Brigham Young University Law School
BYU Law Digital Commons

Utah Court of Appeals Briefs

2006

Thomas W. Tolman and Verla F. Tolman v. Logan City and John and Jane Does : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2

Part of the Law Commons

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

Recommended Citation
Brief of Appellee, *Tolman v. Logan City and Does*, No. 20060713 (Utah Court of Appeals, 2006).
https://digitalcommons.law.byu.edu/byu_ca2/6731

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

THOMAS W. TOLMAN and VERLA F. TOLMAN, Plaintiffs/Appellants, vs. LOGAN CITY and JOHN and JANE DOES, 1-20, Defendant/Appellee.	: : : : : : : : : : :	**BRIEF OF APPELLEE LOGAN CITY** Case No. 20060713-CA

APPEAL FROM A DECISION OF THE
FIRST JUDICIAL DISTRICT COURT, CACHE COUNTY,
THE HONORABLE GORDON J. LOW, DISTRICT JUDGE

David R. Daines
Chris Daines
CHRIS DAINES LAW
135 North Main Street, Suite 108
Logan, Utah 84321
Telephone: 435-752-1750

Attorneys for Plaintiffs/Appellants

Jody K Burnett (0499)
WILLIAMS & HUNT
257 East 200 South, Suite 500
P. O. Box 45678
Salt Lake City, Utah 84145-5678
Telephone: 801-521-5678
Facsimile: 801-364-4500

Kymber Housley
Logan City Attorney
255 N. Main Street
Logan, Utah 84321
Telephone: 435-716-9084
Facsimile: 435-716-9081

Attorneys for Defendant/Appellee Logan City

UTAH APPELLATE COURTS
DEC 2 1 2006

IN THE UTAH COURT OF APPEALS

THOMAS W. TOLMAN and VERLA F. TOLMAN, Plaintiffs/Appellants, vs. LOGAN CITY and JOHN and JANE DOES, 1-20, Defendant/Appellee.	**BRIEF OF APPELLEE LOGAN CITY** Case No. 20060713-CA

APPEAL FROM A DECISION OF THE
FIRST JUDICIAL DISTRICT COURT, CACHE COUNTY,
THE HONORABLE GORDON J. LOW, DISTRICT JUDGE

David R. Daines
Chris Daines
CHRIS DAINES LAW
135 North Main Street, Suite 108
Logan, Utah 84321
Telephone: 435-752-1750

Attorneys for Plaintiffs/Appellants

Jody K Burnett (0499)
WILLIAMS & HUNT
257 East 200 South, Suite 500
P. O. Box 45678
Salt Lake City, Utah 84145-5678
Telephone: 801-521-5678
Facsimile: 801-364-4500

Kymber Housley
Logan City Attorney
255 N. Main Street
Logan, Utah 84321
Telephone: 435-716-9084
Facsimile: 435-716-9081

Attorneys for Defendant/Appellee Logan City

TABLE OF CONTENTS

STATEMENT OF JURISDICTION 1

STATEMENT 1

PROVISIONS OF CONSTITUTION, STATUTES, ORDINANCES AND RULES 1

STATEMENT OF THE CASE 4

A. NATURE OF THE CASE 4
B. COURSE OF PROCEEDINGS 4
C. STATEMENT OF FACTS 5

ARGUMENT 10

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE CITY'S DENIAL OF TOLMANS' DOWNZONING APPLICATION WAS NOT ARBITRARY, CAPRICIOUS OR ILLEGAL 10

II. THE TRIAL COURT APPROPRIATELY GRANTED SUMMARY JUDGMENT ON TOLMANS' TAKINGS AND DUE PROCESS CLAIMS 14

A. TOLMANS FAILED TO PRESERVE THEIR TAKINGS CLAIM AND DUE PROCESS CLAIM FOR APPELLATE REVIEW . . . 14

B. TOLMANS' ARGUMENT WITH RESPECT TO THE CITY'S STATUTE OF LIMITATION DEFENSE IS ADVANCED FOR THE FIRST TIME ON APPEAL AND IS FACTUALLY INCORRECT 15

C. TOLMANS' INVERSE CONDEMNATION CLAIMS FAIL AS A MATTER OF LAW 16

D. TOLMANS' ARTICLE I, SECTION 7 DUE PROCESS CLAIMS ARE FACTUALLY AND LEGALLY UNSUPPORTED 20

III. THE CITY'S DENIAL OF TOLMAN'S DOWNZONING REQUEST WAS NOT ILLEGAL "REVERSE SPOT ZONING." 22

TABLE OF AUTHORITIES

Cases

Bagford v. Ephraim City, 904 P.2d 1095 (Utah 1995) 17

Bradley v. Payson City Corp., 2003 UT 16, 70 P.3d 47 . . . . 11-13, 21

Brookside Mobile Home Park, Ltd. v. Peebles, 2002 UT 48, 48 P.3d 968 . . . . 14, 15

City Comm'n of the City of Miami v. Woodland Park Cemetery Co.,
553 So.2d 1227 (Fla. App. 1989) 29

City of Livonia v. Dept. of Social Services, 333 N.W.2d 151 (Mich.App. 1983) 21

City of Suffolk ex rel. Herbert v. Bd. of Zoning Appeals for City of Suffolk,
580 S.E.2d 796 (Va. 2003) 18

Colman v. Utah State Land Bd., 795 P.2d 622 (Utah 1990) 19

Consaul v. City of San Diego, 8 Cal.Rptr.2d 762 (Cal.App. 1992) 25, 31

Cornish Town v. Koller, 817 P.2d 305 (Utah 1991) 19

Crestview-Holladay Homeowners Ass'n, Inc. v. Engh Floral Co.,
545 P.2d 1150 (Utah 1976) 26

Dauerheim, Inc. v. Town Bd. of Town of Hempstead, 310 N.E.2d 516 (N.Y. 1974) . . . 30

Donner Crest Condominium Homeowners Ass'n v. Salt Lake City,
2005 UT App 163, 2005 WL 775306 at *4 26

Dufau v. Jefferson Parish, 200 So. 2d 335 (La. App. 1967) 28

Foutz v. City of South Jordan, 2004 UT 75, ¶ 17, 100 P.3d 1171 13

Glennon Heights, Inc. v. Central Bank & Trust, 658 P.2d 872 (Colo. 1983) 18

Hatch v. Davis, 2004 UT App 378, ¶ 56,102 P.3d 774 15

Hyland v. Mayor and Township Comm. of Morris Township,
327 A.2d 675 (N.J.App. 1974) 30

Intermountain Sports, Inc. v. Dept. of Transp.,
2004 UT App 405, ¶ 8, 103 P.3d 716 17

Jacobs, Visconsi & Jacobs Co. v. City of Lawrence,
715 F.Supp. 1000 (D. Kan. 1989) 18

Johnson v. Hermes Assoc., Ltd., 2005 UT 82, 128 P.3d 1151 (Utah 2005) 1

Johnson v. Utah-Idaho Central Railway Co., 249 P.1036 (Utah 1926) 17

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886,
120 L.Ed.2d 798 (1992) 17

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 106 S.Ct. 2561,
91 L.Ed.2d 285 (1986) 18

Marshall v. Bd. of County Comm'rs, 912 F.Supp 1456 (D. Wyo 1996) 18

Marshall v. Salt Lake City, 141 P.2d 704 (Utah 1943) 27

Midvale City Corp. v. Haltom, 2003 UT 26, ¶ 75, 73 P.3d 334 22

Miller v. Town of Tilton, 655 A.2d 409 (N.H. 1995) 30

Nat'l Parks and Conservation Ass'n v. Bd. of State Lands,
869 P.2d 909 (Utah 1993) 19

Palermo Land Co., Inc. v. Planning Comm'n of Calcasieu Parish,
561 So.2d 482 (La. 1990) 28, 29

Patterson v. American Fork City, 2003 UT 7, ¶ 23, 67 P.3d 466 17

Penn Central Transp. Co. v. City of New York, 438 U.S. 104,
98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) 23-25, 30

Phi Kappa Iota Fraternity v. Salt Lake City, 212 P.2d 177 (Utah 1949) 27, 28

Ross v. City of Yorba Linda, 2 Cal.Rptr. 2d 638 (Cal.App. 1991) 29

Scherbel v. Salt Lake City Corp., 758 P.2d 897 (Utah 1988) 17

Smith Investment Co. v. Sandy City, 958 P.2d 245 (Utah App. 1998) 19, 21

Springville Citizens for a Better Community v. City of Springville,
1999 UT 25, ¶ 30, 979 P.2d 332 . . . . 13, 25

State in Interest of Summers v. Wulffenstein, 616 P.2d 608 (Utah 1980) 20

Sullivan v. Town of Acton, 645 N.E.2d 700 (Mass.App. 1995) 30

Town of Alta v. Ben Hame Corp., 836 P.2d 797 (Utah App. 1992) 26

Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499 (Ill. 1951) 29

Village of Belle Terre v. Borass, 416 U.S. 1, 94 S.Ct. 1526, 39 L.Ed.2d 797 (1974) . . . 11

W.C.& A.N. Miller Dev. Co. v. Dist. of Columbia Zoning Comm'n,
340 A.2d 420 (D.C. 1975) 21

Weatherford v. City of San Marcos, 157 S.W.3d 473 (Tex.App. 2004) 18

Western Land Equities, Inc. v. City of Logan, 617 P.2d 388 (Utah 1980) 17

Statutes and Rules

Utah Code Ann. § 10-9-1001 . . . . 2, 13, 26

Utah Code Ann. § 10-9-303(6) 3

Utah Code Ann. § 10-9-405 (2004) 2

Utah Code Ann. § 10-9a-404(4) 11

Utah Code Ann. § 10-9a-801 . . . . 1, 10, 13, 26

Utah Code Ann. § 10-9a-801(3) 1

Utah Code Ann. § 10-9a-801(5) (2004) 2

Utah Code Ann. § 10-9a-801(8)(a) 2, 16

Utah Code Ann. § 72-12-25(3) 17, 21

Utah Code Ann. § 78-12-28(4) 21

Other Authorities

1 Ziegler, Rathkopf's The Law of Zoning and Planning, (1996, supp. 2001)
§ 1:40 at 1-53 24

3 Ziegler § 38:17 at 38-14 to 38-16 24

3 Ziegler § 41:4 at 41-13 to 41-14 24

STATEMENT OF JURISDICTION

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

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue: Was the trial court correct in determining that the decision of the City to deny the Tolmans' request for the favorable exercise of legislative discretion to rezone their property was not arbitrary, capricious or illegal under the applicable statutory standard granting a strong presumption of validity and substantial judicial deference to the City under the provisions of Utah Code Ann. § 10-9a-801?

Standard of review: Appellate courts "review the district court's summary judgment ruling for correctness, granting no deference to its legal conclusions, and consider whether it correctly concluded that no genuine issue of material fact existed." Johnson v. Hermes Assoc., Ltd., 2005 UT 82, ¶ 12, 128 P.3d 1151, 1155 (Utah 2005).

Preservation: This issue was presented to the trial court by the City's supporting and reply memoranda. (R. 33-145, R. 218-225.)

PROVISIONS OF CONSTITUTION, STATUTES, ORDINANCES AND RULES

Utah Code Ann. § 10-9a-801(3):

> (a) The courts shall:
> (i) presume that a decision, ordinance or regulation made under the authority of this chapter is valid; and
> (ii) determine only whether or not the decision, ordinance, or regulation is arbitrary, capricious, or illegal.

> (b) A decision, ordinance, or regulation involving the use of legislative discretion is valid if the decision, ordinance, or regulation is reasonably debatable and not illegal.
>
> . . .
>
> (d) A determination of illegality requires a determination that the decision, ordinance, or regulation violates a law, statute, or ordinance in effect at the time the decision was made or the ordinance or regulation adopted.

Utah Code Ann. § 10-9a-801(5) (2004):

> If the municipality has complied with Section 10-9a-205, a challenge to the enactment of a land use ordinance or general plan may not be filed with the district court more than 30 days after enactment.

Utah Code Ann. § 10-9a-801(8)(a):

> (i) If there is a record, the district court's review is limited to the record provided by the land use authority or appeal authority, as the case may be.
>
> (ii) The court may not accept or consider any evidence outside the record of the land use authority or appeal authority, as the case may be, unless that evidence was offered to the land use authority or appeal authority, respectively, and the court determines that it was improperly excluded.

Utah Code Ann. § 10-9-1001 (effective 1992, repealed 2004):

> Any person adversely affected by any decision made in the exercise of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local decision is rendered.

Utah Code Ann. § 10-9-405 (2004):

> Except as provided in Section 10-9a-406, the general plan is an advisory guide for land use decisions, the impact of which shall be determined by ordinance.

Utah Code Ann. § 10-9-303(6) (eff. 1992, repealed 2004):

> (a) The general plan is an advisory guide for land use decisions.
> (b) The legislative body may adopt an ordinance mandating compliance with the general plan.

Logan City Land Development Code § 17.01.040:

> Land development and capital improvement projects shall be consistent with the General Plan. The City's administration and its departments shall carry out the mandate of the general plan when reviewing project proposals, development plans, and capital improvement programs.
> A. Planning Commission Implementation
> The Planning Commission shall not approve any project for which it cannot substantiate a finding that the project is consistent with the goals, policies and implementation programs of the General Plan.
> B. Board of Adjustment Implementation
> The Board of Adjustment shall not approve any variance request for which it cannot substantiate a finding that the project is consistent with the goals, policies and implementation programs of the General Plan.
> C. Design Review Committee Implementation
> The Design Review Committee shall not approve any project for which it cannot substantiate a finding that the project is consistent with the goals, policies and implementation programs of the General Plan.
> . . .
> E. Relationship of the General Plan to the Land Development Code
> The General Plan is the adopted policies of the Municipal Council. The general Plan represents a lengthy public participation process and incorporates long range goals, identified policies and an implementation program. <u>The content of the General Plan may be cited as a basis for making decisions or as part of the finding to support actions</u> initiated by this Land Development Code. The General Plan is adopted as part of this code by reference. The General Plan provides the policies that enable the specific regulations of the Land Development Code to be carried out. Implementation measures in the General Plan provide direction for specific measures within the Land Development Code. When there is a conflict between the General Plan and the Land Development

> Code, if the General Plan provides precise development standards, the General Plan is to be used. If the General Plan provides policy language and no specific development standards, the Land Development Code's specific measures are to prevail. (emphasis added).

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a challenge to the exercise of legislative discretion by the Logan Municipal Council arising from the City's enactment of an ordinance in 1989 rezoning the Tolmans' property from multi-family to single-family zoning and the subsequent denial in 2004 of an application for a zone change of the property back to a higher density multi-family use.

B. COURSE OF PROCEEDINGS

In June of 2004, Tolmans applied to the City for a rezoning of their property and those of others similarly situated. (R. 106-109.) After review by the City's planning staff and Planning Commission, both of which recommended denial of the application, the Logan Municipal Council denied the application during its meeting on August 3, 2004. (R. 141-45.) Tolmans timely sought judicial review of that decision on the grounds that it was arbitrary and capricious. (R. 1-8.) Tolmans' complaint also alleged takings claims and a claim under 42 U.S.C. § 1983. (*Id.*)

Because the record before the City was more than adequate to establish the factual basis for the City's exercise of legislative discretion, the City sought summary judgment by motion filed June 22, 2005. (R. 33-145, R. 218-225.) Tolmans did not respond to the City's motion and memorandum, causing the trial court, on January 6, 2006, to issue an

order to show cause why the matter should not be dismissed for failure to prosecute. (R. 149-151.) After hearing arguments why the matter should not be dismissed, the court granted Tolmans until April 4, 2006, to respond to the City's motion. Tolmans submitted their opposition memorandum on April 13, 2006. (R. 199, et. seq.) After the City responded, the trial court issued a Memorandum Decision granting the City's motion based upon the arguments in its memoranda. (R. 230-31.) The Summary Judgment and Order of Dismissal were entered by the Court on June 12, 2006. (R. 233-34.) Tolmans then commenced this appeal.

C. STATEMENT OF FACTS

Tolmans' property is a single family home which was situated in a multi-family zone when they purchased it in 1983. (Second Amended Complaint ¶ 5, R. 3.) Six years later, 60 property owners petitioned the Logan City Planning Commission for a downzoning of properties in the area where Tolmans' property lies from R3 to R2. (R. 50-53.) The petitioners were concerned with various issues including preservation of the single-family residential character of their properties, privacy issues, decreasing single-family residential property values, effects of increased density, and problems posed by absentee landlords. (*Id.*)

The Planning Commission considered the rezoning proposal and unanimously recommended approval to the Municipal Council. (R. 55-59.) At the meeting, the Commission received a second petition presented by additional homeowners requesting that the zoning change include their properties. (*Id.*)

After a public hearing on October 19, 1989, the Municipal Council voted unanimously to rezone the properties to R2. (R. 60-63.) The ordinance was approved by the Mayor on November 2, 1989. (Ordinance 89-52, R. 64-65.) Tolmans did not challenge the zoning amendment, although it affected their property as well as that of many others.

The City subsequently engaged in two years of study after which the Municipal Council adopted a revised General Plan for the City of Logan on June 16, 1995. (R. 66-88.) Consistent with the General Plan, the Council adopted a zoning map and Land Development Ordinance on March 6, 1996. (*Id.*) The General Plan recognizes the tension between single family residences and multi-family uses within neighborhoods and the City's efforts to balance the interests involved.

> Logan is a City of neighborhoods. Prior to preparing the General Plan, the City Council and Planning Commission were facing requests from each of the City's residential neighborhoods to decrease the permitted density for new residential development. The actions sought, called *downzoning* requests, were intended to stop the proliferation of *fourplex* residential development in what were basically established single family neighborhoods.
>
> Zoning is an ongoing process intended to recognize changes in community values and development needs. The City invested extensive time and emotional energy into consideration of zone changes in each neighborhood. The General Plan calls for new zoning districts, which requires an area-by-area evaluation of the City to determine which new zoning district is applied to what area. The issues and concerns that generated the reductions in densities during the early 1990s had not changed at the time the General Plan was proposed for adoption in 1995. These values and concerns are still a part of the evaluation process for zone changes.

> . . .
>
> The greatest challenge in the General Plan is to balance the need for housing with desire to maintain neighborhood character.

(Logan City General Plan, relevant portions appearing at R. 66-88.) Under the new ordinance, Tolmans' property and those of others which had been zoned R2 in 1989 were now designated as SFR (single-family residential).

On June 24, 2004, Tolmans applied to the City for rezoning of their property and properties of others, including a total of 32 properties over approximately 8 acres, on June 24, 2004. (R. 102-105.) Pursuant to statutory authorization at Utah Code Ann. § 10-9-303(6)(b) (effective at the time), the City's Land Development Code mandates that City officials approve land use applications only if they are consistent with the provisions of the General Plan. (Land Development Code § 17.01.040.) Tolmans did not apply for amendment to the General Plan as provided by Chapter 17.52 of the City's Land Development Code. At the time of Tolmans' application for rezone, the City was conducting studies for the preparation of a new General Plan.

The City's planning staff evaluated the Tolman application and recognized that multi-family use would likely be the best use in the area and that the preliminary findings in the general plan revision process would probably support the rezoning. (R. 106-109.) The staff believed the rezone request was premature, implying that it might be more appropriate under the revised general plan. (*Id.*) The staff also recognized the mandatory requirement that rezoning be consistent with the general plan and believed that a rezoning

in this context might constitute illegal spot zoning. (*Id.*) Ultimately, the staff recommended denial of the rezoning because it was incompatible with the express provision of the General Plan objective to "restore the single family scale, character, and stability to the area." (*Id.*)

The Planning Commission considered Tolmans' rezoning request on July 22, 2004. It voted unanimously, with one abstention, to recommend to the Council denial of the application. (R. 110-136.) On August 3, 2004, the Municipal Council considered the zoning application. The minutes establish that denial was recommended on the basis of lack of conformity with the General Plan.

> The staff recommendation to deny the rezone was made because of the belief that Mr. Tolman's request was contrary to the current General Plan and 1996 citywide rezone. The Planning Commission also recommended denial, finding that the request was incompatible with the current General Plan and not supported by other planning documents, including the 1996 rezone.

The Council set a public hearing on the request for August 24, 2004. (R. 137-140.)

At the public hearing, a majority of individuals opposed the downzoning. After discussion, the Council voted unanimously to deny the rezoning request based on the staff and commission recommendations, which were in turn based upon noncompliance with the General Plan. (R. 141-45.)

SUMMARY OF ARGUMENT

The real and relatively narrow issue presented by this appeal is whether the trial court correctly concluded that the City's denial in 2004 of Tolmans' rezoning request was

not arbitrary, capricious or illegal. Under governing Utah law, the City's denial of the rezoning request based on inconsistency with the General Plan is, by definition, not arbitrary, capricious or illegal. The trial court's conclusion on this issue was correct and should therefore be affirmed.

Tolmans insist that the City's 1989 and 1995 zoning decisions are not barred by statutes of limitation. There are two problems with that argument. First, they make it for the first time on appeal. Secondly, it is based upon a claim that the City did not preserve its statute of limitations defense in its answer, an allegation that is not correct (R. 30-31).

Tolmans' complaint also alleges, in cursory fashion, a takings claim and a due process claim. The City addressed those claims in its memorandum in support of its motion (R. 42-47), but Tolmans did not respond to the City's arguments in their opposition memorandum. (R. 199-216.) By not presenting the trial court with legal arguments to support these claims, Tolmans have failed to preserve those issues for appeal.

Ignoring the real nature of the issues, Tolmans chose at the trial court level and again here to focus their arguments on a claim that the City's denial of a downzoning for a total of 32 separate parcels covering 8 acres somehow constitutes "reverse spot zoning." This argument has several flaws. First, it illustrates that Tolmans do not understand the legal technicalities of spot zoning. For example, the cases which find illegal reverse spot zoning in the context of the denial of zoning applications are few and far between and do not fit the facts of this case, despite Tolman's arguments. Secondly, Tolmans ignore the

case law in which the decision to deny was based upon the provisions of a comprehensive general plan, as is the case here. Those cases hold that decisions consistent with existing, legislatively adopted comprehensive plans, even if they appear to contain elements of spot zoning, do not constitute illegal spot zoning. Another problem with Tolmans' spot zoning argument at the trial court, and with their other arguments, is that Tolmans simply dumped a pile of legal authorities at the trial court's doorstep, providing scant legal analysis, with the hope or expectation that the trial court would perform their analysis for them. The court properly declined to do so.

The real issue presented here, and the one properly decided by the trial court, is whether denial of a rezoning request which is not consistent or compatible with the City's General Plan, and for which the applicant did not file a request for general plan amendment, is arbitrary, capricious or illegal. Under Utah law, it is not. The trial court's determination of this governing issue was legally correct and affirmation by this Court is appropriate.

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE CITY'S DENIAL OF TOLMANS' DOWNZONING APPLICATION WAS NOT ARBITRARY, CAPRICIOUS OR ILLEGAL.

To prevail at the trial court, Tolmans had the burden to (1) overcome a statutory presumption of validity of the City's decision; and (2) establish that, under applicable law, the decision was arbitrary, capricious or illegal. Utah Code Ann. § 10-9-1001

(repealed 2004).[1] The main problem with Tolmans' arguments is that they ignored at the trial court, and continue to ignore here, applicable and well-established Utah case law on this issue, particularly Bradley v. Payson City Corp., 2003 UT 16, 70 P.3d 47.

The City's denial of Tolmans' request for downzoning was an exercise of legislative discretion. Bradley ¶ 11 at 51. Here, we have two legislative acts involved, the zoning decision and the adoption of a comprehensive general plan. *See* Utah Code Ann. § 10-9a-404(4) (legislative body may adopt or reject proposed general plan). The Bradley court recognized that legislative zoning decisions "are entitled to particular deference." *Id.* ¶ 12 at 50-51. Therefore, the standard for determining whether a legislative denial of a rezoning application is arbitrary or capricious is the "highly deferential" determination of whether it is reasonably debatable that the decision could promote the general welfare. *Id.* ¶ 14 at 51-52. *See also* Village of Belle Terre v. Borass, 416 U.S. 1, 4, 94 S.Ct. 1526, 1528, 39 L.Ed.2d 797 (1974) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.")

In Bradley, a landowner appealed from the city's denial of his request to rezone property from low density residential-agricultural to higher density multi-family residential. The Supreme Court discussed the extensive history of its treatment of municipal land use decisions, noting that it had previously held that "it is 'the court's duty

---

[1]The statute was re-enacted as Utah Code Ann. § 10-9a-801 with the same legal standard and some explanatory codification of case law.

to resolve all doubts in favor' of the municipality, and the burden is on the plaintiff challenging a municipal land use decision to show that the municipal action was clearly beyond the city's power." Bradley ¶ 12 at 51 (citation omitted). The court then discussed the application of the reasonably debatable standard.

> In general, because a zoning classification reflects a legislative policy decision, we will not interfere with that decision except in the most extreme cases. The guiding principle behind our interpretation of legislative zoning decisions is that we will not substitute our judgment for that of the municipality. Though a municipality may have a myriad of competing choices before it, the selection of one method of solving the problem in preference to another is entirely within the discretion of the city; and does not, in and of itself evidence an abuse of discretion. The propriety of the zoning decision need only be reasonably debatable.

Bradley ¶ 24 at 54 (punctuation, citations omitted).

Of particular significance to the issue before this Court, the Bradley court recognized the appropriateness of a legislative decision relying on the city's general plan.

> Payson City's reliance on the General Plan as a basis for its decision is precisely the kind of legislative decision that should be left to the city council and undisturbed by the judiciary. It is not up to the court to determine whether Payson City made the right decision or the best decision in relying on the General Plan . . . We evaluate only whether it was reasonably debatable that the decision reached would promote the general welfare. Payson City's reliance on the long-term policy preferences embodied in the General Plan satisfies the reasonably debatable standard.

Bradley ¶ 26 at 55 (emphasis added). In other words, if a city denies a rezoning based upon noncompliance with the general plan, that denial is, by definition, not arbitrary or capricious as a matter of law.

As in Bradley, the issue before this Court is not whether approval of Tolmans' rezoning request would have been a better decision. Nor is the issue whether, ultimately, multi-family zoning may turn out to be the better zoning for these properties. The simple issue is whether the City's denial based upon lack of compliance with its General Plan passes the arbitrary and capricious challenge. The Bradley court has already squarely held that it does.

Moreover, Logan City's General Plan is not merely advisory. The Land Development Code mandates that any zoning amendments be consistent with the General Plan. In turn, the General Plan reflects the carefully weighed policy decision to support attempts to maintain or restore the single-family character of the SFR zones.

Admittedly, it is possible that in the future, the General Plan may reach a different policy conclusion more in favor of Tolmans' position. The weighing of policy issues in the revision of the General Plan had not been completed at the time of the application and could not legally be considered the governing legislative policy of the City. That legislative policy was defined by the 1995 General Plan and Tolmans did not apply for an amendment to that General Plan. The Council was required by ordinance to follow the long-term policy decision reflected in the General Plan. Its action in doing so cannot be

arbitrary or capricious.[2] The City is therefore entitled as a matter of law to summary judgment.

II. THE TRIAL COURT APPROPRIATELY GRANTED SUMMARY JUDGMENT ON TOLMANS' TAKINGS AND DUE PROCESS CLAIMS.

A. TOLMANS FAILED TO PRESERVE THEIR TAKINGS CLAIM AND DUE PROCESS CLAIM FOR APPELLATE REVIEW.

In its memorandum in support of its motion for summary judgment, the City provided legal arguments establishing that Tolmans' inverse condemnation and due process claims failed as a matter of law. Tolmans, in their opposition memorandum, failed to address any of these arguments, a fact noted by the City in its reply memorandum. (R. 223.) Because the City's arguments were unopposed, (1) there was no preservation of the issues for appeal, and (2) summary judgment on those issues was appropriate as a matter of law.

---

[2]Tolmans have identified nothing done by the City which constitutes a violation of statutes or its ordinances and could be determined to be illegal in a § 10-9-1001 review. The decision to deny the rezoning is therefore not arbitrary, capricious or illegal. To the extent that their argument of illegality relies on their "spot zoning" argument discussed below, that is not what is contemplated by the statute. The current version of the land use act codified the definition of illegality: "A determination of illegality requires a determination that the decision, ordinance, or regulation violates a law, statute, or ordinance in effect at the time the decision was made or the ordinance or regulation adopted." Utah Code Ann. § 10-9a-801(4)(d). This is simply a codification of existing case law on the issue of illegality. Foutz v. City of South Jordan, 2004 UT 75, ¶ 17, 100 P.3d 1171, 1175 (explaining "illegal" to mean violating ordinances); Springville Citizens for a Better Community v. City of Springville, 1999 UT 25, ¶ 30, 979 P.2d 332, 338 (decision illegal as violating mandatory ordinances).

In Brookside Mobile Home Park, Ltd. v. Peebles, 2002 UT 48, 48 P.3d 968, the Supreme Court discussed what is necessary to preserve an issue for appeal. The primary consideration is that "the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." Brookside ¶ 14 at 972 (citation omitted). The Brookside court identified three factors for determining whether the trial court had the necessary opportunity.

> (1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) a party must introduce supporting evidence or relevant legal authority.

Brookside ¶ 14 at 972 (citation omitted). This Court has applied the same standard. Hatch v. Davis, 2004 UT App 378, ¶ 56,102 P.3d 774, 787 -788.

Here, Tolmans not only provided no "relevant legal authority," they simply ignored the City's analysis of their claims. Because they failed to make even a minimal attempt to preserve these issues at the trial court, it is appropriate for this Court to decline to evaluate those claims or theories.

B. TOLMANS' ARGUMENT WITH RESPECT TO THE CITY'S STATUTE OF LIMITATION DEFENSE IS ADVANCED FOR THE FIRST TIME ON APPEAL AND IS FACTUALLY INCORRECT.

Tolmans make a cursory argument that the applicable statute of limitation does not bar their constitutional claims, *i.e.,* that their claims are "still viable." That argument is made for the first time on appeal. This Court has frequently stated that "[a]bsent plain error or exceptional circumstances, which Plaintiff has not argued, an appellate court will not consider an issue-even a constitutional issue-which is raised for the first time on

appeal." Hatch, ¶ 56 at 787. Tolmans' failure to address the limitations issues before the trial court is fatal to their appeal on those issues.

Moreover, the fundamental premise of Tolmans' argument is factually unsupported. They claim that the limitations defense was not raised in the City's answer. The limitation defense is clearly and specifically raised in the City's answer. (R. 30, 31.)

C. TOLMANS' INVERSE CONDEMNATION CLAIMS FAIL AS A MATTER OF LAW.

Assuming for the sake of argument that Tolmans' complaint sufficiently preserves issues for which they advanced no legal argument, the City addresses the merits of those claims. Tolmans claim that the 1989 decision to downzone their property and the 2004 denial of their rezoning application constitute inverse condemnation under Article I, section 22. In doing so, they make two inconsistent allegations: (1) the decisions denied them "all economically viable use of their property," (R. 24, ¶ 19), and (2) took from them "a major portion of the reasonably expected return on their 1983 investment in their home property." (R. 21-22, ¶¶ 7, 8.) Tolmans provided no evidence to support the first allegation.[3] The second allegation provides no support for an inverse condemnation claim.

---

[3]The affidavit of Thomas W. Coleman (R. 158-197) is simply a belated and improper attempt to supplement the legislative record and attack the exercise of legislative discretion by the City Council based on information which was never presented to or considered by them, all in violation of the standards of Utah Code Ann. § 10-9a-801(8)(a).

The threshold weakness in Tolmans' takings claim, however, is that the claim, to the extent it is based upon the 1989 downzoning, is time-barred. There is no specified limitation for the bringing of an Article I, section 22 takings claim, therefore, under Utah statute, litigation must be commenced within four years. Utah Code Ann. § 72-12-25(3). *See* Johnson v. Utah-Idaho Central Railway Co., 249 P.1036, 1041 (Utah 1926) (applying four-year catch-all statute to a claim for taking.)

Moreover, Tolmans' takings claims lack legal support. The threshold inquiry in a takings action is whether the plaintiff has a protectable property interest. Intermountain Sports, Inc. v. Dept. of Transp., 2004 UT App 405, ¶ 8, 103 P.3d 716, 718-19. Tolmans have no such interest and completely ignore Utah law on vested rights.

"It is established that an owner of property holds it subject to zoning ordinances enacted pursuant to a [city's] police power." Western Land Equities, Inc. v. City of Logan, 617 P.2d 388, 390 (Utah 1980). *See also* Scherbel v. Salt Lake City Corp., 758 P.2d 897, 901 (Utah 1988) (owner acquires protected property interest or vested right in current zoning only upon application for development consistent with the existing zoning); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027, 112 S.Ct. 2886, 2899, 120 L.Ed.2d 798 (1992) (noting that property owners should expect uses of property to be restricted by legitimate use of police powers and that some rights must yield to the police power). Utah courts have expressly rejected unilateral expectations as a basis for asserting a protected property interest. *E.g.,* Bagford v. Ephraim City, 904 P.2d 1095, 1099 (Utah 1995) (in which court looked to federal law and other state law to

identify scope of protected property interest). *See also* Patterson v. American Fork City, 2003 UT 7, ¶ 23, 67 P.3d 466 (citing federal law holding that unilateral expectation is insufficient to create a constitutionally protected property right). Tolmans have, at best, a unilateral expectation that their property might be rezoned for multi-family use.

The general rule is that, while the use and ownership of property are fundamental rights, a property owner has no vested, protected property right in a contemplated development or entitlement to a particular zoning.[4] State courts which have examined the issue have consistently held that a property owner has no protected property right in any particular zoning of property, including the existing zoning absent an application for development under that zoning, which would support state constitutional takings or due process claims.[5]

---

[4]Marshall v. Bd. of County Comm'rs, 912 F.Supp 1456, 1464 (D. Wyo 1996); Jacobs, Visconsi & Jacobs Co. v. City of Lawrence, 715 F.Supp. 1000, 1004-05 (D. Kan. 1989); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348-351, 106 S.Ct. 2561, 2566-2567, 91 L.Ed.2d 285 (1986).

[5]Weatherford v. City of San Marcos, 157 S.W.3d 473, 483 (Tex.App. 2004) (property owner has no "vested right in any particular zoning classification"); City of Suffolk ex rel. Herbert v. Bd. of Zoning Appeals for City of Suffolk, 580 S.E.2d 796, 798 (Va. 2003) ("Privately held land is subject to applicable local zoning ordinances whether enacted before or after the property was acquired. Generally, landowners have no property right in anticipated uses of their land since they have no vested property right in the continuation of the land's existing zoning status."); Glennon Heights, Inc. v. Central Bank & Trust, 658 P.2d 872, 877 (Colo. 1983) (en banc) (property owners' interest in their property "does not amount to a vested right in the maintenance of a particular zoning classification").

The Utah Supreme Court has recognized that routine regulation which has an impact on property value does not necessarily require compensation under Article I, section 22.

> Many statutes and ordinances regulate what a property owner can do with and on the owner's property. Those regulations may have a significant impact on the utility or value of the property, yet they generally do not require compensation under article I, section 22. Only when the governmental action rises to the level of a taking or damage under article I, section 22 is the State required to pay compensation.

Colman v. Utah State Land Bd., 795 P.2d 622, 627 (Utah 1990).

To state a claim for relief for an alleged taking arising from application of zoning ordinances, a plaintiff must allege and prove that he has been deprived of all reasonable uses of his land.

> [F]or there to be a taking under a zoning ordinance, the landowner must show that he has been deprived of all reasonable uses of his land. For example, almost all zoning decisions have some economic impact on property values. However, mere diminution in property value is insufficient to meet the burden of demonstrating a taking by regulation.

Cornish Town v. Koller, 817 P.2d 305, 311-12 (Utah 1991) (emphasis added). In other words, a regulatory taking only occurs when there is no remaining economically viable use for the property.

> The state has broad authority to regulate or prevent certain uses of land under its police power; it need compensate a landowner only if the regulation deprives him or her of all economically viable use of the land, *i.e.,* when it effects a "regulatory taking."

Nat'l Parks and Conservation Ass'n v. Bd. of State Lands, 869 P.2d 909, 925 (Utah 1993) (emphasis added).

The term "economically viable use" does not equate to highest and best use. For example, in Smith Investment Co. v. Sandy City, 958 P.2d 245 (Utah App. 1998), the Court of Appeals, applying federal law which similarly requires deprivation of all economically viable use, concluded that a substantial reduction in value (43 percent reduction) did not deprive a property of economically viable use so long as some reasonable value remained and the reduction did not support a takings claim.

Tolmans' takings claims fail on two counts. First, they possess no property interest entitled to Article I, section 22 protection. Secondly, they also are unable to produce any evidence that they have no remaining economically viable use of their property. In reality, the fact that they own property within the City, located in a residential zone, strongly supports the conclusion that there is substantial value to the property for the purposes for which it is currently zoned. There is no evidence that the denial of the rezoning even diminished the value of the property. Moreover, any claim of reduced value based upon the 1989 downzoning is time-barred.

D. TOLMANS' ARTICLE I, SECTION 7 DUE PROCESS CLAIMS ARE FACTUALLY AND LEGALLY UNSUPPORTED.

Tolmans' second amended complaint alleges due process violations under Article I, section 7. They do not even bother to identify whether these are procedural or substantive due process claims. There is nothing in their Second Amended Complaint

which would support a procedural due process claim and, in fact, the record establishes that they were afforded procedural due process.[6]

The first step in a due process analysis is, as in the takings analysis, the identification of a constitutionally protected property interest. State in Interest of Summers v. Wulffenstein, 616 P.2d 608, 610 (Utah 1980). As discussed above, Tolmans have no such interest. *See* City of Livonia v. Dept. of Social Services, 333 N.W.2d 151, 160-61 (Mich.App. 1983) ("the mere fact that the individual plaintiffs may have relied upon the continuance of existing zoning does not give them a property interest entitling them to due process protection."); W.C.& A.N. Miller Dev. Co. v. Dist. of Columbia Zoning Comm'n, 340 A.2d 420, 424 (D.C. 1975) ("while property rights may not be taken away without due process of law, a property owner has no right to a particular zoning classification of his property.") Absent a legally cognizable property interest, Tolmans' due process claims fail as a matter of law.

Moreover, in a substantive due process challenge, a zoning ordinance will be upheld under the reasonably debatable standard applicable to the arbitrary and capricious analysis discussed above.

> In reviewing [a] substantive due process challenge, we focus not on the ordinance's alleged or potential effects, but on the ordinance itself and the reasons given by [the] City for its enactment.

---

[6]Any due process claims based upon the 1989 downzoning are also time-barred because they were not brought within two years. Utah Code Ann. § 78-12-28(4). To the extent that § 78-12-28 may be deemed prospective only, then the extant catchall four-year provision in § 78-12-25(3) applies.

. . .

> If the ordinance and the stated policies and reasons underlying it do, within reason, debatably promote the legitimate goals of increased public health, safety or general welfare, we must allow [the] City's legislative judgment to control.

Smith Investment at 253. It is well-established law that courts do not substitute their judgment for that of the city's legislative body. *Id.* at 253.

The record provides more than adequate evidence that the City's zoning decision is at least debatably reasonable. In fact, the Supreme Court in Bradley has concluded that legislative reliance on the General Plan as a basis for denying a rezoning is, by definition, reasonably debatable and not arbitrary or capricious. There is, therefore, no basis for Tolmans' substantive due process claims.

III. THE CITY'S DENIAL OF TOLMAN'S DOWNZONING REQUEST WAS NOT ILLEGAL "REVERSE SPOT ZONING."

As a threshold issue, it is at least debatable whether Tolmans adequately preserved their "reverse spot zoning" argument. What they presented to the trial court was an annotation, Dennison, "Determination whether zoning or rezoning a particular parcel constitutes illegal spot zoning," 73 A.L.R. 5th 223 (1999) and excerpts from the annotation with absolutely no legal analysis. (R. 210-214.) It is questionable whether this constitutes provision of "relevant legal authority," since the annotation cites cases both in favor of and against Tolmans' position. For example, § 12 of the annotation contains 41 cases in which spot zoning has been found to exist where the parcel was zoned more restrictively than surrounding property and § 13 contains 34 cases where the

opposite conclusion was reached. Absent some kind of legal analysis, citation to the annotation is meaningless. Utah Courts have consistently refused to perform a party's analysis where the party has failed to do so. *E.g.,* Midvale City Corp. v. Haltom, 2003 UT 26, ¶ 75, 73 P.3d 334, 349 (without analysis, court is unable to make an informed decision). After those excerpts, Tolmans discuss Utah cases which are immaterial to the argument they advance.

Admittedly, Tolmans have done a better job on appeal of actually looking at some of the cases cited in the annotation and extracting language from those cases. It is, however, questionable whether the trial court was afforded any meaningful opportunity to make an informed decision on the spot zoning argument for purposes of preserving the argument for appeal.

Aside from the preservation issue, Tolmans' arguments fail to comprehend the essence of "reverse spot zoning." This is evidenced in part by their citation to Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). Contrary to Tolmans' characterization, the U.S. Supreme Court did not "adopt[] the illegal 'reverse spot' zoning doctrine applicable here." (Applt's Brf. p. 11.) The Penn Central court simply explained that reverse spot zoning is "a land use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than neighboring ones." Penn Central, 438 U.S. at 132, 98 S.Ct. at 2663. The court then distinguished spot zoning as the "antithesis of land-use control as part of some comprehensive plan." *Id.* The Penn Central court found no illegal spot zoning because

the decision to deny development was based upon an existing comprehensive land development plan.

A respected land use treatise defines and discusses the concept of reverse spot zoning.

> This phrase refers to an arbitrary zoning or rezoning of a small tract of land that is not consistent with the comprehensive land use plan and that uniquely burdens an individual owner largely to secure some public benefit. Reverse spot zoning usually results from the downzoning of a tract of land to a less intensive use classification than that imposed on nearby properties.

1 Ziegler, Rathkopf's The Law of Zoning and Planning, (1996, supp. 2001) § 1:40 at 1-53. The key issues are arbitrary zoning, small tracts, unique burden on "an individual owner," and the purpose to secure a "public benefit." The treatise further discusses reverse spot zoning as the use of zoning to acquire for the public or adjoining property owners specific benefits without reciprocal benefit to the property owner. 3 Ziegler § 38:17 at 38-14 to 38-16. The treatise also concludes, as did the Penn Central court, that zoning decisions consistent with a general plan are not spot zoning.

> Zoning in accordance with a comprehensive plan promotes the public welfare by providing for an orderly and integrated development process. By definition, therefore, spot zoning is the antithesis of planned zoning. Rezoning individual tracts or small parcels of land will be held invalid when not enacted in accordance with a comprehensive plan.

3 Ziegler § 41:4 at 41-13 to 41-14.

Nor is the "island" argument made by Tolmans determinative of the issue of spot zoning.

> Usually spot zoning involves a small parcel of land, the larger the property the more difficult it is to sustain an allegation of spot zoning. Likewise, where the 'spot' is not an island but is connected on some sides to a like zone the allegation of spot zoning is more difficult to establish since lines must be drawn at some point. Even where a small island is created in the midst of less restrictive zoning, the zoning may be upheld where rational reason in the public benefit exists for such a classification.

Consaul v. City of San Diego, 8 Cal.Rptr.2d 762, 775 (Cal.App. 1992) (citations omitted). It is significant that the property at issue here is not a single, small parcel of land but 32 distinct properties.

As recognized by Rathkopf's and the Penn Central court, the key to whether what might other wise amount to spot zoning is discriminatory is whether the zoning decision is made in the context of a comprehensive general plan. Here, the materiality of the general plan is enhanced by the fact that the City, by mandatory ordinance which it cannot ignore, *see* Springville Citizens, *supra*, was required to approve the rezoning application only if it was consistent with the provisions of the general plan. That makes it all the more significant that Tolmans did not apply for a general plan amendment which would pave the way for their downzoning request.

Also significant here is that, though Tolmans argue the issues with respect to their property, the application denied by the City was for rezoning of 32 separate parcels, not just the Tolman property. This points out the inherent weakness of the Tolmans'

argument that their property is surrounded by lower density uses and is isolated because of those uses.

It is difficult to understand why Tolmans discuss the Utah cases which they cite. For instance, contrary to their statement that "[t]hree Utah cases have accepted, defined and distinguished the applicable principle of illegal 'reverse spot zoning,'" (Aplt's Brf p. 13), no Utah case, reported or unreported, contains the term "reverse spot zoning." Also, the Utah cases do not base a determination of spot zoning on property uses in general, including nonconforming uses, but rather focus on differences in "permitted use," *i.e.,* those uses identified and permitted by zoning classification rather than a request for the favorable exercise of legislative discretion to change the zoning. *See* Donner Crest Condominium Homeowners Ass'n v. Salt Lake City, 2005 UT App 163, 2005 WL 775306 at *4. The specific holding in Donner Crest was that "the Planning Commission did not single out the Van Cott project for a separate zoning classification or allow Van Cott a use inconsistent with neighboring projects." *Id.* (emphasis added).

The discussion in Crestview-Holladay Homeowners Ass'n, Inc. v. Engh Floral Co., 545 P.2d 1150 (Utah 1976) similarly involved discussion of "permitted uses" which differ from permitted uses in the zoning district overall. Crestview-Holladay at 1151. While the Crestview-Holladay court discussed the spot zoning issue on which the trial court ruled, the Supreme Court did not expressly rule on that issue, instead expressing the opinion that "[i]t is doubtful that the term 'spot zoning' applies to this case in view of the size of the tract." *Id.* Rather, it recognized that its review was limited to determining

whether the zoning decision was arbitrary, capricious or illegal. *Id.* at 1152. It expressly held that the plaintiff failed to establish that the decision was arbitrary, capricious or illegal. *Id.* Applied to this case, Crestview-Holladay supports the City's position that zoning is not the issue, but rather whether the City's decision was arbitrary, capricious or illegal under § 10-9-1001 or § 10-9a-801.

The action in Town of Alta v. Ben Hame Corp., 836 P.2d 797 (Utah App. 1992) had a procedural posture nowhere near the Tolmans' case. In Ben Hame, the town was enforcing its existing zoning regulation by prohibiting use of a single-family residence for commercial ski lodging. The spot zoning issue arose only as a defense in its answer and advanced by expert affidavit with respect to a long-established zoning ordinance. The claim was that the zoning of the entire subdivision constituted illegal spot zoning. The court did not expressly rule on the spot zoning issue because it held that Ben Hame's arguments were conclusory and lacked factual support. It did note, however, that the area was universally zoned the same, despite some dissimilarity in uses, indicating a lack of spot zoning. *Id.* at 805 n.7.

Marshall v. Salt Lake City, 141 P.2d 704 (Utah 1943) is more helpful to the City's position than to Tolmans'. The court expressly identified the issue in Marshall:

> Can a city, as part of a general zoning plan, create small districts, for the purpose of placing within convenient distance of the inhabitants of the residential district certain small businesses, handling daily conveniences and necessities for the home?

Marshall at 704 (emphasis added). The Marshall court distinguished small parcel zoning pursuant to a general plan from illegal spot zoning undertaken "without regard to a unified plan." *Id.* at 711. As in other Utah cases, the court noted that spot zoning consisted of "specially zoned" areas within larger districts. By implication, it does not cover property such as Tolmans' which lie within a single zoning district but might be restricted to a use different from some surrounding uses which exist as nonconforming uses. In other words, as in Marshall, there is no target or special zoning involved here.

A Utah case which Tolmans chose not to cite is Phi Kappa Iota Fraternity v. Salt Lake City, 212 P.2d 177 (Utah 1949). In Phi Kappa, the court recognized two important realities of zoning. First, zoning is a legislative decision afforded broad discretion. *Id.* at 181. Secondly, "spot zoning" is not necessarily an evil, but may occur upon proper exercise of legislative discretion.

> Zoning necessarily involves boundary problems and, when 'spot' zoning is permitted in a residential district, the legislative body must determine where the boundary is to be placed, attempting, as far as possible, to minimize the resulting inconveniences. This is essentially a legislative problem, and the determination may be attacked only if there is no reasonable basis therefor. Often there may be little difference in the character of the property on either side of the line, but such a showing will not justify a judicial alteration or extension of the boundaries.

Phi Kappa at 181-82. There the court found no discriminatory spot zoning in the application of a restriction on residential use of property in a boundary area next to public educational institutions.

Tolmans' other cited authorities are of little help in this context. For example, there is no value in a citation to an annotation which contains case law both pro and con and must be sorted out by analysis of the fact and surrounding legal constraints. Nor is there much guidance from the individual cases cited by Tolmans. For example, the four-part test identified in Dufau v. Jefferson Parish, 200 So. 2d 335 (La. App. 1967) (Aplt's Brf pp. 19-20) was expressly abrogated by the Louisiana Supreme Court in Palermo Land Co., Inc. v. Planning Comm'n of Calcasieu Parish, 561 So.2d 482 (La. 1990). In particular, the Louisiana high court rejected the shifting of the burden of proof to the municipality. Palermo Land at 489-90. Moreover, Dufau involved an affirmative change in the zoning ordinance assigning the property a more restrictive use, not a denial of a zone change as is the case here. The issue for the Louisiana courts, however, is whether the property is singled out and changed to a zoning classification different from the properties surrounding it. Palermo Land at 490.

None of the cases cited by Tolmans was decided in the context of an existing, comprehensive general plan. There is no reference to a general plan as the basis for the municipality's decision in City Comm'n of the City of Miami v. Woodland Park Cemetery Co., 553 So.2d 1227 (Fla. App. 1989). The issue in Woodland Park turned on the fact that the properties surrounding the property at issue were actually zoned at a lower density than the subject property. That is not the case here. The zoning designation applies uniformly. The fact that there are higher density uses which existed under prior zoning classifications merely makes those uses nonconforming. In Woodland Park, the

plaintiff was denied a similar zoning classification as the surrounding properties. Not so here.

The only discussion of a comprehensive plan in Ross v. City of Yorba Linda, 2 Cal.Rptr. 2d 638 (Cal.App. 1991) is the City's amendment of its general plan after the property owners commenced the challenge to the zoning ordinance. The fact that the comprehensive plan did not preclude the use proposed by the plaintiff played a part in the court's decision that the higher density zoning was arbitrary.

In Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499 (Ill. 1951), the challenge was to an upzoning which was passed without reference to provisions of a comprehensive general plan. The issue there turned on whether it was appropriate for the City to increase zoning intensity for the benefit of a few owners in the area, an issue consistent with the general definition of reverse spot zoning discussed above.

Courts which have considered small parcel zoning issues in the context of a comprehensive general plan have held that no spot zoning occurs where the decision is in conformance with the general plan. Sullivan v. Town of Acton, 645 N.E.2d 700, 702 (Mass.App. 1995) (decision consistent with "long-range study and recommendations by the planning board"); Miller v. Town of Tilton, 655 A.2d 409, 411 (N.H. 1995) (affirming trial court ruling that zoning amendment was consistent with general plan and therefore not spot zoning); Hyland v. Mayor and Township Comm. of Morris Township, 327 A.2d 675, 678 (N.J.App. 1974) ("We perceive no substance to plaintiffs' argument that the amendatory ordinance deviates from the comprehensive plan to which zoning

ordinances should conform and thus constituted 'spot zoning.'") Recognizing, as did the Penn Central court that spot zoning is the "antithesis of planned zoning," the New York Supreme Court held that an ordinance conforming to a general plan is not spot zoning even if it creates the appearance of spot zoning.

> Nothing in the record warrants classification of the board's action, as spot zoning, which has been defined as the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners. . . . [S]pot zoning is the very antithesis of planned zoning. If, therefore, an ordinance is enacted in accordance with a comprehensive zoning plan, it is not 'spot zoning,' even though it (1) singles out and affects but one small plot or (2) creates in the center of a large zone small areas or districts devoted to a different use.

Dauerheim, Inc. v. Town Bd. of Town of Hempstead, 310 N.E.2d 516, 518 (N.Y. 1974).

In this matter we have several elements which preclude a finding of reverse spot zoning in the City's denial of Tolmans' rezoning application. First, we are not dealing with a single parcel but rather with 32 separate parcels. As noted by the California court in Consaul, the existence of multiple parcels makes the spot zoning argument difficult to carry. The zoning at issue here is uniformly single-family residential, despite the fact that there are nonconforming uses which pre-existed the ordinance. The City has not zoned adjoining parcels differently, a prerequisite for spot zoning. The decision by the Council was not a downzoning or an upzoning, but simply a decision not to change the current zoning classification. Tolmans' property was not targeted for a particular benefit nor the subject of a benefit to adjoining landowners or the City. Finally, the decision is, pursuant

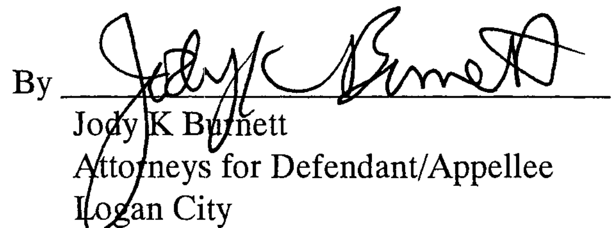
to legislative mandate, consistent with the general plan. Though Tolmans could have sought an amendment to the general plan to accommodate their downzoning request, they did not do so. Under Utah law, the City had no choice but to follow the mandatory provisions of its ordinance and deny the rezoning request.

CONCLUSION

The only legitimate issue here is whether the City's denial of Tolmans' downzoning request was arbitrary, capricious or illegal under applicable Utah law. The trial court properly applied that well-established law and reached the correct conclusion that it was not. Tolmans' other claims are barred, either by their failure to preserve them at the trial court or by applicable statutes of limitation. The primary argument upon which Tolmans rely, that the decision of the City somehow constitutes illegal reverse spot zoning, fails as a matter of law. It is therefore appropriate for this Court to affirm the decision of the trial court. The City respectfully requests that it do so.

Dated this 21st day of December, 2006.

WILLIAMS & HUNT

By 

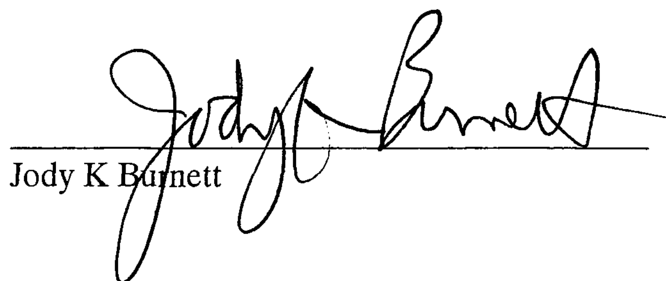
Jody K Burnett
Attorneys for Defendant/Appellee
Logan City

132137.1

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of December, 2006, two (2) true and correct copies of the foregoing **Brief of Appellee Logan City** were mailed by first class mail, postage prepaid thereon, to:

David R. Daines
Chris Daines
CHRIS DAINES LAW
135 N. Main, Suite 108
Logan, UT 84321



Jody K Burnett