over the page. No where in

1 the stated eight facts in connection with his motion for  
2 summary judgment did he state that there was no prejudice.  
3 Did he state in those facts that the city council would have  
4 made the same decision regardless.

5 **THE COURT:** On the contrary.

6 **MR. DAINES:** He says it later in his argument and he  
7 puts things in the affidavits of each of the council members.

8 **THE COURT:** Okay. The truth of it is he did raise  
9 the issue and I'll let him address that. That's where I was  
10 going next, in fact, relative to the issue of prejudice.

11 **MR. DAINES:** And we say, first of all, that those  
12 facts that he put before the record, which was a bare bones  
13 statement by the council members and by the mayor, or just by  
14 the council members, that they would have made the same  
15 decision regardless, is too vague as to prove the point of  
16 what it was -- of the circumstances -- to lay out the  
17 circumstances. If it's illegal then under what circumstances  
18 would we make the decision. First of all, we would say that  
19 we're prejudiced because they wouldn't have been in the  
20 position to make the decision.

21 **THE COURT:** Let me ask you a question. Stop for a  
22 minute here. At the February 8th meeting, your client was  
23 there or not?

24 **MR. DAINES:** Not.

25 **THE COURT:** Why not?

1           **MR. DAINES:** I don't recall.

2           **THE COURT:** Did he receive notice? Was notice  
3 published? Was an agenda published?

4           **MR. DAINES:** Yes.

5           **THE COURT:** Was this on the agenda?

6           **MR. DAINES:** I believe so.

7           **THE COURT:** Why wasn't your client there? Why can  
8 he avoid the meetings, miss the meeting, and then say, wait a  
9 minute, I wasn't there?

10          **MR. DAINES:** Because --

11          **THE COURT:** Just a minute. Let's focus on  
12 prejudice. If he were prejudiced by this and had  
13 constructive notice as provided in the publication, and  
14 didn't go there, how can he now be heard to argue wait a  
15 minute, I've been prejudiced by this, by your decision, when  
16 I had notice and could have been there and instructed you?

17          **MR. DAINES:** It was unimaginable to him, or to  
18 anybody but those who made the decision, that they would turn  
19 around and do a 180 degree turn.

20          **THE COURT:** Do we have a copy of the noticed agenda  
21 for the February 8th meeting?

22          **MR. DAINES:** Yes.

23          **THE COURT:** What tab?

24          **MR. DAINES:** Tab seven. By the way, Your Honor,  
25 there was no public hearing so his not being present wouldn't

1 have made a difference. He was not in the situation to be  
2 heard on February 8th.

3 **THE COURT:** He wasn't precluded, though?

4 **MR. DAINES:** He was. There was no public hearing.

5 **THE COURT:** I thought public notice of city council  
6 meetings were to invite the public to be there present?

7 **MR. DAINES:** His being present wouldn't have done  
8 him any good.

9 **THE COURT:** How do you know that?

10 **MR. DAINES:** Because it was not -- it was a public  
11 meeting. He could have gone and seen what they did to the  
12 decision two weeks earlier. He could have gone and observed,  
13 but not done anything about it.

14 **THE COURT:** Is it the finite practice of city  
15 councils to preclude any input from citizens who are there  
16 unless it is described as a public hearing?

17 **MR. DAINES:** They say hearing closed.

18 **THE COURT:** That may be sometimes, but my experience  
19 has been to the contrary, that oftentimes city councils will  
20 invite input at public meetings such as this, irrespective if  
21 it was a public hearing.

22 **MR. JORGENSEN:** I'd like to interject so it's fresh.  
23 January 18th, January 25, February 8th, Mr. Gittins was not  
24 at any of those meetings. He knew about all three of them.  
25 The 18th was a public hearing. His concerns were raised for

1 him, even though he wasn't there.

2 THE COURT: That was before the planning commission?

3 MR. JORGENSEN: Yes. On the 25th he asked that his  
4 concerns be raised and they were, but he wasn't there. On  
5 the 8th he was aware of the meeting and asked that his  
6 concerns be raised and they were. And comment from the  
7 public was invited at the February 8th meeting. I don't know  
8 what more could have been done.

9 THE COURT: If that's the case, and I wasn't really  
10 up on that, but if that's the case why do you suggest to me  
11 in this argument that nobody could have imagined that they  
12 would do what they did?

13 I look at number ten, consideration of ordinance 06-01,  
14 request from Neighborhood Nonprofit Housing Corporation to  
15 rezone property located at 600 West 200 North from A-10  
16 agricultural, and so forth. There's no suggestion there that  
17 it is simply an adjustment of the line as opposed to a  
18 reconsideration of the additional ten acres. Why would  
19 somebody imagine that it wouldn't be just what it says it was  
20 going to be, a consideration of that ordinance? Why do you  
21 argue to this court that he wasn't there because he couldn't  
22 imagine there would be a change, because apparently,  
23 according to this statement he was represented? And  
24 secondly, there's nothing in paragraph ten which restricts  
25 this to simply adjusting that line. How do you come to that

1 conclusion, Mr. Daines?

2           **MR. DAINES:** Your Honor, the truth is that this  
3 agenda was published appropriately. It didn't get published  
4 in the newspaper. That's not on the record.

5           **THE COURT:** Does it have to be?

6           **MR. DAINES:** No.

7           **THE COURT:** So it was done appropriately. Notice is  
8 90 percent really constructive notice.

9           **MR. DAINES:** I understand.

10           **THE COURT:** But here, apparently, unless you take --  
11 have some difference of opinion relative to what Mr.  
12 Jorgensen suggests, your client knew full well it would be  
13 reconsidered and had somebody there to represent his interest  
14 and an opportunity was given for input. And there's nothing  
15 in paragraph ten which restricts you to a reconsideration of  
16 the exact location of the line.

17           **MR. DAINES:** Let's look at the minutes.

18           **THE COURT:** No. Let's talk about the notice.

19           **MR. DAINES:** About these assumptions that his  
20 interests were represented.

21           **THE COURT:** Okay. Let's take a look at paragraph 10  
22 first of the agenda, which was published, as I understand it,  
23 appropriately and in accordance with law. What is there  
24 about paragraph ten which would raise your client's comfort  
25 level to the point where he doesn't have to worry about what

1 was going on?

2 MR. DAINES: Nothing.

3 THE COURT: Then why wasn't he there to have input?

4 MR. DAINES: Because he didn't see the posting of  
5 this.

6 THE COURT: Is my job here to objectively or  
7 subjectively determine whether or not he, or a reasonable  
8 person, would be noticed -- notified by that notice?

9 MR. DAINES: I don't think it's about notice. It's  
10 about prejudice.

11 THE COURT: Well, prejudice always occurs when a  
12 city council holds a meeting. And nobody can argue about it  
13 later if in fact they didn't protect themselves. They knew  
14 what was going on constructively, presumptively.

15 MR. DAINES: No. Prejudice isn't just about notice  
16 and whether you're present at the meeting or not. The  
17 question of prejudice is whether the outcome would be  
18 different depending on whether the rules were followed.

19 THE COURT: Let's assume the rules were followed.  
20 What would your client have done differently?

21 MR. DAINES: He wouldn't have gone to the meeting  
22 because they wouldn't have had that on the agenda. There  
23 wouldn't have been -- they wouldn't have been in a position  
24 to have made any decision contrary or different from the  
25 January 25th decision, unless it was by unanimous consent.



1           **THE COURT:** If in fact the ordinance had been  
2 passed?

3           **MR. DAINES:** Regardless of whether --

4           **THE COURT:** On the contrary. This city council can  
5 do anything it needs to do in order to facilitate the city's  
6 business except change an ordinance without complying with  
7 the statute and the ordinance in place. The question is  
8 whether they changed the ordinance. They changed a decision,  
9 but did they change an ordinance? There's a world of  
10 difference. I keep telling you that.

11           **MR. DAINES:** The question is not whether they  
12 changed the ordinance under Robert's Rules. The question is  
13 whether they changed their decision.

14           **THE COURT:** That's right.

15           **MR. DAINES:** Under Robert's Rules the question is  
16 whether they changed their decision.

17           **THE COURT:** Is there any requirement here -- is  
18 there any requirement they didn't meet with respect to  
19 paragraph ten in order to change a decision? It says  
20 consideration of the same thing. Why can't they change a  
21 decision?

22           **MR. DAINES:** Under Robert's Rules they can't. They  
23 can reconsider it.

24           **THE COURT:** What needed to be done under Robert's  
25 Rules?

1           **MR. DAINES:** Under Robert's Rules, their only  
2 opportunity to have this rezone done -- one of two things can  
3 happen under Robert's Rules.

4           **THE COURT:** Robert's Rules doesn't control rezoning,  
5 the zoning ordinances do. My question is what under Robert's  
6 Rules didn't they do?

7           **MR. DAINES:** They govern the procedure before the  
8 city council. Under the city council's procedures they could  
9 have handled it by unanimous consent. They could have and  
10 should have handled it by unanimous consent.

11           **THE COURT:** Okay. Mr. Jorgensen.

12           **MR. JORGENSEN:** Having held the two public hearings  
13 and the two meetings, this whole issue was thoroughly vetted.  
14 It was discussed. Everybody was given a chance to talk that  
15 wanted to. All of the issues were addressed.

16           A vote was taken on the 25th, but there was no written  
17 ordinance. And you can talk about what they could have,  
18 should have, might have done, but to expect the city manager,  
19 city engineer, to run into the back room and redraft the  
20 boundary line of that and bring it back and say is this what  
21 you want during the meeting is asking quite a bit. Those  
22 meetings are long enough as it is. There was a public  
23 hearing. It's just not the practice of the city manager to  
24 run in the back and redraft ordinances.

25           **THE COURT:** Is it your position that this court, in

1 issuing a ruling in this case, must affirmatively declare  
2 that the adoption of Robert's Rules of Order by Smithfield  
3 City is not tantamount or does not equate to the adoption of  
4 an ordinance?

5           **MR. JORGENSEN:** I don't think you need to reach that  
6 point. Whether it's an ordinance or not, they complied with  
7 all land use requirements. They complied with the procedures  
8 they'd followed for decades as far as procedure is concerned.  
9 And the issue is that there was not a written ordinance  
10 before them so they could not have adopted it that evening,  
11 even if they had voted to reconsider unanimously. The motion  
12 had been made by a member of the group that was in the  
13 majority on the initial vote. They could not have adopted an  
14 ordinance that night. It had to be delayed until another  
15 meeting and it was. Notice was given. It was presented.

16           State law says in section -- this gives us a pretty good  
17 idea of what the legislature intends. In section 10-3-508  
18 it's entitled reconsideration. "Any action taken by the  
19 governing body shall not be reconsidered or rescinded at any  
20 special meeting unless the number of members of the governing  
21 body present at the special meeting is equal to or greater  
22 than the number of members present at the meeting when the  
23 action was approved."

24           So the idea there, of course, is to protect those in the  
25 minority who might not be aware of a special meeting that's

1 being called.

2 THE COURT: I understand the purpose. You suggest  
3 the numbers were appropriate.

4 MR. JORGENSEN: And the idea is that  
5 reconsiderations can take place even in special meetings so  
6 long as the correct number of council members are present.  
7 Why can't they then occur in regular meetings when full  
8 notice is given? Five council members were present on the  
9 25th and five were present on February 8th.

10 MR. DAINES: May I respond to that?

11 THE COURT: Uh-huh.

12 MR. DAINES: That code provision says under what  
13 circumstances you cannot have a reconsideration at a special  
14 meeting. It doesn't say that because you cannot have a -- it  
15 doesn't establish that the city can have a reconsideration.

16 THE COURT: It states the negative, not the  
17 affirmative?

18 MR. DAINES: That's right.

19 THE COURT: What's wrong with that?

20 MR. DAINES: There's nothing wrong with that.

21 THE COURT: If it's written in the negative and the  
22 negative is complied with, the affirmative suggests you can  
23 go ahead, right?

24 MR. DAINES: No.

25 THE COURT: Why?

1           **MR. DAINES:** Not if the city has adopted rules that  
2 are contrary. It leaves it open for the city. They can --

3           **THE COURT:** Once again we're bound by the Robert's  
4 Rules or no?

5           **MR. DAINES:** Yes. These issues of fact that he's  
6 trying to raise about -- we contest them. The city's  
7 practices over the 23 years previous, or whatever, we  
8 contested those facts with the mayor -- with the affidavits  
9 of two previous mayors about the following of Robert's Rules.  
10 They followed Robert's Rules. But that's irrelevant, Your  
11 Honor.

12           **THE COURT:** I would agree with you.

13           **MR. DAINES:** All right.

14           **THE COURT:** But the city's practices over the years  
15 are to me far less persuasive than some other aspects of  
16 this. Although I don't think they're to be ignored, but to  
17 me they're far less persuasive.

18           **MR. DAINES:** If you're going to take them into  
19 account, we need to take into account the affidavits of the  
20 two previous mayors.

21           **THE COURT:** I don't believe there's a city in this  
22 state, let alone this country, that follows to the letter  
23 Robert's Rules if they've adopted them. I've never seen it.

24           **MR. DAINES:** Then go ahead and read the affidavits.  
25 When issues are brought up they resort to Robert's Rules to

1 resolve them. But, honestly, that's still irrelevant.  
2 Whether they ran the stop sign 23 years in a row --

3 **THE COURT:** That's not the issue before this court.  
4 We're not going to get into the rules of relevance or  
5 evidence on that issue.

6 **MR. JORGENSEN:** The fact remains that there was not  
7 a written ordinance at the January 25th meeting. I mean, the  
8 argument is there should have been. Maybe there could have  
9 been, maybe there might have been, but there wasn't.

10 **THE COURT:** Well, sometimes an ordinance is laid out  
11 and it's adopted and signed and is done. Sometimes it takes  
12 some tweaking to redraft what was done at the city council  
13 meeting. Particularly that's my experience with respect to  
14 land planning because legal descriptions may vary as the  
15 meeting proceeds.

16 **MR. DAINES:** And those are handled uniformly by  
17 unanimous consent. That's the way it's done, whether you're  
18 talking about the practice of the city or Robert's Rules.

19 **THE COURT:** The question is whether unanimous  
20 consent is required. Robert's Rules suggests so perhaps.

21 **MR. DAINES:** To complete what the city started it  
22 is. But the city on February 8th didn't complete what the  
23 city started on January 25th.

24 **MR. JORGENSEN:** It did. They completed rezoning the  
25 property.

1           **THE COURT:** It depends on how you define complete.  
2 The truth of it is, however, had you adjusted the line at  
3 all, it may have -- it would have affected the actual acreage  
4 involved in what happened on the 25th.

5           **MR. DAINES:** But the city ordinances provided for  
6 those kinds of issues to be resolved by the Board of  
7 Adjustments. The city, once it adopts --

8           **THE COURT:** The city hardly should be in the  
9 practice, Mr. Daines, of adopting an ordinance recognizing  
10 it's going to be tweaked later on. They ought to do it as  
11 exact as they can in the first place.

12           **MR. DAINES:** Their ordinances contemplate that there  
13 are going to be times when there's uncertainty as to a  
14 boundary.

15           **THE COURT:** But you don't create uncertainties  
16 intentionally, knowing they'll be there. There's no question  
17 before this court that there's an uncertainty known.

18           **MR. DAINES:** But, Your Honor, have you read through  
19 the explanation of council member Monson? Let's look at a  
20 fact that was admitted. |

21           **THE COURT:** What is it?

22           **MR. DAINES:** If you go back to -- there wasn't  
23 uncertainty.

24           **THE COURT:** Give me the tab.

25           **MR. DAINES:** Rather than a tab on this one, if you

1 go to the white binder, tab two. It's fact -- it's on  
2 page --

3 MR. JORGENSEN: Fifteen, maybe?

4 MR. DAINES: Yeah, 15 to 16. This is statements  
5 made by Chris Monson to the Board of Adjustments later about  
6 her level of certainty.

7 THE COURT: Where are you?

8 MR. DAINES: Tab two.

9 THE COURT: The bottom of 15, top of 16?

10 MR. DAINES: Right. One of the council members  
11 says, Mr. Daines you know you said there was considerable  
12 confusion. And then he turns to Ms. Monson, who was there at  
13 this Board of Adjustments hearing. What I'd like to ask is  
14 the night of the Smithfield council when it was voted 5-0,  
15 correct, was there the time confusion among the council?  
16 There was some confusion, so Jim stood up and showed us a big  
17 map which he had. The day before I met with he and the mayor  
18 and put a mark where I thought the line should be, just a  
19 small mark. This is just before the January 25th meeting.  
20 And so when there was confusion he stood up and held up the  
21 map. This would be during the meeting on the 25th. I  
22 pointed that mark out exactly where it was. But we were also  
23 given small maps in front of each of us. The two people off  
24 to the side of me said where is that on this little map? I  
25 wasn't exactly sure, but I did say I'm fine with the property



1 boundary. There was a definite property boundary drawn on  
2 the small map. I did say that's fine with me and that's  
3 where I'll propose that we do it is along that property  
4 boundary. So I did say on that map, the property boundary  
5 that had been marked on the map.

6 There were multiple maps and variations in sizes. It was  
7 just a small map and was just a little bit different than the  
8 great big map that we had. Nothing deviating in maps? They  
9 weren't exact. The big map and small maps weren't exact as  
10 far as the markings. Could that be where some of the  
11 confusion arose from? Possibly. I say, I didn't say there  
12 was confusion. I wasn't there that night. Neither was I.  
13 Jim Gass is the one in his chronology that says there was  
14 confusion. Toolson, right. I know Chris was there and I  
15 just wanted her opinion. Thank you.

16 It was either the north line of the Michelsen property or  
17 the south line of the Lundberg, Jacobsen Johnson property.  
18 Chris, that was the line. There wasn't confusion.

19 **THE COURT:** Except a reference to Sixth West.

20 **MR. DAINES:** There wasn't confusion in her mind  
21 about where that line was.

22 **THE COURT:** Her mind isn't determinative.

23 **MR. DAINES:** She made the motion.

24 **THE COURT:** But that isn't determinative. A person  
25 making a motion does not determine whether or not there's

1 confusion.

2 MR. DAINES: And then reading on page 17 --

3 THE COURT: These aren't votes, these are opinions.

4 MR. DAINES: Seventeen, according to the testimony  
5 of an eyewitness, after the discussion ended the manager  
6 asked the council if anyone had any questions. No one  
7 responded that they had a question.

8 THE COURT: You are ignoring entirely the affidavit  
9 of Mr. Gass that says, wait a minute, it's all fine and good  
10 for you folks to tell me to do this and you think there's no  
11 confusion, but when I put it down on paper there's  
12 considerable confusion. It doesn't do this court any good to  
13 say I know what they were thinking because at least one  
14 member said there wasn't a problem. That doesn't determine  
15 the issue at all. In fact, reference to this dialogue isn't  
16 helpful. It doesn't help the court at all on the issue it  
17 has to decide. The notice of the 8th meeting addressed this  
18 that it's going to be considered. That's not the problem  
19 here. That's not the problem. That dialogue doesn't resolve  
20 the issue at all.

21 Okay. We've hammered on this thing back and forth.

22 MR. DAINES: Your Honor --

23 THE COURT: My question is is there anything else we  
24 have not addressed?

25 MR. DAINES: On prejudice.

1           **THE COURT:** Go ahead.

2           **MR. DAINES:** The record is contrary to the  
3 statements -- if you find that -- we don't think the bare  
4 bone statements that we would have voted the same way, they  
5 don't work until you put them into context of what should  
6 have happened. Whether there was a meeting -- whether there  
7 should have been a meeting that night or not, you have to  
8 rule first, Your Honor, whether there was illegality before  
9 we can get to the question of prejudice. That's the way it  
10 worked with Springville Citizens and that's the way it worked  
11 in Gardner versus Perry City.

12           **THE COURT:** What exactly is the prejudice suffered  
13 by your client?

14           **MR. DAINES:** If the vote to reconsider --

15           **THE COURT:** Let's assume the 25 acres is rezoned.  
16 What exactly is the prejudice suffered by Mr. Gittins?

17           **MR. DAINES:** The prejudice is that it wouldn't have  
18 been rezoned. To get back to --

19           **THE COURT:** I'm not clarifying myself very well  
20 here. Let's assume that the 25 acres is rezoned. Even had  
21 he been to all of the meetings --

22           **MR. DAINES:** When?

23           **THE COURT:** Had he been to the 18th meeting and the  
24 25th and on the 25th the rezone occurred. All 25 some acres  
25 had been rezoned then. Mr. Gass then could have drafted this

1 thing and it was all done and signed the next week by the  
2 mayor and recorded. Let's assume that happened. What is the  
3 prejudice to your client?

4 MR. DAINES: None. But that's not what happened.

5 THE COURT: You're not answering my question. How  
6 is he adversely affected by this rezone?

7 MR. DAINES: Because the council abandoned --

8 THE COURT: I'm not talking about any theoretical or  
9 even actual compliance with the code. I want to know how the  
10 rezone adversely affects your client.

11 MR. DAINES: He has a dairy nearby.

12 THE COURT: Okay.

13 MR. DAINES: And it's throughout the record what the  
14 prejudice is to him.

15 THE COURT: Tell me what it is. Tell me how he is  
16 adversely affected if in fact this property is zoned into  
17 residential. I know he doesn't want it, but is there some  
18 actual prejudice occurring here, and if so what is it?

19 MR. DAINES: I thought we were beyond the question  
20 of adverse affect.

21 THE COURT: I'm asking the question. What actually  
22 happens to him if this rezone is in fact -- let's assume  
23 this. Let's assume -- I asked you the question before and  
24 you avoided it. If I decide this case in favor of the city,  
25 how is he adversely affected? I don't want anything about

1 the city didn't comply, what actually happens to him? Does  
2 he lose money, does his farm shut down? What happens?

3 **MR. DAINES:** The answer is in the facts.

4 **THE COURT:** Just tell me.

5 **MR. DAINES:** I honestly didn't come prepared to  
6 argue about his standing. That was conceded by the city.

7 **THE COURT:** I'm not interested in standing. I'm  
8 interested in what it is he doesn't like about this thing. I  
9 want to know how he's personally prejudiced by this action.  
10 He doesn't want to have houses next to his? Does it take his  
11 view away?

12 **MR. DAINES:** Let's go to his affidavit.

13 **THE COURT:** Just tell me.

14 **MR. DAINES:** Because honestly I can't remember. Can  
15 I have my client answer that question?

16 **THE COURT:** Sure. What goes on here? Let's assume  
17 this 25 acres is rezoned, what happens to Mr. Gittins? He  
18 doesn't live there, he doesn't own any of the 25 acres. He  
19 lives next door to it. What's the problem, Mr. Gittins?

20 **MR. GITTINS:** Your Honor, I moved my dairy about  
21 1990 from inside the Smithfield City boundaries to --  
22 approximately half of my dairy is in the county and the other  
23 half of my current dairy is in Smithfield City. It's in an  
24 agricultural zone.

25 **THE COURT:** I understand that. Why do you think

1 this change in the 25 acres next door to you is going to  
2 somehow harm you?

3 **MR. GITTINS:** From experience it will. With the  
4 noise and confusion and the smells and sounds of agriculture,  
5 people who claim that they will understand and they used to  
6 visit grandpa's farm and so on, they'll never complain,  
7 that's not what happens.

8 **THE COURT:** You're afraid that if this land next  
9 door to you becomes residential then something is going to  
10 happen to encroach upon your ability to continue?

11 **MR. GITTINS:** Yes, sir.

12 **THE COURT:** So you think if you can keep everything  
13 around you agricultural you're safer?

14 **MR. GITTINS:** Not everything. That's why I didn't  
15 protest that first decision. I thought it was a decision  
16 that had been done by the community. I didn't -- I don't  
17 like the idea, but I thought it was through the proper  
18 process and it was somewhat of a compromise. That's the way  
19 it was outlined. I thought we could live with that. But  
20 that ten acres that you're talking about comes closer to my  
21 dairy and enhances that threat.

22 You'd have to go through the details, Your Honor, to  
23 understand the ramifications, the problems, that would occur.  
24 Everything from liability factors, which are big factors.

25 **THE COURT:** But these are all conjectural fears.

1 Nothing actually is going to happen to -- if somebody starts  
2 to build houses next door, that doesn't adversely affect your  
3 property, does it?

4 MR. GITTINS: It does. It affects our right to  
5 manage and operate the dairy.

6 THE COURT: How?

7 MR. GITTINS: The complaints start coming in.

8 THE COURT: But what if nobody ever complains?

9 MR. DAINES: That's not been his experience.

10 THE COURT: That's not the point. The question I'm  
11 asking is what is the prejudice? He has a farm and I respect  
12 that. I drink milk, I eat beef. I appreciate all of that.  
13 But what happens to his dairy farm if somebody builds on  
14 their property next door and no complaints are ever made?  
15 Aren't you simply anticipating a possibility that something  
16 is going to happen in the future and in order to prevent that  
17 possibility from occurring, complaints being made and the  
18 city council then, perhaps, giving ear to those, isn't that  
19 all conjectural and speculative? The truth of it is, nothing  
20 happens until the city council takes action against him or  
21 somebody files a nuisance lawsuit against him. But that may  
22 never occur.

23 My question is, if in fact this rezone occurs, and I  
24 understand people, property owners, have rights to contest  
25 rezoning, I understand all of that. But my question is a

1 very simple one. What happens tomorrow if this rezone is  
2 approved by this court today? Does he continue to milk cows?

3 **MR. DAINES:** Tomorrow, yes.

4 **THE COURT:** Tomorrow and tomorrow and tomorrow and  
5 perhaps forever. What he wants to do is quell any complaints  
6 against him milking cows.

7 **MR. DAINES:** And reduce risks.

8 **MR. GITTINS:** May I give you one example? I assume  
9 you're asking for a tangible thing that would happen?

10 **THE COURT:** I'm very much aware, Mr. Gittins -- I've  
11 been involved in this legal practice for a long time. I'm  
12 very much aware of the kind of concerns that arise. My only  
13 certain is specifically right now does it somehow affect  
14 access to your property, ingress, egress, use of your  
15 property? Does it somehow encroach upon your property, and  
16 if so how?

17 **MR. GITTINS:** May I give you an example, sir?

18 **THE COURT:** Uh-huh.

19 **MR. GITTINS:** For example, the engineering plans  
20 currently show access to them taking a second access to 800  
21 West. The city council has tried to make a statement that  
22 they don't want traffic from a 90-home subdivision accessing  
23 300 North or Saddleback Road. It's a very narrow -- what it  
24 is is an old farm lane, really. It's a 33-foot right-of-way.  
25 Even though the developers have asked for that they haven't



1 had access of it as of yet.

2       However, going to 800 West, that traffic will turn around  
3 and come right back up that road. That does interfere with  
4 my access to my dairy and also the movement of farm  
5 machinery. What many people don't know is the UDOT  
6 application -- I shouldn't say application. I don't think  
7 they've made actual application yet. But the UDOT suggested  
8 plan to them was to take two roads to 800 West. Now, if  
9 you've got a 90-home subdivision funneling, no matter how  
10 they want to look at it, a good part of that is going to come  
11 right back up 300 North or Saddleback Road. A 33-foot  
12 right-of-way, in comparison of what the city requires is a  
13 60-foot, plus or minus, right-of-way. It's going to be there  
14 anyway.

15       You know, there's some things like that that really needs  
16 to be resolved. I know Your Honor believes in resolution.  
17 If I can just speak freely for a second, I don't think those  
18 things are being resolved. I think they're being kind of  
19 passed over. But they do have an affect. They definitely  
20 have an affect. If you've ever tried to drive a swather down  
21 a narrow road, or a farm truck or some other vehicle, and  
22 suddenly you've got traffic. The reason I know this is from  
23 current experience where I am. Old county ordinance allowed  
24 for subdivisions down in the county land. We have speeding  
25 traffic coming down along these curves on Saddleback Road in

1 front of my dairy. There's increased traffic. That in  
2 itself is a problem, but that would be nothing compared to a  
3 90-home subdivision.

4           **THE COURT:** We certainly need dairy farms. We also  
5 need houses.

6           **MR. GITTINS:** Understood.

7           **THE COURT:** It's always a struggle. I'm not  
8 insensitive to that. I suspect none of this has anything to  
9 do with the decisions I need to make here. It does have some  
10 effect relative to considerations of whether the city was  
11 arbitrary or capricious. Despite Mr. Daines's suggestion  
12 that that's not the focus, I think by law to some degree it  
13 must be.

14           Has everybody had their say? I'm going to take this  
15 under advisement and issue a memorandum decision. It won't  
16 be a very long memorandum decision. I think I'm there. I'm  
17 going to review a couple more tabs on this thing. I have to  
18 confess there are a couple of areas that concern me. I don't  
19 think, frankly, there are material issues of fact that I've  
20 been able to pull out of here that are substantial, barring a  
21 summary judgment one way or the other.

22           **MR. DAINES:** Mr. Jorgensen says there are.

23           **THE COURT:** Well, I know he does.

24           **MR. DAINES:** He says they clearly indicate a dispute  
25 between the parties as to certain facts.

1           **THE COURT:** There are certain facts. The question  
2 is if they're material to the point they would bar summary  
3 judgment.

4           **MR. DAINES:** If they are to prejudice, we would then  
5 submit they are.

6           **THE COURT:** But I have to -- it's a little  
7 inconsistent when parties come before this court on cross  
8 motions for summary judgment and argue that they're entitled  
9 to summary judgment, but there are issues of fact. Wait a  
10 minute. In fact, cross motions for summary judgment are  
11 unnecessary. Once a motion under 56 is made, either party,  
12 if there's no issues of fact, are entitled to judgment in  
13 their favor if in fact the law favors their position.

14           **MR. DAINES:** We actually reviewed that law after we  
15 met. It says that you can grant --

16           **THE COURT:** It can't be to the contrary. If the  
17 facts aren't in dispute the decision has to be made according  
18 to the law, irrespective of who brought the motion. It can't  
19 be to the contrary. It's not a safe haven. You can't file a  
20 motion for summary judgment thinking if I don't win I'm safe.  
21 You're not because the law may be against you. That applies  
22 in this case on both sides.

23           It's been enlightening. I appreciate your preparations.  
24 A remarkable drafting of the pleadings in this case on both  
25 sides. Frankly, I think that the facts are before this

1 court.

2 Let me tell you as a practical matter what a judge has to  
3 do. I look at these cases and I think are there material  
4 issues of fact. I've never -- that's too strong. I've  
5 seldom seen a motion for summary judgment where some issues  
6 of fact don't exist. But that's not the issue. Some issues  
7 of fact have no application here, only material issues of  
8 fact.

9 MR. DAINES: Your Honor, there was a question that  
10 you addressed to me and I said in answer to it I don't know.  
11 My client would like to answer the question.

12 THE COURT: What was the question?

13 MR. DAINES: Why he wasn't there at the meeting.

14 THE COURT: It was really more rhetorical than  
15 anything else. It really doesn't matter because he certainly  
16 had an opportunity to be there. I'm not holding it against  
17 him that he wasn't. That's not the issue. The issue is  
18 whether or not the council had sufficient information before  
19 it upon which it could make a defensible decision.

20 MR. DAINES: Apparently, between meetings, council  
21 member Wood came into some information that wasn't there at  
22 the 25th meeting that caused him to change his approach  
23 entirely. It caused him to reverse course. If that can  
24 happen between the two meetings to council member Wood, what  
25 else might happen?

1           **THE COURT:** Well, the purpose for a hearing is to  
2 air all of those things. We don't sequester city councils  
3 between meetings.

4           **MR. DAINES:** I understand; but that's an  
5 illustration of the prejudice.

6           **THE COURT:** It's not. It may be an illustration of  
7 a fact received which then should be aired. Information,  
8 knowledge, experience, all of those things should be aired.  
9 That's what hearings are for. That's what meetings are for.  
10 You don't create city council members out of whole cloth.  
11 They're people, members of the community. They're influenced  
12 by everyday living experiences.

13           The purpose for a hearing is to air those considerations.  
14 Whether they are aired or not is not the issue. The question  
15 is whether the opportunity for doing so is provided.

16           **MR. DAINES:** And the purpose of the time between  
17 those meetings and the notice provisions is so that council  
18 members can be informed.

19           **THE COURT:** That's right. But once they send the  
20 notice out they don't put their hands over their ears and  
21 close their eyes and say I'm not going to do anything until I  
22 get there. The purpose for the hearing is for disclosure.  
23 And again it doesn't matter whether disclosure occurs. What  
24 matters is whether or not the opportunity is provided for it.  
25 The last thing this court is going to do is go back and find

1 out if everything everybody knew was said.

2 MR. DAINES: The prejudice to my client, let me be  
3 clear, was he didn't have the opportunity that he would have  
4 otherwise have had to lobby the council members, as  
5 apparently happened with the other people involved in between  
6 the meetings.

7 THE COURT: There you go again, suggesting that that  
8 occurred. Mr. Jorgensen's affidavit denies that. An  
9 un rebutted affidavit is conclusive that it didn't occur.

10 MR. DAINES: It did occur.

11 THE COURT: Do you have an affidavit to that effect?

12 MR. DAINES: Yeah.

13 THE COURT: What does it say?

14 MR. DAINES: It cites the --

15 THE COURT: Give me the page.

16 MR. DAINES: All right. It's tab -- in the burgundy  
17 binder, tab 50 and the attachments to it.

18 THE COURT: Okay.

19 MR. DAINES: Tab 50, pages six, seven, eight and  
20 nine.

21 THE COURT: Newspaper articles?

22 MR. DAINES: Right. Talking about how the  
23 developers -- what their complaints were about the first  
24 thing and how we knew, once we got to them, that they would  
25 make a decision. Once they heard from us they'd make a

1 decision.

2           **THE COURT:** Was an opportunity provided for an  
3 airing of that?

4           **MR. DAINES:** This is an example of the kinds of  
5 things that happened in between counsel meetings that Your  
6 Honor spoke about that aren't inappropriate to happen.  
7 They're not inappropriate. It's not inappropriate for the  
8 developers to talk to council members in between meetings,  
9 not at all. But my client was prejudiced in not having the  
10 lead time that the other people apparently took advantage of.

11           **THE COURT:** Why didn't he take advantage of it  
12 himself?

13           **MR. DAINES:** Because he didn't think that they would  
14 reverse themselves.

15           **THE COURT:** Does his decision in concluding that  
16 carry more sway than apparently these other folks who thought  
17 differently?

18           **MR. DAINES:** May he address that?

19           **THE COURT:** No. I'm asking you, counsel. You're  
20 suggesting the argument that somebody thought the decision  
21 could be looked at again. Your client thought it couldn't  
22 be. I can't make this decision based upon what these parties  
23 thought or didn't think or did or didn't do. The question is  
24 whether or not they complied with the law.

25           **MR. DAINES:** Right. But the second question is if

1 the city didn't comply with the law how is my client  
2 prejudiced?

3 **THE COURT:** He's not prejudiced by the fact that  
4 they did what they did. He's prejudiced by the fact did they  
5 comply with the law.

6 **MR. DAINES:** How is he prejudiced by that is the  
7 question?

8 **THE COURT:** I asked that question more on a personal  
9 note. But as a legal matter your point is he was prejudiced  
10 by the fact that the city council did not comply with the  
11 law?

12 **MR. DAINES:** Yes.

13 **THE COURT:** And he's an interested party being a  
14 neighbor to the zone?

15 **MR. DAINES:** Right. I'm pointing out another aspect  
16 of that prejudice. That is that had it been done correctly  
17 and legally he would have had multiple additional  
18 opportunities to have his --

19 **THE COURT:** Let me tell you why I think that  
20 argument can't be persuasive. Let's assume that not unlike  
21 the developers, Mr. Gittins, during that two week interim,  
22 went out and talked to every one of the city council members  
23 and said this is a bad deal. You need to think about this.  
24 Had he done that, and had they did what they did still, that  
25 wouldn't affect the decision this court has to make either



1 way.

2 You certainly wouldn't say, well, he had his chance to  
3 influence them just as the developers did. You wouldn't take  
4 that position. It's irrelevant. Had he been the only one  
5 going out and lobbying these council members, and they still  
6 did what they did, you wouldn't back off saying, well, we had  
7 our chance. That's not a chance at all.

8 MR. DAINES: That's the very point, that they  
9 wouldn't have done what they did.

10 THE COURT: My point is you can't conclude they did  
11 what they did because of what some developer might have  
12 whispered in their ear. Had your client gone out and  
13 whispered in their ear and they did what he wanted them to  
14 do, neither side could rely on that. That's why you have  
15 hearings. That's why meetings are conducted.

16 MR. DAINES: Right.

17 THE COURT: As I said, you don't sequester city  
18 council members.

19 MR. DAINES: That's correct.

20 MR. JORGENSEN: Your Honor, as a last comment, I  
21 would encourage you, there is a very extensive record that's  
22 been included. It's impossible to refer to all of it. The  
23 transcript of the public hearing before the planning and  
24 zoning commission.

25 THE COURT: I'm not concerned about what was said,

1 what was not said, what was disclosed or not disclosed.  
2 That's not my role. I don't go back and make sure what  
3 everybody knew was said and disclosed on the record. All I'm  
4 concerned with is whether or not the legal opportunity to do  
5 so was done.

6 The last thing a judge does in this kind of case is go  
7 back and say the legislature didn't consider every possible  
8 facet. That's why you defer to the legislative bodies.  
9 That's what we do here. We let them conduct it in the  
10 fashion they think is appropriate. All I do is make sure it  
11 was done legally. Otherwise, we might as well chuck the  
12 legislature and the courts make all the decisions. That  
13 would end up --

14 **MR. JORGENSEN:** The court going to every city  
15 council meeting in the valley.

16 **THE COURT:** I don't want to go to any of them. You  
17 know, another week the legislature down in Salt Lake will be  
18 out of session and we can all come out of hiding and get on  
19 with our lives. Until then, watch out.

20 All right. I'll take the matter under advisement and get  
21 a decision out as rapidly as possible. I know both sides are  
22 interested in getting this thing resolved.

23 Court is in recess.

24 **MR. DAINES:** Thank you, Your Honor.

25 (Hearing concluded at 11:17 a.m.)

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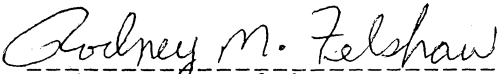
C E R T I F I C A T E

THIS IS TO CERTIFY that the videotaped hearing was transcribed by me, Rodney M. Felshaw, a Certified Court Reporter and Certified Court Tape Transcriber in and for the State of Utah.

That a full, true and correct transcription of the hearing, to the best of my ability, is set forth in the pages numbered 2 to 88, inclusive.

I further certify that the original transcript was filed with the Court Clerk, First District Court, Cache County, Logan, Utah.

Dated this 18th day of May, 2007.

  
Rodney M. Felshaw, C.S.R., R.P.R.

Tab F

**In the First Judicial District Court  
In and for Cache County, State of Utah**

---

**JEFFRY R. GITTINS,**

**Plaintiff(s),**

**MEMORANDUM DECISION**

**vs.**

**Case Number: 060100558 AA**

**SMITHFIELD CITY,**

**Defendant(s).**

**JUDGE: GORDON J. LOW**

---

THE ABOVE MATTER is before the Court upon the Defendant's *Motion to Dismiss Plaintiff's Amended Petition for Review* for failure to timely prosecute and for failure to comply with the Order of the Court. In preparation for its decision, the Court has reviewed the motion and supporting memoranda, as well as Plaintiff's Memorandum Opposing Motion to Dismiss and Plaintiff's Request for Enlargement and supporting Affidavits, and Defendant's Reply to Plaintiff's Memorandum in Opposition and other pleadings relating thereto. The Court also heard oral arguments on the matter on the 14<sup>th</sup> day of December, 2006.

In this matter, the Court ordered the Plaintiff to file his dispositive motion for summary judgment on or before the 15<sup>th</sup> of August, 2006. He failed to do so by that date, and on the 15<sup>th</sup> of November, he filed Exhibits 1-50 to Petitioner's Motion for Summary Judgment. Then, on the 20<sup>th</sup> of November, he filed his Memorandum Supporting Plaintiff's Motion for Summary Judgment - Statement of Facts. Thereafter, on the 27<sup>th</sup> of November, he filed Petitioner's Memorandum Supporting Motion for Summary Judgment - Argument. The Court file does not reflect the filing of the actual Motion, however, all of the memoranda and exhibits were filed

12-15-06  
(R)

after the Defendant's motion for dismissal had been filed, which was on the 12<sup>th</sup> of October.

Without rehearsing all of the arguments made by counsel on both sides, this Court is prepared to deny the motion to dismiss. However, it should be noted that the excuses made by the Plaintiff for failure to comply with this Court's order are unmeritorious. The Court finds that there is no excusable neglect. Plaintiff's counsel could have filed a motion for extension of time. His failure to respond to requests, even informal telephone requests by defense counsel, this Court would suggest is unprofessional. The primary concern by this Court is not necessarily compliance with the Rules of Procedure, or even the orders of the Court relative to the scheduling conference, because the Court recognizes that sometimes those deadlines cannot be met. Perhaps they could not be met in this case, but certainly there could have been requests for extensions and, at the least, courtesy calls to respond to requests by Defense counsel to move the matter along.

Counsel for the defense has appropriately argued that compliance with the rules is necessary in order to move the business of the Court and to ensure compliance and respect for the process. To all of that, the Court has no argument. But the primary focus is prejudice to the Defendant, though much was argued about that. At this juncture, a few more weeks in order to explore the merits of the Plaintiff's claim would be not unduly prejudicial over that which has already been suffered. That is particularly in light of the fact that the Plaintiff has now filed his long awaited motion for summary judgment.

The Court is therefore denying the motion to dismiss and ordering that the Defendant respond in the next thirty (30) days to the Plaintiff's motion for summary judgment. Plaintiff is

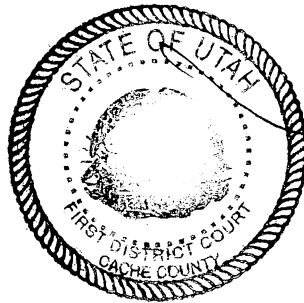
then ordered to reply within ten (10) days and either request a hearing or submit the matter for a ruling without further argument.


With respect to sanctions for the default by the Plaintiff, the Defendant is awarded all of its attorney's fees and costs. The Court solicits an affidavit from defense counsel relative to the same, together with any other costs, expenses, or recognizable financial prejudice suffered by the Defendant as a result of the Plaintiff's delay.

Counsel for the Plaintiff is directed to prepare a formal order in conformance herewith.

Dated this 15 day of December, 2006.

BY THE COURT



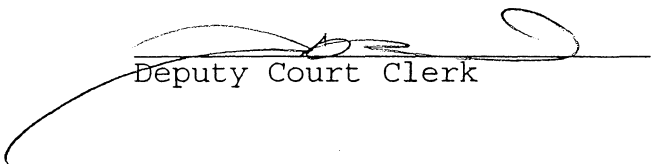
  
Gordon J. Low, District Court Judge  
First District Court

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 060100558 by the method and on the date specified.

METHOD	NAME
Mail	CHRISTOPHER L DAINES ATTORNEY PLA 135 N MAIN ST STE 108 LOGAN, UT 84321
Mail	BRUCE L JORGENSEN ATTORNEY DEF 88 W CENTER ST LOGAN UT 84321

Dated this 15 day of December, 2006.

  
Deputy Court Clerk



Tab G

LOGAN COURTS

2007 MAR 28 AM 8:48

Chris Daines, Bar # 0800  
**CHRIS DAINES LAW**  
135 North Main, Suite 108  
Logan, Utah 84321  
Phone: (435) 752-1750 Fax: 752-1950  
Attorney for Petitioner

---

IN THE FIRST DISTRICT COURT, CACHE COUNTY, STATE OF UTAH

---

JEFFRY R. GITTINS,  
Petitioner,  
vs.

NOTICE OF APPEAL

Case No. 060100558

SMITHFIELD CITY,  
Respondent.

Judge Gordon J. Low

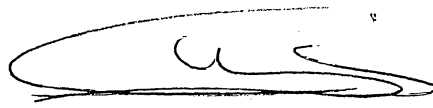
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Notice is hereby given that Petitioner Jeffry R. Gittins, through counsel, appeals to the Utah Court of Appeals the Declaratory Judgment signed and entered in the above-entitled action by the Honorable Gordon J. Low on March 27, 2007.

This appeal is taken from the entire judgment.

DATED March 28, 2007.

CHRIS DAINES LAW



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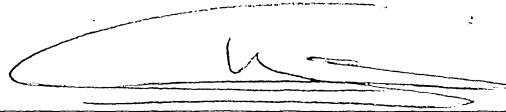
Chris Daines  
Attorney for Petitioner

3-28-07  
FILED

**CERTIFICATE OF SERVICE**

On March 28, 2007, I mailed a copy of the foregoing to:

Bruce L. Jorgensen  
OLSON & HOGGAN, P.C.  
130 South Main  
Logan, Utah 84321

A handwritten signature in black ink, appearing to read "Chris Daines", is written over a horizontal line. The signature is stylized and somewhat cursive.

Chris Daines  
Attorney for Petitioner

Tab H

Bruce L. Jorgensen (#1755)  
Olson & Hoggan, P.C.  
Attorneys for Defendant  
130 South Main, Suite 200  
P.O. Box 525  
Logan, Utah 84323-0525  
Phone: (435) 752-1551  
Fax: (435) 752-2295

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

JEFFRY R. GITTENS,

Plaintiff,

vs.

SMITHFIELD CITY,

Defendant.

)  
)  
) **ORDER FOR PAYMENT OF**  
) **ATTORNEY'S FEES AND COSTS**  
) **TO DEFENDANT**  
)

) Case No. 060100558 AA  
)

) Judge: Gordon J. Low  
)

This matter is before the Court by reason of the Defendant's Motion to Dismiss and Supporting Memorandum. The Motion to Dismiss was thoroughly briefed, and oral arguments were held before the Court on Thursday, December 14, 2006; and the Court, after having reviewed said pleadings and having heard said oral arguments, issued its Memorandum Decision dated December 15, 2006, with the Court's formal Order being signed on February 5, 2007. The Defendant's Motion to Dismiss was denied, but as a sanction, the Defendant was awarded all of its attorney's fees and costs, with the Court having solicited an Affidavit from defense counsel relative to the fees and costs incurred, together with any other costs, expenses or recognizable financial prejudice suffered by the Defendant as a result of the Plaintiff's delay.

OLSON & HOGGAN, P.C.  
ATTORNEYS AT LAW  
130 SOUTH MAIN, SUITE 200  
P.O. BOX 525  
LOGAN, UTAH 84323-0525  
(435) 752-1551

REMONTON OFFICE:  
123 EAST MAIN  
P.O. BOX 115  
REMONTON, UTAH 84337  
(435) 257-3885

The Court has now received Defense Counsel's Affidavit, as requested by the Court; and after having reviewed said Affidavit and good cause existing, it is hereby **ORDERED** that the Plaintiff shall make payment to the Defendant in the amount of \$4,609.50, the payment of which sum represents a reimbursement to the Defendant for the attorney's fees and other costs incurred by the Defendant in preparing its Motion to Dismiss and pursuing it to a conclusion, which payment by the Plaintiff is also a sanction for the default of the Plaintiff in failing to file the initial pleadings required of him on a timely basis in order to pursue his Motion for Review.

DATED this 4 day of ~~March~~ <sup>April</sup> 2007.

BY THE COURT:

/s/ GORDON J. LOW

Gordon J. Low  
District Court Judge

Tab I

FILED  
UTAH APPELLATE COURTS  
AUG 28 2007

THE UTAH COURT OF APPEALS

-----ooOoo-----

Jeffry R. Gittins, )  
 )  
 Plaintiff and Appellant, )  
 )  
 v. )  
 )  
 City of Smithfield, )  
 )  
 Defendant and Appellee. )

ORDER  
Case No. 20070289-CA

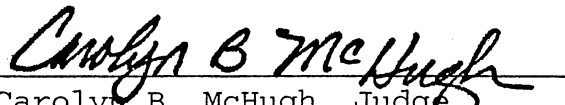
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This matter is before the court on Appellee's motion for summary disposition. Appellee argues that this court lacks jurisdiction due to the filing of an untimely notice of appeal.

IT IS HEREBY ORDERED that the motion for summary disposition is denied without prejudice, and a ruling on the issues raised therein is deferred pending plenary presentation and consideration of the case.

Dated this 28<sup>th</sup> day of August, 2007.

FOR THE COURT:

  
Carolyn B. McHugh, Judge