

1979

Western Land Equities, Inc. et al v. City of Logan et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WESTERN LAND EQUITIES, INC.,)
a Utah corporation; LeGRAND)
E. REEDER and LEAH DAWN)
REEDER,)

Respondents,)

vs.)

Supreme Court No. 16321

CITY OF LOGAN, a municipal)
corporation; THE LOGAN CITY)
MUNICIPAL COUNCIL; MAYOR)
DESMOND L. ANDERSON; DARWIN)
W. LARSEN; CAROL W. CLAY;)
LOYE E. MARTINDALE; CLAUDE)
J. BURTENSHAW, and GLENN)
T. BAIRD,)

Appellants.)

BRIEF OF APPELLANT

An Appeal from the Judgment of the First Judicial
District Court in and for the County of Cache, State of Utah

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TABLE OF CONTENTS

	<u>Page</u>
NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
NATURE OF RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT I	
THE APPROVAL OF SUBDIVISION ACCESSES AND ROADWAYS INVOLVES A DEGREE OF DISCRETION THE EXERCISE OF WHICH WAS JUSTIFICATION FOR DISAPPROVAL OF PLAINTIFFS' PROPOSED SUBDIVISION	5
ARGUMENT II	
DEFENDANTS PROPERLY DENIED APPROVAL OF PLAINTIFFS' PROPOSED SUBDIVISION BECAUSE THE PROPOSED SITE WAS NOT IN A LOCATION OR ENVIRONMENT SUITABLE FOR RESIDENTIAL HOUSING	8
ARGUMENT III	
DEFENDANTS PROPERLY REJECTED PLAINTIFFS' PROPOSED SUBDIVISION BECAUSE IT DID NOT PROVIDE FOR WALKWAYS BETWEEN BLOCKS OVER 800 FEET LONG AS REQUIRED BY DEFENDANT'S SUBDIVISION ORDINANCE	10
ARGUMENT IV	
THE PROPOSED SUBDIVISION IS CONTRARY TO THE INTENT AND SPIRIT OF THE ZONING ORDINANCE ..	10

ARGUMENT V

THE PROPOSED SUBDIVISION CONFLICTS WITH LOGAN CITY'S MASTER PLAN	11
---	----

ARGUMENT VI

THE DISAPPROVAL OF A SUBDIVISION ON SEVERAL GROUNDS ONLY ONE OF WHICH MAY BE VALID IS SUFFICIENT JUSTIFICATION FOR DISAPPROVAL	13
---	----

ARGUMENT VII

THE MERE APPLICATION FOR A SUBDIVISION OR THE APPROVAL OF THE SAME BY A CITY, WITHOUT MORE, DOES NOT CREATE VESTED RIGHTS IN THE SUBDIVISION OWNER WHICH FOREVER FREE HIM FROM SUBSEQUENT ZONING CHANGES	15
CONCLUSION	30

CASES CITED

<u>Martindale v. Anderson, et al.</u> , (Ut. 1978) 581 P.2d 1022	5
<u>Eldorado at Santa Fe, Inc., v. Board of County Commissions of Santa Fe County</u> , 89 N.M. 313, 551 P.2d 1360 (1976)	5
<u>Roussey v. City of Burlingame, et al.</u> (Cal. 1950) 223 P.2d 517	5
<u>Ayers v. City Council of City of Los Angeles</u> (Cal. 1949) 207 P.2d 1	5
<u>Town of Perry v. Thomas, et al.</u> , 82 Ut. 159, 22 P.2d 343 (1933)	5
<u>Nicoli v. Planning and Zoning Commission of Town of Easton</u> , 179 Conn. 89, 368 A.2d 24 (1976)	6

	<u>Page</u>
<u>Pearson Kent Corporation v. Bear</u> , 28 N.Y.2d 396, 271 N.E.2d 218 (1971)	6
<u>Stoptaugh v. Bd. of County Commissioners of El Paso County</u> , (Colo.) 543 P.2d 524	7
<u>Barke & McCaffrey Inc., v. City of Merriam</u> , (Kan. 1967) 424 P.2d 483	7
<u>Jones v. Town of Woodway</u> , (Wash. 1967) 424 P.2d 904	7
<u>Wes Linn Land Co. v. Board of County Commissioners</u> , 36 Ore.App. 39, 583, P.2d 1159 (1978)	11, 12
<u>1000 Friends of Oregon v. Board of County Commissioners</u> , 32 Ore.App. 413, 575 P.2d 651, 656 (1978) ...	
<u>Davian v. Planning Commission of City of Putnam</u> , 174 Conn. 384, 387 A.2d 562 (1978)	15
<u>Contracts Funding & Mortgage Exchange v. Maynes</u> , (Ut. 1974) 527 P.2d 1073	15-17
<u>Wood v. North Salt Lake</u> , 15 Ut.2d 245, 390 P.2d 858 (1964)	18, 19
<u>Ready to Pour, Inc. v. McCoy</u> , 95 Idaho 510, 511 P.2d 792 (1973)	20
<u>Maricopa v. Anzwool Inc.</u> , (Ariz. 1973) 506 P.2d 282	21
<u>Robinson v. Lintz</u> , (Ariz. 1966) 420 P.2d 923	21, 23
<u>Dawe v. City of Scottsdale</u> , 119 Ariz. 486, 581 P.2d 1136 (1978)	22, 23
<u>State v. Dodge</u> , (Ohio 1960) 177 N.E.2d 515	24, 25
<u>Corsino v. Grover</u> , 148 Conn. 299 (1961), 170 A.2d 267	25
<u>Blundell v. City of West Helena</u> , (Ark. 1975) 522 S.W.2d 661	26, 28-29

	<u>Page</u>
<u>Town of Lebanon v. Woods</u> , (Conn. 1965) 215 A.2d 112	26
<u>R. A. Vachon & Son, Inc. v. City of Concord</u> , (N.H. 1972), 289 A.2d 646	26
<u>Youngblood v. Board of Supervisors of San Diego City</u> (Cal. 1977) 71 Cal.App.3d 655, 139 Cal. Rptr. 741	26

STATUTES CITED

Section 17-4-2, Revised Ordinances of Logan City, 1969	2
Section 17-22-1, Revised Ordinances of Logan City, 1969	8
Section 17-22-6, Revised Ordinances of Logan City, 1969	8, 10
Section 17-22-4, Revised Ordinances of Logan City, 1969	13

TREATISES CITED

<u>82 Am. Jur.2d</u> , Zoning and Planning, 373, 698-700, 186	27
1 <u>American Law of Zoning</u> , 402, Sec. 6.21	28
8A <u>McQuillin, Municipal Corporations</u> , 34, Zoning, Sec. 25.188	23

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Appellants.)

BRIEF OF APPELLANT

NATURE OF THE CASE

Plaintiffs sought and obtained a judgment against Defendants estopping them from withholding approval of Plaintiffs' proposed residential subdivision plan.

DISPOSITION IN LOWER COURT

The lower court ordered that the subdivision be approved and that subsequent development within it be allowed free from any subsequent zoning changes limiting or restricting residential uses.

NATURE OF RELIEF SOUGHT ON APPEAL

Defendants seek to reverse the lower court's order estopping Defendants from disapproving Plaintiffs' proposed residential subdivision.

STATEMENT OF FACTS

In or about June 1977, Plaintiffs approached the City of Logan in the course of preparing a preliminary plan for a residential subdivision to be located in an M-1(Manufacturing) zone. R.153. Single family dwellings were permitted uses in that zone at the time of the application, but the zoning ordinance was amended on January 31, 1978 to allow such uses only occasionally and incidental to manufacturing uses by special use permit. Whole residential subdivisions were prohibited. R.101. (Sec. 17-4-2(e), Logan City Ordinances.)

Shortly after initial contact with the City, in conversations with the Plaintiffs' engineer, the City Planner questioned the advisability of developing a residential subdivision plat in the area proposed. R.153. Plaintiffs, nevertheless, continued with their plans, prepared a preliminary subdivision plat, (R.155) expending \$890 for it and another \$1,335 for a boundary survey. R.128.

The Planning Commission's practice is to merely introduce the preliminary plat in one meeting (first reading)

and in the second meeting discuss its merits and take action. R.156. Plaintiffs' project was introduced on July 13, 1977. R.85-86. The second reading was held on August 10, 1977. Some concerns were expressed by the Planning Commission (R.90) and the matter was tabled and referred to the Municipal Council for their input. R.86. On August 18, 1977, the Municipal Council reviewed the matter and expressed some concerns about protecting the potential residential area from manufacturing uses within the development and that more roadways in and out of the subdivision be provided. R.92, 157.

The preliminary plan second reading continued before the Planning Commission on September 14, 1977 at which time concern about the danger of the adjacent railroad activity was expressed, and the matter was tabled for sixty days. R.94. Although the matter was not before them for approval, on October 12, 1977, the Planning Commission and Planner discussed the intent of the City's zoning ordinance as it relates to residential uses in M-1 zones. R.95. The intent of the ordinance was to allow citizens operating manufacturing concerns in the zone to construct homes incidental to the manufacturing use. R.95, 158. On November 9, 1977, the Planning Commission took action to disapprove Plaintiffs' preliminary plan based on the fact that: (1) Development

of residential subdivisions in M-1 zones was contrary to the land use ordinance. (2) Development of a residential subdivision in an M-1 zone is contrary to the City's master plan. (3) Accesses to the subdivision were inadequate. (4) The location of the railroad on three sides of the subdivision made it an inappropriate site for housing. R.96. Some of their reasons were further articulated in a letter to the Municipal Council dated November 17, 1977. R.97.

On November 17, the Plaintiffs appeared before the Municipal Council requesting that their preliminary plan be approved. The Municipal Council reviewed the Planning Commission's letter then refused to approve the proposed subdivision. R.99-100. No protective covenants were ever drawn up to eliminate manufacturing uses within the subdivision and no second exit from the subdivision was ever planned. R.155. It was never modified in any way but remained as originally presented.

Because the Municipal Council began preparations to amend or clarify the zoning ordinance on the matter of housing in M-1 zones, Plaintiffs commenced this action on December 23, 1977, on which date application for a restraining order was made which order was made on January 3, 1978 restraining the City from amending its zoning ordinance. R.14. On April 18, 1978, after motion by Defendants, the injunction was terminated. R.80-81. The City's change

or clarification of the zoning ordinance took place on January 19, 1978 (R.102) and became effective as it pertained to Plaintiffs' property on the date the injunction was terminated.

ARGUMENT

I

THE APPROVAL OF SUBDIVISION ACCESSES AND ROADWAYS INVOLVES A DEGREE OF DISCRETION THE EXERCISE OF WHICH WAS JUSTIFICATION FOR DISAPPROVAL OF PLAINTIFFS' PROPOSED SUBDIVISION.

In dealing with questions of whether a proposed residential subdivision plan should be approved, Defendants recognize and have no argument with the fact that the act of approval is administrative in nature, Martindale v. Anderson, et al., (Ut. 1978) 581 P.2d 1022, and largely ministerial, Eldorado at Santa Fe, Inc., v. Board of County Commissions of Santa Fe County, 39 N.M. 313, 551 P.2d 1360 (1976). However, many administrative actions involve some discretionary action. So it is with approval of subdivisions. Roussey v. City of Burlingame, et al. (Cal. 1950) 223 P.2d 517, Ayers v. City Council of City of Los Angeles (Cal. 1949) 207 P.2d 1. Take for example the act of opening a road to public use which is part of the action taken when a subdivision is approved.

In Town of Perry v. Thomas, et al., 82 Ut. 159, 22 P.2d 343 (1933), where a town decided to convert a private road

into a public street and to widen it at the same time, property owners and citizens in the area questioned the town's right to do so. There this court stated:

"Under powers thus delegated to municipal boards the necessity, expediency, or propriety of opening a public street or way is a political question, and in the absence of fraud, bad faith or abuse of discretion the action of such board will not be disturbed by the courts." (citing cases).
22 P.2d 343, 345.

The traffic flow, access, location and configuration of a new roadway has always been a legitimate concern for cities including proposed accesses resulting from a subdivision of land. Nicoli v. Planning and Zoning Commission of Town of Easton, 179 Conn. 89, 368 A.2d 24 (1976).

In Pearson Kent Corporation v. Bear, 28 N.Y.2d 396, 271 N.E.2d 218 (1971), the county planning commission denied approval of plaintiff's proposed residential subdivision even though the plan itself was not intrinsically unacceptable because the project was so located as to create danger to nearly residents in that roads through which the plaintiff would channel traffic were too narrow and unable to accommodate additional traffic, and the absence of sidewalks would increase hazards to young children going to school. In that circumstance the highest court for the State of New York said:

"But the commission is not limited in disapproving a subdivision, to an intrinsic evaluation of the

subdivision itself. It may consider, among other things, the "safety" and "general welfare" of the county, including adjacent areas. Thus, as a matter of legal power, the commission acted within its jurisdiction. And if it was within its jurisdiction it is not easy to say that its action was arbitrary and without reasonable basis."
271 N.E.2d 218, 219.

The following cases are further examples of the proper exercise of discretion in the approval or disapproval of subdivisions: Stoptaugh v. Bd. of County Commissioners of El Paso County, (Colo.) 543 P.2d 524; Barke & McCaffrey Inc., v. City of Merriam, (Kan. 1967) 424 P.2d 483; and Jones v. Town of Woodway, (Wash. 1967) 424 P.2d 904.

In this case presently before the Court, the planner, the planning commission, and the municipal council expressed concern about the single access proposed by Plaintiffs (R.92, 96, 97, 153, 157), and the suggestion was made that Plaintiffs provide another means of ingress and egress for the proposed subdivision. R.92, 157. That second means of ingress and egress was never provided and the subdivision plan remained as it was originally presented. R.155. Consider, as the Defendants did, what would be the result if a fire started in the subdivision, or a person was choking and the fire engine or ambulance and medical technicians had to wait an extra five minutes while the railroad people were notified that their stopped train or switching operations were blocking the subdivision access. Such a possibility

dictates a second access free of conflicts with the trains.

The subdivision ordinance itself provides for the exercise of the kind of judgment exercised here. Section 17-22-1, Revised Ordinances of Logan City, provides:

"Purpose. The following requirements controlling the subdivision of land are designed to provide for the orderly development of Logan City and to secure a coordinated road layout and adequate provision for traffic, transportation, recreation, water, drainage, sewage and other facilities in order to promote the health, safety, convenience and general welfare of the inhabitants of Logan City."

In essence, one of the reasons for denial of Plaintiffs' subdivision was that it did not make "adequate provision for traffic" necessary for the promotion of the "health, safety, convenience and general welfare of the inhabitants of Logan City," especially for the ones who would live in the subdivision.

II

DEFENDANTS PROPERLY DENIED APPROVAL OF PLAINTIFFS' PROPOSED SUBDIVISION BECAUSE THE PROPOSED SITE WAS NOT IN A LOCATION OR ENVIRONMENT SUITABLE FOR RESIDENTIAL HOUSING.

The subdivision ordinance provides:

17-22-6. General requirements and minimum standards of design.

(c) Lots.

(1) The lot arrangement and design shall be such that lots will provide satisfactory and desirable sites for buildings and be properly related to topography, to the character of surrounding development, and to existing and probable future requirements. P. 70.

The subdivision was planned in an area which would be surrounded by railroad tracks on three sides. R.97, 155. Only one means of ingress and egress was provided which would require that every man, woman and child would be required to cross the tracks to the east in order to exit or enter the development. R.97. The proposed development was in an M-1 zone and along side a railroad spur. Activity on the spur such as refrigerator cars would create a nighttime annoyance to the neighboring residents.

The possible conflicts with M-1 uses was brought to the attention of the developer (R.97, 97), and a request was made by Municipal Council Chairman Claude Burtenshaw, that protective covenants be written to at least protect the subdivision from within, but the record reveals that none were ever presented for approval prior to the time approval of the subdivision by the municipal council was demanded. The city planner reported that no protective covenants were ever filed with or presented to the City. R.154.

To approve a subdivision under the circumstances and in the location requested by Plaintiffs would most likely create an undesirable residential area with dissatisfied residents moving out and unwitting new owners moving in until knowledge of the problems became common knowledge, causing property values to fall and permanent families to stay away.

III

DEFENDANTS PROPERLY REJECTED PLAINTIFFS' PROPOSED SUBDIVISION BECAUSE IT DID NOT PROVIDE FOR WALKWAYS BETWEEN BLOCKS OVER 800 FEET LONG AS REQUIRED BY DEFENDANT'S SUBDIVISION ORDINANCE.

At the time Plaintiffs were urging approval of their subdivision most of the attention was centered on the controversy of whether the zoning ordinance authors intended to allow residential subdivisions in M-1 zones and whether the ordinance itself allowed it. Other matters were of course considered, but one matter received little attention. Section 17-22-6, Logan City Ordinances, states:

17-22-6. General requirements and minimum standards of design.

(d) Blocks.

1. The maximum length of blocks shall be not more than thirteen hundred (1300) feet. In blocks over eight hundred (800) feet long there shall be provided a dedicated walkway through the block at approximately the center of the block. Such walkway shall be not less than ten (10) feet wide. R.68.

Plaintiffs never complied with this ordinance at any time. The subdivision plat itself illustrates this (R.155) as does the affidavit of Mark Brenchley, City Planner. R.154.

IV

THE PROPOSED SUBDIVISION IS CONTRARY TO THE INTENT AND SPIRIT OF THE ZONING ORDINANCE.

In the above three arguments, Defendants have attempted to show the deficiencies in Plaintiffs' proposal as it relates to the City's subdivision ordinance. In addition the subdivision and its proposed site is contrary to the

intent of the zoning ordinance itself. It is true that "single family dwellings" were permitted uses in the M-1 zone on the date Plaintiffs submitted their application, but nowhere does the zoning ordinance refer to whole residential subdivisions. The planning commission, the municipal council and the planner were all under the impression that the zoning ordinance would be frustrated if such a development were allowed. R.95, 96, 97, 100, 154. The ordinance had always been construed by the planner as only allowing occasional residential use incidental to manufacturing uses. R.154. That is the way the ordinance now stands as amended (to clarify) in January 1978. R.101-102.

V

THE PROPOSED SUBDIVISION CONFLICTS WITH LOGAN CITY'S MASTER PLAN.

When approving subdivisions the municipality must look not only to the requirements of the subdivision ordinance but also to the zoning law and then finally to the city's master plan for guidance. In Wes Linn Land Co. v. Board of County Commissioners, 36 Ore.App. 39, 583, P.2d 1159 (1978) the county denied approval of the subdivision and the developer appealed to the Court of Appeals. The principal issue there was whether the county's findings were adequate. The court said they were not and remanded the case. During the course of rendering the decision, the court referred

to the various considerations:

"A subdivision application which conforms to a zoning ordinance may nevertheless be denied if the application of the zoning ordinance is inconsistent with the comprehensive plan or with statewide goals, or if the application fails to conform to the subdivision ordinance, but the order must express the reasons the use permitted by the zoning ordinance is not allowed. Here, the application for residential development within a residential zone was denied in part, for example, because it was not agricultural, but there was no explicit application of any plan provision or goal which would override the zoning ordinance." 583 P.2d 1159, 1161.

The same court in another case referred to the considerations of subdivision ordinance, zoning law, and master plan as having a hierarchical relationship:

"There is a recognized hierarchical relationship between the comprehensive plan, zoning laws and subdivision ordinances. At the bottom of the hierarchy is the decision to approve or disapprove a tentative subdivision plan. In approving a subdivision, the decision-making body must first ascertain whether it is in compliance with the zoning ordinance. Bienz v. City of Dayton, 29 Or. App. 761, 566 P.2d 904, rev. den. (1977). Next it must determine that the zoning ordinance is in compliance with the comprehensive plan. Baker v. City of Milwaukie, *supra*. The plan has been likened to a constitution implemented by zoning and subdivision ordinances. Baker v. City of Milwaukie, *supra*, 271 Or. at 507, 533 P.2d 722." 1000 Friends of Oregon v. Board of County Commissioners, 32 Ore. App. 413, 575 P.2d 651, 656 (1978).

The master plan contemplated no substantial residential development in the M-1 zone. That was one of the reasons the planning commission rejected the proposed subdivision. R.86, 96, 97. If Plaintiffs would have done their homework with regard to the expectations of the master plan, perhaps

they would have recognized that residential subdivisions were not to be developed in the M-1 zone.

Section 17-22-4(a) of Logan City Ordinances states:

17-22-4. Preliminary plan.

(a) Each subdivider of land should confer with the Planning Commission before preparing the preliminary plan in order to become thoroughly familiar with subdivision requirements and with proposals of the official comprehensive plan affecting the area in which the proposed subdivision lies. (Emphasis added.) R.66.

Thus, the ordinance imposes a duty upon the developer to know or to find out about the expectations of the master plan.

VI

THE DISAPPROVAL OF A SUBDIVISION ON SEVERAL GROUNDS ONLY ONE OF WHICH MAY BE VALID IS SUFFICIENT JUSTIFICATION FOR DISAPPROVAL.

The Plaintiffs' proposed subdivision was formally disapproved by the planning commission on the following grounds:

1. It was against the "intent of the Logan City Land Use (Zoning) Ordinance. R.87, 97, 157-158.
2. It was contrary to the intent of the Logan City Master Plan. R.87, 97, 154, 157-158.
3. It provided only one means of ingress and egress causing potential hazards. R.86, 87, 97.
4. Railroad activity on three sides of the subdivision was a danger to those who would be living there. R.86, 87, 97.

The Stipulated Statement of Facts states that the above reasons for rejection are only some of the reasons. R.87,

paragraph 16. One other reason, had they given the plan's details careful consideration, was the absence of the pedestrian walkway mentioned in Argument V above which was brought to the trial court's attention in the motions which it ruled upon.

The stated reasons the municipal council gave for rejecting the preliminary plan were:

1. No protective covenants were provided to protect against M-1 uses within the subdivision. R.157, paragraph 2.
2. There was only one means of ingress and egress and that was across a railroad track. R.157, paragraph 2.
3. To allow a residential subdivision in an M-1 zone would be to violate the spirit and intent of the zoning ordinance. R.157-158.
4. The location of a residential subdivision in an M-1 zone runs contrary to the City's master plan. R.157-158.
5. The subdivision would be surrounded by a railroad on three sides. R.86.

An unstated reason for rejecting the preliminary subdivision plan which was not articulated by the municipal council until later was that it did not provide for pedestrian walkways through blocks of over 800 feet long. This matter was brought to the attention of trial court, but the court apparently considered the matter unimportant.

If any of the above reasons are sufficient for proper denial of Plaintiffs' proposed subdivision, then this Court

should hold the Defendants' denial to be justified and reverse the trial court. Davian v. Planning Commission of City of Putnam, 174 Conn. 384, 387 A.2d 562 (1978).

VII

THE MERE APPLICATION FOR A SUBDIVISION OR THE APPROVAL OF THE SAME BY A CITY, WITHOUT MORE, DOES NOT CREATE VESTED RIGHTS IN THE SUBDIVISION OWNER WHICH FOREVER FREE HIM FROM SUBSEQUENT ZONING CHANGES.

Plaintiffs and the trial court avoided the application of the subsequently adopted zoning amendments to Plaintiffs' planned subdivision by relying on Contracts Funding & Mortgage Exchange v. Maynes, (Ut. 1974) 527 P.2d 1073. In that case plaintiff purchased property which was then unzoned. Thereafter, he requested the county planning commission to grant him a conditional use permit for construction of mobile homes, which it did. Then about three weeks later after it had sought the opinions of neighbors in a hearing, it denied plaintiff's request for a building permit. About four months later, plaintiff renewed its request for a building permit. Two days after that the county amended its zoning ordinance to exclude the construction of mobile homes in that area, and at the same time denied plaintiff's request for a building permit. That case differs from this one in the following respects:

1. In Contracts the zoning law clearly permitted the use requested, but in this case the zoning law said nothing about construction of subdivisions in M-1 zones and the city had always construed the ordinances to prohibit such development. R.154.

2. In Contracts, plaintiff had done everything prerequisite to issuance of a building permit, then made a request for the same. In this case Plaintiffs had not done everything necessary and prerequisite to the issuance of a building permit. They had only applied for preliminary approval of a subdivision plan.
3. In Contracts, the only reason for denial of plaintiff's building permit request was that local residents opposed the construction. No Other reason was given:

"There is nothing in this record to indicate that the county or anyone else denied the application for a permit because of failure to file something, pay something, do something or violate something." 527 P.2d 1073, 1074.

Reasons for refusing to approve Plaintiffs' plan for a subdivision are listed and explained above, but essentially they are:

- A. Subdivisions in M-1 zones violate the intent of the zoning ordinance.
- B. Subdivisions in M-1 zones violate the intent of the master plan.
- C. The subdivision provides inadequate access (one access over railroad tracks).
- D. The subdivision provides for no walkways in blocks longer than 800 feet.
- E. The subdivision is in an improper location for residential living because it is bounded by railroad tracks on three sides.
- F. No protective covenants for excluding manufacturing uses within the subdivision have ever been presented, received or reviewed.

Again, this Court reiterated the principal problem in

Contracts:

"--there is nothing in this record to show that plaintiff was asked for maps, data, evidence, or anything else,--since it was never given any conditions with which it must have and may have complied,--only nothing but an arbitrary turn-down." 527 P.2d 1073, 1074.

One can hardly say the Defendants gave Plaintiffs "nothing but an arbitrary turn-down." In addition to the technical requirements for subdivisions and residential building, may the approving agency consider the broader policies and goals to be achieved by a municipality in an attempt to organize itself and to promote the health and welfare of its citizens? Certainly, the Plaintiffs have exhibited little interest in such matters. The City has done its best to anticipate and avoid the problems and serious dangers which most certainly will befall the proposed development and the people who may live in it. If this Court does not reverse, both it and the developer can assume responsibility for what happens there, because if the District Court's decision is upheld there is no regulation regarding zoning or subdivisions which the City can adopt at any time in the near or distant future, no matter how critical or important it might be, which the Plaintiffs in this case cannot ignore. As they argue, their rights are "vested" and nothing can change that.

The Utah case which comes closest to articulating the accepted principles found in the concepts of non-conforming

uses and vested rights is Wood v. North Salt Lake, 15 Ut.2d 245, 390 P.2d 858 (1964).

In Wood the plaintiff again was at the building permit stage when he ran into problems. His predecessors had subdivided and platted the property in 1955 which was accepted and dedicated by the City of North Salt Lake at approximately the same time. The zoning ordinance in question was enacted in 1957. In 1963 the plaintiffs were ready to construct homes and applied for a building permit. The city refused to grant it because the lots had only 6,000 square feet (as originally platted) instead of 7,000 as required by the 1957 ordinance. Prior to applying for the building permit, water mains and sewer mains had been installed in the streets. Both systems provided connection facilities in front of each lot for which plaintiff's predecessors had paid their fair share. One of the lots was owned by a single owner who had no way of getting the extra square footage required by the city before he could build. Under these circumstances, the court said:

"Without canvassing fine distinctions, we simply conclude that enforcement of the ordinance, subject of this action, eminently would be unfair, inequitable, discriminatory and inconsonant with realistic concepts of affirmative and privileged use of one's property. Enforcing this ordinance would render a 60' lot, owned by one individual, utterly useless and no doubt a weed-infested liability, although the purchaser presumably was put to the expense mentioned above--"
390 P.2d 858, 859.

Because plaintiff would be unreasonably damaged by imposition of the new regulation and because the city made no effort to assert any police powers through appropriate procedures, the court relieved the owners of the 7,000 square foot lot requirement. This court did, however, recognize:

"In reasoning as we do, we are not unmindful of the authorities that sanction zoning ordinances where persons are not unreasonably damaged thereby, but at the same time we are alert to and mindful of the authorities that strike down such ordinances where resulting damage is substantial, as we think is true in the case of a one-unit owner in the platted area here--and we cannot lay down a rule for him, but not one for him in the area who happens to have two adjoining lots. We say this under the particular facts of this case, none other." 390 P.2d 858, 859.

The above reference indicates that unless the damage to the private developer is substantial then efficacy should be given to the subsequently enacted or amended zoning ordinance. The only thing in the record which would indicate that Plaintiffs are damaged at all is the fact that they have spent \$1,335 for a boundary survey and \$890 for the preparation of a preliminary subdivision plat. It is submitted that the boundary survey has value to the Plaintiffs regardless of what they do with their property. Thus, Defendant is left with the loss of the \$890 for the preliminary subdivision plat. That amount is insubstantial for purposes of acquiring vested rights under the circumstances of this case.

Plaintiffs also cited Ready to Pour, Inc. v. McCoy, 95 Idaho 510, 511 P.2d 792 (1973) as being in support of their position. Again, Ready To Pour involved a city's refusal to grant a building permit after plaintiff had done everything necessary or prerequisite to its issuance. Plaintiff attacked the subsequently enacted zoning ordinance which completely eliminated the industrial zone as arbitrary, capricious, and confiscatory. No such attack on Logan City's amendment has been made. In Ready To Pour the court pointed to "uncontroverted evidence" that there were similar cement batch plants in the area and other operations, including the city's which were industrial in nature. There is nothing in the case which stands for the proposition that once the plaintiff built his batch plant, that it didn't become a non-conforming use and subject to the ordinance and that all other requests for building permits could not be denied because of the change in the zone. Here the Plaintiffs were not at the building stage. No building permits have ever been requested or denied. Most likely it will take several years to construct homes on all 87 lots planned for the subdivision, yet Plaintiffs claim perpetual freedom of their planned development from subsequently enacted zoning ordinances, no matter how great the need. That is not reasonable.

At the trial level Plaintiffs also cited County of Maricopa v. Anzwool Inc., (Ariz. 1973) 506 P.2d 282, and Robinson v. Lintz, (Ariz. 1966) 420 P.2d 923. In the County of Maricopa case the developer had secured the approval of both the planner and the planning commission. After the county refused to approve the subdivision plan, plaintiff sued in mandamus. There it was clear, and the court so found, that plaintiff had met all the legal requirements for approval, and once approved and filed, the lots became "legally established" by statutory mandate and no longer subject to zoning changes affecting their size, etc. The earlier case of Robinson v. Lintz, *supra*, was cited. That also was a mandamus case against the City of Phoenix for refusing to issue building permits because the previously filed subdivision lots did not meet the minimum area requirements of the city ordinance. The subdivision had previously been a part of the unincorporated area of the county. The subdivider applied for building permits based upon her previously filed subdivision. The question in that case was whether plaintiff's lots had become "legally established" pursuant to a county ordinance which allowed building on substandard lots which had been "legally established" prior to the adoption of the ordinance making them substandard. That situation is quite a different case than is now before the Court.

Plaintiffs failed to cite the most recent Arizona case which relates to the other two cases and the problem at hand. Dawe v. City of Scottsdale, 119 Ariz. 486, 581 P.2d, 1136 (1978) is a typical example of the proper application of the universally accepted principles of vested rights and non-conforming uses. In that case plaintiffs filed their subdivision with maximum 10,000 sq. ft. lots while the land was still in the unincorporated area of the county (1960). In 1963 Scottsdale annexed the area. Their zoning ordinance required 35,000 sq. ft. lots. At the time of the annexation, plaintiffs had not yet begun to build upon the lots. Plaintiffs brought an action seeking to compel the City of Scottsdale to issue building permits and to have their subdivision plat and lots declared "legally existing." The trial court found in favor of the city, the intermediate appellate court reversed the city, and Arizona's Supreme Court vacated the judgment of the intermediate appeals court and affirmed the decision of the trial court. The court stated the issue as follows:

"The principal question at issue is whether the appellant's have since 1963 a vested right to develop substandard lots within the City of Scottsdale because of the recording of their plat. We think not." 581 P.2d 1136, 1137.

The court referring to the general principle stated:

"It has been repeatedly held that subdivision ordinances apply to lots on prior recorded maps which were unsold at the time of the ordinance's

enactment. Ziman v. Village of Glencoe, 1 Ill.App.3rd 912, 275 N.E.2d 168 (1971); Sherman-Colonial Realty Corp. v. Goldsmith, 166 Conn. 175, 230 A.2d 568 (1967); Blevens v. City of Manchester, 130 N.H. 284, 170 A.2d 121 (1961); State ex rel. Mar-Well, Inc. v. Dodge, 113 Ohio App. 118, 177 N.E.2d 515 (1960); Caruthers v. Board of Adjustment, 290 S.W.2d 340 (Tex.Civ.App.1956)." Id. at 1137.

The court then went on to distinguish the case of Robinson v. Lintz, supra and stated that Robinson "...does not hold that such a lot is unaffected by subsequent zoning enactments." Id. at 1138. The court further stated that:

"Robinson did not concern itself with the problem we must decide here; namely whether the filing of a plat immunizes a parcel of real estate from subsequent zoning regardless of how urgent the need for regulations might be." Id. at 1138.

The court then compared the continued development of lots in a subdivision with the vested rights principles applied in building permit cases (where the zoning ordinance is changed after the issuance of a building permit). The opinion concluded:

"We have held that where the amount of work which was done toward the construction of a service station was of small consequence, the permittee acquired no vested right to complete the construction of the building if the board of supervisors exercised its power to rezone the property and revoked the building permit. Verner v. Redman, 77 Ariz. 310, 271 P.2d 468 (1954)." Id. at 1138.

The question here as was in the Dawe case, is whether what Plaintiffs have done toward construction (actually putting the land to use) was of such small consequence that the subdivider is considered to have acquired no vested rights.

That was essentially the question posed in Wood v. North Salt Lake, supra where this court in equity held that plaintiffs would lose too much when the cost of the otherwise useless lot and the utility stubs to each lot were considered. The only thing these Plaintiffs will lose if they are not allowed to go ahead is the \$890 paid for drafting the preliminary subdivision plan. The boundary survey has value to Plaintiffs regardless of what they develop on the property.

There are numerous cases which deal with the same vested rights issue in other states and the question always is the same: How much damage will the party suffer if the zoning ordinance were applied to the balance of his subdivision development or to his planned subdivision, or to his planned building, or to his partially constructed building. One such case is State v. Dodge, (Ohio 1960), 177 N.E.2d 515. There the plaintiff applied for a writ of mandamus to compel the issuance of a building permit based on the fact that the subdivision on which the building was to be erected had been approved and filed before the city changed its zoning ordinance requiring homes in that area to have frontage of 100 feet instead of 50 feet as was the case under the old law. There the court stated:

"The mere fact that an allotment plat is approved and recorded does not irrevocably fix the rights of the parties. Valid changes may thereafter be

be made in the zoning regulations, and the allotter must conform thereto..."

"There are no buildings on the lands of this allotment that do not conform to the requirements of the zoning law. The claim of nonconforming use is based on the assertion that, as soon as an allotment is platted, and such plat approved by the authorities, and funds are expended to improve the grade and to lay out streets, a use of the lands has occurred which causes it to be not subject to any zoning regulations adopted after the approval of the allotment plan."

"The fallacy of this claim is so readily apparent that no lengthy discussion need be made. This proposal would prevent any changes in city planning, and fix a use that never could be amended. In addition, the claim of "use" would be based upon hope rather than upon occupancy and beneficial employment of the lands. The land in this allotment without houses did not become, by reason of the plat approval, a nonconforming use." (Emphasis added.) 177 N.E.2d 515, 519-520.

In Corsino v. Grover, 148 Conn. 299 (1961), 170 A.2d 267, annotated in 95 ALR 2d 751, the property owner filed a proposed subdivision before the town had even adopted a subdivision ordinance. The minimum lot area at that time had apparently not been determined. However, the town proposed to change the zoning requirement to require 10,000 sq. ft. lots in that area. The question was whether the property owner could build a cottage on a 4,000 sq. ft. lot using the rationale of the continuation of a nonconforming use. The court rejected the idea saying that the lot had not yet been put to a use and that a proposed use cannot create a nonconforming use. The use must be actual, and the mere filing of a plat or map could not foreclose a zoning authority from

taking action which it, in its good judgment deemed necessary. It should be noted that the property owner had already built upon 179 of 448 undersized building lots and had spent in excess of \$28,000 to erect a permanent office building and install other improvements for his development.

Another very good example is Blundell v. City of West Helena, (Ark. 1975) 522 S.W.2d 661 where the court disapproved the use of some mobile home lots but approved the use of others because construction of various kinds of utility lines, grading of the lots, etc. indicated there was "substantial use" even though the mobile homes had not actually been moved in. The court cited a number of cases holding that contemplated use without active steps taken beyond preliminary work or planning was necessary before a party could claim vested rights to continue the use.

"Preliminary contracts or work which is not of a substantial nature is not sufficient to establish a vested right. County of Saunders v. Moore, supra. The mere purchase of property with intention to devote it to a use is not sufficient in spite of preliminary work, such as clearing, grading and excavating, if that owner has not incurred substantial obligations relating directly to the use of the property." 522 S.W.2d 611, 668.

See also Town of Lebanon v. Woods, (Conn. 1965) 215 A.2d 112, R. A. Vachon & Son, Inc. v. City of Concord (N.H. 1972), 289 A.2d 646, Youngblood v. Board of Supervisors of San Diego City (Cal. 1977) 71 Cal.App.3rd 655, 139 Cal. Rptr. 741.

Disregarding the fact that Plaintiffs' proposed subdivision is not yet approved and filed, most all the treatises on the subject reflect the same point of view as the above cases. In 82 Am. Jur.2d, Zoning and Planning, 373, 698-700, 186, Nature and Extend of Use or Vested Right, the rule is stated as follows:

"Most courts impose the requirement of actual use, as distinguished from mere planned or intended use. A mere contemplated use is insufficient to establish an existing nonconforming use within the meaning of a zoning law exempting nonconforming uses. A right to a nonconforming use is not consummated merely by reason of the intent of a landowner to conduct that particular use on his land; before a supposed nonconforming use may be protected, it must exist somewhere outside the property owner's mind. It has been held that a nonconforming use is not established merely by showing that one has purchased property for the purpose of a particular use. Platted but undeveloped land is not normally regarded as a "use" in zoning law for purposes of establishing a prior nonconforming use, and, in the absence of a statute or ordinance providing otherwise, the filing of a map or plat by a developer of a subdivision plat is not an existing use of land which can form the basis of a nonconforming use. According to some courts, an "existing" use means the utilization of premises so that they may be known in the neighborhood as being employed for the purpose of that use."

"So far as establishing a nonconforming use is concerned, mere preparation for use is not tantamount to actual use, and even the investment of money in preparation for a particular use of land does not stake out a vested right to that use. Ordinarily where no work has been commenced, the fact that plans had been made for the erection of a building before the adoption of a zoning ordinance prohibiting the kind of building contemplated is held not to exempt the property from the operation of the zoning regulation. In order for a landowner to proceed with the construction of a building or facility which may be utilized for a nonconforming use, the commencement of the construction must have been substantial, or substantial costs toward completion of the job must have been incurred." (Emphasis added.)

In Anderson's work, American Law of Zoning, the rule or principle is stated as follows:

"No nonconforming use is established where the developer has received preliminary approval of his plat, or even where filing is followed by extensive preliminary work. The courts have said that to recognize a nonconforming use at this early stage would result in less risk to the subdivider, but it would tend to perpetuate the problems that zoning is intended to eliminate." 1 American Law of Zoning, 402, Sec. 6.21, Filing and Approval of Plat.

In McQuillin, Municipal Corporations, the rule is stated as follows:

"The general rule is that actual use is distinguished from merely contemplated use when a zoning regulation opposed to it becomes effective is essential to its protection as a lawful nonconforming use. Accordingly, the question of an existing business or other use at the time zoning restrictions become effective must be considered in the light of the principle that the law is concerned, not with a mere plan or intention, but with overt acts or failure to act. Thus, it is not the present intention to put property to a future use but the present use of the property which must be the criterion. That is to say, mere intentions or plans at the time a zoning ordinance becomes effective to use particular land or dwellings for a certain use does not entitle one to that use in contravention of the ordinance....Indeed, the fact that a party makes a large investment in a city lot, which at the time it is purchased is free of restrictions, with an intent to use it for business purposes, does not invalidate a zoning ordinance subsequently adopted insofar as that ordinance restricts the use of the lot to residential purposes. So also, the mere filing of maps for the subdivision of a parcel of real estate is not an establishment of a vested right to continue a use nonconforming to subsequently enacted subdivision regulations." (Emphasis added.) 8A McQuillin, Municipal Corporations, 34, Zoning, Sec. 25.188, Uses Intended or Planned.

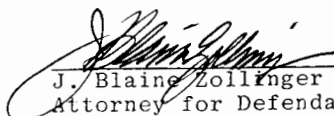
The burden of proving the existence of vested rights rests upon the party claiming them. Blundell v. City of

to make it clear that only some of the planning commission's reasons for rejecting the subdivision plan were listed in its letter to the municipal council. R.87. The focus indeed was on the single issue, but that does not mean that all other issues and requirements were met as was the conclusion of the trial judge.

CONCLUSION

It is clear from the affidavits, exhibits, and the Stipulated Statement of Facts that Plaintiffs' proposed subdivision has never been in a condition to be approved. The clarification or amendment of the zoning ordinance to clear up what would otherwise develop as a very serious problem in the uses of M-1 land does prohibit the Plaintiffs from carrying out their plans. No "use" of the land had begun, and Plaintiffs did not expend so much money in preparation for use as to acquire a vested right to develop contrary to the subsequently amended zoning ordinance or any other zoning ordinance which might be enacted sometime in the future.

RESPECTFULLY SUBMITTED this 24 day of May, 1979.


J. Blaine Zollinger
Attorney for Defendant-Appellant

West Helena, supra. Here the trial court assumed that plaintiff had done everything necessary prior to approval of his subdivision plan:

"...after the plaintiff had done everything procedurally he was supposed to do he was put off by the city who then passed the ordinance..."
R.170.

Although the trial court in this case referred to the items listed in paragraph 9 of the Stipulated Statement of Facts (R.86) as not being resolved (conflicts with the master plan, not adequate access, no protective covenants, and the danger of the railroad tracks on three sides), he went on to conclude that the subdivision was ready in all respects for approval, ignoring the items listed in paragraph 9 of the Stipulated Statement of Facts as well as the facts established by affidavits of Mark Branchley (R.153-154) and Council Chairman Claude Burtenshaw. R.157-158. The requested roadways and pedestrian pathways were not laid out, nor were protective covenants provided as required by city ordinance. These considerations clearly indicate that even if it were conceded that the land use ordinance permitted residential subdivisions in M-1 zones, not merely isolated occasional houses incidental to M-1 uses, the subdivision could not have been legally approved at the time it was presented. For that reason, the Contracts Funding case is not good precedent for this case. Defendants tried

CERTIFICATE OF MAILING

I hereby certify that I mailed to copies of the foregoing Brief of Appellant, postage prepaid, to John Preston Creer, Attorney for Plaintiff-Respondent, Senior & Senior, 1100 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah, 84111, this 24 day of May, 1979.

Lois H. Rice