1980

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH COUNTY, a body politic,	:	
Plaintiff-Respondent.	:	
vs.	:	Case No. 17039
JUDY BAXTER, SQUAW PEAK, INC., TOM STUBBS, FRANK HORTON and DIANA HORTON,	:	
Defendants-Appellants.	:	

BRIEF OF RESPONDENT

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

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TABLE OF CONTENTS

	Page
STATEMENT OF NATURE OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT I	
THE DEFENDANT IS WITHOUT STANDING IN EQUITY TO PRAY FOR ESTOPPEL	5
ARGUMENT II	
EVEN ASSUMING, ARGUENDO, THAT THE COURT FINDS THAT THE DEFENDANT HAS SOUGHT EQUITY WITH CLEAN HANDS, THEN ON THE MERITS OF THE EVIDENCE PRESENTED, THE COUNTY CANNOT BE ESTOPPED FROM SEEKING A PERMANENT INJUNCTION BASED ON A VALID EXERCISE OF ITS POLICE POWER	8
ARGUMENT III	
THE FINDINGS OF THE TRIAL JUDGE, BECAUSE OF HIS ADVANTAGED POSITION, OUGHT NOT BE DISTURBED UNLESS THE EVIDENCE CLEARLY PREPONDERATES TO THE CONTRARY	11
ARGUMENT IV	
THE DOCTRINE OF "LACHES" IS BARRED	13
CONCLUSION	15

CASES CITED

	Page
Alexander Company v. Owatonna, 24 N.W.2d 244 (Minn. 1946)	11
Dansie v. Murray City, 560 P.2d 1123 (Utah 1977)	10
Eastman v. Eastman, Utah, 558 P.2d 514 (1976).	13
Kier v. Condrack, 25 Utah 2d 139, 478 P.2d 327 (1970)	13
Lockard v. Los Angeles, 33 Cal.2d 453, 202 P.2d 38, cert. den., 337 U.S. 939, 93 L. Ed. 1744, 69 S. Ct. 1516	14
McBride v. McBride, Utah, 581 P.2d 997 (1978) .	13
National F. Insurance Insurance Company v. Thompson, 281 U.S. 331, 74 L. Ed. 881, 50 S. Ct. 288	5, 6
Pagano v. Walker, Utah, 539 P.2d 452 (1975) ...	13
Pope v. Pope, Utah, 589 P.2d 752 (1978)	13
Precision Instrument Mfg. Company v. Automotive Maintenance Machinery Company, 324 U.S. 806, 89 L. Ed 1381, 65 S. Ct. 993	6
Rock v. Matthews, 35 W. Va. 531, 14 S.E. 137	6
Rockford v. Sallee, 129 Ill. App. 2d 75, 262 N.E.2d 485	14
Salt Lake County v. Kartchner, Utah, 552 P.2d 136, 139 (1976)	5, 9
State, etc. v. St. Charles City Board of Adjustment, Miss., 553 S.W.2d 729 (1977)	9
Tanner v. Baadsgaard, Utah, 612 P.2d 345 (1980)	13

	Page
Timpanogos Highlands, Inc. v. Harper, Utah, 544 P.2d 481 (1975)	13
Utah County v. Kenneth J. Young, et al., Utah 615 P.2d 1265 (1980)	10
Watson v. Watson, Utah, 561 P.2d 1072 (1977)	13

AUTHORITIES CITED

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27 Am. Jur.2d, Equity, §§ 136 and 138	6
82 Am. Jur.2d §253	14
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8A McQuillan, Municipal Corporations, Third Edition Rev., Section 25.349 at p. 517	10
Utah Rules of Civil Procedure, 8(c)	14

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UTAH COUNTY, a body corporate and politic,	:	
Plaintiff-Respondent,	:	
vs.	:	CASE NO.
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Defendant-Appellants.	:	

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

This is an appeal from an action initiated by Utah County pursuant to the County's Zoning Ordinance and the Utah Enabling Statutes to obtain an injunction against the continued commercial use of a single-family residence which is owned by the defendant-appellant, and which property is situated in the Critical Environmental I Zone in Utah County, State of Utah.

DISPOSITION IN LOWER COURT

The Fourth District Court in and for Utah County, State of Utah, the Honorable J. Robert Bullock, Judge Presiding

and sitting without a jury, issued an injunction prohibiting the further commercial use of appellant's single-family residence which use is not permitted in the Critical Environmental I Zone of Utah County.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the District Court's decision and findings which granted plaintiff a permanent injunction prohibiting the defendant from further commercial use of the single-family dwelling on the property in question until such time as the zone is changed permitting expanded commercial use, or until such time as it is otherwise permitted by law.

STATEMENT OF FACTS

There existed two structures on the subject property: (1) a single-family residence constructed in March of 1953 (T.R. 31) and (2) the Riverbend Lounge, a commercial establishment.

While the property in question is presently in the Critical Environmental I Zone, it previously had been in the Watershed Conservation Zone (W.C.I.). Said property never was within a Commercial Zone. Land within the Critical Environmental Zone has functioned historically as a primary watershed for much of the irrigation and culinary water supply for the Utah Valley area. Experience has shown this watershed area to

be environmentally fragile; its preservation is of critical importance to the County. 4-5-5(A) of "The 1976 Revised Zoning Ordinance of Utah County, Utah."

Both the single-family residence and the Riverbend Lounge were separate non-conforming uses in the Critical Environmental Zone upon adoption. (T.R. 31, 35). On January 17, 1977, the business known as the Riverbend Lounge was destroyed by fire (T.R. 34, 42). Prior to the fire, appellant-defendant had resided in the residence on the subject property. (T.R. 42). A building permit was issued to defendants for the construction of a steak house to replace the Lounge which had burned down. (T.R. 25). Also, on or about November 15, 1978, defendant-appellant made application to remodel the single-family residence on the premises. Defendant-appellant indicated on the building permit that the existing use of the parcel was "single family" and that the intended use of the parcel was "single family". (Plaintiff's Exhibit "1"). Defendant-appellant provided all the information for the permit while a county employee prepared the form (T.R. 43).

With her application, defendant-appellant submitted a site plan prepared by herself expressing what was to be done with the property (T.R. 43), (plaintiff's Exhibit "3"). On the site plan, defendant-appellant has identified a kitchen, a living room, bedrooms, closets and other rooms common to a

residence. Both the building permit application and the site plan contain no indication whatsoever that the subject property was to be used other than for a single-family residen Since the permit and the site plan were in order, a permit issued.

At the time of application, defendant-appellant anticipat spending $3,500 to remodel (Plaintiff's Exhibit "1"). She estimated at trial that she actually spent between $12,000 and $15,000 (T.R. 47).

After completion of the improvements to the home, defendant-appellant made application for a business license for sai structure. The same was denied.

Defendant-appellant never did have a business license to operate commercially from the single-family residence (T.R. 44

The Riverbend Lounge, which had burned down, was totally reconstructed into a new facility, the Squaw Peak Steakhouse. It was completed and opened for business on December 31, 1979.

Upon completion of the steak house, defendant-appellant intended to transfer back into that new facility. (T.R. 50 and 51). Defendant-appellant knew that her commercial use of the home was, at best, temporary. (T.R. 50). Defendant-appellant never intended to have two commercial businesses on the property. (T.R. 51). Because of partnership problems, not because of any misleading on the part of Utah County or the

Building or Zoning Department, defendant-appellant was unable to transfer her business to the new facility and, therefore, operated a commercial business in the single-family residence. (T.R. 51).

Plaintiff brought this action because defendant-appellant changed the use of a single-family residence to a business, all contrary to "The 1976 Revised Zoning Ordinance of Utah County, Utah"; because a single-family residence and a commercial business had expanded into two businesses in the Critical Environmental Zone. "The 1976 Revised Zoning Ordinance of Utah County, Utah" provides:

> A nonconforming use of a building or lot shall not be changed to another nonconforming use whatsoever. Changes in use shall not be made, except to a conforming use. 4-1-8(D).

ARGUMENT

I

THE DEFENDANT IS WITHOUT STANDING IN EQUITY TO PRAY FOR ESTOPPEL.

The frequently cited maxim that "he who comes into equity must come with clean hands" is an ancient and favorite precept of the Equity Court. See Salt Lake County v. Kartchner 552 P.2d 136, 139 (Utah, 1976). The same principle is expresse in the language that "he who has done inequity shall not have equity". The principle announced thereby is recognized as bein a fundamental principle of equity jurisprudence. National F.

Insurance Company v. Thompson, 281 U.S. 331, 74 L. Ed. 881, 50 S. Ct. 288. The underlying theory inherent in the clean hands doctrine is that equity has for its purpose the dispensi of unalloyed justice and that, as Lord Chief Justice Wilmot observed, "No polluted hand shall touch the pure fountain of justice". See Rock v. Matthews, 35 W. Va. 531, 14 S.E. 137.

It is equally well settled that one's misconduct or lack of conduct need not necessarily have been of such a nature as be punishable as a crime or as to justify legal proceeding of any character. Any willful act concerning the cause of action which rightly can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim. 27 Am. Jur.2d Equity, Section 138. The "clean hands" doctrine takes on even greater significance when the suit in equity concerns a public interest. 27 Am. Jur.2d Equity, Section 136 at Page 668 states:

> . . . [W]here a suit in equity concerns the public interest as well as the private interest of the litigant, the doctrine that he who comes into equity must come with clean hands assumes a greater significance since it not only prevents a wrongdoer from enjoying the fruits of his transgressions, but also averts an injury to the public. See also Precision Instrument Mfg. Company v. Automotive Maintenance Machinery Company, 324 U.S. 806, 89 L. Ed. 1381, 65 S. Ct. 993.

In the instant case, defendant would have this Court estop the County from exercising its police powers. To grant such relief would infer that the defendant has sought equity with

"clean hands". Such an inference is in direct conflict with the evidence presented and is contrary to the findings of the trial Court. In support thereof, the plaintiff would specifically draw this Court's attention to the following:

First, the building permit was issued for the remodelling of a "single-family residence" with an estimated cost of $3,500. (See plaintiff's Exhibit "1"). However, in fact, between $12,000 and $15,000 were expended. Ms. Baxter provided plaintiff with the $3,500 estimate and executed the permit bearing that figure. (Plaintiff's Exhibit "1"). (T.R. 67). Just above defendant's signature is the following agreement:

> I agree to comply with all the county and state building laws and ordinances, that the representations in this application for a building permit are true and accurate, and any misinterpretation or error herein are the sole responsibility of the applicant, and shall in no way incur or accrue liability or obligation to Utah County, its officers or agents. (Plaintiff's Exhibit "1").

Secondly, Ms. Baxter, on the face of the building permit, designated the intended use of the structure as "single-family residence" (Plaintiff's Exhibit "1").

Thirdly, Ms. Baxter submitted a site plan, on which she described rooms common to a single-family residence and not a commercial establishment. She testified that the "living room" in said site plan now has tables and chairs and a portable bar. The large "closet" in said site plan is now a large walk-in cooler. It became very clear in trial that the representations of defendant on the building permit and site plan were not "true and accurate".

Certainly the weight of the evidence supported the Court's finding:

> That the defendant, Judy Baxter, had no agreement with plaintiff allowing commercial use of the single-family dwelling.

In light of the above, it stands to reason that the estoppel argument can best be applied <u>against</u> the defendant; she cannot now claim the building permit was issued for a commercial business when all her designations on the requisite documents are for a "single-family residence". Therefore, the rules of equity do not assist her in her claim.

II

> EVEN ASSUMING, ARGUENDO, THAT THE COURT FINDS THAT THE DEFENDANT HAS SOUGHT EQUITY WITH CLEAN HANDS, THEN ON THE MERITS OF THE EVIDENCE PRESENTED, THE COUNTY CANNOT BE ESTOPPED FROM SEEKING A PERMANENT INJUNCTION BASED ON A VALID EXERCISE OF ITS POLICE POWER.

The defendant alleges that the County should be estopped from seeking a permanent injunction. Defendant bases her allegation on the notion that "a party seeking an injunction must show a clear legal or equitable right and a well-grounded fear of immediate invasion of that right."

Further, defendant contends that the Court erred by failing to balance the conveniences prior to granting the injunction in favor of plaintiff.

Defendant's contention and reasoning is faulty in several respects because we are dealing with zoning laws. The doctrine of estoppel is not generally applicable against a government body. Only under "exceptional circumstances" have a few jurisdictions allowed estoppel to be applied. See State, etc. v. St. Charles City Board of Adjustment, 553 S.W.2d 729 (Miss. 1977) In Utah, the above-stated exception allowing estoppel against a municipal entity, was addressed by the Court in Salt Lake County v. Kartchner, 552 P.2d 136, 138 (Utah, 1976), wherein the Court stated:

> Estoppel, waiver or laches ordinarily do not constitute a defence to a suit for injunctive relief against alleged violations of zoning laws, unless the circumstances are exceptional. Zoning ordinances are governmental acts which rest upon the police power and as to violations thereof any inducements, reliances, negligence of enforcement, or like factors are merely aggravations of the violation rather than excuses or justifications therefor. [Emphasis added].

In Kartchner, supra, the County was estopped because it was not uniformly enforcing the law. Such is not the case in the present matter now before this Court. As the Court in State, etc. v. St. Charles City Board of Adjustment, supra, admonished "The doctrine of estoppel is not generally applicable against a governmental body and if applied, it is done so only in exceptional circumstances and with great caution." [Emphasis added]. 553 S.W.2d at 726.

Defendant has further asserted that Utah County is estopped by the acts of its agents. In response to such a claim, first and foremost, defendant-appellant admitted that she was not misled by Utah County and its employees. (T.R. 51 The Court, supported by the evidence at trial, found no misleading by respondent. Thus, an essential element of an equit estoppel is missing.

Second, the structure, itself, is a home and does not violate the zoning laws; it is only the commercial use that is proscribed.

As a matter of law, estoppel may not be used as a defense by one who acted fraudulently, or in bad faith, or with knowle 8A McQuillin, Municipal Corporations (3rd Ed. Rev.), Sec. 25.3 P. 517; Utah County v. Kenneth J. Young, et al., Utah, 615 P.2 1265 (1980).

Even if it had been determined that County had misled Ms. Baxter, estoppel is not always available. "The principle well established that a public or governmental corporation such as a municipal corporation is not estopped by the acts of its officers when they exceed their powers. The rule is that persons dealing with such officers must, at their peril, ascertai the scope of their authority." 3 McQuillan, Municipal Corporations, Third Edition, Section 12.126a at Page 534.

The above language was cited with favor in Dansie v. Murray City, 560 P.2d 1123 (Utah, 1977).

The underlying reason for the rule as cited above and applied by the Court in Dansie, was best stated by the Minnesota Supreme Court in Alexander Company v. Owatonna, 24 N.W. 2d 244 (Minn. 1946), wherein it stated:

> A contrary rule would lead to chaos in municipal affairs. If the doctrine of estoppel could be invoked in such situations, municipalities would repeatedly find themselves bound by the unauthorized acts of their officers and agents possessing only limited authority. Experience has shown the wisdom of the prevailing rule and persons dealing with municipal officers and agents are bound by constructive notice of the law and public records with respect to the powers and functions of such officers or agents.

Defendant has relied upon a mountain of case law to drive home a non-meritorious point and in so doing has ignored the fact that estoppel is inapplicable, except under exceptional circumstances.

Further, it is unreasonable to think that a municipality must weigh and consider the "conveniences" before exercising legitimate police powers in enforcing its zoning laws. That theory is not a "well established and fundamental rule of law" in the field of zoning enforcement.

III

THE FINDINGS OF THE TRIAL JUDGE, BECAUSE OF HIS ADVANTAGED POSITION, OUGHT NOT BE DISTURBED UNLESS THE EVIDENCE CLEARLY PREPONDERATES TO THE CONTRARY.

Defendant-appellant alleges that "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". Evidently, counsel has forgotten plaintiff's first witness.

As its first witness, the Chief of the Food Section in the City-County Health Department was called. In that capacity he performed an inspection of the commercial establishment in the single-family residence, resulting in a finding of health, safety, and sanitary deficiencies (T.R. 21).

When plaintiff attempted to inquire of the Health Officer concerning those deficiencies, counsel for defendant strenuously objected, claiming that "nothing there is relevant to this proceeding". (T.R. 21).

It is Utah County's position that health deficiencies in a food establishment are a detriment to Utah County and its residents and can cause irreparable harm. Certainly the Court can reasonably infer that health and safety deficiencies will affect Utah County residents.

Counsel, upon objecting to the evidence and claiming it to be irrelevant, ought to be estopped from claiming on appeal that it is totally necessary, requisite and relevant and that the lack of said information forms the basis for reversal. Those positions are patently inconsistent.

On Appeal, this Court will not disturb the action of the trial Court unless the evidence clearly preponderates to the contrary, or the trial Court has abused its discretion, or

misapplied principles of law. Eastman v. Eastman, Utah, 558 P.2d 514 (1976); Watson v. Watson, Utah, 561 P.2d 1072 (1977); and Pope v. Pope, Utah, 589 P.2d 752 (1978).

In a recent Utah case, Tanner v. Baadsgaard, Utah, 612 P.2d 345 (1980), this Court stated its well-established rule:

> Due to the prerogatives and advantaged position of the trial judge, we indulge considerable deference to his findings. Where the evidence is in dispute, we assume that he believed that which is favorable to his findings, and we do not disturb them unless it clearly preponderates to the contrary. The Court relied upon sound Utah case law: Timpanogos Highlands, Inc. v. Harper, Utah, 544 P.2d 481 (1975); Pagano v. Walker, Utah, 539 P.2d 452 (1975); McBride v. McBride, Utah, 581 P.2d 997 (1978); Kier v. Condrack, 25 Utah 2d 139, 478 P.2d 327 (1970).

Based upon the record, certainly the trial judge did not abuse his discretion in holding that the County was not estopped from seeking injunctive relief. The findings in the instant case are supported by the evidence and should not be disturbed.

IV

THE DOCTRINE OF "LACHES" IS BARRED.

Defendant-appellant contends that Utah County delayed in asserting its rights, being guilty of laches. While it is true that several months passed before a suit was filed, Utah County was working with Ms. Baxter's counsel from May, 1979, attempting to resolve this matter. Certainly Utah County should not be

faulted for attempting to resolve this matter short of litigation, even though that policy may cause some delay in the filing of a law suit, if or when it becomes necessary.

It appears that defendant-appellant has delayed in asserting the defense of laches. Such defense is clearly an affirmative defense. Rule 8(c) of the Utah Rules of Civil Procedure provides:

> In pleading to a preceding pleading, a party shall set forth affirmatively . . . laches . . ., and any other matter constituting an avoidance or affirmative defense.

Defendant-appellant never raised the defense of laches in her answer, nor was any claim or argument made at trial. Clearly it is untimely to raise the defense of laches for the first time at appellate review. The argument should be barred

Defendant's argument is also marred by the fact that no vested right to violate a zoning ordinance can be acquired by a continuing violation. Lockard v. Los Angeles, 33 Cal.2d 453 202 P.2d 38, 7 A.L.R.2d 990, cert. den., 337 U.S. 939, 93 L. Ed. 1744, 69 S. Ct. 1516. Mere non-action by a municipality does not constitute acquiescence. Rockford v. Sallee, 129 Ill. App.2d 75, 262 N.E.2d 485. The doctrine of laches does not ordinarily apply to a municipality whose duty it is to enforce its own zoning regulations. 82 Am. Jur.2d §253.

CONCLUSION

The defendant-appellant has gone far afield in her arguments. The trial judge characterized this case as a zoning case and narrowed the issues. It was not meant to be a review of the denial of Ms. Baxter's beer license. Nothing in the pleadings refers to a beer license.

The granting or denial of a beer license is within the exclusive domain of the Board of Utah County Commissioners. Said Board has never been joined as a party to this action. It should be emphasized that Iva Snell, a County Building and Zoning Officer, contrary to statements found in the defendant-appellant's Brief, has no authority whatsoever to deny or grant approval of a beer license.

Many of the defendant-appellant's arguments are rendered irrelevant because they are beyond the scope of this trial.

Defendant's counsel have confused the facts considerably. That is understandable because they are the third firm of attorneys representing Ms. Baxter in this case. Furthermore, they have attempted to reconstruct the case without the advantage of having participated at the trial, nor at any of the Commission hearings prior to trial.

Defendant-appellant has argued page after page the doctrine of estoppel and laches. The doctrine of laches is

simply barred for failure of timeliness. Also, the maxim that "he who comes into equity must come with clean hands" is an ancient precept of the Equity Court. In the instant case, the defendant is seeking this shield of equity without clean hands, and the relief prayed for should be denied.

Defendant-appellant has ignored the fact that the doctrine of estoppel is generally not available against a governmental entity unless the circumstances are exceptional. The plaintiff County, vigorously contends that no exceptional circumstances exist in the instant case which would estop the County from exercising its inherent police power to protect the health, safety, and general well-being of the public.

The defendant-appellant has attempted to make complex that which is very simple.

Defendant-appellant testified or admitted at trial:

1. That she endorsed the building permit claiming the intended use was to be residential;
2. That she filed a site plan with rooms identified as residential rooms (living room, bedroom, etc.);
3. That she estimated the remodelling of the home would be $3500. She actually spent between $12,000 and $15,000 (T.R. 44);
4. That she, in fact, used the home for a commercial business;

5. That she never had a business license to conduct a business in the home (T.R. 44);

6. That she intended the commercial use of the home to be temporary; to be used during the construction period of the restaurant by her partners (T.R. 50);

7. That when her partners completed the new steak house, she intended to transfer the business to the new structure (T.R. 51);

8. That upon completion of the same, she experienced problems with her partners and was unable to transfer (T.R. 51);

9. That the problems were not caused by any misleading on the part of Utah County or its officers, and that the problems resulted from a partnership breakdown (T.R. 51).

There is no question that where there once existed one commercial business, Ms. Baxter and her partners now have two in that Critical Environmental Zone. There is no question that a single-family residence has been converted to a commercial use.

Defendant-appellant continued her commercial use of the home long past the newly completed construction, and even long past the trial and the issuance of the injunction.

Defendant has prayed that the injunction be lifted and that she be entitled to a permanent commercial use of the single-family residence. She is asking this Court to grant her a permanent commercial use in an already non-conforming residential building, contrary to the zoning ordinance of Utah County and contrary to the evidence presented at trial.

Plaintiff respectfully resists that prayer for relief and requests that this Court affirm the lower Court.

Respectfully submitted this
day of December, 1980.

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By _____
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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Respondent, postage prepaid, to Phil L. Hansen and David O. Drake, 800 Boston Building, Salt Lake City, Utah 84111, Attorneys for Defendant-Appellant, Judy Baxter, this _____ day of December, 1980.

_____
Secretary