2003

Acosta v. Salt Lake Regional : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JULIAN DEAN HATCH and LYNNE MITCHELL,	)	
Petitioners and Appellants,	)	CASE NO. 20000189-CA
vs.	)	
THE BOULDER TOWN COUNCIL, TOWN OF BOULDER PLANNING COMMISSION and/or BOARD OF ADJUSTMENT, and THE BOULDER EXCAVATING COMPANY,	)	Priority Number 29(b)(15)
Respondents and Appellees.	)	

BRIEF OF APPELLEES BOULDER TOWN COUNCIL AND TOWN OF BOULDER PLANNING COMMISSION

Appeal from Judgments rendered in the Sixth District Court of Garfield County, the Honorable David L. Mower presiding

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STATEMENT REGARDING JURISDICTION OF THE APPELLATE COURT

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

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Did the trial court err in dismissing appellants' petition on the grounds appellants failed to establish that the Planning Commission's issuance of two conditional use permits to Boulder Excavating Company (hereinafter "BEC") was arbitrary, capricious or illegal? In reviewing a Rule 41(b) involuntary dismissal the appellate court "must give great weight to the findings made and inferences drawn by the trial judge". *Southern Title Guaranty Co. Inc. v. Bethers*, 761 P.2d 951, 954 (Utah App. 1988). The appellate court "view[s] the evidence in a light most favorable to the trial court's findings". *Sorenson v. Kennecott-Utah Copper Corp.*, 873 P.2d 1141, 1144 (Utah App. 1994).

The appellate court's review is for correctness if the dismissal is "based upon the failure to establish a prima facie case". *Id.* at 1144. The clearly erroneous standard applies if the dismissal is "granted because the trial court was not persuaded by the evidence". *Id.* The trial court's dismissal was based upon both standards.

2. Have appellants established any basis to overturn the trial court's factual findings? On review the appellate court gives great weight to the trial court's findings and inferences and will overturn the findings only if, after appellants marshal the evidence, the evidence is shown to be clearly erroneous. *Id*; *Bethers, Supra; State v.*

Jarman, 987 P.2d 1284, 1287 (Utah App. 1999); State v. Benvenuto, 983 P.2d 556, 558 (Utah 1999); and *Pennington v. Allstate Ins. Co.*, 973 P.2d 932, 936 (Utah 1998).

3. Did the trial court err when it consolidated the preliminary injunction hearing with the trial on the merits? The appellate court reviews this issue to determine if the trial court abused its discretion by acting unreasonably. See *Walker Drug Co. Inc. v. La Sal Oil Co.*, 972 P.2d 1238, 1244 (Utah 1998) and *Radcliffe v. Akhavan*, 875 P.2d 608, 610 (Utah App. 1994).

4. Did the trial court err in ruling that appellants' petition was without merit and not brought in good faith thus entitling appellees to an award of their attorneys' fees? The issue of whether an action is without merit is reviewed for correctness. *Jeschke v. Willis*, 811 P.2d 202, 203 (Utah App. 1991). The issue of whether an action is not brought in good faith "is a mixed question of law and fact" in which the trial court is given "relatively broad discretion in concluding that bad faith has been shown". *Valcarce v. Fitzgerald*, 961 P.2d 305, 315-16 (Utah 1998).

STATEMENT OF THE CASE

Appellants each own a parcel of land within the Town of Boulder on which two businesses are operated on each parcel. Appellants use their parcels of property for commercial purposes based on nonconforming uses that predated the Town's enactment in May 1998 of Ordinance 39 (hereinafter the "Land Use Ordinance"). The Land Use Ordinance created zoning districts within the Town and imposed land use restrictions in

each district. Appellants became unhappy when the Town of Boulder Planning Commission issued two conditional use permits that allowed other property owners within the Town to also use their property for commercial purposes. In an attempt to stop the commercial uses, appellants appealed to the Boulder Town Council the decision of the Planning Commission issuing the permits. The Boulder Town Council reviewed and affirmed the issuance of the permits and appellants sought judicial review in the trial court. Appellants also sought a preliminary injunction enjoining the Town from issuing additional permits and enjoining BEC (the recipient of the permits) from making any improvements or conducting any business on its property.

The court consolidated the hearing on the Motion for Preliminary Injunction with the trial on the merits. After the presentation of appellants' case the trial court dismissed the action on the merits in accordance with Rule 41(b) Utah Rules of Civil Procedure. The trial court ruled both that appellants had failed to show that the issuance of the permits was arbitrary, capricious or illegal and that it was not persuaded by the evidence appellants presented. The trial court awarded appellees, the Town of Boulder and BEC, their costs and attorneys' fees in defending the petition. Appellants have now appealed the trial court's decision.

The trial court's decision should be affirmed in all aspects and appellees should be awarded their costs and attorneys' fees in defending this appeal. Appellants did not meet their burden of proving that the issuance of the Conditional Use Permits was arbitrary,

capricious or illegal. Neither did appellants meet their burden of showing that the Land Use Ordinance could not, or reasonably debatably could not, promote the general welfare.

Appellants have not challenged the majority of the trial court's findings and have not marshaled the evidence in favor of the findings they do challenge. The trial court's findings thus cannot be overturned. The trial court correctly found that a zoning map was enacted with the Land Use Ordinance, the parties knew the districts within which the properties subject to the Conditional Use Permits were located, use of the word "commercial" in the ordinance was not vague and appellants' action was not pursued in good faith. Appellants have failed to meet their burden of proving the Town's actions were arbitrary, capricious or illegal. The trial court's judgment dismissing appellants' petition should be affirmed.

STATEMENT OF FACTS

The Findings of Fact entered by the Trial Court in support of the Judgment of Dismissal and Order Denying Preliminary Injunction (R. 317-326; Appellants' Addendum H) are as follows:

1. Appellants are individuals, landowners and resident of Boulder Town, Garfield County, State of Utah. (R. 318)

2. Appellees Boulder Town Council and the Town of Boulder Planning Commission are entities consisting of elected or/and appointed officials of the Town of Boulder, Garfield County, which is a political subdivision of the State of Utah. (R. 318)

3. Respondent BEC is a Utah limited liability company with its primary place of business in the Town of Boulder, Utah. Two of its members are Rhea Thompson and Sam Stout. (R. 318)

4. On May 30, 1998, the Boulder Town Council enacted the Land Use Ordinance which zones land use within the Town of Boulder. The Land use Ordinance was amended on January 12, 1999. The Land Use Ordinance established nine (9) districts with specified allowed uses and conditional uses in each district. Part IV B of the Land Use Ordinance adopts an official base map as part of the Ordinance, which maps and defines the location of different districts within Boulder Town. The parties agreed regarding the location of the districts within which the properties subject to the Conditional Use Permits were located. No copy of the official base map was introduced. However, the evidence sufficiently establishes that such map exists. (R. 318-19)

5. The Land Use Ordinance originated as a recommendation from the Boulder Town Planning Commission and was submitted to the Boulder Town Council for adoption. Prior to the adoption of the Land Use Ordinance, various meetings open to the public were held in which provisions of the Ordinance were considered. Appellants appeared at several of the meetings and exercised their opportunity to participate in the hearings regarding the Land Use Ordinance. (R. 319)

6. In December, 1998, BEC filed applications for Conditional Use Permits. Prior to issuance of the two Conditional use Permits to BEC, the Boulder Planning Commission

held a public hearing to obtain public input regarding and to consider issuance of the permits. (R. 319)

7. Appellants appeared at the public hearing and presented and read written objections to issuance of the permits. (R. 319)

8. At that hearing, in accordance with the Land Use Ordinance, the Boulder Planning Commission voted to grant the applications of BEC for two (2) Conditional Use Permits, subject to conditions stated in the Conditional use Permits, and those permits were thereafter issued. The Conditional Use Permits allowed BEC to use two (2) parcels of property within the town limits of Boulder in connection with BEC's construction business. (R. 319-20)

9. One of the Conditional Use Permits was issued for property located at 195 North 300 East, Boulder, Utah (the "Stout residence property"), which property is designated by the Land Use Ordinance as "District 6" and "medium density residential". That permit allowed BEC to construct a garage for its backhoe, to park the backhoe and a limited amount of additional equipment on the property, and to temporarily store construction materials on that property. (R. 320)

10. The other Conditional Use Permit was issued for property located at 4270 North Highway 12, Boulder, Utah (the "Thompson Ranch property"), which property is designated by the Land Use Ordinance as "District 2" and "green belt/multiple use lands". That permits allows BEC to park equipment near the agricultural equipment used at the

ranch and to store construction materials, and to utilize existing improvements for an office for BEC. (R. 320)

11. On March 6, 1999, Appellants appealed to the Boulder Town Council the decision of the Planning Commission issuing the Conditional Use Permits to BEC. (R. 320)

12. The appeals were placed on the agenda of the Town Council and discussed at two Town Council meetings. Appellants were sent notice of both meetings but, because they were out of town, did not receive notice of the first meeting and did not appear at that meeting. (R. 320)

13. Respondent BEC appeared at one meeting and stated its reasons why the decision of the Planning Commission should be affirmed. (R. 321)

14. Appellants appeared at the second Town Council meeting on June 17, 1999, and read to the Council written statements of objections to issuance of the permits. (R. 321)

15. One June 17, 1999, the Town Council affirmed issuance of the Conditional Use Permits to BEC. (R. 321)

16. On or about July 12, 1999, Appellants filed the Petition for Judicial Review that is the subject of this action. (R. 321)

17. Respondent BEC was served a Summons, a copy of the Petition, a Motion for Preliminary Injunction and a Notice of Hearing on August 24, 1999. The hearing on

Appellants' Motion for Preliminary Injunction was set seven (7) days thereafter, on August 31, 1999. (R. 321)

18. After the Boulder Town Council affirmed issuance of the Conditional Use Permits to BEC and prior to the hearing on Appellants' Motion for Preliminary Injunction, BEC caused a garage, which was authorized by the Conditional Use Permit for the Stout residence property, to be largely constructed, up to and including a roof and roofing. Installation of siding and some finish work remained. The garage and related landscaping and screening were the only physical improvements authorized or required by the Conditional use Permit. (R. 321)

19. The Town of Boulder has historically been and remains a largely agricultural community. There are, operating within the Town of Boulder, many farm implements, including tractors and backhoes. (R. 322)

20. Appellant Mitchell owns property that is approximately 500 feet away, and Appellant Hatch owns property that is approximately 500 feet to 600 feet from the Stout residence property. Neither Appellants own property or reside within five miles of the Thompson Ranch property. (R. 322)

21. The Land Use Ordinance by its terms expressly allows "commercial" uses as conditional uses in both District 2 and District 6. (R. 322)

22. The Land Use Ordinance designated District 9 as "commercial". It requires a Conditional Use Permit for all commercial business and construction and lists among

other allowed commercial development "building material, hardware" and "contract construction". (R. 322)

23. The uses for which the Conditional Use Permits were granted are for operation of a contract construction business. (R. 322)

24. The uses for which the Conditional Use Permits were granted to BEC are commercial uses within the meaning of the Land Use Ordinance. (R. 322)

25. The uses for which the Conditional Use Permits were granted are compatible with other uses authorized and existing in the same districts. (R. 322)

26. The designation of "commercial" as conditional uses in the Land Use Ordinance is neither vague nor ambiguous. (R. 322)

27. The Land Use Ordinance by its terms authorizes the issuance of the Conditional Use Permits granted to BEC by the Planning Commission. (R. 323)

28. At all times relevant hereto all parties understood that the Stout residence property is designated "District 6" and "medium density residential" by the Land Use Ordinance. (R. 323)

29. At all times relevant hereto all parties understood that the Thompson Ranch property is designated "District 2" and "green belt/multiple use lands" by the Land Use Ordinance. (R. 323)

30. Appellants were well acquainted with the Land Use Ordinance and knew that it listed commercial as a conditional use at the properties involved in the Conditional Use

Permits. They also knew that the provisions of the Ordinance allowing commercial as a conditional use had been brought to the attention of the Boulder Town Council after the Land Use Ordinance was originally passed and that the Town Council had decided to make no change to the provisions which allowed commercial as a conditional use. They nonetheless contended at the hearing the inclusion of the broad term "commercial" as a conditional use in the Land Use Ordinance was a mistake. (R. 323)

31. The evidence presented by the Appellants at the hearing adequately addressed all of the issues raised in their Petition for Review. In the interest of judicial economy, the trial on the merits should be consolidated with the hearing on the Motion for Preliminary Injunction. (R. 323)

The Findings of Fact entered by the Trial Court in support of its order awarding attorneys' fees (R. 3588-62; Appellants' Addendum I) are as follows:

32. Appellants sought review of Boulder Town's decision to affirm the granting of Conditional Use Permits to BEC. (R. 359)

33. Appellants testified that they knew the Land Use Ordinance contained provisions which allowed "commercial" uses as a conditional use. They also testified that they knew that these provisions had been brought to the attention of the Town Council after the Ordinance was passed, and that the Town Council determined not to revise those provisions. Yet Appellants still claimed that the inclusion of "commercial" use as a conditional use was a mistake which should be ignored by the Court.

34. Appellants also argued that the term "commercial" has no meaning and therefore that any decision allowing a commercial use is arbitrary. However, Appellants ignored the provisions of the Ordinance governing a commercial district, which includes a list of commercial uses and includes in that list "contract construction". (R. 359)

35. BEC's proposed use was a commercial use for contract construction. Both Appellants testified that they had never been to or seen the Thompson Ranch property dealt with in one of the Conditional Use Permits. (R. 360)

36. Appellants made a claim that no official map was attached or adopted with the Land Use Ordinance. (R. 360)

37. Appellants presented a weak factual basis and legal position in their attempt to meet the heavy burden of establishing that BEC's actions were arbitrary, capricious, or illegal. (R. 360)

38. Although they filed their Petition on July 12, Appellants failed to serve BEC until August 24, at which time they served a Summons, the Petition, the Motion for Preliminary Injunction, and a Notice of Hearing on the Motion for Preliminary Injunction setting the hearing for seven (7) days after service, August 31, 1999. Appellants waited forty-three (43) days after filing their Petition to serve BEC, choosing to give BEC only seven days to prepare to meet their Motion for Preliminary Injunction. In addition, while they failed to prosecute their Petition or to seek a prompt hearing on their Motion for Preliminary Injunction, BEC almost completed construction on the only improvement

authorized by the Conditional Use Permits, the garage on the Stout residence property. By the time of the hearing on the Motion for Preliminary Injunction, the only tangible and permanent harm which could have been avoided by an injunction had already occurred. Yet Appellants joined BEC in this action claiming a right to a preliminary injunction nonetheless. (R. 360)

39. BEC's reasonable attorney's fees and costs are $5,276.70. (R. 360-61)

40. The Town of Boulder's reasonable attorney's fees and costs are $4,400.00. (R. 361)

ARGUMENT

I. The Trial Court Correctly Dismissed Appellants' Petition On The Grounds Appellants Failed To Establish That The Planning Commission's Issuance Of The Conditional Use Permits Was Arbitrary, Capricious Or Illegal

The Utah Municipal Land Use Development and Management Act (§10-9-101 et. seq. Utah Code Ann.) grants municipalities the power and discretion to enact ordinances, resolutions and rules and to make decisions regarding the use and development of land within their borders. Section 10-9-1001 of the Act allows a person adversely affected by a municipality's land use decision to seek judicial review of the decision. However, subsection (3) of §10-9-1001 significantly limits the scope of the trial and appellate courts' review of such decisions. It states:

(3) The courts shall:

(a) presume that land use decisions and regulations are valid; and

(b) determine only whether or not the decision is arbitrary, capricious, or illegal.

This court recently concluded that the "arbitrary, capricious or illegal" standard set forth in §10-9-1001(3) applies to all municipal land use actions and decisions; but that the standard of review differs somewhat depending on whether the courts are reviewing a legislative action or an administrative/adjudicative decision. *Harmon City, Inc. v. Draper City*, 997 P.2d 321, 325 (Utah App. 2000); *Ralph L. Wadsworth Const., Inc. v. West Jordan City*, 999 P.2d 1240, 1243 (Utah App. 2000). A municipality's legislative zoning classification will be reviewed under the deferential reasonably debatable standard and the ordinance will be upheld if it "could promote the general welfare, or even if it is reasonably debatable that it is in the interest of the general welfare". *Harmon City, Supra.* at 325. A municipality's administrative/adjudicative decisions will only be considered arbitrary, capricious or illegal if "not supported by substantial evidence". *Ralph L. Wadsworth Const., Supra* at 1242-43

This court also recently reaffirmed that in any action attacking a municipality's ordinance or decision, the plaintiff, not the municipality, bears the burden to show that the municipality's action was arbitrary, capricious or illegal. *Harmon City, Supra*, at 329. This burden coincides with the presumption of §10-9-1001(3) Utah Code Ann., which requires the courts to "presume that land use decisions and regulations are valid". The burden placed on the plaintiff is also consistent with §10-9-704(3) Utah Code Ann.,

which governs appeals of a municipality's land use decisions made to a municipality's board of adjustment or legislative body. That section states: "The person or entity making the appeal has the burden of proving that an error has been made".

As will be shown hereafter the appellants at the trial court did not meet their burden to show that the Planning Commission's issuance of special use permits to BEC was arbitrary, capricious or illegal. The trial court properly granted appellees' Rule 41(b) motion to dismiss finding that appellants failed to make out a prima facie case and determining that is was not persuaded by the evidence appellants presented. See *Southern Title Guaranty Co. Inc. v. Bethers*, 761 P.2d 951, 953-54 (Utah App. 1988).

A. An Official Zoning Map Was Presented And Adopted With The Land Use Ordinance

Part IV B of the Land Use Ordinance expressly adopts the Town's official map and states:

> B. OFFICIAL MAP ADOPTED The official base map is hereby adopted and made part of this ordinance, and districts shall exist and be established on the official base map as adopted and amended from time to time (Appellants' Addendum B, 22)

Despite this express statement in the ordinance adopting the map, appellants took the position in the trial court, and persist in taking the same incredible position on appeal, that a map was never presented to or adopted by the Town Council. Indeed appellants' assertion that no map exists is the primary focus of their appeal.

Contrary to appellants' assertion the trial court expressly made a factual finding

that the map exists. The court found: "No copy of the official base map was introduced. However, the evidence sufficiently establishes that such map exists." [1] (R. 318-19). Additionally, during trial in a conversation with appellants' counsel the court stated:

> I wanted to follow up with you a little bit on this no map argument. The evidence that I've got suggests that there was a map at the meeting on May 29th, 1998. It may not have had, ah, the right title. It may not have been called the base map or the official map, but I think there was a map there. (Trial Transcript, hereinafter "TT", p. 192).

The trial court's factual finding that a map existed cannot be reversed on appeal. To overturn a trial court's factual finding an appellant must marshal all of the evidence in the record that supports the trial court's finding; and then demonstrate why when viewing the evidence in the light most favorable to the trial court's finding the evidence is insufficient to support the finding. *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 899 (Utah 1989). Appellants have not only failed to marshal the evidence supporting the trial court's finding, they refuse to do so. Instead appellants ingenuously state "Since the Respondents did not present any evidence at the hearing, there is no evidence to marshal". Appellant's Brief p. 5. Appellants cite no legal authority for this novel assertion.

When a party challenging a factual finding on appeal fails to marshal the evidence the appellate court is required to assume the trial court's factual findings are correct and

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[1]Appellees were prepared to introduce the official map into evidence had they needed to present their case. However, the court properly granted appellees' Rule 41(b) motion to dismiss at the conclusion of appellants' evidence.

will not consider an appellant's challenge to the findings. *State v. Jarman, Supra*, 987 P.2d at 1287; *State v. Benvenuto, Supra*, 983 P.2d at 558. The trial court's factual finding that a map was presented and adopted should not be overturned.

It is not surprising that appellants refuse to marshal the evidence. The testimony elicited from appellants on cross examination alone, establishes the existence of the map. Appellant Mitchell acknowledged on cross examination that at the meeting where the Land Use Ordinance was adopted she requested that the town council color her property on the map pink to show it was zoned commercial based on a nonconforming prior use. (TT, 142-43). Appellant Mitchell also acknowledged that at the time she made the request she was looking at the map and could see her property was not colored. (TT, 143-44)

Appellant Hatch was not at the meeting when the Land Use Ordinance was adopted. (TT, 49 and 53). He thus had no basis to testify whether or not a map was presented and adopted. However on cross examination he expressly acknowledged that on June 17, 1999 when his appeal to the Town Council was considered he was told there was a map in the town office and that he could come and see it any time he wanted. (TT, 80). He also acknowledged he understood that when the town council referred to the town office they were referring to the Post Office.[2] (TT, 83). The trial court's factual finding that a zoning map was presented and adopted should not be disturbed.

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[2]The Town Clerk is employed at the Post Office and maintains town files in that building.

B. There Was No Dispute Regarding The Zoning Districts In Which The Properties At Issue Were Located

Appellants contend that in the absence of a zoning map the Land Use Ordinance is void for vagueness. They contend that without a map citizens don't "know what district their property falls under and what specific conditions may apply to their property". (Appellants' Brief p. 28). Appellants' argument fails for several reasons. First as has been shown above, there is a map. Second, an ordinance is not unenforceable if it is not vague in its application to the facts of the case. See *Greenwood v. City of North Salt Lake*, 817 P.2d 816, 819 (Utah 1991). In this case there is no dispute that appellants knew what zoning districts the subject properties were located.

The trial court made several factual findings that the zoning districts in which the subject properties were located were undisputed. The court found: "The parties agreed regarding the location of the districts within which the properties subject to the Conditional Use Permits were located". (R. 319); "At all times relevant hereto all parties understood that the Stout residence property is designated 'District 6' and 'medium density residential' by the Land Use Ordinance". (R. 323); and "At all times relevant hereto all parties understood that the Thompson Ranch property is designated 'District 2' and 'green belt/multiple use lands' by the Land Use Ordinance". (R. 323). Appellants challenge these factual findings but again refuse to marshal the evidence in support of the findings. Appellants' refusal to marshal the evidence, by itself, mandates upholding the

trial court's findings. *Jarman, Supra* at 558. In addition the testimony of appellant Hatch elicited on cross examination absolutely establishes the trial court's findings. Appellant Hatch testified as follows:

> Q. On this page you state the Stout site–that's the one that's closest to your house–is located in the medium density residential District 6; is that correct?
>
> A. That's correct.
>
> Q. So at the time you filed this appeal, you acknowledged that it was District 6.
>
> A. Yes.
>
> Q. Okay. Also, you – you acknowledge that, um, the other site, the Thompson Ranch site is District 2 Green Belt multiple use; it that correct?
>
> A. That's correct.
>
> Q. Okay. Has there ever been any issue about that?
>
> A. Um –
>
> The Court: If you don't understand, say no.
>
> THE WITNESS: – not really. Not – not really. I don't think so.
>
> Q. BY MR. BAGLEY: So –
>
> WITNESS: No one's ever said that I was wrong when I said those things.
>
> Q. So your testimony is that it's never been disputed that the, ah, Stout Residence site is District 6 and the Thompson Ranch site is District 2.
>
> A. Right.
>
> Q. Okay. So it's never been an issue.

A. One's in a Green Belt. One's in medium density. I forget the numbers, but I think that's right.

Q. Okay.

A. 2 and 6.

Q. And the town has never disputed that either, have they?

A. No they have not. (TT, 75-76)

Likewise there is no dispute that appellants knew what zone their own properties were within. (TT, 100, 101 and141).

Even assuming, *arguendo*, that no zoning map existed, the Land Use Ordinance is not void for vagueness. Appellants knew exactly which districts the subject properties were within. This knowledge precludes a finding of vagueness. *Greenwood, Supra*, at 819; See also *Salt Lake City v. Lopez*, 935 P.2d 1259, 1265 (Utah App. 1997).

Appellants' knowledge also precludes a finding of prejudice. In *Springville Citizens For A Better Community v. City of Springville*, 979 P.2d 332 (Utah 1999) the Utah Supreme Court ruled that plaintiffs were not entitled to relief by a mere showing that a City's land use decision was illegal based on the City's failure to comply with its own ordinance. The court stated at 338:

> Rather, plaintiffs must establish that they were prejudiced by the City's noncompliance with its ordinances or, in other words, how, if at all, the City's decision would have been different and what relief, if any, they are entitled to as a result.

Because appellants admittedly knew the applicable zoning for the subject

properties, there could be no prejudice, even assuming, *arguendo*, the non-existence of the map.

C. The Word "Commercial" As Used In The Land Use Ordinance Does Not Make The Ordinance Vague

Appellants also assert that use of the word "commercial" in the Land Use Ordinance makes the ordinance void for vagueness. Appellants first claim that allowing commercial uses as conditional uses in various districts rather than providing only one commercial district "results in a contradiction in the different districts". (Appellants Brief, p. 29). However appellants have cited no authority that restricts a municipality to single uses within a district or limits the number of districts that allow the same categories of conditional uses. Indeed Section 10-9-407(1) Utah Code Ann. allows a municipality broad discretion to allow conditional uses. That provision states:

> A zoning ordinance may contain provisions for conditional uses that may be allowed, allowed with conditions, or denied in designated zoning districts, based on compliance with standards and criteria set forth in the zoning ordinance for those uses.

The fact that the Town Council chose to allow commercial uses in multiple districts does not invalidate the Land Use Ordinance nor does it make the ordinance vague.

Appellants also contend that the ordinance's listing of some specific commercial uses as conditional uses in some districts while also listing the uses under the general "Commercial" district "does not make sense". (Appellants' Brief at 30). What does not make sense, however, is appellants' refusal to accept the proposition that a municipality

has the statutory prerogative to allow commercial uses in more than one district.

Appellants also contend that the term "contract construction" (which is listed under the Commercial district 9 as an allowed use) is vague because it does not distinguish between the size of a contractor who would be hired "to come in and improve a lot" as opposed to one who operated "a major construction business". (Appellants' Brief at 32) However, the law is not so restrictive as to require a municipality to specify in its zoning ordinances the size a business can be. In *Buhler v. Stone*, 533 P.2d 292, 294 (Utah 1975) the court stated:

> Concerning the charge of vagueness, it should be realized that legislation must necessarily be in somewhat general terms because it is obviously impossible to describe in detail every act and circumstance a statute or ordinance is intended to deal with. It is but sensible and practical that courts should take into consideration the difficulties involved in describing such conditions with the last degree of precision of language. The pertinent parts of the ordinance should not be viewed in isolation for the purpose of finding fault with them and declaring it unconstitutional; they should be viewed in light of the total context and purpose; and an enactment should not be declared void for vagueness unless it is so deficient that it is susceptible of no reasonable construction which would make it operable. (Emphasis added).

The Land Use Ordinance is not confusing and can be understood by average persons of normal intelligence. Likewise the numerous requirements of the Land Use Ordinance for issuance of conditional use permits; i.e. a public hearing, site development plan requirements and compliance with the Uniform Building Code are safeguards against arbitrary and capricious enforcement. Appellants have simply failed to

overcome the ordinance's statutory presumption of validity. Appellants did not meet their burden of proving that the ordinance, as written, could not or reasonably debatably could not promote the general welfare. *Harmon City, Supra*, 997 P.2d at 325. The trial court did not err in concluding that the Ordinance was not ambiguous and in dismissing the complaint.

D. The Conditional Use Permits Were Properly Granted

Appellants attempt to shift their burden of proof to appellees arguing the Conditional Use Permits were illegal because "[t]here was no evidence presented at the hearing that [the site development] conditions were met". (Appellants' Brief at 33). Appellants ignore the presumption of validity afforded a municipality's actions by Section 10-9-1001(3) Utah Code Ann.; as well as the burden placed on a person challenging the municipality's action to prove the action was arbitrary, capricious or illegal. It was the appellants' burden to prove noncompliance; not appellees' burden to prove compliance.[3] Appellants' absolute failure to meet their burden precludes reversal on appeal.

The Land Use Ordinance (Exhibit B to Appellants' Addendum) creates nine zoning districts within the Town. The properties at issue were located in Districts 2 and 6. The ordinance specifically lists "ALLOWED USES" and "CONDITIONAL USES"

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[3]Appellants could easily have introduced into evidence BEC's application for the permits, its site development plans and the permits issued by the Planning Commission which would have shown BEC's compliance with the site development requirements. Appellants chose not to do so for obvious reasons.

for each of those districts. "Commercial" uses are listed under the heading "CONDITIONAL USES" in both Districts 2 and 6.

District 9 is the general "COMMERCIAL" district. The ordinance also specifies a list of various uses under the heading "ALLOWED USES" for that district. The allowed uses include "Contract Construction" as well as "Building Materials, Hardware". The ordinance itself thus defines "contract construction" and "building materials, hardware" uses to be commercial uses. Appellants have never disputed or even questioned the fact that the conditional use permits were issued for operation of a contract construction business. In view of this court's analysis in *Ralph L. Wadsworth Construction, Supra*, 999 P.2d 1240, the Planning Commission would have erred had it not issued the permits.

The conditional use permits were properly granted. Appellants have failed to show any error on the part of the trial court in concluding that issuance of the permits was not arbitrary, capricious or illegal.

II. The Court's Factual Findings Should Not Be Overturned

In their Statement of Issues appellants challenge ten of the trial court's findings of fact. They, however, have not marshaled the facts in support of any of the challenged findings. As such this court cannot consider appellants' challenge to the findings and is required to assume the correctness of the findings. *State v. Jarman, Supra*, at 1287; *State v. Benvenuto, Supra* at 558.

A. There Was Sufficient Evidence To Support The Trial Court's Findings

On review of a Rule 41(b) dismissal this court gives great weight to the findings and inferences drawn by the trial court and views the evidence in the light most favorable to the findings. *Sorenson, Supra*, 873 P.2d at 1144; *Bethers, Supra*, 761 P.2d at 954. Appellants' challenge of several of the trial court's findings is further evidence of appellants' stubbornness in continuing to assert claims not supported by the law and facts. There is ample evidence in the record to establish every fact appellants challenge on appeal. As was shown *infra* the evidence clearly establishes the existence of the zoning map as well as the fact that all parties agreed and acknowledged the Stout residence property was zoned "Medium Density Residential" and the Thompson Ranch property was zoned "Green Belt/Multiple Use".

Likewise, there is supporting evidence for the court's finding that BEC appeared at a Town Council meeting and stated its reasons why the Planning Commission's decision should be upheld.[4] Appellant Hatch testified regarding the June 2, 1999 meeting as follow:

> Q. Do you know if the town discussed your appeal at that meeting, without your presence?
>
> A. Yes, they did evidently, according to the town meeting minutes. The Boulder Excavation Company presented – had a long lengthy discussion about it. (TT, 71).

Additionally in Exhibit 9 which appellants introduced into evidence (which is their

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[4]Why appellants consider this fact important to their appeal is unknown.

statement given to the Town Council on June 17, 1999) appellants stated: "A few days ago the minutes of the June 3, 1999 meeting were posted and we were shocked to find the Council had allowed BEC and their attorney to present a defense to our appeals." Similarly Exhibit 10, the Town Council minutes of June 17, 1999, states: "The appeals made by Lynne and Julian to the conditional use permits issued to Boulder Excavating Company were discussed. There was a lengthy discussion at the last meeting, but they were not in attendance."

There is also sufficient evidence to support the trial court's finding that the garage on the Stout residence property was largely constructed up to and including a roof and roofing and that installation of siding and some finish work remained. Regarding the garage appellant Hatch testified "Apparently it has a roof. Looks like it's complete, basically closed in. I don't know about the interior or anything. I – it looks like it's closed in. It's got a metal roof with red and white stripes that looks like a candy cane or something." (TT, 106)

Similarly there is ample evidence to support the trial court's finding that "[t]he uses for which the Conditional use Permits were granted are compatible with other uses authorized and existing in the same districts." Appellants themselves testified that they each owned businesses in the same district where the garage was built. (TT, 36, 140, 141). They also testified that the district is predominantly agriculture with tractors, hay balers and bale wagons with sheds where equipment can be parked. (TT, 76, 77, 149,

156, 163). Appellant Hatch also testified that farmers have backhoes in Boulder that are often parked on their property and that they were not a problem with him (TT, 102).

Every finding appellants challenge on appeal has adequate evidentiary support in the record. The obvious reason appellants fail and refuse to marshal the evidence is because the findings are adequately supported.

B. The Trial Court Considered The Evidence Presented

Without providing any analysis appellants make the bald assertion that the trial court failed to consider all of the evidence and exhibits entered into evidence. Appellants however cannot and have not pointed to any specific evidence the court did not consider. Appellants insinuate the court failed or refused to read some of the exhibits entered into evidence. However there is no proof, whatsoever, in the record to substantiate that insinuation. Moreover, evidence that is admitted into evidence is presumed to have been considered.

There is absolutely no basis for concluding that the trial court failed to consider the evidence. Nor did appellants make any objection that the trial court failed to consider evidence. Without an objection the issue is waived. *Lamb v. B & B Amusements Corp.*, 869 P.2d 926, 931 (Utah 1993).

III. The Trial Court Did Not Abuse Its Discretion In Consolidating The Preliminary Injunction Hearing With The Trial

Rule 65A(a)(2) of the Utah Rules of Civil Procedure allows a trial court discretion

prior to or during a preliminary injunction hearing to consolidate the hearing with the trial on the merits. The Rule states in relevant part:

> Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.

Appellants claim the trial court abused its discretion in consolidating the preliminary injunction hearing with the trial without giving appellants prior notice that it intended to do so. Appellants' claims are without merit. The trial court did not abuse its discretion for three reasons. First, appellants were not surprised by the consolidation. Second, appellants did not object to the consolidation; and third, appellants were not prejudiced by the consolidation.

A. Appellants Were Not Surprised By The Consolidation

In BEC's Memorandum in Opposition to Motion for Preliminary Injunction mailed to appellants' counsel four days prior to the preliminary injunction hearing, BEC quoted Rule 65A(a)(2) and urged the court to consolidate the hearing with the merits and to rule upon the entire petition at the hearing. Counsel for BEC also moved for the same relief in his opening statement at the hearing. Counsel stated:

> I would urge the Court, at the conclusion of this hearing or prior to the conclusion of this hearing, to rule to consolidate the trial of the principle matter with this hearing today, as is allowed by Rule 65, and make a final ruling, because I believe that the Court will see that there is no possibility that - that this action by the Town of Boulder was arbitrary, capricious, or illegal. (TT, 29, 30)

Appellants were informed twice prior to their presentation of any evidence of BEC's motion to consolidate. Absent a showing of surprise, there can be no abuse of discretion in a court's consolidation of a preliminary injunction hearing with the trial. *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 459 (7th Cir. 1993); *Johnson v. White*, 528 F.2d 1228, 1231 (2nd Cir. 1975).

B. Appellants Did Not Object To The Consolidation

A party who fails to object on the record at trial to an alleged error is deemed to have waived the issue and is precluded from having the issue reviewed on appeal. *Lamb, Supra* 869 P.2d at 931; *State v. Whittle*, 780 P.2d 819, 820-21 (Utah 1989). In addition to the two requests by BEC for consolidation, counsel for Boulder Town also requested the court to consolidate the merits with the preliminary injunction hearing. The request was made when the Town made its motion to dismiss at the conclusion of the plaintiff's evidence. (TT, 175). On none of these occasions did appellants raise an objection or argue against consolidation. In the absence of an objection in the record, the issue was not preserved for appeal. *Id.* The trial court thus did not abuse its discretion.

C. Appellants Were Not Prejudiced By The Consolidation

A party contesting entry of final judgment at the preliminary injunction stage must not only demonstrate surprise but also prejudice. *D. Patrick, Inc., Supra.*, at 459. See also *Johnson, Supra*, at 1231 (stating that in order to obtain a reversal for such an error, a party must show not only surprise but prejudice "in the sense of having other material

evidence to introduce") and *Eli Lilly and Co. v. Generix Drug Sales, Inc.*, 460 F.2d 1096, 1106 (5th Cir. 1972) stating:

> [S]urprise alone is not a sufficient basis for appellate reversal; appellant must also show that the procedures followed resulted in prejudice, i.e., that the lack of notice caused the complaining party to withhold certain proof which would show his entitlement to relief on the merits.

Appellants have identified no evidence which would show their entitlement to relief that they withheld at the trial. They were thus not prejudiced by the consolidation. The court did not abuse its discretion in consolidating the preliminary injunction hearing with the trial on the merits.

IV. The Trial Court Did Not Err In Awarding Appellees Their Attorney's Fees

Section 78-27-56 Utah Code Ann., mandates that the trial court award attorney's fees to a prevailing party if the court determines the action is without merit and not brought in good faith. That section specifically states in relevant part:

> "In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under subsection (2). (Emphasis added).

The trial court found both that appellants' claims were legally without merit and that they were not brought or asserted in good faith. The record supports the court's findings and conclusions.

A. Appellants' Claims Are Legally Without Merit

As has been shown *infra* and as is demonstrated by the briefs of the other parties to this action, appellants' claims are legally without merit. The Planning Commission's issuance of the Conditional Use Permits was not arbitrary, capricious or illegal. Appellants have provided the court with no legal authorities or analysis to overturn the court's ruling and dismissal of the petition. As such, the first requirement of Section 76-27-56 is satisfied.

B. Appellants Have Not Challenged The Court's Factual Findings

In issuing its Order awarding attorney's fees, the trial court made ten findings of fact upon which it based its conclusion that appellants' action was not brought in good faith. Appellants have not challenged any of the court's findings of fact made to support the award of attorney's fees.[5] In the absence of a challenge to the court's factual findings, they cannot be overturned. See *Benvenuto, Supra*, 983 P.2d at 558. The factual findings adequately support the court's ruling that the case was not brought in good faith. The requirements of Section 78-27-56 are established in this case.

C. The Fact That Judicial Review Is Provided By Statute Does Not Preclude A Finding Of Bad Faith

Appellants assert that because Section 10-9-1001(2) specifically allows for judicial review of a municipality's land use decisions, their availment of that provision precludes

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[5]Of the court's nine conclusions of law, appellants similarly only challenge conclusion numbers 5 and 7.

a finding of bad faith. Taken to its logical conclusion, that argument means that no case of any kind could ever be found to have been brought in bad faith. Any case that is ever filed in a court is done so pursuant to some provision in the law allowing a case to be brought. There is no basis for applying appellants' illogical argument to land use decisions, nor have appellants cited any authority that would exclude application of Section 78-27-56 from actions for judicial review of land use decisions.

D. Appellants' Proceedings In This Court Demonstrate Their Lack Of Good Faith

Appellants describe this appeal as one "for judicial review of the Town of Boulder's enactment of a zoning ordinance". (Appellants' Brief at 6). Appellants request this court to declare the Land Use Ordinance invalid. (Appellants' Brief at 44). However at the trial court appellants did not seek a declaration of the invalidity of the ordinance. They termed their case as one "for a judicial review of the granting of conditional use permits approved by the Town of Boulder's Planning Commission and/or Board of Adjustment, and upheld by the Boulder Town Council; and for injunctive relief". (R. 1; Appellants' Petition). Appellants did not want the trial court to declare the Land Use Ordinance invalid because to do so would have invalidated their claims regarding the Conditional Use Permits.[6] Indeed appellants' counsel on two separate occasions acknowledged, in response to questions from the trial court, that if the ordinance were

[6]In the absence of the land use ordinance there would be no restriction on BEC's use of its property.

declared invalid, the petition would have to be dismissed. A result appellants did not want.

In Appellants' opening statement, the court and appellants' counsel had the following discussion:

> THE COURT: What happens to the petitioners' claims if there's no ordinance in effect on the date that the conditional use permits were issued? They're meaningless, aren't they?
>
> MR. CALL: If– if they're – if the court holds that the ordinance is – was void ab initio, then – then this petition would be moot. (TT, 17)

Again in closing argument the court asked counsel for appellants about what would happen to appellants' claims if the ordinance were invalid. The trial court and Mr. Call had the following discussion:

> THE COURT: If I – I wanted to follow up with you a little bit on this no map argument. The evidence that I've got suggests that there was a map at the meeting on May 29, 1998. It may not have had, ah, the right title. It may not have been called the base map or the official map, but I think there was a map there. But let's assume that it wasn't – didn't qualify as a map. Then does the whole ordinance go down the drain?
>
> Now I wonder why you make that argument, because if the whole – the whole ordinance goes down the drain, you've got nothin' to complain about.
>
> MR. CALL: Well, if – if the – if they didn't comply with the – with the statute–
>
> THE COURT: Okay.
>
> MR. CALL: – in passing the ordinance, then the – yeah, the – <u>the petition would go away</u> . . . (Emphasis Added). (TT, 192, 193)

Despite the obvious result that by failing to request such relief in the trial court appellants waived their right to request on appeal a declaration that the ordinance is invalid[7]; appellants demonstrate their bad faith by requesting such relief on appeal. In short by requesting a declaration that the ordinance is invalid, appellants admit their petition should be dismissed; with the result there would be no restrictions on BEC's use of its property. Why then did they pursue this appeal, and even more so, why is BEC a party to this appeal?

Continuing to pursue a claim on appeal, which appellants knew if their requested relief is granted, will provide them no relief, can only be considered to be an act of bad faith.

As a result of this action, Boulder Town has incurred significant attorney's fees on appeal that it can ill afford on its tiny budget. Those fees should be born by appellants. The trial court's award of attorneys' fees should be affirmed and both the Town of Boulder and BEC should be awarded their attorneys' fees incurred in defending this appeal.

CONCLUSION

Based upon the foregoing, appellees, the Boulder Town Council and the Town of Boulder Planning Commission respectfully request this court to affirm the trial court's

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[7]See *Monson v. Carver*, 928 P.2d 1017, 1022 (Utah 1996).

Judgment of Dismissal and Order Denying Preliminary Injunction and its Findings, Conclusions and Order on Motion for Attorney's Fees. Appellees further request that they be awarded their attorneys' fees in prosecuting this appeal pursuant to Section 78-27-56 Utah Code Ann., and that the case be remanded to the trial court to augment the award of attorneys' fees and costs incurred in defending this appeal.

DATED this 31st day of August, 2000.

MARVIN D BAGLEY
ATTORNEY FOR BOULDER TOWN

MAILING CERTIFICATE

On the 31st day of August, 2000, I mailed a true and correct copy of the foregoing BRIEF OF APPELLEES BOULDER TOWN COUNCIL AND TOWN OF BOULDER PLANNING COMMISSION, by United States Mail, First-Class postage thereon prepaid to:

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