2001

Marvin A. Melville; Renee B. Melville; Verna B. Melville; Eileen Dunyon; Albion Basin Development Co., Marvil Exploration Co., Canyonland Inc., Valley Investment Co., Intermountain Development, Inc. v. Salt Lake County, Ralph Y. McClure; William E. Dunn; Darrel Maynes; Lee Hoffman; Wilbur C. Parkinson; Harry L. Gibbons; Douglas H. Campbell; Gerald H. Barnes; Clayne J. Ricks; Frank Granato; Albion C. Mulcock; Millie Oberhansley Bernard; Gary Palmer; Graham W. Doxey; D. James Cannon; John Doe #!; John Doe #2; John Doe #3 : Brief of Appellant

Unknown.
Utah Supreme Court
Joseph S. Knowlton; Attorney for Plaintiffs and Appellants.

IN THE SUPREME COURT OF THE STATE OF UTAH

MARVIN A. MELVILLE; RENEE B. MELVILLE; VERNA B. MELVILLE; EILEEN DUNYON; ALBION BASIN DEVELOPMENT CO., a Utah corporation; MARVIL EXPLORATION CO., a Nevada corporation; CANYONLAND, INC., a Utah corporation; VALLEY INVESTMENT CO., a Utah corporation; and INTERMOUNTAIN DEVELOPMENT, INC., a Utah corporation,

Plaintiffs and Appellants,

- vs -

SALT LAKE COUNTY, a body politic; RALPH Y. McCLURE; WILLIAM E. DUNN; DARREL MAYNES; LEE HOFFMAN; WILBUR C. PARKINSON; HARRY L. GIBBONS; DOUGLAS H. CAMPBELL; GERALD H. BARNES; CLAYNE J. RICKS; FRANK GRANATO; ALBION C. MULCOCK; MILLIE OBERHANSLEY BERNARD; GARY PALMER; GRAHAM W. DOXEY; D. JAMES CANNON; JOHN DOE #1; JOHN DOE #2 and JOHN DOE #3;

Defendants and Respondents.

No. 13734

APPELLANTS' BRIEF

Appeals from the Order of the Third Judicial District Court,
Salt Lake County, State of Utah
The Honorable G. Hal Taylor, District Judge,
And Judgment of the District Court for the Third Judicial
District Salt Lake County, State of Utah
The Honorable Stewart M. Hanson, District Judge

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STATEMENT OF THE CASE

This is an action attacking the validity of Salt Lake County's zoning ordinance restricting the development of private property in the canyons East of metropolitan Salt Lake City to 50 acres for each private dwelling structure.

The action is divided into four causes in the alternative. The first in the nature of a constructive taking. The second for damages against the individuals on the basis of a conspiracy to deprive the plaintiffs of their properties without just compensation. The third, asking for declaratory judgment asking the ordinance to be declared illegal and unconstitutional; and the fourth, asking for writs of mandamus requiring the defendants to issue certain of the plaintiffs building permits. The District Court dismissed the first two causes of action before trial and dismissed the last two causes of action after trial.

STATEMENT OF FACTS

In 1965, the Salt Lake County Planning Commission passed a master plan for Salt Lake County. In that master plan they designated certain areas of the canyons to be parks and recreation and open-space areas (Ex., 15-P, Tr., p. 191).

In 1970 and 1971, the United States Forest Service negotiated with plaintiffs in an effort to acquire or trade properties to get them out of the canyon areas (Tr., pp. 613, 619, 756, 765, 766).

In 1971, some of the plaintiffs made plans to develop their properties in Albion Basin above Alta Utah by erecting multiple housing units thereon. In regard to this effort, they requested from the United States Forest Service a permit for the right of way for sewer. Said permit was temporarily denied on November 8, 1971 (Ex. 74-D, Tr., p. 538). One of the reasons given therein for the refusal to grant to plaintiffs a right of way was the desire of the

Forest Service to acquire the plaintiffs' properties in this area. Another of the reasons was that with the further development in Alta, there wouldn't be room in the sewer, The Forest Service owns almost all of Alta (Tr., p. 615). Plaintiffs' properties are outlined in Ex. 44-P and Ex. 67-D. The County put temporary regulations into effect on the 19th day of May, 1971, without publishing these temporary regulations (Tr., p. 527, Ex. 11-P). The County interprets commercial as being anything over a single family dwelling (Tr., p. 423).

On August 24, 1971, the County Planning Commission, after a helicopter trip with the United States Forest Service, met with the County Commission during a hearing on the proposed county zoning of the canyons. During the meeting, Commissioner McClure pointed out that before the County Commission could consider adopting an ordinance, a recommendation was needed from the Planning Commission. He stated his opinion that if the canyons are to be enjoyed by the residents, there must be restrictions before the ground is all developed for private use. (Ex. 42-P).

Notice of a public hearing in regard to the amending of the zoning map by reclassifying the canyons from unzoned to FR-50 was promulgated on the 30th of August, 1971 (Ex. 13-P). This Notice was published once in the Salt Lake Tribune on the 3rd day of September, 1971, and the hearing was held on the 4th day of October, 1971 (Ex. 14-P, Tr., p. 214). There was not an unzoned classification in the county zoning ordinance, nor did the Commission have a zoning map of the canyons (Tr., p. 395).

At the October 1971 meeting, it was discovered that the zoning ordinance did not provide for FR-50 zoning. So, the County Commission set November 10, 1971 as the time to have a hearing to establish FR-50 zoning and other regulations. The County Commission held that this October 6th hearing be taken under advisement until after the November 10th meeting (Ex. 14-P). The November 10th meeting was advertised in the Salt Lake Tribune once on the 11th day of October, 1971 (Tr., pp. 95, 128).

At the November 10, 1971 meeting (Ex. 12-P), Mr. Barnes, in the second full paragraph, pointed out changes made from the original proposal from the County Planning Commission. The County Commission adopted this change in the zoning, setting forth the FR-50 zone and other regulations including the naming of new districts for the canyons. This ordinance was passed on the 10th day of November, 1971 (Ex. 1-P). This ordinance was passed under the provisions of Sec. 17-15-1, Utah Code Annotated, 1953, as amended, to take effect immediately upon publication as being necessary for the immediate preservation of the peace, health and safety of the county (Ex. 1-P).

The ordinance amending the classification of the canyon from unzoned to FR-50 was passed on November 15, 1971, five days later, again to take effect immediately upon publication, for the preservation of the peace, health and safety of the County (Ex. 9-P).

The minutes of the November 15, 1971 meeting (Ex. 7-P), show that Commissioners McClure and Dunn expected this ordinance to be of a temporary nature, to last

six months. It is indicated from Ex. 7-P that the Commissioners did not consider FR-50 zoning to be reasonable and that they did not intend the FR-50 zoning to be permanent and they expected to change the zoning in May of 1972 so that they could complete a zoning plan.

There was some question in the minds of the County Commissioners McClure and Dunn as to whether or not there was a necessity for the immediate passage of the ordinance for the immediate peace, health and safety of the County (Tr., pp. 657, 558, 559).

On the 1st day of October, 1971 plaintiff Albion Basin Development Company made an application with the County for a building permit for the building of a fourplex and plaintiff Marvin Melville made an application for a building permit for a fourplex (Ex. 24-P, 25-P, 17-P and 20-P).

On the 29th of September, 1971, the Board of Health gave clearance for the building of plaintiff Melville's fourplex, and on October 1, 1971, they gave clearance for the Albion Basin fourplex (Ex. 19-P, 20-P, 22-P), (it appears that Ex. 20-P and Ex. 22-P are the same instrument). On the 4th day of November, all requirements for the permits were met except the zoning (Tr., p. 133).

On November 5, 1971, the County Health Department withdrew their prior approval (Ex. 21-P). The Board of Health's action was taken after conferences with the Zoning and Planning Department, and was on the ground of a bigger developmet than two-fourplexes (Tr., pp. 338, 339).

During the period of time the temporary regulations were in force, the County granted five building permits for residential construction without any reference to the Planning and Zoning Department (Ex. 37-P, 38-P, 39-P, 40-P, 41-P). Further, the County granted seven commercial building permits without zoning approval (Ex. 29-P, 30-P, 32-P, 34-P, 35-P, 36-P).

There are many public pronouncements and indications which would lead to the conclusion that the main purpose of the FR-50 zoning was to stop private development in the canyons and particularly plaintiffs' proposed development until such time as the properties could be acquired for public purposes (Ex. 16-P, 42-P, 15-P, Tr., pp. 345, 347, 459, 469, 470, 471, 473, 474, 477, 613, 619, 631, 639). The Forest Service told the County Commission that proposed developments were in the area of a proposed ski run (Tr., pp. 469, 470, 471), yet the Forest Service stated that there was not a formal application for a ski run (Tr., pp. 639, 640).

The zoning has diminished the value of plaintiffs Marvin A. Melville and Renee B. Melville and Albion Basin Development Company's properties in the Albion Basin above Alta. Albion Basin Development Company's four lots have been diminished in value from $75,200 to $17,500, or a diminution of $57,700; and on Melville Lots 1 and 2, from $62,400 to $8,750, or a diminution of $53,650; and on Lots 29 and 30, from $33,600 to $8,750, or a dimunition of $24,850; and on the 20 acres above the Albion Basin subdivision (Ex. 47-P), from $640,000 to $15,000, or a loss of $625,000 (Tr., pp. 299, 300, 301),

and the other parcels from the amounts as specified in the Complaint (Tr., pp. 119, 287, 138), to approximately $8,750 per individual parcel. There was no evidence in contradiction to the plaintiffs' appraisal witnesses.

Plaintiff Albion Basin's properties have water (Ex. 58-D), and storage for the water of approximately one-half million gallons (Tr., p. 259), Ex. 46-P). The Health Department has ultimately granted their permission for two-fourplexes (Ex. 22-P, 23-P). Plaintiffs Melville and Albion Basin have met all requirements for a building permit at the present time except zoning (Tr., pp. 136, 139, 140).

There is no engineering reason why plaintiffs' proposed development on their Albion Basin properties can't be carried out (Tr., pp. 333, 334). Plaintffs Albion Basin Development Company and Marvin Melville were only proposing to develop two-fourplexes, or eight units, and a public water system requires ten units or 50 or more people (Tr., p. 336). The State does not have regulations for private water systems (Tr., p. 367).

The Health Department's withdrawal of permission was predicated upon a larger development than two-fourplexes (Tr., p. 368). The County has no water rights in the canyon. The plaintiff Albion Basin Development Company, under the current health regulations for sewage, could develop as big a development as they desired as long as they had sufficient ground for absorbtion of the water and large enough vaults (Tr., pp. 373, 374, 383). Absorbtion in the Albion Basin properties was plenty adequate (Tr., p. 376). Relatively speaking, the public will

create more pollution than a private dwelling with waste disposal available (Tr., p. 377). The County had never referred any proposed development to the State for approval over nine units until plaintiffs' fourplexes were submitted (Tr., p. 383).

The Albion Basin subdivision was approved on the 10th day of December, 1962, and filed in the County Recorder's Office on January 24, 1963. The Salt Lake County Board of Health approved the subdivision on the 6th day of November, 1962 (Ex. 43-P).

On May 31, 1972, a hearing was held to amend the FR-50 zone to allow smaller parcel of useage and to provide other regulations in regard to that zoning (Ex. 69-D). The Notice of Publication and the Notice of Hearing was published one time on the 29th day of April, 1972, to amend the zoning as proposed on May 31, 1972, and the matter was taken under advisement (Ex. 6-P).

The amended ordinances were proposed on the 4th day of June, 1972 and were put into effect under the provision that the passage of the ordinance was necessary for the immediate peace, health and safety of the County and the inhabitants thereof. The ordinances were passed some 15 days after the hearing (Ex. 3-P, 4-P, 5-P).

The minutes of the meeting held June 14, 1972 do not set out the provisions of the ordinance as passed. The only reference in the minutes to the zoning ordinance is as follows: Commissioner Ralph Y. McClure made the motion that they approve the canyon zoning as submitted by the Planning Commission. The role was called author-

izing the Chairman of the Board to sign the ordinance and the Clerk to attest his signature and to have published in a newspaper of general circulation showing the vote to be: McClure, Aye; Blomquist, Aye; Dunn, Aye. This is found on the 10th page of Ex. 5-P.

It is the practice of the Commission to have all ordinances as passed set forth verbatim in the minutes (Tr., p. 529). The zoning maps of the Salt Lake County as promulgated by the Salt Lake City Commission and the County Planning Commission are not filed in the County Clerk's Office (Tr., p. 526). The zoning maps which were to be attached to the ordinance passed, being Ex. 3-P, which would be the most current zoning ordinance in the canyon, was not filed in the County Clerk's Office (Tr., p. 527). The temporary regulations as originally passed by the County Commission, being Ex. 11-P, was not published (Tr., p. 527). The zoning maps were not filed in the County Recorder's Office (Tr., pp. 465, 466, 467). The zoning plan was not submitted to the State Planning Coordinator (Tr., pp. 520, 521). There were no zoning districts created to cover the canyon areas (Tr., pp. 535, 544). There was no immediate necessity for the preservation of peace, health or safety of the County in passing the last zoning ordinance (Ex. 3-P, 4-P; Tr., p. 533).

On the 1st day of June, 1973, the District Court granted defendants' Motion to Dismiss Plaintiffs' First and Second Causes of Action with prejudice (Tr., p. 108).

ARGUMENT

POINT I

THE ZONING ORDINANCES ZONING THE CANYONS EAST OF SALT LAKE VALLEY FR-50 ARE ILLEGAL AND INVALID BECAUSE THE COUNTY FAILED TO COMPLY WITH THE PROVISIONS OF THE STATE ZONING STATUTES.

On the 19th day of May, 1971, the Salt Lake County Commission promulgated temporary regulations covering the canyons East of the Salt Lake Valley. Said temporary regulations were promulgated under the provisions of § 17-27-19, Utah Code Annotated, 1953, as amended, which provides as follows:

> "Promulgation of Temporary Regulations. The board of county commissioners of any county after appointment of a county or district planning commission and pending the completion by such commission of a zoning plan, may, where in the opinion of the board conditions require such action, promulgate by resolution without a public hearing regulations of a temporary nature, to be effective for a limited period only and in any event not to exceed six months, prohibiting or regulating in any part or all of the unincorporated territory of the county or district the erection, construction or alteration of any building or structure used or to be used for *any business, industrial or commercial purpose.*" (Emphasis added)

This provision provides that the Board of County Commissioners, pending the completion by the Planning Commission of a zoning plan, may promulgate the resolution without a public hearing, regulations of a temporary nature for a period not to exceed six months covering con-

struction for business, industrial or commercial purposes, and does not cover construction of a residential nature. These temporary regulations as passed by the County Commission pending the completion by the Planning Commission of a zoning plan, were put into effect without any notice to the public of any sort and without complying with the provisions of § 17-15-1, Utah Code Annotated, 1953, as amended, which requires that all ordinances prior to becoming effective, shall be published in a newspaper at least once.

The provisions of § 17-27-19, UCA, 1953, as amended, provides that the resolution can go into effect without a public hearing. However, when such regulations have, in essence, the full force and effect of an ordinance and effect the property rights of the citizens of the County, such regulations, in order to be effective, should be published as an ordinance. *McQuillin Municipal Corporation,* 3rd Ed., Vol. 5, § 15.08, p. 73:

> "Resolution is said to be only a less solemn or less usual form of an ordinance. 'It is an ordinance still if it is anything intended to regulate any of the affairs of the corporation', and if it is in substance and effect an ordinance."

(Id. § 15.03, P. 56:)

> "When ordinance is Necessary".

(Id. § 15.04, P. 58-60)

> "Illustrations . . . to regulate and control the manner of constructing dwelling houses and other buildings and structures . . ."

At the end of the six month period, the County Commission, being very anxious to promulgate new zoning in

the canyons, and not, at the time, having a zoning plan, passed two ordinances, one on November 10, 1971, and one on November 15, 1971. In these ordinances, the one which was passed November 10th provided for the promulgation of certain zoning classifications including FR-50 which is designated as Forestry Recreation Zones 50 and adds the names of several new planning districts. The ordinance as passed on the 15th of November, 1971 provides that the revised ordinance of Salt Lake County, 1966, as amended, is hereby amended to include all of the canyons and classifies them from unzoned to Forest Recreation Zoned, FR-50. These two ordinances were passed under the provisions of § 17-27-14 which provides for amending district and zoning resolution in force and provides for publishing Notice one time.

The Notice provided for the amendment of a zoning map whereby the zoning of all of the canyons East of Salt Lake would be reclassified from unzoned to FR-50. In actuality, at the time of said Notice, there was no zoning map covering the canyons East of Salt Lake County to amend, there was no planning district formed to cover the canyons East of Salt Lake County, nor was there any classification of FR-50. At the time of the passage of these ordinances, the canyons East of Salt Lake County had no zoning and what the County Commission was attempting to do by amending their zoning ordinances was to add a large part of the county to the zoning ordinance.

In order to add new territory to the zoning ordinance, the County has to comply with the provisions of § 17-27-10, UCA, 1953, as amended. This section provides that

prior to zoning all or any part of the County, a zoning plan should be certified and this includes any amendment to any previous zoning plan or any addition thereto. After receiving the certification of the zoning plan and before the adoption of any zoning resolution, a public hearing shall be held and notice shall be given by four publications. The provisions of § 17-27-10 which are the provisions that govern *new* zoning, were admittedly not complied with. The provisions of § 17-27-11 provide for the establishment of zoning districts. The last sentence of said section provides:

> "Zoning, unless county-wide, shall be limited to districts established by the board of county commissioners, either on petition as hereinbefore (hereinafter) provided or by direct action as hereinbefore provided."

It was admitted at the time the ordinances were passed that zoning in Salt Lake County was not county-wide. It was further admitted that districts covering the canyons East of Salt Lake County had not been established either by the Board of County Commissioners or on petition as provided in the zoning statutes.

Both of the sections referred to, 17-27-10 are couched in mandatory language and provide that the notice shall be given and in 17-27-11 shall be limited. Therefore, the ordinances as passed by Salt Lake County covering the canyons East of Salt Lake County are invalid and of no force and effect since Salt Lake has not complied with the provisions of § 17-27-10, UCA, 1953, as amended, which covers the promulgation of new zoning, nor the provisions of § 17-27-11 which provides for zoning districts.

> Metzenbaum, Law of Zoning, 2nd ed. Vol. 3, pp. 1891-1893. "Failure to comply with provisions of State Law governing publication of Notice of public hearing, invalidated zoning ordinance."

See *Tolman v. Salt Lake County,* 20 Ut. 2d 310; and *In Re: Phillip's Estate,* 86 Ut 358.

In addition to failing to comply with those two provisions, the County did not comply with the provisions of § 17-27-20, UCA, 1953, as amended, which provides for the submitting of any zoning plan to the State Planning Commission before finally adopting such plan. At the time of the passage of this provision, there was not a State Planning Commission in effect. However, thereafter the State Legislature established a State Planning Coordinator which would effectively cover any and all duties that might be required by a State Planning Commission.

It was the intent of the State Legislature that the State Planning people should have the right to submit their advice and criticism in respect to such planning prior to its finally being adopted by any county. Further, § 17-27-24, UCA, 1953, as amended, provides that:

> "Upon the adoption of any zoning ordinance or regulation, map or maps, the Board of County Commissioners shall file a certified copy of each in the office of the County Clerk and Recorder which copies shall be accessible to the public."

Salt Lake County has not and does not comply with the provisions of § 17-27-24, UCA, 1953, as amended. Therefore, it is next to impossible for the public to determine whether or not their properties are covered by any zoning

regulation map or maps. The provisions of § 17-27-24, UCA, 1953, as amended, are also couched in mandatory terms.

The County Commission of Salt Lake County, in May of 1972, after the promulgation of a zoning plan by zoning commission, amended the earlier ordinance which provided that all of the canyon area be zoned FR-50 to a less restrictive zoning in accordance with the amendment. This, again, was promulgated after only one notice of the zoning hearing and again failed to establish any zoning districts covering the canyons.

Clearly then, in the County's haste to zone the canyons where no zoning had been in force, instead of following the provisions of the statute covering new zoning, they attempted to do the same thing by an amendment to their current zoning. This is particularly interesting in that the County Commission themselves recognized the need for the zoning plan in passing the temporary regulation and, in essence, extended the temporary regulation for another six months from November 1971 to May of 1972 through the ploy of adopting the FR-50 zoning. The force and effect of the zoning, as promulgated, and the desire of the planners and the County Commission, is to be able to direct and control each individual proposed development as it is submitted, which, in effect, would be spot zoning.

In the original notice as provided for the promulgation of the amendment to the zoning map, it was thought that what the County Commission was trying to do was amend their official map in that there was not zoning

covering the canyons. The provisions of § 17-27-7, UCA, 1953, as amended, provides for publication of three successive weeks. However, this was not what the County Commission was attempting to do. What they were attempting to do was to add new zoning and provide a new zoning map covering areas of Salt Lake County which did not have a zoning map prior to the proposed zoning, nor did they have any classification covering the unzoned territory.

The provisions of the statute are clear and unambiguous and before the County is allowed to substantially effect property rights, they should comply with the provisions of the State Statutes and for failure to do so, such zoning ordinances are illegal.

Notice has been held to be a mandatory requirement in the passage of these restrictive ordinances.

POINT II

THE ZONING ORDINANCES COVERING THE CANYONS EAST OF THE SALT LAKE VALLEY ARE UNCONSTITUTIONAL AS BEING A TAKING OF PRIVATE PROPERTY FOR PUBLIC PURPOSES WITHOUT JUST COMPENSATION.

The FR-50 zoning ordinance covering all of the canyons East of Salt Lake County and its amendments are unconstitutional. The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval force, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 22, Article I of the Constitution of Utah provides:

> "Private property shall not be taken or damaged for public use without just compensation."

There have been many cases interpreting the provisions of the Constitution and the differentiation between the police power of the sovereign and the provisions of the Constitution requiring just compensation. It has been suggested that the Constitutional provisions in regard to the protection of private property evolved out of the common law and the expression of such common law by Sir William Blackstone:

> "So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any

> private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modeled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an execution of power, which the legislature indulges with caution, and which nothing but the legislature can perform." Robert Malcom Kerr, *The Commentaries on the Laws of England of Sir William Blackstone,* (1876) at 109-110.

In the present case, the County is trying to acquire the private property in the canyon areas for the use of its citizens by passing FR-50 zoning. The real purpose of the passage of the zoning is spelled out clearly by Commissioner Blomquist and by Commissioner McClure. Commissioner McClure spells out the intention, first at the meeting of the Planning Commission on August 24, 1971. Further, the minutes of the November 15th Commission meeting points out why Commissioner McClure is voting the way he is. (Ex. 7-P). Commissioner Blomquist spells out in great detail the ultimate purpose of the FR-50 zoning and the desire and need felt by the Salt Lake County Commission to restrict development until such time as

the United States Government could acquire the property through the offices of the Forest Service even though there is no question that the Forest Service did not have sufficient funds to carry out the acquisition program nor has Congress appropriated them (Tr., pp. 469-477). The passing of zoning ordinances for the purpose of delaying development until the public acquires the property or for the development of public facilities, is clearly a taking of the property in the constitutional sense and makes the ordinances unconstitutional.

2 *NICHOLS ON EMINENT DOMAIN* § 6.3 (3rd ed. 1970) states:

> "The weight of authority . . . is not in support of this strict construction (of taking). The modern, prevailing view is that any substantial interference with private property which destroys or lessens its value (or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed) is, in fact and in law, a 'taking' in the constitutional sense, to the extent of damages suffered, even though the title and possession of the owner remains undisturbed."

Certainly under this concept, the restricting of the use of plaintiffs' property to one house per fifty acres, particularly when the property is less than fifty acres, is a restriction that amounts to a taking. In this regard see *United States v. Lynch,* 188 U.S. 455 (1903); *United States v. 677.50 Acres of Land in Marion County, Kan.,* 239 F. Supp. 318 (D.C. Kan. 1965), flood control dams backing water over private property was held to be a taking. *United States v. General Motors Corp.,* 323 U.S. 373. In *Robertson v. City of Salem,* 191 F. Supp. 604, the city zoning of property

close to the State Capitol to prevent development so property could be acquired in future by the State also held to be a taking under the Federal Constitution. See also *Miller v. City of Beaver Falls,* 82 A(2d) 34, stopping development for future public park held invalid; *Peacock v. County of Sacramento,* 271 Cal. App. 2d 845; *Kissinger v. City of Los Angeles,* 327 Pac. 10, zoning for airport development held invalid; *Sanderson v. Wittmar,* 162 N.W. 494; *Chase v. City of Glen Cove,* 246 N.Y.S. 2d 975; *Greenhills Home Owners Corp. v. Village of Greenhills,* 202 N.E. 2d 192; and *Appeal of Kit-Mar Builders, Inc.,* 268 A(2d) 765, zoning lots no less than two acres along roads and no less than three acres in the interior held unconstitutional.

The question evolves itself around the idea, is the protection of the property for the use of the residents of the County and for recreational purposes a legitimate function of the zoning?

The landmark United States Supreme Court case that deals with this question of police power or taking was the case of *Pennsylvania Coal v. Mahon,* 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922). This case dealt with legislation dealing with mine subsidence which dealt with two Pennsylvania State Statutes known as the Fowler Act and the Kohler Act. The Fowler Act, establishing the Pennsylvania State Anthracite Mine-Cave Commission, and the Kohler Act, which prohibited the mining of coal so as to cause the subsidence of any building, structure or transportation route within the limits of a designated class of municipalities. The Act made it unlawful so to mine anthracite coal as to cause the caving-in, collapse or subsidence of:

"(a) Any public building or any structure customarily used by the public as a place of resort, assemblage or amusement, including, but not being limited to, churches, schools, hospitals, theatres, hotels, and railroad stations.

(b) Any street, road, bridge or other public passageway dedicated to public use or habitually used by the public.

(c) Any tract, roadbed, right of way, pipe, conduit, wire or other facility used in the service of the public by any municipal corporation or public service company as defined by the Public Service Company law.

(d) Any dwelling or other structure used as a human habitation or any factory, store, or other industrial or mercantile establishment in which human labor is employed.

(e) Any cemetery or public burial ground."

The Supreme Court of Pennsylvania declared the Kohler Act constitutional and specifically held the Kohler Act a valid exercise of the state's police power. The coal company appealed to the United States Supreme Court. The opinion was written by Justice Holmes. Holmes chose to concentrate on the taking claim and framed the issue an exercise of the police power to protect the public health and safety against an ever-growing hazard, or was the Act merely a way of getting the coal company's property without paying for it. The question was whether the Kohler Act tried to accomplish through police power regulation what could only be accomplished by eminent domain.

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it is always open to interested parties to contend that the legislature has gone beyond its constitutional power."

"It is our opinion that the Act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal where streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, 'For practical purposes, the right to coal consists in the right to mine it.' Commonwealth v. Clearview Coal Company, 256 Pa. St. 328, 331. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. Thus we think we are warranted in assuming the statute does . . ."

"The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

This Pennslyvania coal case appears to be the case that has set the perimeters for all subsequent taking cases and the Supreme Court has rarely taken cases involving

the regulation of land since the handing down of this decision. It appears that the Supreme Court prefers to leave these subjects to the State Courts.

In the present case, one piece of property in particular has been reduced in value from $640,000 to $15,000 or a dimunition of $625,000, solely related to the zoning ordinance. When a piece of property has its highest and best use for a multiple dwelling and then is diminished to value to one house per 50 acres in order to protect the canyons for public use, surely this goes beyond the rights of the legislature and is in effect, an exercise of the eminent domain.

In the case of *Baker v. Planning Board of Farmington,* 353 Mass. 141, 228 N.E. 2d 831 (1967), the land owned by Mrs. Baker consisted of eleven acres of land which had come to be surrounded by subdivisions of the town of Farmington. The town had held an easement for a ditch to conduct storm waters across the property since 1934 which had originally been sufficient to accommodate all runoff. However, as the area was developed, the ditch became inadequate, and during heavy rains and thaws the property served as a retention area for flood waters.

Mrs. Baker's proposed subdivision was disapproved because the creation of the subdivision would deprive the town of the retention basin and as a result, overtax the downstream drainage facilities. The Court cited the finding of a master in the case:

> "The board had but a single reason for disapproving the . . . (definitive) plan, namely, the extra cost to the town of handling the sewage and surface drainage produced by the subdivision."

Speaking to the taking issue, it went on:

> "Obviously a planning board may not exercise its authority to disapprove a plan that a town may continue to use the owner's land as a water storage area and thereby deprive the owner of reasonable use of it."

As this case demonstrates, when the regulation appears to be designated to secure land for a public facility such as a retention basin the Courts are likely to feel that condemnation is the only appropriate technique.

In the case of *MacGibbon v. Board of Appeals of Duxbury,* 356 Mass. 696, 255 N.E. 2nd 289 (1969), this case involved the interpretation of the zoning by-law adopted.

> "For the purpose of protecting and preserving from despoliation the natural features and resources of the town, such as salt marshes, wetlands, brooks and ponds. No obstruction of streams or tidal rivers and no excavation or filling of any marsh, wetland or bog shall be done without proper authorization by a special permit issued by the Board of Appeals."

The town board had repeatedly denied an application by Mr. MacGibbon to fill portions of estuarine wetland which he owned. The Court in MacGibbon read Massachusetts zoning enabling legislation narrowly to prohibit such action by towns in the state:

> "The preservation of privately owned land in its natural, unspoiled state for the enjoyment and benefit of the public by preventing the owner from using it for any practical purpose is not within the scope and limits of any power or authority delegated to municipalities under the Zoning Enabling Act."

Professor Van Alstyne, in an excellent article written for the Southern California Law Review, "Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria," 44 *So. Cal. L. Rev. 1,* citing the general principal says:

> "A regulation which restricts the use of private property solely to governmental functions, such as use for public schools, public parks, or public housing as a prelude to later eminent domain proceedings, is uniformly regarded as an unconstitutional infringement of private property rights. Even in the absence of a limitation of public activities, highly restrictive use regulations, imposed for the purpose of preventing private developments that would increase the cost of planned future acquisitions of the subject property for governmental purposes, are equally invalid."

To determine what the County has in mind for plaintiffs' properties, all one has to do is look at the master plan as set out in Ex. 15-P which shows some of plaintiffs' properties designated for use as park, recreation and open-spaces and Ex. 16-P, the general plan for Alta in Little Cottonwood Canyon which shows some of plaintiffs' properties planned for proposed public acquisition for recreation. Commissioner McClure in the minutes of the November 15, 1971 meeting (Ex. 7-P) states:

> "First and foremost, the canyons must be protected for public use. The general public must be allowed an opportunity to reach and see the beauty of the canyons. Continued unrestricted private development will reduce the public recreational value of the canyons."

Chief planner Campbell (Tr., p. 233) states:

> "It (the FR-50 zone) was intended to accomplish the purpose of the master plan. The zoning was in FR-50 which was to create recreational, maintain a recreational area."

Commissioner Blomquist (Tr., pp. 469-477) states without hesitation or reservation that the purpose of the FR-50 zoning was to block private development (and in particular plaintiffs' private development) for public purposes. In fact, there is really no contradiction to what the main purpose of the FR-50 zoning was by anyone at the Trial. The purpose as of the zoning is a legal conclusion and not a finding of fact.

The County goes to a great deal of trouble to try and justify its restrictive zoning on the basis of its need to protect the water supply. The County has no vested interest in the water, the water being owned by Salt Lake City. Further, the State Legislation has provided legislation to allow the City to have jurisdiction over its watershed which allows the City to enact ordinances to prevent pollution and contamination and to provide for permits for the construction and maintenance of any closet, privy, outhouse or urinal. This provision can be found in § 10-8-15, UCA, 1953, as amended.

The plaintiffs have met all requirements as provided by the Salt Lake County and Salt Lake City Board of Health in regard to any question of pollution and even though water protection is a legitimate exercise of the police power, the private property owners cannot be expected to carry the full burden for such protection.

In *Pittsburg Coal Company v. Sanitary Water Board,* 4 Pa. Cmwlth 407, 286 A. 2d 459 (1972), a majority of the Pennsylvania Commonwealth Court found that a regulation requiring treatment of mine waste waters before discharge to be a taking of the operator's property rights. The mine was operated at the lowest point in the basin's seam of coal and was beneath some 100 to 350 billion gallons of polluted waters in abandoned mines higher on the sloping coal seam. Three natural out-flows totaled 17 million gallons a day.

The mine operator argued that of the 3.44 million gallons of water discharged which it pumped daily from its mine, only 1.27 million originated from its mine, the rest coming through breaches in the barrier between the mine and the huge adjoining pool. Therefore, it proposed to treat only its 1.27 million gallons under the Pennsylvania Pure Streams Law. Faced with an order to cease operations if it did not treat its discharge, it appealed to the Courts relying heavily on the constitutional prohibition against taking property without compensation.

The majority of the judges sitting found:

> "No matter how meritorious the desired results may be, the use and enjoyment of property by its owner should not be burdened or impaired in the

> name of public health, safety or welfare absent a rational relationship between the evil sought to be cured and the use of property as contributing to the evil. It is at this point that curing the evil should be assumed as a direct responsibility of government and not placed upon the property owner in the guise of an exercise of the police power."

In cases of this nature, there has to be a rational relationship between the evils sought to be cured and the use of property as contributing to the evil. There is no evidence that the restriction of the use of property to one house per 50 acres is going to affect the quality of the water or any other legitimate area of the police power regulation. Particularly this is so if the reason for the restriction is to allow the use of the private properties by the public. The concept of restricting private property development so that the public use can be exploited is contrary to any idea of protecting watersheds.

The Albion Basin properties of plaintiffs', even at their most maximum use, would only bring 200 to 300 people into the area. However, with the development of a ski lift, the Forest Service proposes to bring into the area thousands. Common sense would indicate that thousands of the public would pollute the water supply more than hundreds of private dwellers wherein private dwellers provide for the elimination of their own waste.

It is hard to understand why the County feels like it has a right to restrict the use of private property for the benefit of its citizens for forestry and recreation purposes. What use does the owner have of his property as forest or public recreation?

Ordinarily, we wouldn't be concerned with what purpose the legislative body had in passing legislation. However, when their purpose is clear and is spelled out, then it becomes a legitimate area of inquiry by the Courts. Salt Lake County and the United States Forest Service have made no bones about their desire to acquire the private property in the canyon areas for public purposes and have spelled out that desire in many conferences and meetings and as the head of the Planning Department of Salt Lake County, Mr. Douglas Campbell spelled out in his testimony (Tr., pp. 347, 348), the Forest Service and County have a community of interest in this area.

See Gibbons and Reed Co. v. North Salt Lake, 19 Ut. (2d) 329:

> "Although the wisdom and the nature of zoning power has been left in the discretion of the City authorities, the Courts may still intervene and set aside their action if said ordinances are confiscatory, discriminatory, or unreasonable."

Clary v. Eatonville, 124 A.(2d) 54:

> "While motives of the legislative body may not be subject to inquiry in determining validity of legislation, there is a well recognized exception to the rule where motivation is disclosed on the face of the act, assimilable to declaration of legislative interest, or as a part of legislative proceedings, and where Mayor of Village read statement in presence of members of board of trustees as exposition of zoning action about to be taken by the board, such statement was properly admissible in weighing validity of board's action."

DeSena v. Gulder, 265 N.Y.S. (2d) 239:

> "Rule which prohibits in case of attack, an ordinance which is valid on its face and inquiry into

legislative motivation, absent showing of fraud, personal interest, or corruption, does not bar judicial inquiry into purpose of zoning ordinance."

Mugler v. Kansas, 123 U.S. 661:

"The Courts are not bound by mere forms nor are they to be misled by mere pretenses, they are at liberty — indeed are under a solemn duty — to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the Courts to so adjudge, and thereby give effect to the Constitution."

Also see *Wital Corp. v. Denville,* N. J. 225 A(2d) 139.

There is also a question as to whether or not the ordinance is unconstitutional as an abridgment of the plaintiffs' right to contract. The FR-50 zoning restricts the development of properties to one lot per 50 acres which means that there is no way that the owners of the property could distribute or alienate their property for parcels less than 50 acres. You would need 100 acres to subdivide the property into two lots. What happens if someone were to die who owned acreage in the canyon zoned FR-50? How is it going to be divided? How can he transfer the property to sellers or heirs?

Further, the FR-50 zoning is discriminatory. If a person needs 50 acres to build a cabin in the canyons, only the rich will have the opportunity of having second homes in the canyon areas.

There is absolutely no showing on the part of the County that there is any relationship between the need to restrict the use to 50 acres per lot to any evil that might need to be corrected under the police power.

POINT III

THE ZONING AND ENFORCEMENT OF THE BUILDING REGULATIONS ON PROPERTIES IN THE CANYONS EAST OF THE SALT LAKE VALLEY ARE ARBITRARY, CAPRICIOUS, AND UNREASONABLE.

After the passage of the temporary regulations, but prior to the passage of the FR-50 zoning in November of 1971, some of the plaintiffs made application for a building permit for two-fourplexes in a subdivision which had been approved both as to water and sewer disposal and all other factors some nine years prior to the building permit application. The Board of Health granted their approval for the two-fourplex units and upon being informed by the Zoning Department about the fact there was no zoning and the plaintiffs involved were proposing a larger development than two-fourplexes, they withdrew their prior approval. In fact, plaintiffs were not proposing anything but applications for building permits for two-fourplexes. The County considers any building over a single residence to be commercial and, as such, under the provisions of the temporary regulations, even though the statute, § 17-27-19, UCA, 1953, as amended, provides for restriction only on permits for any business, industrial or commercial purposes. The Building Enforcement Division in interpreting the temporary regulations, granted five building permits for residential permits in the same area

as plaintiffs' Albion Basin properties, and seven commercial permits. Even though the temporary regulations provides that all applications for permits for commercial purposes should be reviewed by zoning. Yet, the Building Enforcement Division refused to grant to plaintiffs, residential permits.

The Court has just recently ruled on a question similar in *Contract Funding Mortgage Exchange, a Utah corporation v. Darrell Maynes and Salt Lake County,* #13608, which opinion was filed November 4, 1974. The withholding of the permits was done for the purpose of delaying plaintiffs' construction until after the zoning ordinance was passed.

A reading of the ordinance as found in Section VIII, Title 22, Zoning Ordinance (Ex. 1-P) shows the following:

> "Site Plan approval for Single Family Dwellings: In order to determine compliance with this ordinance and to promote orderly and harmonious development of canyon areas, site plans for single family dwellings shall be approved by the Zoning Administrator prior to issuance of any building permits. Applications for site plan approval shall be accompanied by a site plan, elevations and transverse and longitudinal sections showing the relationship of the construction to the natural grade and finished grade. Drawings show proposed signs, landscaping, exterior material, color schedules and all other information necessary to enable the Zoning Administrator to make the findings as set forth above. Applications may be approved as submitted, approved subject to conditions, or disapproved. Actions of the Zoning Administrator shall be subject to appeal to the Planning Commission."

This shows the degree of control that is placed in the hands of the Zoning Administrator. There is no indication as to what landscapes, exterior materials or color schedules might be acceptable, all this to be left to the asthetic judgment of the Zoning Administrator. This section is so broad as to be incapable of understanding and places in the hands of the Zoning Administrator too much arbitrary power into determining what would be acceptable.

POINT IV

THE COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AND SECOND CAUSES OF ACTION.

If you assumed all of the fatcs as alleged in plaintiffs' Complaint in regard to their First and Second Causes of Action to be true, there is no question under the arguments as set forth in argument two that the defendants' actions amount to a taking of the private property and, as such, the plaintiffs should be reimbursed for such taking.

There is no question but what plaintiffs cannot recover on both the First and Third Causes of Action, and if the Statute is declared unconstitutional, then plaintiffs would be reinstated to all their rights in the use of their properies. However, these causes of action were pleaded in the alternative as is provided in the rules, and this option should be left with the plaintiffs.

The Second Cause of Action is founded upon the actions of the individuals and alleges a conspiracy to deprive the plaintiffs of the value of their property in violation of

their constitutional rights. Such allegations consist of purposely devaluing plaintiffs' properties in order for the governmental entities to acquire said properties at a future date, all actions being outside the scope of their employment. The facts as alleged are that the employees of the County and the employees of the Federal Government have met together and worked out a plan whereby all of the development on plaintiffs' properties would be stopped with the intent that either the Federal Government or the Salt Lake County would acquire the property at a future time at a lesser cost, or would not have to acquire such property. These facts, as alleged, fit the definition of criminal conspiracy which is defined under § 76-12-1, UCA, 1953, as amended:

> "If two or more persons conspire: (4) to cheat and defraud any person of any property by any means which are in themselves criminal, or by any means which if executed would amount to a cheat, or to the obtaining of money or property by false pretenses . . ."

Certainly the acts of conspiracy to deprive the plaintiffs of the value of their property do not fit in the confines of the defined duties of the defendants in their employment. In *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, the question of when and how actions may be maintained against the employees of the Federal Government and, I would assume this would apply to the employees of the County Government, is gone into in great depth. In that matter the Supreme Court said:

> "If an action is such to create a personal liability whether sounding in tort or in contract, the fact that the defendant, as an officer, is an instrumen-

> tality of the sovereign does not forbid a Court from taking jurisdiction over a suit against him, since the principle that an agent is liable for his own torts applies to acts of public officers or public instrumentalities.
>
> A suit for specific relief against a public officer is not a suit against the sovereign, where the suit is directed against action which the officer purports to take as an individual and not as an official, or which is beyond statutory limitations of his powers, or is taken under statute or order claimed unconstitutional."

In the Larson case, the question was not so much whether or not you could sue the agent in damages, but whether or not you could bring an injunctive action against him. There, the Court ruled that if the damages sought to be recovered were against the individual and not the government, then the suit could be maintained and the Court will further maintain an action enjoining the agents from acting where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions, the officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. The second type of case is that in which the statute or ordinance conferring power on the officer to take action in the sovereign's name is claimed to be unconstitutional. Then there is a right of action against the individual.

In the present circumstances, the actions alleged are not only illegal as per the criminal code and tortious on that score, but are in violation of the plaintiffs' constitutional rights. Since the plaintiffs are not seeking to re-

cover in the second cause of action against the sovereign, i.e., the County, but are only seeking to recover against the individuals for the tortious acts alleged, and since the agents and officers are acting outside the scope of their authority in violation of the plaintiffs' constitutional rights, there is ample ground for granting damages against said individuals.

The main theory is not that the defendants passed an ordinance, but that they met together to deprive plaintiffs of the value of their property and whether or not the defendants were employees of some governmental body or not would make no difference, for if any individual conspired to defraud the plaintiffs of their property, the plaintiffs would have an action to recover for such conduct. See also *Malone v. Bowdoin,* 369 U.S. 643.

POINT V

THERE IS NO NEED TO GO TO THE BOARD OF ADJUSTMENT FOR ADMINISTRATIVE RELIEF IF THE RELIEF BEING SOUGHT IS A TESTING OF THE VALIDITY OF THE ORDINANCE THAT WOULD GIVE THE JURISDICTION.

The provisions of § 17-27-15, UCA, 1953, as amended, provide:

> "Any zoning resolution of the board of county commissioners may provide that the board of adjustment may in appropriate cases and subject to appropriate principles, standards, rules, conditions and safeguards set forth in the zoning resolution, make special exceptions to the terms of the *zoning regulations* in harmony with their general purpose

and intent. The commissioners may also authorize the board of adjustment to interpret the zoning maps and pass upon disputed questions of lot lines or district boundary lines or similar questions, as they may arise in the administration of the zoning regulations." (Emphasis Added).

The Board of Adjustment has jurisdiction in regard to zoning matters, and when there is no zoning, there is no need to refer to the Board of Adjustment. Certainly the Board of Adjustment is not in a position to rule on the validity of the zoning ordinance giving them jurisdiction. These plaintiffs are not seeking to find relief from any determination of the zoning ordinance. They are seeking to have the zoning ordinance declared invalid as being completely illegal and unconstitutional. The Board of Adjustment has no authority or jurisdiction to make any such interpretation of the zoning ordinance they might be trying to rule on. The rule that the party is required to exhaust all administrative remedies does not apply when the party is questioning the validity of the ordinance that gives the administrative body jurisdiction.

CONCLUSION

Defendant Salt Lake County and its officers and employees, in the Fall of 1971, passed FR-50 zoning on all of the canyons East of Salt Lake County. This zoning was new zoning and not an amendment of any existing zoning ordinance. The defendants admittedly passed the canyon zoning ordinance which provided for the requirement of 50 acres per residential lot, without following the requirements of the State Zoning Statute. Further, the County

has not filed their zoning maps with the Salt Lake County Clerk's Office nor the Salt Lake County Recorder's Office, nor have they given the state planning people a chance to review their zoning as required by Statute.

The zoning ordinance was passed without the required notice given for new zoning ordinances and later in the Spring of 1972, after a plan was developed, they did not pass the new zoning ordinance, but amended the faulty ordinance passed in the Fall, again without forming zoning districts. So, clearly, the FR-50 zoning, as passed in the Fall of 1971, is invalid as not complying with the Statute's original requirements and the amendment to the invalid ordinance would also be invalid.

The purpose of the FR-50 zoning was to acquire the private property for recreational purposes for the public and to stop development until the private property could be acquired by a public agency and, as such, the zoning was unconstitutional. The purpose of the zoning is to be determined by the facts in the matter and is a legal conclusion.

There is no relationship shown by the County between the necessity of 50 acres per lot and any evil that would need to be cured under the police power of the sovereign. The requirement of 50 acres per residential lot is unreasonable and diminishes the value of the property to an extent that it leaves the owner of the property with no reasonable use for his property and amounts to a taking. Further, the limitation of 50 acres per lot restricts

the property owner's right to distribute or alienate his property to the extent of its being a violation of his right to contract under the Constitution.

The defendants arbitrarily, capriciously and unreasonably denied to two of the plaintiffs building permits on an approved subdivision for two-fourplexes, such denial being for the purpose of effecting the FR-50 zoning prior to those plaintiffs getting their building started, and those plaintiffs are entitled to a writ of mandamus requiring the Building Enforcement Department of the Salt Lake County to issue their building permits as applied for. Therefore, the Trial Court's ruling should be reversed and the current canyon zoning should be declared illegal and unconstitutional and the County should be required to issue the building permits as applied for.

Respectfully submitted,

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