


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 #1; John Doe #2; John Doe #3 : Brief of Appellant. Brief of Respondent

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Utah Supreme Court  
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### Recommended Citation

Brief of Respondent, 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 #1; John Doe #2; John Doe #3 : Brief of Appellant, No. 13734.00 (Utah Supreme Court, 2001).  
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# IN THE SUPREME COURT OF THE STATE OF UTAH

MARVIN A. MELVILLE; RENEE B. MELVILLE; VERA 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. McCCLURE; 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.**

BRIGHAM YOUNG UNIVERSITY  
Reuben Clark Law School

Case No.  
13734

## Brief of Defendants - Respondents

Salt Lake County, et al.

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

# FILED

JAN 27 1975

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**Defendants and Respondents.**

## Brief of Defendants - Respondents

Salt Lake County, et al.

### NATURE OF THE CASE

This is an action attacking the zone classification by Salt Lake County of appellants' property located



in the canyons east of the Salt Lake Valley. The lawsuit is divided into four causes of action. The first alleges that the zoning classification constitutes a taking without compensation. The second alleges a conspiracy among numerous County officials to deprive appellants of the use of their property. The third is in the form of a declaratory action seeking to invalidate zoning classification of appellants' property. The fourth seeks a writ of mandamus requiring respondents to issue building permits to certain of the appellants.

## DISPOSITION IN LOWER COURT

The appellants' First and Second Causes of Action were dismissed by the Honorable G. Hal Taylor prior to trial. Appellants' Third and Fourth Causes of Action were dismissed by the Honorable Stewart M. Hanson after a six-day trial on the merits. The court held the zoning classification of appellants' property was reasonable and not arbitrary or capricious and did not constitute a taking under the Utah or United States Constitution. The court found that appellants had failed to exhaust their administrative remedies prior to bringing this lawsuit by appealing the decision of Salt Lake County not to issue building permits to appellants to the Salt Lake County Board of Adjustment. The court further found that appellants had not met the requirements for a building permit.

## RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the lower court's decision.

## STATEMENT OF FACTS

In May of 1971, the Salt Lake County Commission enacted a temporary regulation which required approval of the Salt Lake County Planning Commission prior to the issuance of a building permit for commercial or industrial developments in the canyons east of Salt Lake Valley. Ex. P-11. This regulation was enacted by the Salt Lake County Commission pursuant to the power granted the County under Utah Code Annotated 17-27-19. Mr. Jerry Barnes, a member of the Planning staff for Salt Lake County, testified the regulation was put into effect to control development in the canyons until studies could be made to develop a comprehensive zoning plan for the canyon areas. R-455. Ex. D-4.

On November 10, 1971 the Salt Lake County Commission zoned the canyons FR-50 pursuant to the application and recommendation of the Salt Lake County Planning Commission. Ex. P-1, P-9, P-14. The FR zoning permits single family dwellings, agriculture and accessory uses as permitted uses. Ten other uses are permitted in the FR zone upon the owner of property obtaining a conditional use permit from the Salt Lake County Planning Commission. The conditional uses al-

lowed in the FR zone include, among others, dwelling groups, planned unit developments, commercial and private recreation, logging and mineral extraction. Ex. D-64, Section 22-9a. The FR-50 classification requires a minimum of 50 acres for development. However, a single family dwelling may be built on any parcel of land under the minimum acreage requirement existing at the time the zoning went into effect. Ex. 64, Section 22-2-2. At the time the FR-50 zoning was implemented in November of 1971, the studies with regard to each specific piece of property in the canyon were not completed and the County Commission indicated at that time that the zoning would be changed for areas which were appropriate for higher density development when the canyon studies were completed. Ex. P-14. On June 14 of 1972, zoning classification for many areas of the canyons was amended. Ex. P-3.

Appellants are owners of certain patented mining claims in the canyon area, particularly Little Cottonwood Canyon. On October 1, 1971, certain of the appellants applied for building permits to build two fourplex condominiums on their property located in the Albion Basin area above the city of Alta in Little Cottonwood Canyon. Ex. P-24, Ex. P-25. These two fourplexes were the initial phase of an extensive condominium development in the area. Ex. P-26, R-288-289. Appellants were not issued a building permit at that time for their condominium development because they failed to obtain the approval of the Planning Commission for building permits under the temporary regu-

lations in effect at that time in the canyons and because they did not have an adequate water supply acceptable to the City-County Board of Health. Finding No. 10. In June of 1972, much of appellants' property in the Albion Basin area was rezoned from FR-50 to FR-1. Ex. D-66, Ex. P-3. The FR-1 classification requires a minimum of one acre for development.

On March 25, 1973, appellants filed their lawsuit attacking the canyon zoning.

## POINT I

### THE ZONING ORDINANCE ZONING THE CANYONS EAST OF SALT LAKE VALLEY WAS VALIDLY ENACTED BY THE SALT LAKE COUNTY COMMISSION.

Utah Code Annotated 17-27-9 sets forth the powers and duties of the Planning Commission with regard to making a zoning plan for the unincorporated territory within the County.

"The county planning commission of any county may, and upon the order of the board of county commissioners in any county having a county planning commission, shall make a zoning plan or plans for zoning all or any part of the incorporated territory within such county, including both the full text of the zoning resolution or resolutions and the maps, in representing the recommendations of the commission for the

regulation by districts or zones of the location, heights, bulk, and sizes of buildings and other structures, percentage of lot which may be occupied, the size of lots, courts and other open spaces . . .”

Section 17-27-10 requires the Planning Commission to certify the plan to the County Commission and requires the County Commission to hold a hearing thereon prior to the adoption of any zoning regulation. Under this section notice of such hearing must be published four times in a newspaper of general circulation at least 30 days prior to such hearing. Section 17-27-11 sets forth the manner in which zoning districts and regulations are enacted. Section 17-27-14 grants the power to the county commissioners to amend the districts “or any other provisions of the zoning resolution.” Under this section, prior to such amendment, the Commission must hold a hearing, notice of which must be published one time in a newspaper of general circulation at least 30 days prior to the time of the hearing.

Originally, zoning in the county was done by districts, each district containing a separate text and maps. However, since the adoption of the uniform zoning ordinance for Salt Lake County in 1966, regulation of location, heights, bulk and size of buildings and other structures, etc., has been done by zones. A separate text is not enacted for each district. Ex. P-63. The uniform zoning ordinance also contains general provisions such as a parking provision which

the County has applied to all unincorporated territory in the county since the adoption of the uniform text. Ex. P-63, Section 22-1 through 5; 22-31, 22-32 R-233. The County has taken the position that since the uniform ordinance applies to all unincorporated territory in Salt Lake County, zoning of additional territory within the unincorporated areas of the county is not original zoning but rather, is an amendment to the existing text and ordinance and is covered by the notice requirements of 17-27-14 and not by the requirements of 17-27-10. This is the method followed by the County in enacting the canyon zoning and much of the zoning elsewhere in the County. R-397-404. The zoning plan certified to the County Commission by the Planning Commission is contained in the text and map for the FR zoning in the canyons and meets the requirements of Utah Code Annotated 17-27-9 for a zoning plan. *Damick v. Planning and Zoning Comm.*, 256 A.2d 428 (1969); *Hawkins v. City of Richmond*, 286 N.E.2d 682 (1972); *Higginbotham v. City of the Village*, 361 P.2d 191 (Okla. 1961); *Cleaver v. Board of Adjustment*, 414 Pa. 367, 200 A.2d 408 (1964).

The objection raised by appellants is that the notice of the hearing was published only once instead of four times. This objection is not based on any claim of prejudice against the appellants or lack of opportunity to be heard. Mr. Marvin Melville, who represented appellants in this action, testified that all of the appellants had actual notice of the hearings on the canyon zoning. R-292, Finding of Fact No. 7. Mr. Knowlton and Mr. Mel-

ville were both present and participated in the hearing on the canyon zoning held on October 6, 1971, for which appellants claim the notice requirements were not met. Ex. P-14. Four to five hundred people attended this hearing. Ex. P-6. Nowhere during that hearing or in the trial below did appellants claim any prejudice or lack of opportunity to be heard on the basis of the notice requirements followed by the County.

In *Naylor v. Salt Lake City*, 17 U.2d 300, 410 P.2d 764 (1966), this court rejected an attack on a zoning ordinance on the grounds of improper notice under Utah Code Annotated 10-9-5 where the plaintiffs had actual notice and participated in the zoning hearing. The court noted that the plaintiffs had suffered no disadvantage because of having actual notice of the hearing. See also *Salt Lake County v. Public Service Commission*, 29 U.2d 386, 510 P.2d 923 (1973).

The *Naylor* case is consistent with law in other jurisdictions. In *Dolomite Products Company v. Kippers*, 241 N.Y. Supp. 2d 748, 752, (1963), the court rejected plaintiffs' attack on the insufficiency of the hearing notice where plaintiffs had actual notice of the zoning hearing and participated in it. The court stated:

"The purpose of the requirement for publication of the notices is to advise those who may have had any interest in, and desire to be heard upon, the proposed administrative action. It would seem that, as to those who had actual notice of the hearing, the purpose of the statute requiring publication, would have been served.

It has been held that such notice for appearance and participation in the hearing would constitute a waiver of any and all error in giving notice . . .”

A similar result was reached in the case of *Ridgewood Land Company vs. Simmons*, 137 So.2d 532 (Miss. 1962), where plaintiffs, who had actual notice of and attended the hearing, attacked the zoning ordinance on the grounds that the legal description in the notice was incorrect. The court stated:

“ ‘One who has received notice of a hearing and actually attends waives objection to insufficiency of the notice because the notice has achieved its purpose.’ ”

Numerous other courts have ruled to the same effect. *Clark v. Wolman*, 243 Md. 597, 221 A.2d 687 (1966); *Re Request for Rezoning by Yeany*, 120 Ohio App. 20, 200 N.E.2d 813 (1963); *Malley v. Clay County Zoning Commission*, 225 So.2d 555 (Fla. 1969); *Hilton v. Board of Supervisors*, 7 Cal. App. 3rd 708, 86 Cal Rptr. 754 (1970).

Appellants also attack the validity of the canyon zoning on several other statutory grounds. None of these allegations were specifically raised by appellants in their complaint, their motion for summary judgment, or their amended complaint during trial. Utah Code Annotated 17-27-11, the requirements of which appellants allege the County did not comply with in enacting the canyon zoning, grants to the County Commission



the power to create zoning districts. No procedure or method is set forth as to how such districts must be created by the County Commissioners as they are in Utah Code Annotated 17-27-17 which provides for creation of districts by petition. The County Commission did create the Big Cottonwood, Little Cottonwood, Parley's and Millcreek Planning District on the same date the FR-50 zoning was enacted for the District. Ex. P-1. The County Commission appointed commissioners for the district. R-419. If the County erred in creating districts by this method, no prejudice resulted to appellants. While most procedural requirements are regarded as mandatory, most courts will uphold a zoning ordinance enacted where the legislative procedures which substantially, if not literally, comply with the statutory prescription. *Naylor v. Salt Lake City Corp.*, supra; *Mulligan v. New Brunswick*, 83 N.J. Super 185, 199 A.2d 82 (1964). This is especially true when no prejudice resulted from the error. *Brown v. Shelby*, 360 Mich. 299, 103 N.W.2d 612 (1960). In any event, zoning of the County had been made countywide by the time of trial and districts were therefore no longer required. R-521.

Appellants also attack the canyon zoning on the grounds that zoning ordinances have not been filed with the County Recorder's Office and the maps have not been filed with the Clerk's Office in the past pursuant to the requirements in Utah Code Annotated 17-27-24. The language and the purpose of this statute do not support appellants' contention that failure to comply with

it's provisions affects the validity of the ordinance. The obvious purpose of this statute is to make the ordinances available to the public. Appellants do not allege they were not aware of the canyon zoning or did not have an access to the ordinance and in fact, all zoning ordinances are available to the public at the Planning Commission. Nowhere does the statute specifically require the filing of a zoning ordinance as a prerequisite to its effectiveness, nor does it state a time limit in which this must be done. The requirement in Section 17-27-24 that the county commission "shall" file copies of the ordinances is analogous to the requirement in Section 17-27-4 that the planning commission "shall" make a master plan of the county. The language in neither section specially states compliance with its requirements are a prerequisite to the validity of zoning ordinances. This court has specifically held that failure of the planning commission to make a master plan does not affect the validity of ordinances. *Gayland v. Salt Lake County*, 11 U.2d 307, 358 P.2d 633 (1961).

Because Utah Code Annotated 17-27-24 does not require that its provisions be met by the county before zoning ordinances became effective or invalidate ordinances for failure of the county to meet its requirements, respondents submit the court should not read this requirement into the statute, the effect of which would be to strike down all of the zoning in Salt Lake County. Courts in other jurisdictions having similar statutes requiring that zoning ordinances be filed with clerks or in the recorder's office have held that failure to comply

with such requirements does not invalidate a zoning ordinance. *Frost v. Village of Hilshire Village*, 403 S.W.2d 836 (Texas 1966); *DeLand v. City of Tulsa*, 26 F.2d 640 (8th Cir. 1928); *Wright v. DeFatta*, 142 So.2d 489, Aff. 152 So.2d 10 (La. 1962).

## POINT II

**THE LOWER COURT CORRECTLY FOUND THE ZONING PLAN FOR APPELLANTS' CANYON PROPERTY IS REASONABLE AND NOT ARBITRARY OR CAPRICIOUS.**

Under Utah Code Annotated 17-27-13, zoning regulations may be enacted by counties "for the purpose of promoting the health, safety, morals, convenience, order, prosperity or welfare of the present and future inhabitants of the state of Utah . . ." This Court has held that the exercise of the zoning power is a legislative function and the wisdom of a zoning plan is a matter which lies in the discretion of the authorities and may be set aside by the court only if confiscatory, discriminatory or arbitrary. *Naylor v. Salt Lake City Corp.*, supra; *Dowse v. Salt Lake City Corp.*, 123 Utah 107, 255 P.2d 723 (1953); *Phi Kappa Iota Fraternity v. Salt Lake City*, 116 Utah 536, 212 P.2d 177 (1949). The lower court, after hearing evidence on the canyon zoning for six days, found the zoning classification of appellants' property was not

arbitrary or capricious but rather, was based on considerations of fire and police protection, access to property, avalanche protection, protection of the watershed, availability of water and sewer, soil and slope protection, landslide dangers, visual considerations, acknowledgment of existing facilities and slope. **R-37, Finding No. 10.**

The evidence shows that the County has spent thousands of dollars and many man hours to gather information and facts for the purpose of developing a proper zoning plan for the use and protection of the canyons. Topographical studies were made by the staff of the Planning Commission of all privately owned property in the canyons prior to the zoning amendments enacted in June of 1972. **R-448-449.** Numerous public agencies and other sources were contacted by and supplied information to the staff of the Salt Lake County Planning Commission which prepared the zoning plan for the canyons. **R-449.** The Salt Lake City Water Department supplied information concerning culinary water supply from Little Cottonwood Canyon which supplies a major percentage of the culinary water supply for Salt Lake City Water Department. **R-450.** Charles Wilson of the Salt Lake City Water Department, representing Mayor Garn, appeared at the hearings on the canyon zoning and submitted a statement that Salt Lake City supported the canyon zoning plan as the extraterritorial jurisdiction of Salt Lake City could not alone solve the watershed problem. **Ex. P-6.** Since Salt Lake City is a major supplier of culinary

water to the residents of Salt Lake County located outside of Salt Lake City, (R-384) there can be no question that protection of this watershed relates to the health and welfare of the residents of Salt Lake County.

Dr. David W. Eckhoff, Associate Professor of Civil Engineering at the University of Utah, testified that the University's Department of Civil Engineering conducted a study, in which he participated, to determine the effect of the continued increased use of Little Cottonwood Canyon on the water supply from Little Cottonwood Canyon. Ex. D-90, R-673-685. The study showed that the number of coliform in the water has been doubling since 1967 and if this trend continued at the same rate, the water would exceed the maximum coliform acceptable by the U.S. Public Health Service for raw water supply by 1978. The study also showed a direct relationship between land use intensity and coliform count in the water. Dr. Eckhoff concluded that only drastic prohibition of further human use of the canyons could alter this trend. R-681. However, the day usage of the canyon has increased from 165,000 in 1967 to 282,1000 in 1971. Ex. 66, p. 27.

The U.S. Forest Service supplied information concerning avalanches and topography of the canyons. R-449. Much of Little Cottonwood Canyon is undevelopable because of soil erosion hazards, vegetation problems, avalanche danger, and extreme slopes. Ex. D-66, p. 45, p. 51, p. 53. A composite map in the Master Plan shows very little of the land is suitable for development. Ex. D-66, p. 69.

The town of Alta, which is located immediately below the Albion Basin, was contacted to determine its zoning plan. All of Alta, except the present lodge developments, are zoned FR-100, which requires 100 acres for single family dwellings and is more restrictive than any canyon zoning in Salt Lake County. R-450. The Soil Conservation Service, the City-County Health Department and the State of Utah also were contacted and furnished information.

Mr. Julian Thomas, an expert in avalanches and forest land appraisal formerly employed by the Forest Service as the District Ranger for the Wasatch Front area, testified as to the developability of each of appellants' 40 parcels of land involved in this lawsuit. Exhibit D-86, which is a topographical map on which all of appellants' parcels of land in the canyons are located, makes it clear nearly all of their land is literally located on mountaintops. For instance, Mr. Melville admitted that Parcel 2 contains a vertical drop of almost 1,600 feet. R-760. Mr. Thomas testified that with the exception of three parcels of land in the Albion Basin, none of the land is presently developable because of lack of water, access, steepness of the terrain and avalanche danger. R-589-594. He further testified that much of the land is so steep that it would actually take a rock climber to go over it. R-589. A summary of this testimony is contained in Exhibit D-87 where Mr. Thomas concludes only 2 per cent of the land is developable at all.

The evidence introduced by the County shows numerous reasons justifying the zoning of appellants' property in the Albion Basin area for single family recreation use and not commercial or high density use which is allowed in limited areas further down the canyon. Mr. Thomas testified that the avalanche danger was greater in the Albion Basin area than in the Snowbird area. When the canyon zoning was being considered the sewer extended to the Snowbird area but there were no plans to extend the sewer into the Albion Basin area. R-458. In fact, the Forest Service denied appellants' application to extend the sewer over Federal lands into the Albion Basin area. Ex. D-74. Mr. Thomas testified the road to the Albion Basin is owned by the Forest Service and is only left open in the summer months. R-622. A ski run crosses the road in the winter and so it would be very difficult to open it in the winter. R-572. Mr. Melville testified the only winter access into the Albion Basin is by snowmobile or by using the ski lift and hiking cross-country. R-265. This lack of winter access could cause problems of fire and police protection if the property were developed commercially. R-705. Appellants' property in the Albion Basin is adjacent to a public campground which the staff of the Planning Commission felt was not compatible with commercial development. R-460, R-706. Finally, the visual impact of high density development in the Albion Basin area would be much greater than in the Snowbird area because the Snowbird area is down in the canyon.

The present zoning of appellants' property in Little Cottonwood Canyon is consistent with the master plan for the area which was prepared by Eckbo, Dean, Austin and Williams, a land consulting firm from San Francisco, at the expense of over \$19,000 to the County. Ex. D-66, R-497. This plan calls for limited development in the Albion Basin area. Ex. D-66, p. 6. Mr. Clayne Ricks, Director of the Planning staff for the County, testified that further studies have been contracted by the County in the areas of transportation, land use capacity and economics for the canyons. R-706.

Zoning in the canyons has not been done haphazardly or arbitrarily. Rather, it is a continuing process based on scientific studies gathered by County planners, other government agencies and professional consultants. It is hard to imagine how the County could have been more thorough in planning for proper use of land in the canyons. The evidence from these studies makes it apparent that if we are to protect the natural resources in our canyons, development must be restricted and controlled. The present zoning plan for the canyon is designed to protect natural resources in the canyons while at the same time allowing limited development of private property in the canyons. Respondents would submit that the evidence fully supports the lower court's finding that this is a reasonable zoning plan for our canyons.



### POINT III

#### THE LOWER COURT CORRECTLY HELD THAT THE CANYON ZONING DOES NOT CONSTITUTE A TAKING OF APPELLANTS' PROPERTY.

The very purpose of zoning is to limit and control the uses of property. The fact that a zoning ordinance denies a property owner the highest and best use of his land does not make it unconstitutional. *Chevron Oil Co. v. Beaver County*, 22 U.2d 143, 449 P.2d 989 (1969); *Board of County Commissioners v. Kay*, 240 Md. 690, 215 A.2d 206 (1965); *Richmark Realty Co. v. Whittlif*, 226 Md. 273, 173 A.2d 196 (1961); *Appeal of Ligget*, 291 Pa. 109, 139 A. 619 (1927); *Ridgewood Land Co. v. Moore*, 222 So.2d 378 (Miss. 1969); *Wright v. Littleton*, 483 P.2d 953 (Colo. 1971). In the latter case the court noted that a zoning ordinance which does not allow a landowner to use his property in the most profitable manner is not unconstitutional since the limitation of use is an essential and fundamental purpose of all zoning.

Likewise, the fact that a zoning ordinance reduces the value of a particular parcel of land does not make the ordinance unconstitutional provided the regulation bears a reasonable relationship to the health, safety, morals and welfare of the community. *Leary v. Adams*, 226 A.2d 472, 147 So. 391 (1933); *White Lake v. Amos*, 371 Mich. 693, 124 N.W.2d 803 (1963); *Udell v. McFadyen*, 40 Misc. 2d 265, 243 N.Y.S.2d 156

(1963) ; *Norbeck Village Joint Venture v. Montgomery County Council*, 254 Md. 59, 254 A.2d 700 (1969) ; *Hedrich v. Kane Connty*, 117 Ill. App.2d 169, 253 N.E.2d 566 (1969).

It is clear from the numerous reasons set forth in Point II of respondents' brief that the canyon zoning relates to the health, safety, morals and welfare of the citizens of this valley and therefore was correctly upheld by the court even if appellants had established a substantial reduction in the value of their land. However, based upon the testimony of appellants' own expert, the lower court found that the evidence did not establish a substantial change in value. Appellants' expert testified as to the value of appellants' property in the Albion Basin before and after the canyon zoning became effective in November of 1971. He offered no testimony with regard to the other properties involved in the lawsuit. His testimony regarding the property in the Albion Basin was based entirely on two sales of property which he thought were prior to the enactment of the canyon zoning: The first, a sale at \$40,000 an acre to a Mr. Cahill and the second at the equivalent of \$37,634 also to Mr. Cahill from a different seller. R-301-302. Appellants' appraiser testified there were no other comparable sales after the effective date of the FR-50 zoning. R-302. On the basis of these two sales he testified that in his opinion the land was worth \$32,000 prior to the zoning and then he estimated the value of the land after the zoning. However, the option agreement on the second sale to Mr. Cahill was

exercised in 1972 after the implementation of the FR-50 zoning and not before as the appraiser had mistakenly assumed. Ex. D-100, R-737. Thus, what actually happened is Mr. Cahill paid approximately the same price for property prior to and after the enactment of the FR-50 zoning. On the basis of this testimony the lower court found that the appellants had not established a substantial reduction in the value of their land because of the FR-50 zoning.

There are numerous cases upholding zoning ordinances or denying applications for zoning amendments where the economic effect on the property involved is much more severe than the affect of the canyon zoning on appellants' property.

This Court, in *Chevron Oil Company v. Beaver County*, supra, upheld the refusal of Beaver County to rezone from agricultural land worth \$20 an acre to highway service land worth \$10,000 an acre.

A "forest preserve district" requiring six acre minimum lot sizes in the town of Sanbornton, New Jersey, was upheld in *Steel Hill Development Inc. v. Town of Sanbornton*, 469 F.2d 956 (1st Cir. 1972) where many of the same considerations for protecting the environment were involved as are present in our own canyons. In that case, the court stated:

"We recognize as within the general welfare, concerns relating to the construction and integration of hundreds of new homes which would have an irreversible effect on the area's ecolog-

ical balance, destroy scenic values, decrease open space, significantly change rural character of this small town, put substantial burdens on the town for police, fire, sewer and road services . . .”

Another area where courts have weighed the public interest in protecting the environment against the allegation of taking of property without compensation in deciding the validity of zoning ordinances is flood plain zoning. These ordinances have been upheld even though they place severe restrictions on the use of property where property owners were left with a reasonable use of their property and the evidence established the zoning related to the health, safety, and welfare of the people. *Turner v. County of Del Norte*, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972); *Famularo v. Board of County Commissioners of Adams County*, 505 P2d 958 (Colo. 1973), *Turnpike Realty Co. v. Town of Dedham*, 284 NE2d 891, 900 (Mass. 1972). In the latter case the court upheld a flood plain ordinance even though it placed severe restrictions on building on plaintiff's property causing a reduction in the value of his land from \$431,000 to \$53,000. The court emphasized the dangers to the community from overdevelopment, the same danger which is present in our canyons and concerned the County representatives who enacted the canyon zoning.

“Although it is clear that the petitioner is substantially restricted in the use of the land, such restrictions must be balanced against the potential harm to the community from overdevelopment of a flood plain area.”

Still another area where the courts have upheld severe restrictions on the development of land is the area of shoreline and wetlands control. A landmark case in this area is *Candlestick Properties Inc. v. San Francisco Bay Conservation and Development Commission*, 89 Cal. Rptr. 897 (1970). In this case the court upheld the McAteer-Petris Act under which the San Francisco Bay Conservation and Development Commission denied a permit to plaintiffs therein to deposit fill on their property located on the bay. Plaintiffs alleged that the property had no value for any other purpose and alleged the taking without compensation. The court noted changing conditions and their effect on the environment stating:

“In short, the police power, as such, is not confined within the narrow circumspection of precedence, resting upon past conditions which do not cover and control present day conditions . . . that is to say, as a commonwealth develops politically, economically, and socially, the police power will likewise develop, within reason to meet the changing conditions.” 89 Cal Rptr at 905

The court noted the danger to the Bay by allowing continued uncontrolled filling.

“In those sections the legislature has determined the bay is the most valuable single natural resource of the entire region and changes in one part of the bay may affect all other parts, that the present uncoordinated haphazard manner in which the bay is being filled threatens the bay

itself and is therefore enimical to the welfare of both present and future residents of the bay area; and that a regional approach is necessary to protect the public interest in the bay." 89 Cal. Rptr. at 905.

The fundamental rule governing all the cases involving an allegation of a taking is that to sustain such an allegation, the aggrieved party must show that the enforced restrictions upon his property will preclude its use for any purpose to which it is reasonably adapted. *Famularo v. Board of County Commissioners of Adams County*, supra; *Fertitta v. Brown*, 252 Md. 594, 251 A.2d 212 (1969); *Phoenix v. Burke*, 452 P.2d 722 (Ariz. 1969); *Schour v. Lynbrook*, 25 App. Div. 2d 677, 268 N.Y.S. 2d 577 (1966). In the case herein appellants attempt to show a taking by claiming that the FR-50 does not allow them to build on any parcels under 50 acres; however, this is not true. As appellants well known, the zoning ordinance permits a single family dwelling on any parcel of land existing at the time a zoning ordinance is enacted setting minimum lot sizes greater than the size of the existing parcel. Section 22-2-2, Revised Ordinances of Salt Lake County, 1966. Ex. P-63, R-343. The Planning Commission specifically considered this fact when recommending the passage of the canyon zoning. R-524. This was also stressed at the hearing on the FR-50. Ex P-14. In the area where appellants applied to build their two fourplexes, which is zoned FR-1, they had an approved subdivision prior to the enactment of the canyon zoning for 30

lots. Ex. P-43. Under the present canyon zoning ordinance appellants may build a single family dwelling on each of the 30 lots in the subdivision and a single family dwelling on each other parcel of land owned by the appellants in the canyon under 50 acres. In fact, Mr. Knowlton has built a cabin on a lot less than one acre since the enactment of the canyon zoning. R-501. In the Albion Basin alone the present canyon zoning classification permits approximately 100 single family cabins to be built. R-707.

Appellants in their lawsuit offered no testimony that classification of their land for single family residences would cause them to lose any money they have invested in the land. In fact Mr. Melville testified the land is old mining claims, some of which was acquired at tax sales. R-282. They only tried to show, unsuccessfully, that they could earn more money if it were zoned in a different manner. This same contention was rejected by this court in the *Beaver County* case. Obviously, there is no question single family recreation homes for which appellants' property is zoned, is an appropriate use of the property and an economically feasible use of the property.

Appellants' allegations that the zoning of their property was a conspiracy among numerous County officials and the Forest Service to preserve it for public use is not supported by the facts. The zoning of appellants' property in the Albion Basin was a small

part of a comprehensive zoning plan for all of the canyons east of Salt Lake County. When the canyon zoning went into effect, appellants' property was zoned FR-50 in the same manner as all other property in the canyons. In June of 1972, much of appellants' Albion Basin property was rezoned from FR-50 to FR-1 although a great deal of the canyon remained in the more restrictive FR-50. Properties surrounding appellants' property are zoned in the same classification as is appellants' property. Ex D-68. There has been no different treatment in the zoning of appellants' property than in the zoning of any of the properties surrounding their property. The numerous differences between appellants' property and the limited properties zoned for higher density use lower in the canyon have been set forth in Point II. The fact that a hundred residences may be built in the Albion Basin alone is inconsistent with the theory that the County is attempting to prevent building in the area.

Commissioner McClure testified the zoning of appellants' property was not implemented to allow public purchase of the area at a lower price, but rather, as a part of comprehensive zoning plan for all of the private owned land in the canyons, R-200-206, R-445. Mr. Campbell, Director of the Planning Commission in 1971 testified that no member of the Commission had tried to influence the zoning plan they recommended for adoption in the canyons. R-358. Mr. Thomas from



the Forest Service also testified that the Forest Service did not try to influence the zoning plan that the County adopted. R-611. On the basis of this testimony the court found that there was no giant conspiracy among the respondents to zone appellants' property in a manner that it could be purchased at a lower price or preserved for public use. Finding No. 11. Rather, the evidence showed that the public officials implemented the canyon zoning to control the development boom before irreparable damage was done to the land and natural resources in the canyons, both public and private.

#### POINT IV

#### THE LOWER COURT CORRECTLY DISMISSED APPELLANTS' FOURTH CAUSE OF ACTION SEEKING A BUILDING PERMIT.

A. Appellants did not meet County requirements for a building permit.

The lower court found that appellants did not meet County requirements of the Planning Commission and the requirements of the City-County Board of Health for a building permit. Finding of Fact No. 10. This finding is supported by the record. Mr. Hoff-

man, the Supervisor of Water and Sewage Sanitation for the City-County Board of Health, testified that appellants' original source of water for the proposed condominium development was not adequate because it dried up during the winter months and informed appellants they would have to seek an alternative source. R-379-382. Mr. Melville admitted at trial that the source was not adequate in the winter. R-296. Appellants then proposed a second source for the fourplex condominiums; however, this source was not completed or approved before the zoning was implemented in the canyons. R-281. Although appellants applied to the County for a building permit for two fourplex condominiums, Mr. Melville testified this was the first step in a major condominium development in the Albion Basin area. R-29. Appellants' building plans reflect a development for 11 condominiums consisting of four units each. Ex. P-18. Because appellants contemplated a major development in the area and because Mr. Hoffman had certain questions as to the capacity and effect on the watershed of appellants' proposed mine tunnel water source, it was referred to the State Engineer for review. R-380-383. This is the same approach the County took in the Snowbird development in the canyons. R-386. The fact that the immediate development may not have required the approval of the State in no way prevents the County from seeking the assistance of the State where it is needed.

Temporary zoning regulations in effect for the canyons at the time appellants applied for their build-

ing permits required the approval of the Salt Lake County Planning Commission for the erection of a building structure for "commercial or industrial purposes". Ex. P-11. However, appellants did not obtain approval of the Planning Commission. Mr. Douglas Campbell, former director of the Planning staff, testified that the longstanding interpretation of the term "commercial" in the temporary zoning regulations included multi-unit dwellings as such dwellings are generally income producing developments. R-357. Mr. Campbell further testified that other persons proposing similar developments as the appellants in areas under temporary regulations have been required to obtain approval of the Planning Commission prior to the issuance of a building permit. R-357. The Snowbird development for condominiums obtained Planning Commission approval. R-501, Ex. D-70. The wording and purpose of the enabling statute authorizing counties to enact temporary zoning regulations support this interpretation by County officials.

Utah Code Annotated 17-27-19 authorizes the County to enact temporary zoning regulations requiring Planning Commission approval of a structure to be used for "business, commercial or industrial purposes". By using both the terms "business" and "commercial" in the statute, the legislature apparently intended a "commercial" purpose to include more than the building of a "business". Development of an eight-unit condominium involves sale, lease or rental of some or all of the units

and is normally thought of as a "commercial" venture. The purpose of the temporary regulations obviously is to control certain types of development while the Planning Commission is developing a zoning plan for the County. By granting counties the right to require Planning Commission approval of "business, commercial and industrial developments" during this interim period, the legislature was concerned with the control of the types of uses which necessarily have the most impact on an area and thus, which need to be limited as to location in a zoning plan. Multi-unit dwellings are within this category as they generate additional traffic in an area and have an impact on public services. Thus Respondents would submit County officials were correct in requiring appellants to obtain Planning Commission approval for their condominium development.

B. Appellants failed to exhaust their administrative remedies prior to bringing suit.

Utah Code Annotated 17-27-16, 1953, provides as follows:

"Appeals to the Board of Adjustment may be taken by any person aggrieved . . . by the decision of any administrative officer or agency based upon or made in the enforcement of the provision of the zoning resolution . . .

Upon appeals, the Board of Adjustment shall have the following powers: (1) To hear and decide appeals where it is alleged by the appellant that there is any error in any order, requirement decision or refusal made by any administrative

official or agency based on or made in the enforcement of the zoning resolution . . .”

The statute proceeds to delegate to the Board of Adjustment the power to promulgate rules of procedure describing time limits in which an appeal must be made. Salt Lake County Board of Adjustment General Rules of Procedures, July 16, 1963, No. 3, provides:

“An appeal taken to the Board of Adjustment must be taken within 90 days after the cause of action arises or the appeal will not be considered by the Board of Adjustment.” Ex. D-102.

In *Lund v. Cottonwood Meadows Company*, 15 U.2d 305, 308, 392 P.2d 40 (1964), this Court stated:

“The 90-day limitation of Section 17-27-16 is designated to assure speedy appeal to the proper tribunal of any aggrievance that a party may have who is adversely by a decision of an administrative agency.”

In that case, which dealt with the issuance of a building permit to construct a mobile trailer park, this Court ruled that since the aggrieved party had failed to exhaust his administrative remedies by appealing the adverse decision to the Board of Adjustment within 90 days after the cause arose, the suit was properly dismissed by the lower court for failure of the appellant therein to exhaust his administrative remedies.

In the case herein, appellants were denied a building permit by Ronald Ivie of the County Building and

Zoning Department on the basis that appellants' proposed condominium fourplexes were "commercial" buildings within the meaning of the temporary zoning regulations in effect for the canyons at that time and needed zoning approval prior to the issuance of the permit. R-136. In addition, the permit was denied because appellants did not have an adequate water supply for the development. This was a decision of an administrative official which should have been appealed to the Board of Adjustment pursuant to the requirements of Utah Code Annotated 17-27-16. The lower court was correct under the authority of the *Lund* case in dismissing appellants' Fourth Cause of Action because of the failure of appellants to do so. The fact that appellants in their lawsuit also challenge zoning ordinances later enacted for the same piece of property in which they sought a building permit has no effect on the jurisdiction of the Board of Adjustment to decide the building permit question.

## CONCLUSION

Protection of the natural resources in our canyons is of vital importance to the health, safety and welfare of every resident in this valley, including property owners in the canyon. Almost nothing could more directly relate to the health, safety and welfare of the people than the protection of the watershed. This alone should be sufficient to justify the reasonableness of the zoning plan for the canyons. However, the evidence

showed there are numerous other considerations that support the zoning plan. Slope, avalanches, erosion and landslides make a great majority of property in the canyons undevelopable at all. Lack of sewer and water, access, police and fire protection make high density development of the Albion Basin undesirable. The beauty of the canyons is an asset to this community which must be protected for all to enjoy. This does not mean public use of private property but only that private development in the canyons be limited and controlled so as not to destroy this beauty. This is what the canyon zoning plan attempts to do.

Our legislature specifically mentions the protection of the health, safety and welfare of the "future inhabitants" of the state as well as the present inhabitants as one of the proper aims of zoning. In our canyons, more than anywhere else in the state, proper land use planning today is essential to protect the welfare of our children and grandchildren. The canyon zoning plan, as applied to the appellants' property in the canyon, allows them the right to build an extensive single family residential development on all their lots in the Albion Basin regardless of the size of such lots. On their property in the Albion Basin zoned F-1 they may develop any parcel over one acre for any uses allowed in the FR zoning. On their other property in the canyons which is zoned FR-50, most of which is undevelopable at all, they may develop any parcels over 50 acres, many of which appellants own, for any of the uses allowed in the FR-50 zoning. On any parcels under

50 acres they may develop a single family home. When weighed against the numerous essential considerations supporting the need for this zoning in the canyons, this regulation of use does not support appellants' allegations that their land has been taken without compensation.

For the reasons stated in here respondents would submit the decision of the lower court should be sustained.

Respectfully submitted,

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