

1955

## H. C. Hardgraves v. Harry L. Young et al : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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# In the Supreme Court of the State of Utah

H. C. HARGRAVES, Building Inspec-  
tor for Salt Lake City, a municipal  
corporation,

*Plaintiff and Appellant,*

vs.

HARRY L. YOUNG, KENNETH L.  
ANDERSON and WILLIAM WAL-  
KENHORST,

*Defendants and Respondents.*

Case No. 8275

## PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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# In the Supreme Court of the State of Utah

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H. C. HARGRAVES, Building Inspector for Salt Lake City, a municipal corporation,

*Plaintiff and Appellant,*

vs.

HARRY L. YOUNG, KENNETH L. ANDERSON and WILLIAM WALKENHORST,

*Defendants and Respondents.*

Case No. 8275

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## PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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### PETITION FOR REHEARING

COME NOW the defendants and respondents in the above entitled case and petition the court for a rehearing upon the following grounds:

I. In determining that the structures in question are within the terms of the ordinance, the appellate court has invaded the province of the trial court as a finder of fact.

II. In holding that the prohibiting of the structures in question is reasonably related to the public health, safety,

morals and general welfare, the court has relied on a line of cases which has no applicability to the facts in this case.

A Brief in support of this petition is filed herewith.

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BRIEF IN SUPPORT OF PETITION FOR REHEARING  
STATEMENT OF POINTS RELIED UPON

POINT ONE

IN DETERMINING THAT THE STRUCTURES IN QUESTION ARE WITHIN THE TERMS OF THE ORDINANCE, THE APPELLATE COURT HAS INVADED THE PROVINCE OF THE TRIAL COURT AS A FINDER OF FACT.

POINT TWO

IN HOLDING THAT THE PROHIBITING OF THE STRUCTURES IN QUESTION IS REASONABLY RELATED TO THE PUBLIC HEALTH, SAFETY, MORALS AND GENERAL WELFARE, THE COURT HAS RELIED ON A LINE OF CASES WHICH HAS NO APPLICABILITY TO THE FACTS IN THIS CASE.

## POINT ONE

IN DETERMINING THAT THE STRUCTURES IN QUESTION ARE WITHIN THE TERMS OF THE ORDINANCE, THE APPELLATE COURT HAS INVADED THE PROVINCE OF THE TRIAL COURT AS A FINDER OF FACT.

Because of the brevity of the opinion rendered by the Court in this case, it is difficult to determine the grounds upon which the Court held that the structures in question were within the terms of the Salt Lake City ordinances here being considered. We are unable to tell whether the Court is holding by this opinion that any device, structure or growth is prohibited in a sideyard regardless of whether or not it may be part of a building or whether the court is holding, contrary to the holding of the trial court, that the carports or rigid awnings in question actually do constitute a part of the building. It is submitted that this point should be clarified. Left in the position in which the opinion heretofore rendered leaves it, doubt is thrown upon the right of a landowner to have anything in his sideyards. The language of the court could be constructed to prohibit trees, clothes-line poles, beach umbrellas, shrubbery or anything else that extends above the surface of the ground. Such was certainly not the intention of the City Commission in adopting the ordinance in question. The clear intendment discernable from the language of the ordinance is otherwise. The Section of the Ordinance quoted by the Court is as follows:

“(a) The area of a side or rear yard shall be open and unobstructed, except for the ordinary projections

of window sills, belt courses, cornices and other ornamental features to the extent of not more than 4 inches except that where the building is not more than 2 inches in height the cornice or eaves may project not more than 2 feet into such yard . . . ” Sec. 6727, Revised Ordinances of Salt Lake City, 1944.

It will be noted that all of the exceptions contained in the above quoted section apply to things which are definitely and unmistakably integral parts of the building. No exception is made as to such matters as trellises, fences, detachable awnings, trees or shrubbery, which are commonly found in every side yard for the reason that the clear intendment of the ordinance is to apply only to buildings and, therefore, no exception is needed as to things which are not parts of buildings.

The basic statute to which the exceptions above quoted apply reads as follows:

“In all Residential A, A-3, B-2, districts, for every building erected there shall be a side yard along each lot line. The least dimension of any such side yard shall be 35% of the building height, but in no case less than 8 feet for Residential A and A-3 . . . ” Sec. 6725, Revised Ordinances of Salt Lake City, 1944.

The only interpretation that can be placed upon this section is to the effect that the side yard requirements shall apply to buildings and not to other devices which may ordinarily be found in a yard. It does not seem conceivable, therefore, that the court could have intended to extend the application of the ordinance regarding side yards to things which are not parts of the buildings.

Assuming, therefore, that the court intended to extend the statute only to buildings, we are still left with an uncertainty

as to whether or not the court construed the rigid awnings or car ports in question as being independent buildings themselves, or whether they are constructed as being integral parts of the residences. It seems quite clear from the city ordinances that they cannot be considered as independent buildings in themselves.

Section 401 of the Building Code defines a building as follows:

“A building is any structure built for the support, shelter *and* enclosure of persons, animals, chattels or movable property of any kind.”

As was pointed out in our brief in this case, there is no enclosure involved here. Therefore, the structures cannot be considered as independent buildings in and of themselves, and it does not appear logical that this court would have so considered them. We are then left with the supposition that this court must have considered the structures as an integral part of the residential building.

It is respectfully submitted that if the appellate court did thies, it invaded the province of the trial court as a finder of fact. The legal principles to which we must have reference to determine whether or not an improvement becomes part of the realty or part of the building are too well established to require reiteration here. Suffice it to say that the trial court found under the evidence by applying such legal principles that these devices were not parts of the buildings. They are not permanently attached to the building; they are bolted to the building and are readily and easily removable without damage to the building. On the open side they are supported

by posts, which are also readily removable. Based upon this evidence, the trial court found, as a matter of fact, that the devices in question were not parts of the buildings but were merely adjuncts thereto, just as would be a television aerial or any other readily removable improvement. The principle that an appellate court should not disturb a finding of fact by the lower court which is supported by creditable evidence is well established. In this regard see *Clark v. Dulien Steel Products, Inc. et al*, (Cal) 128 Pac. (2d) 608; *Koury v. Vogel, et al*, (Okla) 130 Pac. (2d) 93; *Fitzkee v. Turner* (Cal) 75 Pac. (2d) 522 and *Stow et al v. Bruce et al* (Okla) 61 Pac 2d) 1043.

The question of whether a finding that a structure attached to but removable from the realty actually becomes a part of the realty is a question of law or fact was considered by the District Court of appeal in California in the case of *Oakley v. Butler*, 59 Pac. (2d) 826. Certiorari was denied by the Supreme Court of California. In the *Oakley* case certain improvements were made to a building by an assignee under a contract of sale. The original vendee defaulted and the vendor brought foreclosure action. The assignees in possession maintained that certain improvements which they had installed were not part of the realty and so not subject to foreclosure. The trial court held with the assignees to the effect that the improvements were not part of the realty. This ruling was attacked on appeal. In refusing to pass upon this matter on appeal, the appellate court stated:

"The question as to whether or not property affixed to real estate becomes a part of the real estate is ordi-

narily a question of fact to be determined by the trial court from all of the evidence in the case. 'A thing is deemed to be affixed to land when it is \* \* \* embedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolt, or screws.' Civ. Code, Sec. 660. 'When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as provided in section ten hundred and nineteen, belongs to the owner of the land, unless he chooses to require the former to remove it.' Civ. Code, Sec. 1013. In *Andrews v. First Realty Corporation*, 6 Cal. App. (2d) 407, 44 P (2d) 628, it is said: 'The question whether the property involved in this case became a fixture or remained personal property is a question of fact to be determined by the fact finder upon all the facts and circumstances in evidence bearing upon the question. It is the duty of this court on appeal to view the evidence in the light most favorable to the respondent; and if we find any substantial evidence to sustain the findings of the trial court it is our duty not to disturb such findings.'

Certainly in this case there is creditable evidence from which the district court could have found that the devices in question were not part of the building and from which he did so find. As has been pointed out above, the structures are not permanently attached, but are readily removable. They are no different in principal from a large umbrella erected in a side yard which would extend across and afford shade and protection from rain to the driveway. The trial court having so found, its decision in this matter should not be disturbed by the appellate court.

## POINT TWO

IN HOLDING THAT THE PROHIBITING OF THE STRUCTURES IN QUESTION IS REASONABLY RELATED TO THE PUBLIC HEALTH, SAFETY, MORALS AND GENERAL WELFARE, THE COURT HAS RELIED ON A LINE OF CASES WHICH HAS NO APPLICABILITY TO THE FACTS IN THIS CASE.

As a basis for its holding that the prohibiting of the devices here concerned is reasonably related to the public health, safety, morals or general welfare, this Court relies upon the case of *Gorieb v. Fox*, 274 U. S. 603, 71 L. Ed. 605, 47 S. Ct. 675. We have no quarrel with *Goreib v. Fox*, except that it has no applicability to the facts of the case now before the court. *Goreib v. Fox* did not give cities carte blanc power to enact zoning ordinances as evidenced by the fact that many zoning ordinances have been declared unconstitutional by the Supreme Court since *Gorieb v. Fox*. In that case the city ordinance complained of required buildings in the designated residential area to have a designated set-back. The building which was there proposed was a commercial building set flush with the street having a two story brick wall erected right on the front property line. The Supreme court sustained the ordinance pointing out a number of reasons why the proposed structure might be detrimental to the public health, safety or general welfare. None of these reasons have any applicability to the instant case however. The Supreme court goes into the question there of light and air, plus vision of drivers at intersections, etc. As we have previously pointed out, we have no question here of interference with light, air or vision; we have no question

of congestion of population; we have no question of fire hazard. The only question involved is one of aesthetic values.

In a later case, *Nectow v. City of Cambridge*, 277 U. S. 183, 72 Law Ed. 842, the Supreme Court of the United States struck down a zoning ordinance as having no relation to public morals, safety or public welfare when such an ordinance acted to prohibit a commercial building in an area which was commercial in character. These devices are consistent with the use of the area for residential purposes. They have no detrimental effect on the public welfare, health or safety. They are not opposed by the persons most directly concerned—those living next door, as evidenced by the letters from these individuals contained in the city files and introduced in evidence in the court below.

There is no line of cases depending upon *Gorieb v. Fox* or any other fundamental decision upholding the right of the city to prohibit devices such as there in residential areas. The only two cases which we have been able to discover decided by the Courts in the country definitely hold that these devices do not violate set back or side yard requirements. These cases are: *Olcott v. Sheppard Knapp Co.*, 89 N. Y. Supp. 201 and *French v. Cooper*, 43 Atl. (2d) 880. The case of *French v. Cooper* is directly in point with the case here being considered. We wish again to quote from the language of the Court in that case:

“The sketch returned with the record discloses that the building proper has the necessary setbacks on both Atlantic Ave. and North Street and in the absence of proof to the contrary, we hold that the awning is not

a part of the building. There is no evidence that it is permanently attached to the building and it is at most an adjunct thereto, i. e. added but not essentially a part thereof.

“It is settled that a municipality has no power to limit the use to which property may be put unless the regulation is designed to promote public health, safety and general welfare. *Durkin Lbr. Co. v. Fitzsimmons*, 106 NJL 183, 147 Atl. 555. We fail to see in what respect the erection of this awning can adversely affect public health, safety or general welfare. The absence of a brief on behalf of the respondents suggests that they too experience the same quandry. The fact that nearby property owners have expressed themselves as favoring the proposed awning and they have no objection waives against the reasonableness of the decision to refuse the permit. Prosecutor is entitled to his permit and costs.”

## CONCLUSION

Brevity is certainly a virtue to be applauded in judicial decisions or in any other writing, provided the ground is covered adequately. However, a decision of an appellate court has a function other than to merely determine the disposition of the case immediately before the court. If such were the only purpose all cases could be disposed of either by the words, “reversed and remanded” or “affirmed.” The decision in this case does little to advise the city officials or the residents of the city what they can or cannot do in regard to the erection of structures in their sideyards. The basis of the decision is left to conjecture. It will leave the law in such a state of uncer-

tainty as to place persons desiring to improve their property in a position of peril and will lead to further litigation.

It is submitted that a rehearing should be granted in this case and the principles set forth in the brief in support of this petition should be examined by and disposed of by this court.

Respectfully submitted,

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