

1982

# John E. Merrihew v. Salt Lake County et al : Brief of Defendants-Respondents

Utah Supreme Court

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H. Ralph Klemm; Attorney for Appellant-Plaintiff;

Ted Cannon; Attorney for Respondents;

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN E. MERRIHEW,

Plaintiff-Appellant,

-vs-

SALT LAKE COUNTY PLANNING AND  
ZONING COMMISSION, LELAND S.  
SWANER, BUDD M. RICH, GARY D.  
PALMER, DALE V. JONES, THOMAS  
BOWEN, VELMA STEELE, WILLIAM  
MARSH, CLAYNE RICKS & RAY  
NOBLE,

Defendants-Respondents.

Case No. 18070

BRIEF OF DEFENDANTS-RESPONDENTS

Appeal From A Judgment Of The  
Third Judicial District Court  
In And For Salt Lake County, Utah  
Honorable G. Hal Taylor, Judge

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FILED

MAR 26 1982

IN THE SUPREME COURT OF THE STATE OF UTAH

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JOHN E. MERRIHEW,	:	
	:	
Plaintiff-Appellant,	:	
	:	
-vs-	:	
	:	
SALT LAKE COUNTY PLANNING AND	:	
ZONING COMMISSION, LELAND S.	:	Case No. 18070
SWANER, BUDD M. RICH, GARY D.	:	
PALMER, DALE V. JONES, THOMAS	:	
BOWEN, VELMA STEELE, WILLIAM	:	
MARSH, CLAYNE RICKS & RAY	:	
NOBLE,	:	
	:	
Defendants-Respondents.	:	

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BOWEN, VELMA STEELE, WILLIAM  
MARSH, CLAYNE RICKS & RAY  
NOBLE,

Defendants-Respondents.

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Case No. 18070

BRIEF OF DEFENDANTS-RESPONDENTS

---

NATURE OF THE CASE

This is an action in the form of mandamus to implement a decision of the Board of County Commissioners to rezone plaintiff's-appellant's property from Agricultural A-1 to Commercial C-1 and to compel the Salt Lake County Building Inspector to reissue to plaintiff a building permit to build a grocery and fruit store on his property located in Salt Lake County.

DISPOSITION IN LOWER COURT

On September 3, 1981, the District Court granted defendants' motion for summary judgment, holding that the rezoning of plaintiff's property by the Board of County Commissioners on August 7, 1980 was null and void and that the matter should be reheard by the Board after a proper and correct notice of hearing

has been published and posted pursuant to the requirements of Utah Code Ann. §17-27-17 (1953).

### RELIEF SOUGHT ON APPEAL

Defendants seek affirmance of the lower court's decision.

### STATEMENT OF FACTS

Plaintiff is the record owner of real property located along 2200 East between approximately 7700 South and 7800 South in Salt Lake County, containing approximately 9.5 acres of land. On April 24, 1980, plaintiff filed Application No. 3358 with the Salt Lake County Planning Commission, requesting that the zoning classification of a portion of the above-described property (less than one acre) be changed from Agricultural A-1 to Commercial C-2 to allow plaintiff to construct a grocery and fruit store on the property.

After several hearings on the matter, plaintiff's application was denied by the Salt Lake County Planning Commission on June 10, 1980 on the grounds that: (a) the request is in conflict with the County Master Plan, (b) the proposed use is not necessary nor desirable at this location, and (c) ingress and egress to the site is already dangerous. T-26.

On June 3, 1980, plaintiff filed a notice of appeal from the Planning Commission's decision with the Board of County Commissioners of Salt Lake County as provided for and allowed by the ordinances of the County. T-27.

After plaintiff filed his notice of appeal with the Board of County Commissioners, it was discovered by Mr. Glenn Graham, a

member of the County planning staff, that the property described in the application by plaintiff did not abut 2000 East.

Mr. Graham requested that plaintiff furnish a new legal description describing property which abutted 2000 East because it was necessary that the rezoned property abut 2000 East to accommodate plaintiff's proposed development. T-58, 59. Plaintiff then furnished a new legal description to the planning staff. The new legal description was also in error. It did not close and went across 2000 East. T-60, 66. This legal description was used in the public notice for hearing before the Board of County Commissioners which was published and posted pursuant to Utah Code Ann. 17-27-17. T-59. It reads as follows:

Beginning at a point South 89° 39' East 415.4 feet and North 32° 06' East 235 feet, more or less, from the Southwest corner of Section 27, Township 2 South, Range 1 East, Salt Lake Base and Meridian, thence North 8° 52' East 35 feet, more or less, thence South 8° 52' West 200 feet, thence East 129.31 feet, thence North 32° 06' East 126.55 feet, more or less, to place of beginning. T-60.

The legal description of the property which plaintiff apparently intended to have rezoned, according to his complaint, and which was considered for rezoning by the Planning Commission and County Commission reads as follows:

Beginning at a point S 89°39' E 415.40 feet and N 32°06' E 117.48 feet from the Southwest corner of Section 27, Township 2 South, Range 1 East, Salt Lake Base and Meridian, and running thence N 32°06' E 107.70 feet; thence N 8°52' E 46.11 feet; thence N 71°56' W 262.26 feet; thence South 217.00 feet; thence S 89°39' E 185.00 feet to the point of beginning. T-21.

The address stated in the rezoning application submitted by plaintiff for the property which plaintiff sought to have rezoned is 7770 South 2000 East. 7770 South 2000 East is the address of property owned by Edson F. Packer, which property is located northwest of plaintiff's property with access to 2000 East through a right-of-way. T-62. A mailbox inscribed with the number "7770" and the name "Packer" is located on 2000 East and in front of plaintiff's home at 7750 South. T-67. The notice of hearing contained the address 7770 South 2000 East for the property plaintiff sought to have rezoned. T-59.

The Board of County Commissioners of Salt Lake County at the hearing held on August 7, 1980 voted to reverse the decision of the Salt Lake County Planning Commission, being unaware that the notice for the hearing contained an improper legal description and address for the property which plaintiff allegedly sought to have rezoned.

The ordinance enacted rezoning plaintiff's property contained the same erroneous legal description furnished by plaintiff which was used in the notice of hearing.

Plaintiff subsequently applied to the Building Inspection Division of Salt Lake County for a building permit to allow construction of a proposed fruit store on his property. The building permit was issued by that division on November 19, 1980. On Tuesday, November 24, 1980, defendants William Marsh and Clayne Ricks discovered for the first time that the legal description used in the notice of hearing which was published and posted

for the hearing before the Board of County Commissioners was erroneous and did not describe the property which was considered and approved by the Commission at that hearing. T-56, 66, 67. After consulting with the County Attorney's Office, William Marsh advised plaintiff that the property had not been properly rezoned for commercial development because the notice of hearing did not accurately describe the property which was considered for rezoning and that the matter would have to be reheard before the Board of County Commissioners after a corrected notice of hearing was published and posted. Plaintiff's building permit was subsequently revoked by the Building Inspection Division prior to plaintiff beginning any construction on the site. T-66, 67. Plaintiff did not appeal the decision of the building inspector to revoke the building permit to the Board of Adjustment prior to filing the action herein. T-57. He also refused to allow the matter to be reheard by the Board of County Commissioners.

### ARGUMENT

#### POINT I

PLAINTIFF FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES; THEREFORE, THIS SUIT IS NOT PROPERLY BEFORE THIS COURT.

Section 17-27-16, Utah Code Ann., provides in part:

"Appeals to the board of adjustment may be taken by any person aggrieved by his inability to obtain a building permit, or by the decision of any administrative officer or agency based upon or made in the course of the administration or enforcement of the provisions of the zoning resolution.... Upon appeals the board of adjustment shall have the following powers:

(1) To hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, or refusal made by administrative official or agency based on or made in the enforcement of the zoning resolution...."

The decision of the planning staff and building inspector to revoke plaintiff's building permit and to have the Board of County Commissioners rehear his zoning application is a decision an administrative officer made in the course of the enforcement of the zoning ordinance and plaintiff had the right to appeal that decision to the Board of Adjustment under Utah Code Ann. 17-27-16. It is a general proposition of law that parties must exhaust potential administrative remedies as a prerequisite to seeking judicial review. Pacific Intermountain Express Co. v. State Tax Comm., 316 P.2d 549 (Utah 1957); Johnson v. Utah State Retirement Office, 621 P.2d 1234 (Utah 1980); 2 Am. Jur.2d Administrative Law, Section 595.

The same principle has been applied in zoning law where parties have failed to appeal to the Board of Adjustment a decision of the building inspector to deny a building permit. In State ex rel. J. S. Alberici v. City of Fenton, 576 S.W.2d 574 (Mo. 1979), plaintiff therein sued the City of Fenton because the building inspector refused to issue a permit for the construction of a trash transfer station on the basis of a letter from the City Attorney that the use would violate the ordinance. The court dismissed the action, stating:

"Mandamus being an extraordinary legal remedy, should not issue unless the party seeking the writ shows a 'clear, unequivocal specific right to have performed the thing demanded and that the defendant or respondent has a corresponding duty to perform the action sought.' (cites omitted) The respondent did not satisfy this standard, and we hold therefore that the writ was inadvisably issued because there was available to the respondent an adequate and available remedy by way of administrative review which was not exhausted." 576 S.W.2d at 579.

Numerous other courts have also held that a person denied a building permit must exhaust his administrative remedies before seeking judicial relief. Watson v. Norris, 217 So.2d 246 (Ala. 1968); Wern v. Kasotsky, 158 N.Y.S.2d 106 (1956); Nauhaus v. Building Inspector, Inc., 415 N.W.2d 235 (Mass. 1980); Daisy Barn Stores, Inc. v. Perlman, 244 N.Y.S.2d 452 (1963).

Utah law is in accord. In Lund v. Cottonwood Meadows Co., 392 P.2d 40 (Utah 1964), the Utah Supreme Court affirmed summary judgment against plaintiffs who alleged a violation of a zoning ordinance by the Planning Commission in issuing a permit for a mobile trailer park, but who had failed to appeal from that administrative ruling to the Board of Adjustment as provided in Section 17-27-16.

The Lund case is similar to the fact situation herein. Here plaintiff failed to exhaust his administrative remedy by appealing to the Board of Adjustment the decision of the County Building Administrator to revoke plaintiff's building permit on the basis that plaintiff's property had not been rezoned properly. Therefore, defendants submit the lower court had no jurisdiction in the matter.

## POINT II

FAILURE TO COMPLY WITH THE PROPER NOTICE  
REQUIREMENTS OF UTAH CODE ANN. 17-27-17  
RESULTED IN A DEFECTIVE AND INVALID HEARING  
AND THE ZONING ORDINANCE ENACTED AT THE  
HEARING IS INEFFECTIVE AND VOID AS A MATTER  
OF LAW.

Utah Code Ann. Section 17-27-17 (1953) provides the procedure for having property rezoned. That section requires that the Board of County Commissioners hold a public hearing before rezoning any property, the time and place of which must be given by publication and posting at least 30 days prior to the hearing.

The majority of jurisdictions adopt the general rule that when applicable statutes call for notice of hearing prior to the adoption or amendment of zoning laws, they are construed as mandatory and jurisdictional so that ordinances passed in contravention thereof are invalid or void in the sense that they were never legally enacted. Citizens For Better Government v. County of Valley, 508 P.2d 550 (Idaho 1973); Holly Development Inc. v. Board of County Comm'rs., 342 P.2d 1032 (Colo. 1959); Nesbit v. City of Albuquerque, 575 P.2d 1340 (N.M. 1977); State ex rel. Freeze v. Cape Girardeau, 523 S.W.2d 123 (1975, Mo. App.); Kirk v. Village of Hillcrest, 15 Ill. App.3d 415, 304 N.E.2d 452 (1973); 96 ALR2d 449.

This Court has also invalidated zoning enacted in contravention of statutory notice requirements. In Tolman v. Salt Lake County, 437 P.2d 442 (1968), the Court struck down a zoning ordinance for failure to give adequate notice. Although notice

was posted on the courthouse door and on two telephone poles, the Court held such efforts were not "designed to give notice to the persons affected," as required by statute. Also in Melville v. Salt Lake County, 536 P.2d 133 (1975), the Court struck down a zoning ordinance where the notice of hearing was published one time instead of four times as required by statute.

Use of the address for Edson Packer's property on the notice of hearing as the property plaintiff sought to have rezoned failed to meet the requirement that notice fairly apprise interested parties of the pendency of the action. Far from being calculated to convey the necessary information and afford an opportunity to respond, it was insufficient, ambiguous and misleading to the average citizen and therefore inadequate as "notice." In similar fact situations where the description of the property being considered for rezoning was misleading and confusing in the notice of hearing, courts have invalidated the zoning ordinances.

In the case of Dietz v. Remington, 118 N.Y.S.2d 177 (1952), a zoning amendment notice described an incorrect location of the premises involved (distance of 1600 feet west rather than 700) and made reference to lot numbers on a map of development when in fact there were two different maps of the development, each of which included ambiguous lot numbers. The court held the notice failed to reasonably apprise the public of the specific premises involved and was insufficient to constitute notice under the statute.

In Paquette v. Zoning Board of Review, 372 A.2d 973 (R.I. 1977), a notice of hearing for an application to build an apartment building on two lots described one lot correctly but listed the other lot as 754 Eagle Street instead of 574. The court invalidated the hearing on the basis that the typographical error may have caused some doubt concerning the specific property involved. See also Meldo v. Board of Review, 177 A.2d 533 (R.I. 1962); Abbott v. Zoning Board of Review, 79 A.2d 620 (R.I. 1951).

Plaintiff cites several cases for the proposition that a notice need not use a metes and bounds description as long as it apprises interested persons of the property being considered for rezoning. Defendants do not disagree with this proposition; however, the principle is not applicable here since a metes and bounds description was in fact used in the notice. The description furnished by plaintiff did not close and describes the property as crossing 2000 East. This description did not even include the property in question and is totally inaccurate to give notice to an interested party. This compounded, not cured, the problem of the inaccurate address.

The issue is whether the notice properly notified the public, not the Planning Commission or planning staff, as plaintiff appears to contend. The notice requirements in the law exists for protection of the public and property owners are entitled to proper statutory notice before passage of an ordinance that changes or limits the use of their property or surrounding property. Clearly, the erroneous descriptions of plaintiff's

property on this notice which identified a completely separate and distinct parcel of land by address and made no sense in the metes and bounds description were not sufficient to notify anyone of the location or size of the property actually considered and approved for rezoning by the Commission.

The sufficiency of the legal notice of a zoning hearing is a pure issue of law and not of fact. Federal Building Development Corp. v. The Town of Jamestown, 312 A.2d 586 (1973); Caps v. City of Raleigh, 241 S.E.2d 527 (N. Carolina 1978); Delucia v. The Town of Jamestown, 265 A.2d 636 (R.I. 1970). Therefore, the lower court correctly decided the issue as a matter of law.

Plaintiff further alleges a factual issue exists as to whether employees of the County knew of the erroneous legal description furnished by plaintiff but withheld that information from plaintiff. The affidavits of Clayne Ricks, Glenn Graham and William Marsh state that the planning staff became aware of the error only after plaintiff had been issued his building permit. T-56, 57, 59, 66. Plaintiff has filed no affidavit setting forth facts showing that this is a genuine issue for trial as required by Rule 56(e) of the Utah Rules of Civil Procedure; thus, the matter is a proper one for summary judgment.

#### CONCLUSION

It is undisputed that plaintiff did not exhaust his administrative remedies by appealing the decision of the Building Inspector to revoke plaintiff's building permit to the Board of Adjustment prior to seeking judicial relief.

It is also not disputed that the legal description and address furnished by plaintiff and used in the legal notice of hearing and amended zoning ordinance for plaintiff's property did not describe the property which was considered for rezoning and upon which plaintiff was issued a building permit. The law is clear that a zoning ordinance is invalid where the notice of hearing does not reasonably describe the property considered for rezoning. In such a case, the appropriate remedy is to have the matter reheard after proper notice has been given.

There are no relevant facts in dispute in this matter and the lower court properly decided the case as a matter of law. For these reasons, defendants would submit the lower court's decision granting summary judgment to defendants should be upheld.

DATED this 13 day of March, 1982.

Respectfully submitted,

TED CANNON  
Salt Lake County Attorney  
WILLIAM R. HYDE  
Chief Civil Deputy County Attorney

By

Kent S. Lewis  
KENT S. LEWIS  
Deputy County Attorney  
Attorneys for Defendants-  
Respondents

MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing to H. Ralph Klemm, Attorney for Plaintiff-Appellant, at 500 Clark Leaming Office Center, 175 South West Temple, Salt Lake City, Utah 84101, postage prepaid, this 24 day of March, 1982.

Rieka Latecka

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN E. MERRIHEW,

Plaintiff-Appellant,

-VS-

SALT LAKE COUNTY PLANNING AND  
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BOWEN, VELMA STEELE, WILLIAM  
MARSH, CLAYNE RICKS & RAY  
NOBLE,

Defendants-Respondents.

FILED

DEC 14 1982

Clerk, Supreme Court, Utah

Case No. 18070

ADDITIONAL AUTHORITY OF DEFENDANTS-RESPONDENTS

Plaintiff raises for the first time in his reply brief the contention that the County has no authority to hold a second zoning hearing on plaintiff's application for rezoning even though the published notice of hearing for the original hearing was defective.

This is not a correct statement of law. The courts have consistantly held that where a zoning tribunal exceeds its jurisdiction it has the power to correct the jurisdictional problem by rehearing the matter. Moschetti v. Board of Zoning Adjustment 574 P. 2d 874 (Colorado 1978) Wright v. Zoning Board of Appeals, New Fairfield 391 A. 2d 146 (Conn. 1978); Young Israel of Scarsdale v. Board of Standards & Appeals 331 N.Y.S. 2d 105 (S.C.N.Y. 1972). Where a building permit is issued under an invalid zoning ordinance passed without proper notice and a hearing, a building official may rescind the permit. B & H Investments, Inc. v. City of Coralville 209 N.W. 2d 115 (Iowa, 1973) Bubb v. Barber 295 So. 2d 701 (Fla. 1974).

DATED this 14 day of December, 1982.

Respectfully submitted,

TED CANNON  
Salt Lake County Attorney  
WILLIAM R. HYDE  
Chief Civil Deputy County Attorney

By *Kent S. Lewis*  
KENT S. LEWIS  
Deputy County Attorney  
Attorneys for Defendants-  
Respondents

CERTIFICATE OF DELIVERY

I hereby certify that I personally served two copies of the foregoing on H. Ralph Klemm, Attorney for Plaintiff-Appellant, at 500 Clark Leaming Office Center, 175 South West Temple, Salt Lake City, Utah this 14 day of December, 1982.

*Kent S. Lewis*