2000

E. A. Walton v. Tracy Loan and Trust : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

E. A. WALTON,
Appellant,

vs.

TRACY LOAN AND TRUST COMPANY, a corporation; SALT LAKE CITY, a municipal corporation of Utah; GEORGE T. HANSEN, J. A. ROCKWOOD, W. E. FIFE, ROYAL W. DAYNES, and T. A. SCHOENFELD, as members of the Board of Adjustment, Salt Lake City,
Respondents,

N. L. CROOKSTON, J. S. PEHRSON, PHILLIP SCHONERT, and MARY LaCHAPELL,
Interveners and Appellants.

No. 6118

APPELLANTS' BRIEF

STATEMENT OF THE CASE

This suit was brought by appellants to review the action of Salt Lake City Board of Adjustment in attempting to give the defendant Tracy Loan and Trust Company the privilege of erecting and maintaining a gasoline service station on its 99 by 115 foot lot, being

the northeast corner of the intersection of Second South and Seventh East streets, in contravention of the ordinance prohibiting such use and to enjoin the erection and maintenance of such service station as a nuisance.

Plaintiff has 121 feet frontage on Second South street, beginning 36½ feet westerly from the southwest corner of said intersection, improved by apartments and dwelling houses, eight in number. The interveners who join with the plaintiff are Mrs. LaChapell, owner of a large two story residence on the northwest corner of the intersection, Mr. Crookston, owning a two story residence just north of the LaChapell property, Mr. Pehrson, owning a residence at 210 South Seventh East, Phillip Schonert, owning a two story residence, being the second dwelling east of the proposed service station and within 100 feet of the same.

The court dismissed the complaints and affirmed the action of the Board of Adjustment, and plaintiff and interveners have appealed.

Pursuant to Laws of Utah 1925, Article 3, Title 15, Chapter 8, Revised Statutes 1933, Sections 15-8-89 et seq., the Board of Commissioners of Salt Lake City passed an ordinance and adopted a map, Exhibit "B," zoning Salt Lake City into seven zones, commencing with the most restricted they are as follows:

Residential A, Residential B, Residential B-2, Residential C, Commercial, Industrial, and Unrestricted.

The ordinance appears in full on transcript page 49.

Gasoline service stations are prohibited in Districts A, B and B-2. They are permitted in C District with a provision as follows:

Public garages and gasoline service stations shall not be permitted within 100 feet of any dwelling or apartment house. (Sec. 6 of the Ordinance.)

Both the Halloran residence and the Schonert residence are within this 100 foot limit.

Reference to the map Exhibit "B," shows block 46 wholly as Residential B-2. Two-thirds of the block to the west, nearly all of the block to the southwest, all of the block to the south, all of the block to the southeast, nearly all the block to the northwest, all of the two blocks to the north and then some, all of the block to the south, south-east, all of the block to the east except one lot at the northeast corner, all of the block to the northeast except the southeast corner, all of the block to the north and northeast of that to be zoned as B-2, and indeed for about half a mile east and a quarter of a mile southeast and half a mile to the north and northeast, it is all practically zoned as Residential B-2, and the exceptions noted in the small corners indicated are zoned as Residential C.

Exhibit B was identified by Mr. Woolley, the zoning engineer (Abst. 42), and he testified that the area in question was not affected by any subsequent ordinance. (Abst., 43.)

Plaintiff identified photographs of his and the interveners' property, and the Tracy corner property, Exhibits "C" to "K," which speak for themselves and show, not millionaires' residences of course, but fairly decent middle class property and a middle class environment.

Plaintiff testified, and his evidence is wholly without dispute as to a survey made by him of all the frontage

on Second South from Sixth East to Eighth East, and on Seventh East from First South to Third South, and his evidence shows that all of said property which is improved, (about 90 percent), is improved with residences except a store and service station at Fifth East, the Dickinson store on Seventh East, a store on Eighth East, a Drug store at First South, a Church at Third South. (Abst., 46-52.)

Plaintiff further testified to his experience and knowledge with respect to values of residence property in Salt Lake City. (Abst. 46.)

He gave it as his opinion that the proposed service station would be very detrimental to that vicinity, and would tend to depreciate the value of his property and all property within two-thirds of the block in each direction, including the property of the interveners. (Abst. 52-53.)

He also testified that he made a substantial investment in the way of remodeling and improvement, also the purchase of some of his property influenced by the fact that the territory was zoned. (Abst. 45.) Also that the territory in question had not become a business section. (The physical facts conclusively show this.)

The plaintiff offered to prove that he protested before the Board of Adjustment, and on the hearing the Board declined to hear any sworn testimony, and that no sworn testimony was taken. (Abst. 54.)

The defendants appearing, all objected on the ground that it was immaterial because the present proceeding is a trial *de novo*, and the objection was sustained. (Abst. 54-56.)

Intervener Schonert testified that he had owned and resided at 723 East Second South since 1903. He said that he would much rather not have the station there.

Intervener Crookston, a carpenter and school teacher, teaching at the Bryant Jr. School for the past twenty-three years, said he had occupied his two story and eight room brick house for which he paid $5625.00, thirteen years; that he objected to being close to service stations because they increased the traffic hazard; that the service station would detract from the desirability of his place as a residence; that he would not buy a property close to a service station if he could avoid it. He had had experience buying and selling, and that property close to service stations and stores is not as salable as otherwise. (Abst. 56-57.)

Here it was stipulated that the Tracy Company acquired its property in 1933—consideration $2500.00. At that time there was the Macmillen dwelling house thereon. Taxes ran from $195 to $278 while the house was there; that the house was unrentable, and had been torn down under pressure of the City. (Abst. 57.)

It was further stipulated that interveners Pehrson and LaChapell who were necessarily absent, would give, if present, testimony, in effect, the same as had Mr. Crookston and Mr. Schonert. (Abst. 58.)

A. E. H. Peterson testified:

Real estate broker for the past forty years in Salt Lake City. Resided during that time at 438 East Second South. Actively engaged in the real estate business. Take care of about fifty tenants. Have owned considerable tenant properties. Acquainted with the

vicinity of Seventh East and Second South Streets. Know the property of plaintiff and interveners and the property in that vicinity. The LaChapell house and the houses immediately west of it are desirable residential properties. That is all such property at the present time is fit for. The erection and maintenance of a service station on the Tracy property would have a tendency to reduce the desirability of your property for residence purposes. (Abst. 59.)

At this point Mr. Christensen for the Board of Adjustment offered to cross-examine, which was objected to on the ground that the Board of Adjustment is not an interested party.

Objection overruled and exception taken. (Abst. 60.)

On Mr. Christensen's cross-examination said:

That there was and had been for the last twenty years vacant lots in that vicinity of four blocks; he had not sold any vacant lot in twenty years in that territory. Several single dwelling houses have been erected in that neighborhood in the last ten years. Construction of a service station on the Tracy property has a decided depreciation on the valuation of Mr. Walton's property for dwelling property, and would depreciate the selling value. There would be some effect of that kind for a half a block in each direction, except not so much effect on property half way down the block on Seventh East.

Probabilities against selling the Tracy property for a single residence site; Adapted for a duplex or more units. That territory as a residential district is largely a thing of the past. (Abst. 60.)

Plaintiff and interveners rest. (Abst. 61.)

Mr. Riter moves for non-suit on ground that evidence does not entitle plaintiff to the relief prayed for. (Abst. 58.)

Motion for non-suit by Mr. Christensen for Board of Adjustment on the ground that evidence shows that the Board of Adjustment did not act arbitrarily or capriciously. It is to be noted that Mr. Christian here quite reversed his position, claiming now that the question at issue is whether the Board acted arbitrarily while as above noted (Abst. 54), when Mr. Walton offered to prove arbitrariness Mr. Christensen obtained an exclusion of such evidence on his contention that the same was immaterial because the matters were now triable *de novo*.

The court denied the motions for non-suit.

Tracy Loan and Trust Company then proceeded with its evidence, calling first Thomas E. Gaddis, a real estate broker, who testified to his familiarity with the area. He sold one property in that vicinity recently. Think the Tracy property is worth $40 a foot. Don't think good investment for residential purposes. District is more or less a rental district. (Abst. 62.) Man that would pay six thousand dollars for a home wouldn't buy it in that district. It is an old time residence district. It has been invaded by tenancy people. That tends to pull down its desirability for residential purposes. The reason for that tendency, people wanted restricted districts now days; more modern houses and a district protected by building restrictions in the deeds. Don't know of any appreciable effect of a service station on values. Not economically sound to build an apartment house on the

Tracy property because rents haven't raised to where they were before the depreciation. They are now about seventy-five or eighty percent of what they were before. The proposed service station would in my opinion not affect in value any of the property of the plaintiff or interveners. (Abst. 62.)

On cross-examination he said if he owned the Crookston and Schonert houses he might have a preference as to what might occupy the Tracy corner, would not prefer a residence or apartments rather than a service station. Wouldn't say a service station more desirable. (Abst. 63.)

Walter J. Meeks, a real estate broker, testified: Am familiar with the territory. Thought the service station would not hurt the Walton property, nor the interveners' properties. That it would *help* the Pehrson property! Next to impossible to sell the Tracy property for residential purposes. This because of the Simons old house to the north, and the price $35 to $40 a foot. Tracy property 36 by 114 feet. Only large enough for a small apartment. (Abst. 63.)

They would have to have the Halloran house and the Simons house. Apartment rentals much less than eight or nine years ago. (Abst. 64.)

Apparently this witness did not have the situation very clearly in mind, thinking and stating that the Tracy property was only 36 feet wide instead of 99, and saying that an apartment site would have to take in the Halloran four rods on the east and the Simons three rods on the north.

On cross-examination he admitted that if he owned the Crookston property, and were living there, he should prefer a residence rather than a service station on the Tracy property. However, he made an argument in favor of the gas station because that would attract the holdups and burglaries, implying that it would protect the nearby householders from holdups and burglars.

He then said the service station would hurt the Halloran property and he volunteered the statement that Halloran had consented although he had to admit that he didn't know anything about it. He took it for granted that if Halloran or his daughter had protested the result would have been the other way. In his opinion the Walton and Crookston real estate was worth about $20. per foot if vacant, and the Schonert maybe $25 per foot. (Abst. 64.)

On re-direct he said the service station would put life into the rental property of that vicinity, and not affect desirability of that kind of houses. (Abst. 65.)

Mr. Riter then put in evidence the entire record before the Zoning Commission. Defendants Exhibit "1." Case No. 844. (Abst. 65.)

This is copied in the transcript pages 149-162 inclusive. As Mr. Riter apparently has not abandoned his position taken at the trial that the proceeding at bar is a trial *de novo,* there is probably no materiality in the record before the Board of Adjustment, except to show that there was such a proceeding, and what was done, as a final result, and the annexed maps showing the loca-

tion of the proposed station. So for the present we shall make no analysis of what took place before the Board.

At this point the court indicated his view of the case to the effect that the only thing before the court was the question of whether the Board of Adjustment had acted arbitrarily and capriciously. (Abst. 65.) (not quite consistent with his previous ruling of excluding evidence as to what took place before the Board.) But it soon became apparent that the court was advised and conceded that the want of power of the Board was directly involved in the issues. (Abst. 66-68.)

H. P. Kipp for the Tracy Loan and Trust Company then testified, that he was the property manager for that company, and that he had made a recent survey of the ownership and occupancy of the property about *half* a block in each direction from the Tracy corner. That about fifty percent of such houses were occupied by the owners and the rest by tenants. (Abst. 69-71.)

He also identified Exhibit "2," eight photographs of the properties about the intersection, which were admitted in evidence. (Abst. 71.)

The court made voluminous findings.

They substantially follow the allegations of the answer and include findings of no damage to the appellants but rather benefits, and hardship to the Tracy Company, etc., which findings we shall hereafter specifically discuss. Judgment was rendered, affirming the Board of Adjustment, and denying appellants any relief.

II.

Appellants rely upon all the errors assigned, and in view of the nature of the case deem it unnecessary to reprint the assignment of errors in this brief.

III.

The particular questions involved herein are substantially as follows:

1. Whether Salt Lake City was a proper party to the suit.

2. Whether the Board of Adjustment was more than a nominal party so as to have any right to take any part in the trial.

3. Whether the Board of Adjustment has the power to make the order it did, and thus in effect rezone the area in question.

4. Whether if we assume such power exists the Tracy Company has shown itself entitled to the order affirming the Board.

IV.

BRIEF OF ARGUMENT

1.

SALT LAKE CITY'S GROUND OF DEMURRER THAT IT WAS NOT A PROPER PARTY SHOULD HAVE BEEN OVERRULED.

Sec. 15-8-104 R. S., provides that the city or any person aggrieved by the decision of the Board of Adjust-

ment, may have and maintain a plenary action to review the order made.

It ought to be evident that from this statute and from the nature of the whole matter the city is always a proper party to a suit of this kind.

It may not be improper to state here that all of the defendants demurred on many grounds, and each one had as a ground of demurrer that it was not a proper or necessary party to the action. This might be considered to be a disclaimer. As a matter of fact Judge Evans so regarded it, and the Tracy Company through Mr. Riter withdrew its demurrer upon that suggestion and took time to answer.

Probably however the matter is of no great or perhaps any consequence, at least at this time because if appellants prevail against the Tracy Loan and Trust Company that will be sufficient for their purposes. We refer to the matter at this time for the purpose of indicating that the city is on this record in no position to defend the decree.

2.

THE BOARD OF ADJUSTMENT HAD NO RIGHT TO CROSS-EXAMINE APPELLANTS' WITNESS PETERSON. (Assignment 15.)

The review being by plenary action it is of course triable *de novo*. While out of abundant preaction we made the Board of Adjustment a party defendant it is a nominal party only just the same as a justice of the

peace where his judgment is called into question in the district court either by certiorari or appeal.

It is true that the methods of review of the orders of such boards are various in the various jurisdictions, and many cases appear where the Board is made a party on the record. Nevertheless, the real parties in interest are the appellants, the Tracy Loan and Trust Company and perhaps the City, unless it disclaims or ignores the proceeding.

It was explicitly held in Miles vs. McKinney (Md.), 199A, 540, 543, that the board of zoning appeals analogous with our board of Adjustment is not an interested party and has no right to take part in a proceeding seeking a review of its acts.

3.

THE BOARD OF ADJUSTMENT WAS WHOLLY WANTING IN POWER TO MAKE THE ORDER COMPLAINED OF, THE SAME BEING IN EFFECT A REZONING.

Article 3 of Chapter 8, title 15, Sec. 29 R. S. "The legislative body" in this case the said commission has the power to regulate the character and use of the buildings and structures in Salt Lake City. The following section provides that the legislative body may divide the municipality into districts, etc. That it is there provided "All such regulation shall be uniform for each class or kind of buildings throughout each district.

The next section provides that such regulation shall be made in accordance with the comprehensive plan, etc.

Sec. 15-8-93 provides that the regulations, restrictions and boundaries may be amended, supplemented, changed, modified or appealed by the "legislative body" of the city.

The powers of the Board of Adjustment which is an administrative agency created by the city commission are shown 15-8-101 R. S. and it seems from a reading of that section that the functions of such Board are quite different in character and in extent from that of the City Commission. That section requires the spirit of the ordinance to be observed, and provides for a variance not a substance by which the *literal* enforcement of the provisions of the ordinance will result in unnecessary hardship.

Now referring to the ordinance (Trans. 49)—it discloses that in Residential A, B, and B-2, service stations are wholly prohibited, and even in a lower classification Residential C, they are prohibited absolutely within 100 feet of any dwelling.

The effect therefore of the Board's order is to reduce the area in question to commercial district, and to rezone to as great an extent as could the City Commission itself.

No one would contend that the powers given to the City Commission in Sec. 15-8-93 could be delegated by it to any administrative officer or board. It is necessarily contended here that the Board of Adjustment under the guise of power to permit a variance in the case of peculiar hardship and under special conditions from a *literal* enforcement of the ordinance, may do all that the City Commission itself might do.

We say that it must be assumed that the legislature in giving the zoning powers in general terms to the City Commission, and then in rather narrow terms using such words "special," "literal," "spirit," and "unnecessary hardship" giving the Board of Adjustment (a mere administrative arm of the City) its powers, intended to mark and point out a reasonable difference and distinction between the respective functions of the Commission and the Board.

The fact too that no appeal of any kind to courts is contemplated or given from the action of the City Commission in zoning, either originally or by amendment, and that a plenary review of the action of the Board is given to the City or any person aggrieved, is further and conclusive evidence of a sharp difference between what can be done by the Board of Adjustment, and what can be done by the City Commission.

If we construe the powers of the Board of Adjustment to be limited to minor and practical difficulties, and to taking care of those *literal* matters, not violating the spirit of the ordinance—then there is some reason for a review in the courts and by the city, but if we construe Sec. 15-8-101 to give the Board of Adjustment the power that was attempted to be exercised in the case at bar, then it would seem that we have this situation, namely:

The City Commission may zone, and in so doing may prohibit in a certain district a certain business, then the Board of Adjustment may in effect repeal such prohibition as to such part of the district or all of it as it may choose. Then the City could only appeal by plenary ac-

tion to the courts, and the City's power under Sec. 15-8-93 would be gone. We are thus driven to absolute absurdities if we entertain the notion, that the Board of Adjustment can change the classification of an entire lot so as to permit thereon an entirely new and prohibited use,—a use which the court judicially knows does affect the surrounding area, and the great weight of authority, especially of the more recent authority and the better considered cases are to the effect that such cannot legally be done.

In the case of VanMeter vs. Wilcox Oil & Gas Co. (Okla.), 41 P2, 904, the court held that the power of the Board of Adjustment was very limited. That it could not in effect rezone. The court said: "It cannot under the guise of exceptions and variances modify, amend, repeal or nullify the ordinance by establishing new zone lines and creating different areas for the drilling of oil and gas wells." Its power of review in granting variations and exceptions is limited to adjusting practical difficulties and unusual emergencies which may arise in a particular case when the strict enforcement of the provisions of the ordinance would constitute an unnecessary hardship. It cited the two following cases on this point:

State ex rel. vs. Gurda (Wis.), 243 N. W. 317, and
State ex rel. vs. Kansas City (Mo.), 27 SW. 2, 1030.

In the Gurda case the court held the ordinance itself void as unreasonable, but it based such holding on the ground that the Board of Review analogous to our Board of Adjustment would be wholly lacking in power under

the authority to make variances to take care of a particular situation.

In the Kansas City case the ordinance gave the board of adjustment the same powers as it has here. There the applicant purchased the tract of land after the territory was zoned, and he sought to use the same for a prohibited use.

The Supreme Court of Missouri held that the board was without power to grant the same. That it would be in effect a rezoning to that extent. The court said the ordinance "does not purport to authorize the board of zoning appeals to modify, amend or repeal any of its provisions."

The court said that the board might vary in a particular case the enforcement of a regulation according to its strict letter, but that it could not relieve from a substantial compliance with the ordinance. It said: "their administrative discretion is limited to the narrow compass of the statute; they cannot merely pick and choose as to the individuals of whom they will or will not require a strict compliance with the ordinance."

In the case of Beveridge vs. Harper, etc., Trust, (Okla.) 35 P2, 435, the court held that the legislative body of the city alone has the power to permit a prohibited use which it might do by rezoning, and that the board of adjustment had no such power. It quoted approvingly from the earlier case of Anderson-Kerr vs. Van Meter, 19 P2, 1068: "To uphold the board of adjustment in issuing the drilling permit within a non-drilling territory

under this record, would nullify the ordinance. This the board of adjustment cannot do."

In the case Livingston vs. Peterson (N. D.), 228 N. W., 816, the court held that the zoning ordinance giving the board of adjustment power to vary regulations did not authorize the board to in effect amend the ordinance by authorizing a building forbidden by the ordinance.

In that case it appeared that the earning power of the property would be impaired if permit was not granted. This was held immaterial. The court said: "To permit the board of adjustment to authorize the erection of the building specifically forbidden would be authorizing the board to amend, repeal or suspend a provision of the ordinance, thus conferring upon it legislative power." "The city commission is the legislative body enacting the ordinance, the right of petitioner to erect an apartment house, cannot rest upon the whim, the opinion or the decision of the board of adjustment any more than it can rest upon the consent of residents within the district. The court did recognize the right of the board of adjustment to make minor variances in harmony with the general purpose and intent of the ordinance such as distances from the rear of the lot, etc."

In Prusik vs. Board of Appeal (Mass.) 160 N. E., 312, the court held that while the board might "vary the application" of the zoning law it could not "vary a provision" of it. Also "The financial situation or peculiar hardship of the single owner affords no adequate ground

for putting forth this extraordinary power affecting other property owners as well as the public."

In that case the applicant discovered that the land she purchased was just inside a residential zone, and not available for business use. The court said: "This is quite insufficient to constitute 'practical difficulty'."

In re Mark Block Holding Corp., 253 N. Y. S. 321, the board of appeals attempted to grant a variance of the zoning ordinance to permit the erection of an apartment house in a restricted district. Reversing such order the supreme court said:

> "The character of the neighborhood is substantially, if not exactly as existed when the present zoning resolution was adopted. [The provision for variance] does not embrace cases where the hardship is the restriction of desire to perform an act which would abrogate the very intent and purpose of the ordinance . . . and create a means by which the entire ordinances could be frustrated at will by limitless exceptions."
>
> "Subdivision 2 is a saving clause designated to correct what was intended but not foreseen, and to relieve in a specific case where the generality of the act failed to make proper exception so that slight deviation from the strict letter may be had without violating the spirit."
>
> "Cases considering similar zoning provision exceptions condemn any attempt to do other than permit a slight use extension and the reasoning sustaining even a slight extension is based on the recognition of the principle that the permission to add a few feet of a restricted plot to a large operation on an unrestricted plot where the use of unrestricted would be prevented if permission were withheld is

a reasonable application of discretion, consonant with the purpose of zoning resolution itself and having no material or substantial effect on its general purpose."

In the case of Provo City vs. Claudin, 91 Utah, 60; 63 P2, 570, the court clearly indicated it was the province of the city legislative body to amend, supplement, change, modify or repeal the zoning ordinance, and that the board of adjustment would have been without power to permit the mortuary to be erected in a restricted zone. It said that the board of adjustment does not have authority itself to rezone. "Its functions are limited to making adjustments under the ordinances in order that they will not be as the law of the Medes and Persians. Its powers are what they purport to be . . . limited to relief of cases where owners would suffer special hardships by the ordinance, and to make the ordinance pliable enough so as not to militate against the public welfare." Clearly this holding is in harmony with the reasoning of the cases just cited.

In the case of Huebner vs. Philadelphia etc., Society (Pa.), 192A, 139, the court held that even the city council itself lacked the power to create a separate commercial zone of a single corner lot in order to permit a funeral parlor to be erected thereon.

It cited with approval the following case:

Linden, etc., Church vs. City (N. J.), 173A, 593.

In this case the board of adjustment recommended to the council the passage, and the city council passed an ordinance amending the zoning ordinance so as to

transfer a single corner lot forty feet by 100 feet from a residential district to a business district, the same not abutting on a business district. The court held, annulling the ordinance as unreasonable and void for that reason said: "An attempt to wrench a single small lot from its environment and giving it a new rating that disturbs the tenor of the neighborhood should receive the close scrutiny of the courts lest the zoning enactments . . . be diverted from their true objectives."

In the case of Welton vs. Hamilton (Ill.) 176 N. E., 333, the court held that an ordinance giving to the board of zoning appeals power to modify provisions of the zoning ordinance was unconstitutional as being an improper delegation of the legislative power.

And so in the case at bar if the ordinance be deemed to give the board of adjustment power to do more than make the slight variance as to the application of the ordinance, such would be giving it all the power that the city commission itself has, and so would be unconstitutional as an improper delegation of power.

In the case of Zimmerman vs. O'Meara (Ia.), 245 N. W., 715, the board of adjustment had permitted the defendant to change a single dwelling house into a duplex house for two families, which was in contravention of the restrictions of the zoning ordinance.

The court enjoined such construction on the ground that such was not within the power of the board of adjustment. The court held that the variances permitted to be made by the board of adjustment were only such as were within the spirit of the ordinance.

In the case of Phillips vs. Board of Appeals (Mass.), 190 N. E., 601, the court held that the power to vary should be sparingly exercised, held that the fact that the owners were unable to rent or sell a large dwelling house in a residential district for residence purposes, was insufficient to sustain their action in allowing the use of the same for an undertaking establishment.

The court commented thus: "Business has not encroached upon this property so that it is no longer in a residential district, the neighbors are not in accord in approving this variation, but some stoutly oppose it. The property itself has never been used for business."

In the case of Young Women's Hebrew Association vs. Board of Standards (N. Y.), 194 N. E., 751, there had been some deterioration in the neighborhood, and it appeared that construction of an apartment house would not be at all profitable. Also that the property could not be made to serve a productive conforming use.

The board granted a purported variance of use to permit a gasoline service station.

The court of appeals at New York held that the board exceeded its authority, stating that "Such a theory of variation would in the long run defeat the general purpose of a zoning law."

See also to the same general tenor and effect:

Thayer vs. Board of Appeals of City of Hartford (Conn.) 157A, 273;

People vs. Walsh (N. Y.), 155 N. E., 575;

Levy vs. Board of Standards (N. Y.), 196 N. E., 284;

Heffernan vs. Zoning Board (R. I.), 144A, 674;
Appeal of Perrin (Pa.), 156A, 305.

In the latter case the court said that a gasoline filling station in a residential district is a nuisance regardless of a zoning ordinance. The court had previously made the same holding referring to the fact that the noise, fumes, blowing horns at all hours and other disturbances always accompanied such use.

The court further said "It is only necessary to show an attempt is being made to use property for such a business in a residential locality, and it will be prevented."

In Beckmann vs. Talbot, 300 N. Y. S., 6, the Board of Zoning Appeals under the guise of granting a variance, had permitted the petitioner to use the lot for gasoline storage. Such use was prohibited by the ordinance.

The court said: "The Board of Appeals therefore went beyond its statutory authority in its decision, and its action is wholly void," citing previous cases.

We invite the court's attention also to

Metzenbaum Law of Zoning, 255-257.

The author appears to agree upon authority cited, with our contention.

In the court below respondent cited and relied on

Freeman vs. Board of Adjustment (Mont.) 34P2, 534.

In that case the applicant sought to erect a grocery store in a restricted district very near a location where there had been a grocery store at the time of the pas-

sage of the zoning ordinance. The board of adjustment granted the application and both district and supreme court affirmed. A part of the block was already in the business district; a circumstance wholly lacking in the case at bar.

The court made little discussion of the question of power but said they found little merit in it. The court did hold that the power was not limited to slight variations, and the opinion seems to be somewhat against us, but the authorities cited by the court do not sustain the theory of the Montana court. It referred especially to Bradley vs. Board of Zoning Adjustment (Mass.), 150 N. E., 892, but failed to observe that the Massachusetts statute expressly gave to the zoning board the power to rezone and change boundaries of districts.

Respondent also relied on McCord vs. Ed. Bond etc. Co., (Ga.), 165 S. E., 590.

That case is not in point. There the ordinance unlike the provisions of our statute and of the Salt Lake City Ordinance *expressly* gave to the board of zoning appeals the right to permit the particular use.

4.

EVEN HAD THE BOARD HAD POWER, THE ORDER WAS CLEARLY ERRONEOUS

Defendant's own witnesses put the value of the land of interveners and plaintiff at from $20 to $25 per front foot. $25.25 is what Tracy Company paid for its land.

However, it wants $40 per front foot, and it may be worth more (such is often the case) if it can be promoted

to a prohibited use than it is for a non-prohibited use. But the company acquired the land long after the zoning ordinance was passed, and presumably with full knowledge: First, that the desired use was absolutely prohibited in a residential B-2 district and even in a commercial district would be prohibited because within 100 feet of a dwelling. Practically all the authorities held that their situation does not involve an unnecessary hardship within the purview of the law.

Assignment No. 1

This assignment is directed to 8th finding of fact.

Herein the court found that this particular vicinity is no longer an exclusive residential section. We do not claim that it is. The provisions of the ordinance as to Residential B-2 forbidding service stations, does permit a number of other things besides residences. The City Commission in its comprehensive plan especially provided that B-2 might have apartments and many other things that might not be in an exclusive residential section or district and contemplated that there would be many tenant residences in such a district, but it did not classify such users as reducing the classification to C District much less to Commercial District.

The court found that 50 per cent of the residential structures on Second South from Sixth East to Eighth East and Seventh East from First South to Second South were occupied by tenants. There was no evidence to that effect.

Mr. Kipp's evidence only goes to half of such area approximately. He only went about half a block in each direction from the intersection. But of course such finding is immaterial as to whether the property is occupied by tenants or owners so far as the rightfulness of the claim that it is a commercial district instead of a Residential B-2 district. It is well known that some of the most exclusive residential sections in all cities are occupied more or less by tenants, and that fact has never been regarded as reducing the area to a commercial district.

Assignment No. 3

In the 10th finding the court found that the Tracy tract cannot be sold for residence purposes. The evidence goes no further than to show it cannot be sold for $40 a foot for that purpose. The court further found therein the value would be confiscated. Even if that were true it bought with its eyes open and such a circumstance would not be legal ground for a variance but there is no evidence that it could not be sold for as much as it paid for it because Tracy's own witnesses say that the appellant's property, if vacant, would be worth $20 to $25 per front foot.

There is not a syllable of evidence showing or tending to show that the Tracy property is worth less than other real estate in the neighborhood for residence or other permitted uses, and even if it will not bring a return based on a $40 per foot valuation, such is not confiscation by any means.

Assignment No. 4

The finding with respect to beautifying the Tracy property with lawns, shrubbery and flowers has not a syllable of evidence to support it.

Assignment No. 5

The finding that the service station would not decrease the desirability or value of appellants' property is clearly contrary to the weight and preponderance of the evidence.

The fact that the City excluded service stations from certain districts is strong evidence of their undesirability. Besides this it is a matter of common knowledge that the prohibited uses are prohibited for the very reason that they are undesirable, and that they tend to decrease the residence value.

Even Walter Meeks, defendant's witness, testified that it would hurt the Halloran property.

Assignment No. 6

The court found that the service station would increase the desirability for residential purposes of the premises one block in each direction from the Tracy property. This is going pretty strong. There is not a word of evidence in support of such finding.

Assignment No. 7

In the 14th finding the court found that the Tracy parcel is not fitted for residential purposes. Not a syl-

lable of evidence appears in support of such finding, and it is contrary to all the evidence, and contrary to the physical facts which appear in the evidence without dispute. For more than three-fourths of a block on both sides of the street, north, east, south and west, the property is all residential except the Dickinson Store diagonally opposite. Of course, if the occupancy of residences by tenants destroys the character of the property as residence property and *ipso facto* reduces the classification down to "commercial district," then we may be wrong in the above statement.

It is respectfully submitted that the decree should be reversed.

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Attorney for Other Appellants.