

1980

Utah County v. Judy Baxter et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

UTAH COUNTY, a body corporate :
and politic, :

Plaintiff-Respondent, :

vs. :

CASE NO.

JUDY BAXTER, SQUAW PEAK, INC., :
TOM STUBBS, FRANK HORTON and :
DIANA HORTON, :

17039

Defendant-Appellants :

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT RENDERED IN
THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH
THE HONORABLE J. ROBERT BULLOCK, JUDGE

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	:
Defendant-Appellants	:

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an appeal from a judgment, granting an injunction in favor of plaintiff-respondent Utah County, against defendant-appellant Judy Baxter, wherein defendant-appellant Baxter was enjoined from further maintaining an eating, beer selling, commercial establishment on the property in question.

DISPOSITION IN LOWER COURT

Defendant-appellant Judy Baxter was enjoined from maintaining an eating, beer selling, commercial establishment, in conformity with a beer and commercial license, on the lot in

question, by Judge J. Robert Bullock, Judge of the Fourth Judicial District Court, on the 26th day of March, 1980.

NATURE OF RELIEF SOUGHT

Defendant-appellant Judy Baxter seeks a reversal and setting aside of the District Court injunction, thus allowing her to continue to maintain the eating, beer selling, commercial establishment, without unlawful interference from Utah County.

STATEMENT OF FACTS

From 1935 until 1977, the land upon which the Riverbend Inn was located was zoned for commercial use. Since 1935 there has been a commercial enterprise located there, selling beer and food. Several years ago, prior to 1976, defendant-appellant Judy Baxter acquired the property and the business of the Riverbend Lounge.

In 1976, the Utah County Commission passed a revised zoning ordinance, to go into effect in January 1977. (T.R. 30) That particular ordinance rezoned the property in question to a critical environmental zone. Under such ordinance, no commercial uses were to be allowed as well as no selling of beer. However, the county commission did allow for nonconforming uses in said zone if they existed prior to a certain time.

In March 1953, a caretaker home for the business, the Riverbend Lounge, was built. (T.R. 31) That home is also a nonconforming use under the revised zone. (T.R. 31,35) (This fact was also admitted in plaintiff's Amended Complaint.)

On January 17, 1978 (misstated as 1977 in trial), the business known as the Riverbend Lounge was destroyed by fire. (T.R. 34,42) Mrs. Iva Snell, the head of the Department for Building Inspection and Zoning Enforcement and Business Regulation for Utah County (T.R. 25), at the time of the fire, informed defendant-appellant Judy Baxter, hereinafter referred to as defendant-appellant, that according to the zoning ordinances of Utah County, there had to be a structural remodel or replacement within 12 months of the destruction. (T.R. 48)

In compliance with the above, defendant-appellant went to Ron Parker, an employee of the county, employed in the Building Inspection and Zoning Enforcement (T.R. 33,34) on November 15, 1978 and applied for a building permit to remodel the caretaker home. Mr. Parker filled out the building permit and defendant-appellant apprised him of the fact that she was going to sell beer from the caretaker home, remodeled into a lounge. (T.R. 45) Mrs. Snell and Mr. Parker both knew that the purpose for the remodeling was a commercial establishment to sell beer. (T.R. 45, 51, 55 and 57)

Ron Parker and Iva Snell were informed by defendant-appellant that she had spent \$3,500 to \$4,000 to remodel the caretaker house, at the time of the building permit application. (T.R. 46)

In mid December 1978, with the remodeling complete, defendant appellant paid \$312 to Utah County for a beer

license renewal, which amount the county accepted. (T.R. 39, 47) The former beer license was still in effect at the time of the above renewal. (T.R. 49)

Finally, on July 30, 1979, plaintiff-respondent returned defendant-appellant's check for \$312 to her and told her at the time, some seven months later, that they were denying defendant-appellant her beer license; consequently, according to them, defendant-appellant could no longer sell beer. Then, on or about November 7, 1979, the plaintiff-respondent finally filed an action to close defendant-appellant down entirely, including her commercial and beer license.

ARGUMENT

I

THE TRIAL COURT COMMITTED ERROR IN REFUSING TO DENY DEFENDANT-APPELLANT'S MOTION TO DISMISS.

In the plaintiff's amended complaint, it was alleged that "defendant's continued failure and refusal to cease and desist from such violation will result in irreparable harm to Utah County. . .". In paragraph 11 of that same complaint, plaintiff-respondent stated that the continued violation of a county ordinance was detrimental to the County of Utah and its inhabitants in that it "frustrates the comprehensive plan for the development of the county. . .". At no time during the trial was any evidence elicited or put forth by plaintiff-respondent to in any way reflect that the plaintiff had suffered irreparable injury or harm because of their allegation

that defendant-appellant had failed and refused to cease and desist from an alleged violation of the zoning ordinance. Further, plaintiff never attempted to put on any evidence that any alleged violation of the county zoning ordinance was detrimental to Utah County nor was there evidence produced by plaintiff that such an alleged violation frustrated any comprehensive plan. It is such a basic and fundamental rule of law that the evidence deduced at trial must conform to the pleadings and that those matters plead must be proven at trial in order for plaintiff to receive the relief for which he prays, that to cite authority for that proposition would almost be redundant. Further, as will be shown in the other arguments contained in this brief, it is absolutely essential and necessary in order for a plaintiff to obtain an injunction that plaintiff must plead and prove irreparable injury and harm to themselves. Since the granting of an injunction usually takes away the property rights of a defendant, the pleading and proving of irreparable injury is even more compelling. Otherwise, defendant would be deprived of constitutional rights guaranteed to her.

Henson v. Payne, 302 S.W.2d 44,51 (Mo. 1956), was a suit for an injunction to restrain a defendant religious faction from interfering with the plaintiffs' possession of church property by attempting to construct a building on the church premises. Since plaintiffs did not prevail at the trial level, they filed an after-trial motion to amend the judgment, which

motion included among other things that "the judgment entered is contrary to all of the evidence adduced . . ." The Supreme Court of Missouri, in answer to that argument stated in part that "the decree must conform not only to the evidence but to the pleadings." (Emphasis added) In the instant case, the decree rendered by the trial court did not conform to the pleadings, especially to paragraphs 11 and 12. At page 53 of the trial record, the court stated, "All right, then the county rests?" The county replied, "Yes, Your Honor." At that time counsel for defendant-appellant moved the court to dismiss the complaint on file and then additionally stated that "I don't think the county has shown any detriment to the county." Whereupon, the court queried, "Do they have to?", to which counsel for defendant-appellant replied, "Well, they plead it." To that the court replied, "As a matter of fact, I've precluded it." (T.R. 53,54) Since plaintiff-respondent did not attempt to, nor offer any evidence whatsoever dealing with irreparable injury to the county even though they had plead the same, and the judge held that they did not have to, because he had precluded it, the decree entered by the trial court did not conform to paragraphs 11 or 12 of the pleadings filed plaintiff.

In Haiku Plantations Association v. Lono, 529 P.2d 1,3 (Haw. 1974), an action was commenced by plaintiffs who were the owner-lessees of a subdivision wherein they sought to enjoin the owner of an easement from parking vehicles in and around their subdivision. There, the court stated, "All of

the material allegations of the complaint in the absence of an answer thereto, must be deemed to have been denied by [the defendant] and therefore, it was incumbent upon the plaintiffs to prove each of these allegations by the requisite proof to be entitled to any injunctive relief." In the instant case, all of the material allegations of the amended complaint were denied specifically by defendant-appellant and therefore in order for the plaintiff to prevail, it had the burden to prove each of the allegations contained in their amended complaint. Since the court did not require them to do so, reversible error was committed and injunction should not have issued.

In Pugmire v. Oregon Shortline R. Company, 92 P. 762, 767 (Utah 1907), the court was confronted by a situation which was in reverse to the one in the instant case, but which would be applicable to the case above. There the court stated:

"[T]he plaintiff should have been limited in her proof to the injuries alleged in her complaint. This was not done. Permitting the plaintiff to introduce the evidence objected to naturally tended to take the defendant by surprise and to prove an element of damages of which it had no notice."

As this applies to the instant case, the defendant-appellant was put on notice by plaintiff's amended complaint, that plaintiff intended to prove irreparable injury and harm to the county as well as frustration of a comprehensive zoning plan, which would be detrimental to Utah County. Therefore, since plaintiff did not have to prove the detriment to Utah County because of the frustration of the comprehensive plan; nor more impor-

tantly, since they did not have to prove irreparable injury in order to obtain an injunction, defendant was taken by surprise and had no advance notice. Such surprise and lack of notice really deprived defendant-appellant of her rights of due process.

In Sinclair Refining Company v. Wyatt, 149 S.W.2d 353,355 (Mo. 1941), it was stated, "In an equity case, the decree must conform not only to the evidence but also to the pleadings."

Finally, in Friedel v. Bailey, 44 S.W.2d 9,15 (Mo. 1931), it was held that "this court is limited to the issues contained in the pleadings. The decree must conform not only to the evidence but also to the pleadings."

Therefore, as is stated in the above-cited cases, it is absolutely essential that the decree in the instant case conform to the pleadings. Since the decree entered by the trial court, did not conform to paragraphs 11 or 12 of plaintiff-respondent's amended complaint and a fortiori, since an essential element to the obtaining of an injunction, is to plead and prove irreparable injury, such a failure on the part of the trial court to have the decree conform to the pleadings should result in reversible error. Therefore, plaintiffs-respondents are not entitled in any way to have an injunction issued against defendant-appellant.

Further, by pleading irreparable injury and harm, plaintiffs put defendants on notice that they were prepared to prove that at the time of trial. It is logical to assume,

therefore, that defendant-appellant would naturally prepare to meet that argument of irreparable injury. Since the trial court did not require plaintiffs to prove such, defendant-appellant would not have been prepared to meet such a turn of events at the trial court level. Consequently, there is a compelling due process denial since defendant-appellant was taken by surprise.

Finally, the following two cases should be brought to this court's attention. In La Bellman v. Gleason & Saunders, Inc., 418 P.2d 949 (Okla. 1966), the court stated:

"Jurisdiction of the trial court is limited to the particular subject matter presented by the pleadings, and any judgment which is beyond the issues framed by the pleadings and proof is in excess of the court's jurisdiction and is void."

Secondly, a somewhat recent pronouncement by our own court is stated in Cornia v. Cornia, 546 P.2d 890 (Utah 1976): "While the rules countenance liberality and procedure in the granting of relief to which a party is shown to be entitled, this does not go so far as to authorize granting relief on issues neither raised nor tried."

II

THE TRIAL COURT ERRED IN FINDING
THAT THE TRANSFER OF THE BUSINESS
TO THE HOME ENLARGED THE NONCON-
FORMING USE.

The facts which are pertinent to this argument are that the nonconforming use, prior to its destruction, was between 6,000 and 8,000 square feet in size. (T.R. 48) The original

nonconforming use was used as an eating establishment and a place where beer was dispensed. (T.R. 35,36) After the destruction of the nonconforming use, defendant-appellant transferred the business, which was an eating establishment and a beer dispensing business, to a home located several feet from the site of the original nonconforming use, the square footage of said home being 850 square feet. (T.R. 36) In other words, defendant-appellant maintained exactly the same type of business as she had in the nonconforming use prior to its destruction when she transferred that business to the house. The only difference being that the house was comprised of less square footage, by approximately six to eight times less, than that of the original nonconforming use. Defendant-appellant did not in any way change the nature or character of her business by making such a move and did not enlarge said business. She was compelled to move the business to the only structure on that parcel of ground in order to maintain her beer license and keep it active, in order that said beer license could be renewed.

Further, it was brought out at trial by the county's witness, Iva Snell, that the home to which the business was transferred was originally built and used as a caretaker home for the nonconforming use, prior to its destruction. (T.R. 31) As if to underscore that, Mrs. Snell was asked whether or not the caretaker home for the business was located there and to which she replied, "yes". In other words, the home would never have been built if there had never been a business on that

parcel of ground. The home was there solely for the purpose of the business and as will be further amplified below, that fact is critical.

It was also brought out at trial that the business which was destroyed was a nonconforming use and that the home, located on the property, was also a nonconforming use to the zone in which the property was located. These facts were also admitted in plaintiff-respondent's amended complaint.

In City of Silisbee v. Herron, 484 S.W.2d 154,156,157 (Civ.App.Tex. 1972), the court set forth certain tests as to whether a nonconforming use is valid. One test used is whether or not the use is the same before and after the zoning restriction becomes effective. The court also stated that "certain construction changes or increases have been permitted where the basic use is not changed." Finally, the court stated, "Perhaps the most understandable and easily applied test is that an existing use should mean the utilization of the premises so that they may be known in the neighborhood as being employed for a given purpose." Applying this to the instant case even though the issue is not the establishment of a nonconforming use, is that defendant-appellant used the original nonconforming use to sell food and beer. After the destruction of the original nonconforming use and the transfer of the business to the 850 square foot house, the use was to sell food and beer. The basic use never did change. Applying the last test, above stated, the original nonconforming use was known in the neigh-

borhood as a place for the sale of food and beer. After that business was transferred to the home, the use was still known in the neighborhood as being a place for the sale of food and beer. The only thing that had changed after the destruction of the original nonconforming use, was the site of the business--it had moved several feet to the east of the original nonconforming use. Even so, the transferred business was still the same type of business except that it was now established on a smaller scale, which was necessitated by the small scale of the remodeled home, which became a lounge. The neighborhood still knew that it was a place where food and beer could be purchased.

In Zoning Board of Adjustment v. Lawrence, 309 S.W.2d 883, 884,886 (Civ.App.Tex. 1958), it was found that the entire tract was used as a veterinary clinic at the time of the enactment of the zoning ordinance which did not permit such use. It was also found that Lawrence had moved one building 150 feet and joined that to another building at the cost of \$15,000. Even though the zoning ordinance in question spoke in terms of a structural alteration when applied to a nonconforming use the court found that the nonconforming use could be continued, even in light of the above facts since no structural alterations were made. That case is analogous to the case at bar. Defendant-appellant used all of the parcel of land, where the original nonconforming use was located, as part of the business of selling food and dispensing beer. The land around the

original nonconforming use was used for parking and the home located just east of the original nonconforming use was put there solely as a caretaker home for the business. Had the business not been there, the home would not have been built as a caretaker home for the business; therefore, the entire tract was used for the purposes of maintaining the business. In view of Lawrence, supra, the fact that defendant-appellant moved the business from its original situs to the remodeled home, now lounge, does not mean that defendant-appellant surcharged the original nonconforming use, even though said use was established in a different location on the tract of land.

In City of Wichita Falls v. Evans, 410 S.W.2d 311,313 (Civ.App.Tex. 1967), the court was confronted with the fact that the building from which the business had been transacted was originally a small structure so located on the tract that there was room to construct a new building thereon without removing the old. Evans erected a new building and then took the stock of goods from the old structure and placed them into the new structure and continued the business from the new structure. Then the old building was renewed. The situs of the new building was approximately one foot from the site of the old, but was placed on a new foundation. The applicable zoning ordinance spoke in terms of conducting a business from the "same location." Therefore, the court had to construe the meaning of "same location" to see whether or not the above-mentioned change conformed to the ordinance. The court held

that even though a change had been made, the business was still being conducted from the same location.

That case is apposite to the case at bar, especially since the facts are similar. The remodeled home, now lounge, was located only a few feet from the site of the original nonconforming use and the same or similar stock of goods being sold in the destroyed nonconforming use were sold in the newly remodeled lounge. In other words, the nature of the business had not changed even though the location had, a minimal amount.

The Revised Zoning Ordinance of Utah County states in part, "Nevertheless, a nonconforming building or structure of use of land may be continued to the same extent and character as that which legally existed on the effective day of the applicable regulations." The ordinance in addressing itself to a damaged or destroyed nonconforming building or structure states in part, "[S]uch restoration shall not increase the floor space devoted to the nonconforming use over that which existed at the time the building became nonconforming." The ordinance does not address itself to the question of whether or not the restored nonconforming use has to be located on the exact site of the destroyed nonconforming use. Also, in the case at bar, the floor space devoted to the restored nonconforming use was not anywhere near 6,000 to 8,000 square feet as was contained in the destroyed nonconforming use. In fact, as has already been mentioned, the floor space of the restored nonconforming use was only 850 square feet. Yet the plaintiff-respondent would

have the trial court and this court believe that such a transfer to a nonconforming building which was less than one-sixth of the original floor space of the destroyed nonconforming use, was a change in the extent and character of the original nonconforming use. Such a view is preposterous. In fact, Mr. Burningham, a deputy Utah county attorney, stated to the court that "we have other reason [sic] for getting her stopped." (T.R. 65) This shows that the plaintiff was not really interested in whether or not defendant-appellant had in any way changed the extent and character of the prior nonconforming use.

Since defendant-appellant had a prior nonconforming use which was destroyed and transferred that same use to a location, smaller in size than the original and on the same parcel of ground and dispensing the same products, she necessarily had a vested right in that nonconforming use. To divest her of that right, without any proof whatsoever on the part of plaintiff that the extent and character of the prior nonconforming use had changed is to deny defendant-appellant of her property without due process of law, as is guaranteed to her by the constitutions of the State of Utah and of the United States. Kensmoe v City of Missoula, 480 P.2d 835,838 (Mont. 1971).

Gibbons & Reed Co. v, North Salt Lake City, 19 Ut.2d 329, 431 P.2d 559,564 (1967), dealt with land owners who desired to use their property for sand and gravel excavation. North Salt

Lake City tried to enforce two of its zoning ordinances and one excavation ordinance in order to compel the discontinuance of the use of plaintiff's property for sand and gravel operations. The court was called upon to determine the validity of the provisions of the ordinances as applied to plaintiff's operations on the property. Even though this case deals with the excavation of gravel, which is somewhat different from the facts in the case at bar, the logic used therein, would be applicable to the case at hand. There, this court ruled that because of the very nature and use of an extraction business that the entire tract "is generally regarded as within the exemption of an existing nonconforming use, although the entire tract is not so used at the time of the passage or effective date of the zoning ordinance." Drawing an analogy to the instant case, it can be argued that even though the entire parcel or tract of land wherein the destroyed nonconforming use is located either directly or indirectly was used for the enhancement of defendant-appellant's business operation, the use of a different location, within the same tract and not many feet from the original destroyed nonconforming use, would in no way change the extent and character of the destroyed nonconforming use.

The facts show that defendant-appellant planned to sell food and beer from the 850 square foot remodeled lounge just as she had so done with the destroyed nonconforming use. The fact that the remodeled lounge used to be a home does not

really change the extent and character of the destroyed nonconforming use. She still dispensed the same items to the public, the people surrounding the area knew that the destroyed nonconforming use was a place in which to purchase food and beer and that the same could be purchased from the smaller remodeled lounge. It would be an entirely different case if defendant-appellant had tried to use that parcel of ground in a manner totally unrelated to the items dispensed from the prior nonconforming use. That never happened--the only thing different was that a home had been remodeled into a lounge, the lounge is only 850 square feet and that lounge is located several feet to the east of the original nonconforming use. Since the ordinance does not require that any restorations must be built on the same situs of the prior nonconforming use, it is submitted that a move to a slightly different location on the property, but still dispensing food and beer, is not a change in extent and character. In fact, defendant-appellant's restored operation was on a much smaller scale, born out of necessity of having to locate in a smaller building. Such fact demonstrates that she conformed to the requirements contained in the Utah County ordinance dealing with nonconforming buildings and uses. Such ordinance is appended to this brief as Appendix No. 1.

III

THE COURT ERRED IN NOT REQUIRING PLAINTIFF TO SPECIFICALLY PROVE IRREPARABLE INJURY AND HARM AND ALSO ERRED BY GRANTING AN INJUNCTION WITHOUT REQUIRING PLAINTIFF TO PROVE THE SAME.

At the time plaintiff closed their case in chief, nowhere in that case did they present any evidence whatsoever that by allowing defendant to continue her business operation would result in irreparable injury and harm to plaintiff, Utah County. Yet, in spite of that fact, plaintiff was in court to seek a permanent injunction against defendant's operation of a beer and eating establishment on that property. As is stated in 42 Am Jur 2d, Injunctions §48, "The very function of an injunction is to furnish preventive relief against irreparable mischief or injury . . . The mere assertion that apprehended acts will inflict irreparable injury is not enough. The complaining party must allege and prove facts from which the court can reasonably infer that such would be the result." (Emphasis added) The fact that no injunction can be granted unless there is a showing of irreparable injury or harm is a well grounded and fundamental rule of law. Because the trial court failed to dismiss plaintiff's complaint at the close of their case in chief because they did not offer any evidence whatsoever to support a showing of irreparable injury the court very erroneously granted the injunction to close down defendant's eating and beer selling business.

In Jivelekas v. City of Worland, 546 P.2d 419,423 (Wyo.

1976), plaintiffs sued the City of Worland for damages caused to their home by a sewer backup, alleging that defendant was negligent in the planning, construction and maintenance of its sewer line. Plaintiffs wanted injunctive relief to compel the city "to take necessary steps to replace the sewer line." The court held:

"Since there is no liability, there can, of course, be no injunctive relief. Before injunctive relief will be granted the thing complained of must have caused actual injury and the cause must be proven and identified. . . . 'It must be a material and actual injury, existing or presently threatened, and not one that is fanciful, theoretical, or merely possible, or that is doubtful, eventual, or contingent.'"

In the case at bar, no proof was submitted to the court by plaintiff that there was a material or actual injury whether presently existing or threatened. The court, therefore, cannot grant an injunction because any injury alleged by the county is fanciful, theoretical or merely possible. In fact plaintiff could not in any way show any irreparable injury or harm to themselves which would be different from any, if at all, deriving from the business venture of the prior nonconforming use, even if it had not been destroyed. Plaintiffs could complain that the irreparable injury they suffered was a frustration of the comprehensive plan for the development of the county as set forth in the applicable zoning ordinance. Yet nowhere in the trial did plaintiff present any evidence as to the comprehensive plan for the development of the county nor was any evidence deduced by plaintiff as to any frustration of the com-

prehensive plan. In fact, plaintiffs would be hard pressed to show that the restored nonconforming use frustrated the comprehensive plan for the development of Utah County any more so than the original destroyed nonconforming use had that business not been destroyed. However, such an argument is inapplicable since plaintiffs did not in any way put forth any evidence to support that allegation.

In Venegas v. United Farm Workers Union, 15 Wash.App. 858 552 P.2d 210 (1976), tenants of a labor camp brought a claim for injunctive relief against a labor union, which the court denied, stating:

"Tenants of the labor camp have failed to make a clear showing of necessity for injunctive relief against continuing organizational activities by the UFW. Therefore, the court had no duty to issue the injunction. Absent irreparable injury, there is no abuse of discretion in the denial of injunctive relief."

In the case at bar, plaintiffs have failed to make a clear showing of necessity for injunctive relief against defendant for the continual operation of her business out of the remodeled lounge. Therefore, the trial court below, had no duty, in fact was in clear error to issue the injunction to close down defendant-appellant. Not only did plaintiff fail to show any necessity for the injunctive relief, as was before stated, they failed to show irreparable injury. In Henson, supra, the court denied plaintiff's request for an injunction because the evidence did not show irreparable damage to plaintiffs. The court also held:

"It is the purpose of an injunction to restrain actual or threatened acts which constitute a real injury and is to be used sparingly in clear cases only, and the decree should be so framed as to afford the relief to which complainant is entitled, and not to interfere with legitimate and proper action on part of those against whom it is directed."

As was before stated, there was never any showing on the part of plaintiff or the evidence deduced at the trial that plaintiff had suffered any real injury. In Berryman v. International Brotherhood of Electrical Workers, 416 P.2d 387,388, 389 (Nev. 1966), the court held that "injunctive relief is not available in the absence of actual or threatened injury, loss or damage. There should exist the reasonable probability that real injury will occur if the injunction does not issue." The court in that case, denied the injunction since plaintiffs had incurred no damage or injury, actual or threatened.

As concerning the instant case, no reasonable probability that real injury would occur to the county if defendant-appellant continued in her business venture, was cited.

Again, in Agronic Corporation of America v. deBaugh, 21 Wash.App. 459, 585 P.2d 821,824 (1978), the court held that the "essential elements which must be shown before an injunction will be granted are necessity and irreparable injury." Amplifying that, the court stated:

"A party seeking an injunction must 'show a clear legal or equitable right and a well-grounded fear of immediate invasion of that right.' Furthermore, the acts complained of must establish an actual and substantial injury or an affirmative prospect thereof to the complainant. . . ."

The purpose of an injunction is not to punish a wrongdoer for past actions but to protect a party from present or future wrongful acts. A court should not issue an injunction when the harm it will do to a defendant is disproportionate to the damage caused a plaintiff by the action he asks be enjoined."

In the case at bar, plaintiff did not in any way show any essential elements prior to the granting of an injunction in his behalf. Nowhere in the evidence, considered in plaintiff's case in chief, was there anything dealing with the necessity of an injunction or irreparable injury done to plaintiff. Yet, the trial court granted an injunction which granting, runs counter to the well-established rules of law regarding the elements which must be shown before an injunction will be granted. Further, plaintiff failed to show a clear legal or equitable right and also failed to show a well-grounded fear of immediate invasion of that right. In addition, plaintiff's proof was void of any actual or substantial injury or even an affirmative prospect of any kind of actual and substantial injury. Nowhere did plaintiff seek to protect the county from any present or future wrongful acts of defendant. In accord is KAKE-TV and Radio Inc. v. City of Wichita, 516 P.2d 929,935 (Kan. 1973).

There have been several pronouncements by the Supreme Court of this date regarding the necessary elements to be proven in order that an injunction will be granted. Such a case is Intermountain Electronics, Inc. v. Tintic School District, 14 Utah2d 86, 377 P.2d 783,785 (1963). There, plain-

tiff, who was engaged in the field of cable television, had been granted a franchise to operate a TV system in the town of Eureka. The defendant's school district, acting under the authority of a Utah statute, contracted with a company to install, on a high peak in Juab County, a television translator which would receive, amplify and rebroadcast signals from originating television stations, making the signals available to people in the surrounding area. Action was commenced by Inter-mountain Electronics to restrain the installation of the translator station, it being alleged that plaintiff had made a substantial investment in installing its special TV system; that it had an exclusive franchise in Eureka and numerous contracts with local subscribers and that valuable property rights would be destroyed and irreparable injury would ensue if the plan of the defendants was carried out. The Utah court was not impressed. It ruled:

"The fundamental question is whether the plaintiff asserts a valid basis for prohibiting the defendants from proceeding with the proposed project. To justify doing so, it is not sufficient that plaintiff claim irreparable injury to its property, but there must be some actual or threatened violation of its rights by a wrongful act of the defendants."

This honorable court also cited with approval Jackson v. Harward, 9 Utah2d 136, 137, 339 P.2d 1026 (1959). The long standing law, in the state of Utah, is that not only is it not sufficient that plaintiff claim irreparable injury to its property, but there must also be a showing of some actual or threatened violation of its rights by a wrongful act of the

defendant. As has been stated many times in this brief, in the instant case, plaintiff at the time of trial never did claim nor prove any irreparable injury, a fortiori, they did not even show any actual or threatened violation of their rights by any wrongful acts on the part of defendant-appellant. Therefore, an injunction should never have been granted by the trial court and by its granting, the trial court committed an egregious error.

That rule, extrapolated by the Supreme Court of this state, is further amplified in Crescent Mining Co. v Silver King Mining Co., 17 Utah 444, 54 P. 244, 248 (1898). The court stated:

"The power to grant injunctions to prevent injustice has always been regarded as peculiar and extraordinary. It is not controlled by ordinary and technical rules, but the application for its exercise is addressed to the conscience and sound discretion of the court. Ordinarily, it will not be exercised when the right of the complainant is doubtful, and has not been settled at law; and, even when it has been so settled, an injunction will not be granted when the remedy at law is adequate. It is not enough that an injury merely nominally or theoretically is apprehended, even although an action at law might be maintained for it; but, to justify the interposition of this summary power, there must be cause to fear substantial and serious damage, for which courts of law could furnish no adequate remedy." (Emphasis added)

In accord, is Gulf, C.&S.F.RY.Co. v White, 281 S.W.2d 441 (Civ.App.Tex. 1955). Also, Gibbons & Reed, supra.

As has been amply shown, not only by the Supreme Court of this state, but by authority from other jurisdictions, the

granting of the injunction against defendant-appellant, Judy Baxter, was clearly erroneous absent any showing of necessity and irreparable injury on the part of plaintiff.

B

THE COURT ERRED BY FAILING TO
BALANCE THE CONVENIENCES PRIOR
TO GRANTING THE INJUNCTION IN
FAVOR OF PLAINTIFF.

By their very nature, equity courts should always be solicitous to work out the equities and justice of the case before them.

"Generally, courts are not bound to make a decree that will do more mischief and work greater injury than a wrong which is asked to redress. Thus, if the circumstances are such that the injunction would bear heavily on the defendant without benefitting the plaintiff, it will usually be refused, as where the inconvenience and injury to the plaintiff are not of a pressing character, and the result would be to cause a large loss to defendant." 42 Am Jur 2d Injunctions, §56.

As was before stated, defense counsel, at the close of plaintiff's case in chief, moved the court to dismiss plaintiff's action since plaintiff had failed to prove any irreparable injury. Since the court failed to grant said motion to dismiss, the court never inquired into the onerous burden to be born by defendant while comparing the benefits of the injunction to the plaintiff; hence, it committed reversible error. The above-cited rule from Am Jur 2d is in accord with the decision reached in Huggins v. Wake County Board of Education, 272 N.C. 33, 157 S.E.2d 703, 709 (1967). Also, Barber

v. School District, 335 S.W.2d 527 (Mo.Ct.App. 1960). In the instant case, since plaintiffs did not prove any irreparable injury to themselves if defendant continued in her business, then certainly the fact that the injunction closed down defendant, deprived her of a property right and destroyed her means of livelihood certainly displays the fact that the injunction weighs very heavily on defendant and in no way is beneficial to the plaintiff, since it really does not make any difference whether defendant engages in this business in the original nonconforming use and now in the replaced nonconforming use. In other words, plaintiff is not affected by the continuation of defendant's business, whether it be the original nonconforming use or the reconstructed nonconforming use.

This rule of "balancing conveniences" is a well-established and fundamental rule of law. In Grey v. Mayor, etc., of City of Paterson, 60 N.J.E. 385, 45 A.995, 998 (1900), the court held:

"[T]hat an injunction ought not to be granted when the benefits secured by it to one party is of little importance, while it will operate oppressively and to the great annoyance and injury of the other party, unless the wrong complained of is so wanton and unprovoked in its character as properly to deprive the wrongdoer of the benefit of any consideration as to its injurious consequences, . . . In the case before us, the injury to the defendants would be so great that an injunction should not be granted to these complaintants."

In the instant case, the benefit to be secured by the plaintiff by obtaining the injunction is of so little importance

to them, that they never even bother to put on any proof as to any irreparable injury suffered by them if the injunction would not have been issued. On the other hand, the injunction has operated and will continue to operate so oppressively and so injuriously to defendant, that there is a high likelihood that the defendant will have to suffer bankruptcy. The operation of the business was the defendant's only real means of livelihood and since she has been deprived of that means of livelihood, plaintiff has realized very little benefit. As was before stated, plaintiff's injury, if at all, is extremely incidental and so comparatively small that they did not even bother to ascertain what the injury would be.

The precedent of this jurisdiction is in accord with the above-cited authority. In Crescent Mining Co. v. Silver King Mining Co., 17 Utah, 444, supra, the court held, "If the granting of an injunction would necessarily cause great loss to the defendant,--a loss altogether disproportionate to the injury sustained by the plaintiff,--that fact should be considered in determining whether the application should be granted; and in some cases it would justly have great weight."

In Gibbons and Reed, supra, the court would not grant an injunction in favor of North Salt Lake City. Part of the consideration in arriving at that decision, was the fact that "the record indicates that the fair market value of plaintiff's property would be reduced from almost \$86,000 to approximately \$39,000. In addition to that, the plaintiff would be unable

to utilize sand and gravel deposits of a value approximating one million dollars." Applying that reasoning to the case at hand, if defendant were unable to utilize the parcel of land in question, for the sale of beer or food or for any other commercial activity, the value of that parcel would drop substantially. This is another consideration which the trial court failed to take into account in granting plaintiff the injunction plaintiff sought. In accord is Agronic, supra.

IV

THE COURT ERRED IN GRANTING THE INJUNCTION AGAINST DEFENDANT-APPELLANT SINCE PLAINTIFF-RESPONDENT SHOULD HAVE BEEN ESTOPPED FROM REVOKING DEFENDANT-APPELLANT'S BEER LICENSE AND COMMERCIAL LICENSE AND FROM SEEKING THE INJUNCTION FOR WHICH THEY PRAYED.

Due to the conduct of plaintiff-respondent directed towards defendant-appellant at the time that defendant-appellant applied to Utah County for a building permit and paid the requisite sum as well as in December 1978, wherein defendant paid to the county the sum of \$312 for the beer license (T.R. 38), plaintiff should have been estopped from revoking defendant's beer license and from seeking the injunction which was granted to them by the trial court.

Celebrity Club, Inc. v. Utah Liquor Control Commission, 602 P.2d 689,690,694,695 (1979), involved a situation where the Liquor Control Commission represented to the liquor license applicant that the applicant's plot plan complied with the

statute prohibiting the issuance of such licenses to clubs located within a radius of 600 feet of any public or private school, and applicant, in reliance upon such representation, thereafter expended upwards of \$200,000 to complete the construction of the club. The court there, held that the Liquor Control Commission was estopped from denying the license on the ground that the applicant's facilities did not comply with the 600-foot requirement. In reaching that decision, the court enumerated the elements which are essential to invoke the doctrine of equitable estoppel. These elements are set forth as follows:

- "1. An admission, statement, or act inconsistent with the claim afterwards asserted,
2. Action by the other party on the faith of such admission, statement, or act, and
3. Injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act."

In Celebrity, supra, the agents of the commission advised the owners of the club as to the appropriate alterations to the premises which the petitioner followed.

In dealing with this doctrine of equitable estoppel, the court went on to state:

"The conduct of government should always be scrupulously just in dealing with its citizens; and where a public official, acting within his authority and with knowledge of the pertinent facts, has made a commitment and the party to whom it was made has acted to his detriment in reliance on that commitment, the official should not be permitted to revoke that commitment."

Amplifying the above ruling, 42 Am Jur 2d, Injunctions
§61, states as follows:

"Remedy by way of injunction will not generally be granted in favor of one who, with full knowledge of what is being done or with means of acquiring such knowledge, is acquiescent or delays in asserting, or neglects to assert, his rights until defendant has placed himself in a position from which he is unable to extricate himself without great injury or damage."
(Emphasis added)

In the instant case, the facts indicate that the doctrine of equitable estoppel is applicable. During the trial, plaintiff called Iva Snell to the witness stand. When asked what her occupation was, Miss Snell replied that she was the head of the Department for Building Inspection and Zoning Enforcement and Business Regulation for Utah County. Then in answer to the question propounded to her by plaintiff as to what her duties were, she replied that part of her duties were to "make sure that permits that are issued comply with the zoning ordinance." In effect, Miss Snell, as an agent of the county, had the authority to advise applicants as to whether or not by way of their application they were in compliance with the zoning ordinances of Utah County. Even though much was stated by plaintiff that defendant Baxter, in making the application for a building permit, referred to that building as a single family home, Miss Snell admitted that Ron Parker, who is also an agent of the county and also worked in her department, as well as taking defendant Baxter's application for the building permit, that Mr. Parker knew what the purpose of the single family

dwelling was, i.e., that it was to be used as a lounge from which beer and food would be dispensed. (T.R. 57) Miss Snell also admitted that Mr. Parker told her this and that they had a discussion regarding that, at a time almost contemporaneous to the issuance of the building permit and accepting the \$312 from defendant Baxter for the renewal of the beer license. In fact, defendant Baxter testified that she told Ron Parker, the above-referred to agent of Utah County, that her purpose in remodeling the single family residence was so that it could be modified to the point that it would become a lounge from which beer and food would be dispensed. Also, that the closets which were marked as such on the plans submitted to him should have been marked as coolers. (T.R. 45)

When cross-examined by counsel for defendant, Baxter, Miss Snell stated that she could have been present at the time when defendant Baxter walked into the office to apply for and obtain the building permit. (T.R. 33) As was before stated, Miss Snell admitted that Mr. Parker knew what the purpose of the single family residence was, and that she was apprised by Mr. Parker what that purpose was, i.e., that it was to be used as a lounge to dispense beer and food. (T.R. 57) As a result of the building permit application, said building permit was issued to defendant Judy Baxter on November 15, 1978. The issuance of such permit was inconsistent with later denying defendant the ability to so operate the lounge, especially to sell beer; in light of the fact that Miss Snell described her

duties as making certain that the permits which were issued complied with the zoning ordinance. She, more than anyone else, should have been aware at the time the building permit was issued whether or not said issuance of the permit, would violate the zoning requirements. Thus, the first element that, as was set forth in Celebrity, supra, has been met--an act which was inconsistent with the claim afterwards asserted. Miss Snell's act of issuing the building permit, especially in view of her duties, as well as a month later accepting a check for \$312 for a renewal of defendant's beer license and then seven months revoking the beer license and the commercial license constituted inconsistent acts.

As to the second element enumerated in Celebrity, supra, since these above-referred-to agents of the county were aware of defendant's intent to remodel the home in order to construct a lounge from which to sell beer and food, then by allowing defendant to so proceed, created reliance in the mind of defendant Baxter to the point that she expended from between \$12,000 to \$15,000 to effect such remodeling. (T.R. 44)

In meeting the third element, above enumerated, defendant Baxter has suffered much injury as a result of the inconsistent positions asserted by plaintiff. Her injury is that she has lost the \$12,000 to \$15,000 in the remodeling, and has lost an indeterminate amount of business, which has nearly bankrupted defendant, simply because she relied upon Miss Snell's failure to act as well as any statements made by Miss Snell

and Mr. Parker at the time the application was accepted, which would lead defendant to believe that she could proceed in a manner in which she intended. A fortiori, Miss Snell said that she may have told defendant Baxter that she could have a commercial business in that remodeled home. (T.R. 55) Such a statement by Miss Snell is certainly an act which created reliance, justifiably so, by defendant.

Whether or not the above statement was made by Miss Snell is somewhat immaterial in light of the above-cited passage from Am Jur 2d. This is so because that passage refers to acquiescence once knowledge is acquired. Miss Snell testified that she had the requisite knowledge and because part of her duties were to ensure compliance with the zoning ordinances of Utah County, her failure to deny the permit or even minimally to state to defendant that her seeking such permit was in violation of the zoning ordinances would result in acquiescence.

This principle of acquiescence, as an element in estoppel, is amplified in the statement of this court in Morgan v. Board of State Lands, 549 P.2d 695,697 (Utah 1976):

"Estoppel arises when a party . . . by his acts, representations, or admissions, or by his silence when he ought to speak, intentionally or through culpable negligence, induces another . . . to believe certain facts to exist and that such other . . . acting with reasonable prudence and diligence, relies and acts thereon so that he will suffer an injustice if the former (Land Board) is permitted to deny the existence of such facts."

It has been born out by quoting the trial record above, that minimally, Miss Snell was silent as to whether or not defendant was violating any zoning ordinances of Utah County when she had a duty to speak in the event of a violation. That duty was part of her job as agent for the county. She either did not speak intentionally or was negligent, but either way her silence when she ought to speak induced defendant to believe the fact that her building permit and the state of intention to turn said home into a lounge in which beer and food would be dispensed was in compliance with the existing zoning ordinances. Such belief was justifiable under the facts. Several times throughout the trial, counsel for defendant urged the court to apply the doctrine of estoppel in favor of defendant so that an injunction would not issue against defendant.

Since all of the elements enumerated by this court have been met, the doctrine of equitable estoppel should be applied in this case, to estop plaintiffs from revoking defendant's beer license, her commercial license and obtaining an injunction against defendant. It would appear that plaintiffs are guilty of unclean hands; therefore, they should not be allowed to take advantage of a situation which they themselves created.

THE TRIAL COURT ERRED BY GRANTING INJUNCTIVE RELIEF IN FAVOR OF PLAINTIFFS IN VIEW OF THE FACT THAT PLAINTIFFS WERE GUILTY OF LACHES, DUE TO THE FACT THAT THE LAPSE OF TIME CREATED RELIANCE BY DEFENDANT WHICH RESULTED IN INJURY TO DEFENDANT.

It is a well established principle that "equity aids the vigilant"; so that relief in that tribunal is confined to those who manifest reasonable diligence in asserting their rights and demanding equitable protection, and equity will be denied to those who sleep upon their rights to the prejudice of the party against whom relief is asked. North Carolina Board of Architecture v. Lee, 264 N.C. 602, 142 S.E.2d 643,650 (1965). In accord, Wolf Brick Co. v. Lonyo, 132 Mich. 162, 93N.W. 251, 252 (1903).

This principle of laches has peculiar force when the injunctive power of the court is invoked. Laches or inexcusable delay will not be countenanced when this special form of relief is sought. Consequently, remedy by way of injunction should not be granted in favor of one "who, with full knowledge of what is being done, or with means of acquiring such knowledge, is acquiescent, or delays in asserting, or neglects to assert his rights while the defendant has placed himself in a position from which he is unable to extricate himself without injury or damage." Bacon v. Edwards, 214 S.E.2d 539 (Ga. 1975) B. Ry. Co. v. Kirkland, 59 S.E. 220,222 (Ga. 1907).

"A party is not entitled to an injunction when, with full knowledge of his rights, he has been guilty of delay and laches in asserting them and has negligently allowed large expenditures to be made by another party on whom, great injury would be inflicted by the grant of the injunction." Kirkland, supra. In the instant case, plaintiff, represented by Miss Snell, had full knowledge of her rights, especially in view of the fact that she was to oversee the granting of permits or licenses which would not conflict with the zoning ordinances of the county. Through Miss Snell, plaintiff has been guilty of delay and laches in asserting their rights, if any they have, by waiting from December 1978 until the last part of July 1979 before informing defendant that her operating the lounge in the building which was once a single family residence, was in violation of the zoning ordinances, in the county's opinion, as it applied to nonconforming uses. Plaintiff county, by this delay in asserting their alleged rights, knew that defendant Baxter was making large expenditures in reliance upon the statements and acquiescence of the county. In fact, the longer the wait by plaintiff, the more the reliance by defendant. Then after this great delay by plaintiff, they inform defendant some seven months later that her operation is in violation of the zoning ordinances of Utah County. Then plaintiff waits an additional three months before bringing an injunction to force the closure of defendant's business. Because of laches, by plaintiffs, great injury has been suffered by defendant, especially

with the granting of the injunction by the trial court.

In Bales v. Duncan, 204 S.E.2d 104 (Ga. 1974), the court determined that plaintiff, who had actual knowledge of defendant's plans to convert defendant's residence into a day-care center, which knowledge came to plaintiff in August of 1972, was guilty of laches in failing to bring suit to enjoin said use of defendant's home until October 16, 1972, some two months later, after defendant had expended circa \$15,000 on the project. On appeal, The Supreme Court of Georgia held that the finding of laches by plaintiff, hence the denial of the injunction, was not an abuse of discretion.

The facts in the instant case are very analogous to those in Bales, supra. The building permit granting defendant Baxter the right to modify the home into a lounge, was signed on November 15, 1978 (T.R. 56) and the check for \$312 for the beer license renewal was dated December 21, 1978. (T.R. 56) Yet it was not until July 30, 1979 that defendant received a letter from plaintiff, Utah County Attorney's Office, informing her that her license for beer could not be issued and returning the previously deposited check. (T.R. 60,61, plaintiff's Exhibit No. 5) As an aside, in the commercial banking world, a check more than six months old is a stale-dated check and does not have the same rights of negotiability that a check which is under six months old has. That tends to show that a period of almost seven months is really an unreasonable period of time in which to inform plaintiff that her rights

to sell beer have been revoked; especially, in view of the fact that the longer defendant has waited, the greater the injury she has suffered.

Plaintiff, therefore, slept on their rights for more than seven months, during which time defendant expended more than \$12,000 to \$15,000 in reliance upon modifying the single family residence and maintaining the beer license. Of these facts, plaintiff was aware. (T.R. 44) It would be contrary to equity and good conscience, to suffer a party to stand by and see these acts done, which necessarily involve defendant's taking risks and suffering great expenses and then permit plaintiff to enforce his rights by injunction and thereby inflict loss and damages on defendant while defendant is acting in good faith.

It was inexcusable for plaintiff to wait these seven months before informing defendant that her beer license could not be renewed. If, in fact, defendant was in violation of any zoning ordinances, this fact should have been readily ascertainable by plaintiff, especially since they are the ones who enforce the zoning ordinances.

Further, plaintiff should not have initially misled defendant by accepting her check for \$312 for the beer license renewal. It would be foreseeable that plaintiff could keep that check for possibly two weeks while ascertaining whether or not a violation of the zoning ordinances would occur if said beer license were renewed; however, a wait of seven months denotes

laches on the part of plaintiff. A fortiori, by waiting until November 7, 1979 to file suit to injoin defendant from selling beer is even a more compelling argument for laches. "Where there is inexcusable delay in filing an injunction suit, to the prejudice of other parties, laches acts as a bar to such action." Mansfield Area Citizens Group v. United States, 413 F.Supp. 810 (D.C. Pa. 1976).

In the instant case, as was before stated, Mr. Parker and Miss Snell, in their capacity as agents for Utah County, had actual knowledge of defendant's intent to use the modified home as a lounge in which to dispense beer and food. On page 45 of the trial record, lines 10 to 17, there is related the fact that defendant Baxter made mention to Ron Parker at the time that "I would be selling beer out of the property and that's why the bathrooms and the walk-in cooler, or I've got closet, should have been cooler, was to be use [sic] and why it was remodeled this way."

Judy Baxter was then asked if Miss Snell said anything at that time and defendant replied, "No, she did not." In fact, nowhere in the transcript is there record of Miss Snell ever informing Judy Baxter that Judy Baxter could not operate her business there; yet, Miss Snell herself, listed one of her duties as "making sure that any permits issued are in compliance with the zoning ordinances." (T.R. 25)

From the transcript it can be ascertained, from a preponderance of the evidence, that plaintiff knew what the in-

tended use of the single family residence was, i.e., a lounge from which beer and food would be dispensed. Furthermore, Miss Snell admitted that she may have told defendant Baxter that she could operate a commercial business there. (T.R. 55)

The doctrine of laches will be applied in cases where there is a lapse of time without seeking relief by injunction, to the extent that defendants are injured. Larrecq v. Van Orden, 346 A.2d 922 (Pa.Commonwealth 1975). In that case, plaintiffs waited nine months after the initial announcement of a project to expand a township building before filing their complaint seeking to enjoin the construction of such project and where during such period of time, said township retained and compensated an architect for the purpose of expanding the township building. There, the above-cited court ruled that the trial court did not err in applying the doctrine of laches.

The general rule of law in regard to the use of the doctrine of laches in cases where equitable relief is prayed for, is that the equitable remedy of an injunction must be applied for with reasonable promptness. Martin, et.al. v. Adams County Area Vocational Technical School Authority, et.al., 313 A.2d 785 (Pa.Commonwealth 1973); Brandon, et.al. v. Stover & Pickle, 447 S.W.2d 195 (Ct.App.Tenn. 1969).

CONCLUSION

It is a very basic and fundamental rule of law that the evidence deduced at trial must conform to the pleadings and that those matters plead must be proven at trial in order for any plaintiffs to receive the relief for which they pray. Further, in order for a plaintiff to obtain an injunction, it is absolutely essential and necessary that plaintiffs must plead and prove necessity and irreparable injury and harm to themselves. This is especially essential since the granting of an injunction, especially in the case at bar, robs defendants of any property rights; consequently, resulting in great injury to defendants, especially in this instant case. Attendant thereto, is a compelling constitutional argument, that to require otherwise would deprive defendant of her constitutional rights of due process, wherein she is put on notice by the pleadings, that she denied each and every allegation in those pleadings and therefore was taken by surprise when the very essential element in obtaining an injunction did not have to be proved in conformity with said pleadings, as was decided by the trial court.

In the instant case, and contrary to the great weight of authority, the decree rendered by the trial court did not conform to the pleadings. As such, the court erred in granting an injunction in favor of plaintiff. According to the cases above cited, that is the law in this state.

Defendant-appellant did not enlarge the nonconforming use, which was maintained in the destroyed building, by transferring said use to the modified home located a few feet away from the original use. Defendant-appellant maintained the same type of business, that of selling beer and selling food, the only difference being that the modified lounge was much smaller and was located a few feet away from the original nonconforming use. As was brought out during the trial, that parcel was used to enhance the original nonconforming use. Most of the parcel was taken up in parking and for the home, which was used as a caretaker home for the business, prior to its destruction. Had there been no business located there, the home would not have been built there. In fact, the move by defendant-appellant to the modified home conformed to the express requirement of the Revised Zoning Ordinance of Utah County wherein it was stated that "such restoration shall not increase the floor space devoted to the nonconforming use over that which existed at the time the building became nonconforming." Certainly 850 square feet in no way enlarged or increased the floor space devoted to the original nonconforming use. The ordinance does not address itself to the question of whether or not the restored nonconforming use has to be located on the exact site of the destroyed nonconforming use. There is an applicable maxim to the effect that "that which is not specified is deemed to be excluded." That statement speaks for itself. Another compelling fact is that the people in the neighborhood knew that

that parcel was used as a place to dispense food and beer, which is the use for which the parcel had been put to prior to the destruction. Nothing had changed except the location. Therefore, the trial court erred in finding that the transfer of the business of the prior nonconforming use, later destroyed, to the home, enlarged that nonconforming use, hence is in violation of the zoning ordinances of Utah County. Such a conclusion by the trial court is totally erroneous.

Since the very function of an injunction is to furnish preventative relief against irreparable injury, it is absolutely essential that a plaintiff must prove irreparable injury in order to obtain the relief for which they have prayed. Such is a fundamental rule of equity. By failing to dismiss plaintiff's complaint at the close of their case in chief, because they did not offer any evidence whatsoever to support a showing of irreparable injury, the court committed error. Such error is very prejudicial and has seriously injured defendant-appellant.

The injury complained of must be an actual injury and the cause must be proven and identified. It cannot be one that is fanciful, theoretical, or merely possible, or that is doubtful, eventual, or contingent. However, in the instant case, the above adjectives are inapposite, since plaintiff never offered one shred of evidence as to any injury. In addition, plaintiffs in their amended complaint allege that defendant's continued operation of the business in the modified home frustrated

the comprehensive zoning plan of Utah County. Again, plaintiffs failed to put on any evidence to support that allegation and the trial court committed reversible error in not dismissing plaintiff's case at the conclusion of their evidence, since they failed to so prove that allegation. Absent a showing or irreparable injury and harm, an injunction cannot be granted by the trial court. Similarly, plaintiffs failed to show any necessity for injunctive relief. Such requirement is an element which must be proven in order for plaintiffs to receive injunctive relief.

It is noteworthy that in addition to the above, no reasonable probability that real injury would occur to the county if defendant-appellant continued in her business venture, was in any way proved by plaintiff. As is required by the case law of Utah, the plaintiff in the instant case must not only claim irreparable injury, but there must also be a showing of some actual or threatened violation of plaintiff's rights by a wrongful act of the defendant-appellant. Since this was not done, the trial court grievously erred by not dismissing plaintiff's cause of action at the end of their presentation of the evidence, when urged by defendant's counsel to do so.

Attendant to the necessity of showing irreparable injury in order to obtain an injunction, a trial court, in granting an injunction, must not only determine whether or not irreparable injury or harm has been suffered by the party seeking the injunction, but the trial court must balance the conveniences

prior to the granting of any injunction. Because the trial court in the instant case failed to do so, it again committed error. Clearly, by granting the injunction, the trial court created more mischief and worked a greater injury to defendant than the wrong which was asked by plaintiff to be redressed. The injunction has born heavily on the defendant, in that she is unable to operate her business, after a large expenditure of money in reliance upon the acts and acquiescence of plaintiff. This injunction bears heavily on defendant but does not really benefit plaintiff, since no evidence was offered by plaintiff to show that plaintiff's inconvenience and injury are of a pressing character. In fact, the injury to plaintiff was of such a minimal consequence that they did not even see fit to in any way offer any proof of the existence of any injury. Again, it really does not make any difference to plaintiff whether or not defendant engages in this business in the modified residence or continued to engage in the business in the original location of the destroyed nonconforming use. Nowhere in the record is there any evidence that the trial court balanced any of the benefits to be realized by plaintiff against the hardships or burdens to be placed upon defendant if an injunction was going to be granted. Such a balancing has been referred to in many jurisdictions as the balancing of conveniences. Such a balancing of conveniences is such a well established and fundamental rule of law, that an injunction should not be granted by a court of equity in

an absence of any balancing of such conveniences. Because the trial court did not require the plaintiffs to put on any evidence regarding whether or not they would receive a benefit if the injunction were granted or whether or not they would suffer irreparable injury if it were not granted, the trial court's decision is clearly contrary to the law of this state as well as the long, well-established authority cited in the Utah cases, dealing with this very issue. Therefore, this injunction should never have been granted by the trial court.

As was stated in Celebrity, supra, the elements which must be proved in order to invoke the doctrine of equitable estoppel are: (1) An admission, statement or act inconsistent with the claim afterwards asserted; (2) Action by the other party on the faith of such admission, statement or act; and (3) Injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act. All of these elements are present in the instant case; therefore, the trial court erred by not invoking the doctrine of equitable estoppel against plaintiffs. Plaintiff should have been estopped from seeking an injunction, because they created the situation which led to the creation of the circumstance, which in their minds they felt must be enjoined. Here, there is ample evidence to show that a public official or officials, acting within their authority, had knowledge of pertinent facts and then either by an act or by acquiescence made a commitment and that the defendant, as a result of the act and/or acquiescence has relied to

his detriment on that comment, act or acquiescence; therefore, the plaintiffs should not be permitted to revoke the business and beer license of defendant, since she relied on their acts and/or inaction. As was brought out during the trial, plaintiff's agents were fully aware of the amount of money defendant-appellant expended in reliance upon Miss Snell and Mr. Parker's statements. In fact, Miss Snell even testified that she could have told defendant-appellant that she could operate a commercial enterprise, i.e., that of selling beer and food out of the remodeled home, now a lounge. For the trial court not to estop plaintiff from revoking defendant's commercial and beer licenses, after hearing such evidence, is totally inexcusable; especially, where defendant's counsel urged the trial court to invoke the doctrine of estoppel. It is noteworthy that Miss Snell testified that part of her duties, as agent for plaintiff, Utah County, was to ensure that any permits and licenses issued were to conform to the presently existing zoning requirements of Utah County.

As was stated in Morgan, supra, by this very court, estoppel should arise when the plaintiffs, by their acts, representations, or admissions, or by their silence when they ought to speak, intentionally or through culpable negligence induces defendant to believe that her reconstructed business conforms with the zoning ordinances of Utah County as relating to reconstructed nonconforming uses and since this belief of conformity is justifiable, a fortiori, even is willing to spend large sums of money, cer-

tainly plaintiff should be estopped from the revocation and injunction it sought.

Equally compelling, is the fact that plaintiff waited for such a long time before informing defendant that her beer license and commercial license had been revoked after seeing the amount of money defendant spent in reliance on plaintiff's acts. Certainly the trial court erred in granting the injunction through plaintiffs since it is obvious that by waiting seven months to inform defendant of the revocation and an additional three months before filing suit for injunction, that plaintiffs had slept on their rights, and because plaintiffs were guilty of laches and unreasonable delay, the court erred in granting said injunction. Plaintiffs had the knowledge and wherewithal to immediately enforce their rights, did they feel that their rights would be trammled by the issuance of the permits and licenses to defendant. The periods of time, which the plaintiff took in order to enforce their rights, if any existed, was completely unreasonable and inexcusable. This is especially compelling where it is a governmental agency which either intentionally or negligently induced the reliance of defendant.

Therefore, defendant-appellant, urges this court that it may find that the trial court erred in the points of law, as enumerated in this brief and reverse the granting of the injunction by the trial court, in favor of the plaintiffs, so that defendant may again resume her business of dispensing beer and food in the reconstructed nonconforming use. Also, that this

honorable court find that the reconstructed nonconforming use does not enlarge the destroyed nonconforming use; hence, would be found to comport to the requirements of the revised zoning ordinances of Utah County. Further, that defendant be placed in the same position that she enjoyed in December 1978, so that she may in some way recoup the losses she has suffered as the result of the revocation and injunction imposed upon her by the trial court, with a finding that the trial court acted erroneously, so that defendant-appellant may again realize the property right which she has had, which has been deprived her in an unconstitutional manner. Due to the great amount of injury suffered by defendant-appellant, defendant-appellant respectfully prays that this court will rule that the injunction was erroneously granted and may further rule that defendant-appellant be allowed to again resume the selling of beer and food in the home, now modified into a lounge.

Respectfully submitted this
day of November, 1980.

HANSEN & HANSEN
Attorneys for Defendant-Appellant,
Judy Baxter

by _____

APPENDIX

10.02.0700

GENERAL PROVISIONS

02.0701

Intent

The intent of this section is to accumulate provisions applying to all land and buildings within the unincorporated areas of the county into one section rather than to repeat them several times.

02.0702

Nonconforming Buildings and Uses

In view of the fact that no further development or change in use can be undertaken contrary to the provisions of this ordinance, it is the intent of this ordinance that nonconforming uses shall not be increased nor expanded except where a health or safety official, acting in his official capacity, requires such increase or expansion. Such expansion shall be no greater than that which is required to comply with the minimum requirements as set forth by the health or safety official. Nevertheless, a nonconforming building or structure or use of land may be continued to the same extent and character as that which legally existed on the effective day of the applicable regulations. Repairs may also be made to a nonconforming building or to a building housing a nonconforming use.

- A. *Damaged Building may be Restored*--A nonconforming building structure and a building or structure occupied by a nonconforming use which is damaged or destroyed by fire, flood, or calamity or act of nature may be restored, and the building structure or use of such building, structure, or part thereof may be continued or resumed, provided that such restoration started within a period of one year from the date of destruction and is diligently prosecuted to completion. (Such restoration shall not increase the floor space devoted to the nonconforming use over that which existed at the time the building became nonconforming.)
- B. *Discontinuance or Abandonment*--A nonconforming building or structure or portion thereof or a lot occupied by a nonconforming use which is, or hereafter becomes, abandoned or is discontinued for a continuous period of one year or more shall not thereafter be occupied, except by a use which conforms to use regulations of the zone in which it is located.
- C. *Change to a Conforming Use*--Any nonconforming building or structure which has been changed to a conforming building or use shall not thereafter be changed back to a nonconforming use.

In interpreting and applying this Ordinance, the provisions thereof shall be held to be the minimum requirements needed to promote the public health, safety, morals, convenience, order, prosperity, and general welfare of the present and future inhabitants of the county. Except as specifically provided herein, it is not intended by the adoption of this Ordinance to repeal, abrogate, annul or in any way to impair or interfere with any existing provisions of law or ordinance, or any rules, regulations or permits previously adopted or issued or which shall be adopted or issued pursuant to law relating to the erection, construction, establishment, moving, alteration or enlargement of any building or improvement; nor is it intended by this Ordinance to interfere with or abrogate or annul any easement, covenant or other agreement between parties; provided, however, that in cases in which this Ordinance imposes a greater restriction than is imposed or required by other existing provisions of law or ordinance, then in such case the provisions of this Ordinance shall govern.

Enacted effective September 9, 1970.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing
upon the Utah County Attorney's Office, Courthouse, Provo,
Utah, 84601 this _____ day of November, 1980.
