



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



CASE SUMMARY

In re the Commitment of ROBERT FLEMMING, CV-03-0379-PR

Parties/Counsel: Robert Flemming is represented by Brick P. Storts, III.
The State is represented by Amy Pignatella Cain, Deputy Pima County Attorney.

Issues:

1. “Did Appellant’s waiver of his right to a hearing pursuant to A.R.S. § 36-3703 constitute a waiver of his right to an independent examination pursuant to A.R.S. § 36-3708(B) and A.R.S. § 36-3709(B)?”
2. “Was Appellant denied due process of law when he was denied his substantive right to an annual review pursuant to A.R.S. § 36-3708(B)?”

Facts:

Mr. Flemming plead guilty to sexual conduct with a minor and was sentenced to 10 years in prison. Before his scheduled release in 1998, the State filed a petition to detain him under the Sexually Violent Persons (SVP) Act, A.R.S. § § 36-3701 et seq. In a written agreement with the State, Mr. Flemming stipulated that he suffered from pedophilia and psychosis and was, as a result, a sexually violent person. He agreed to be committed to the State Hospital and waived various rights under the SVP statutes. On January 8, 1999, the superior court found that Mr. Flemming is a sexually violent person and ordered him committed to the State Hospital.

Pursuant to the SVP statutes, doctors at the State Hospital evaluate Mr. Flemming every year to determine whether he should remain in the State Hospital, be placed in a less restrictive alternative, or be discharged completely. The annual evaluation and progress report dated January 4, 2002, recommended that he remain in the State Hospital. Mr. Flemming disputed that recommendation, so he filed in the superior court a Notice of Filing Request for Hearing Pursuant to A.R.S. § 36-3708(B). He requested that the court order an evaluation by an independent professional and conduct a hearing to determine whether he should be placed in a less restrictive environment or be discharged. The State opposed the request on the ground that in the 1998 agreement Mr. Flemming waived an independent evaluation and hearing. On March 18, 2002, the superior court denied Mr. Flemming’s request.

Mr. Flemming appealed and the Court of Appeals affirmed. The Arizona Supreme Court granted review.

This Summary was prepared by the Arizona Supreme Court Staff Attorney-s Office solely for educational purposes. It should not be considered official commentary by the court or any member thereof or part of any brief, memorandum or other pleading filed in this case.



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CASE SUMMARY

STEPHEN G. ZAJAC, et al. v. CITY OF CASA GRANDE, et al.,
No. CV-03-0397-PR (Memorandum Decision)

Parties and Counsel:

Petitioner: Wal-Mart, Inc., represented by Steven A. Hirsch and Stanley B. Lutz of Bryan Cave; and City of Casa Grande, represented by Kay Bigelow of the Casa Grande City Attorney's Office..

Respondent: Stephen G. and Evelia S. Zajac, represented by John T. Moshier and Scott D. Larmore of Morrill & Aronson, and A. Thomas Cole of Cole, Massey & Finley.

Facts:

Arizona statutes require municipalities to enact and implement notice and public hearing procedures to inform adjacent landowners of any proposal to rezone nearby land. A.R.S. §9-462.03(A). Not only must municipalities follow statutorily mandated procedures in A.R.S. §9-462.04, but they also must satisfy any applicable procedures in their own ordinances. A.R.S. §9-462.03(B).

This case involves the adequacy of notice of zoning change provided to the Zajacs under A.R.S. §9-462.03 and Casa Grande City Code § 17.68.500.

Wal-Mart planned to build a superstore on a 28-acre parcel of land in Casa Grande if its application for rezoning was successful. In fact, the store now has been completed and is operating.

The city held three public hearings on the Wal-Mart application. In October, 2001, the city's Planning and Zoning Commission voted 5-2 to recommend that the city council deny Wal-Mart's request. In addition, two petitions circulated by Casa Grande residents were considered by the city council as written protests recognized under Arizona statute and City Code provisions. Despite the recommendation and protests, the city council voted 4-3 in November 2001 to approve the request. Ordinance No. 1178-167 formally rezoned the land, which Wal-Mart purchased and began developing. In December, the Planning and Zoning Commission approved Wal-Mart's site plan. Pursuant to a referendum petition, the city held a special election in May 2002 where a majority of Casa Grande residents who voted approved the rezoning.

Steven Zajac and his mother, who own property near the site but live elsewhere in Casa Grande, filed an action in September 2002 to invalidate the rezoning, alleging that the city

failed to notify them by mail of any of the three hearings, as required by the city's ordinance. They claimed that had they been notified properly, they would have participated in the formal protests, convinced other nearby landowners to do the same, and together they all would have succeeded in requiring the city council to pass on the rezoning by a super majority of $\frac{3}{4}$ vote, rather than just a simple majority. They sought declaratory and injunctive relief. Indeed, the trial court confirmed that the Zajacs names did not appear on any list compiled by the City or by Wal-Mart for the purpose of providing the required notice by mail.

After an evidentiary hearing, the superior court issued findings of fact and conclusions of law rejecting the Zajacs' claims. It essentially held that the city council and Wal-Mart had "substantially complied" with all notice-related legal requirements before rezoning the property, and that the law required no more. The Zajacs appealed.

The court of appeals reversed. It addressed the Zajacs' argument that the trial court erred in holding the city and Wal-Mart were only required to "substantially comply" with City Code § 17.68.500. It found that Arizona courts have continued to apply a strict compliance rule in zoning cases. The court said that Wal-Mart implicitly acknowledged noncompliance with §17.68.500(C), and the record does not show that providing written notice to all necessary persons – including the Zajacs – was particularly difficult, or why the city did nothing after it received back the notices undeliverable to the former owners. The court held, consequently, that absent strict compliance with that requirement, the resulting rezoning ordinance is void and of no effect under controlling Arizona case law.

The Arizona Supreme Court granted the petitions for review and set the case for oral argument. It specifically asked the parties to address in supplemental briefs the effect of the approval by referendum of the zoning ordinance, among other issues.

Issue(s):

A. In Wal-Mart's Petition

"Whether a municipality's reasonable and good faith efforts to provide mailed notice of a proposed rezoning to neighboring lots, which fully complied with the state enabling statute and later was successfully affirmed in a referendum election by the City's voters, may be overturned by a single disgruntled lot owner who leased his premises to a third party and lived off site with his mother in a house in her name in Casa Grande, and therefore argued that he did not technically receive the mailed notice, in the most heavily publicized zoning case in Casa Grande's history."

B. In City of Casa Grande's Petition

"1. Whether the Court of appeals erred in reversing the trial court when it failed to determine gravity of the procedural error before invalidating the ordinance and Plaintiff-Appellant's silence during the referendum election evidences lack of gravity of the error.

"2. Whether the court of appeals erred when it did not heed the holding of *Hart* and apply evidence of unreasonable delay and detrimental reliance to uphold the trial court ruling."

Authority:

A.R.S. §9-462.03(B) provides in pertinent part, and did at the time of the rezoning in question: “A zoning ordinance that changes any property from one zone to another . . . must be adopted following the procedure prescribed in the citizen review process [that under subsection A must include notice and hearing procedures and must be adopted by a municipality by ordinance] and in the manner set forth in section 9-462.04.”

City Code § 17.68.500, “Notice of hearing”, provides:

A. *No rezoning may be adopted until a public hearing has been held on the matter by the planning and zoning commission, and if required under Section 17.68.520 by the city council.*

B. *A notice of the time, date, place, and purpose of the hearings shall be published in a newspaper of general circulation, published or circulated in the city at least fifteen days prior to the date of the first hearing and at least fifteen days prior to the date of any subsequent hearing.*

C. *A similar notice shall be made at least fifteen days before the day of the first hearing to each owner of property situated wholly or partly within two hundred feet of the property to which the rezoning relates. The zoning administrator shall be responsible for placing and mailing such notices. For the purpose of giving mailed notice, the planning director shall require the applicant to furnish the names and addresses of all owners of property within two hundred feet of the property to be rezoned. The zoning administrator shall make a copy of the notice and a list of the owners and addresses to which the notice was sent as a part of the record of proceedings. The failure to receive notice by individual property owners if notices were published and mailed fifteen days prior to the hearing shall not necessarily invalidate the proceedings.*

D. *In proceedings involving rezoning of land which abuts other municipalities or unincorporated areas of Pinal County, or a combination thereof, copies of the notice of the public hearing shall be transmitted to the planning agency of such governmental unit abutting such land. (Ord. 1178 § 7.2.3, 1987)*

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