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Salt Lake County v. J. Marvel Hutchinson : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

UNIVERSITY UTAH
DEC 19 1958
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SALT LAKE COUNTY, Political Sub-
division of the State of Utah,
Plaintiff and Appellant,

vs.

J. MARVEL HUTCHINSON,
Defendant and Respondent.

Case No.
8795

BRIEF OF RESPONDENT

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IN THE SUPREME COURT of the STATE OF UTAH

SALT LAKE COUNTY, Political Sub-
division of the State of Utah,

Plaintiff and Appellant,

vs.

J. MARVEL HUTCHINSON,

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Case No.
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BRIEF OF RESPONDENT

STATEMENT OF FACTS

Respondent agrees substantially with the statement of facts set forth in appellant's brief, with the following exceptions:

1. In the paragraph beginning 5 lines from the bottom on page 5 of appellant's brief and ending on page 6, there is an insinuation that defendant Hutchinson has perjured in his testimony that it was not he who

added, in pencil, a sketch of the plot plan with dimensions 37' x 40'. This insinuation, colored by the phrase "it is interesting to note" is gratuitously misleading. Defendant Hutchinson has expressly denied making the pencil notation (R-34, line 15). Witness for Plaintiff, Griffith, an employee of the County Surveyor's office has admitted making certain of the pencil notations on the back of the application (R-66), and in response to direct question of counsel for Plaintiff as to whether she wrote the words "ten feet," stated "if I did, I don't remember" (R-66, line 29).

2. On page 7 of Plaintiff's brief is the following language presented as a statement of fact: "Mr. Horne, upon receiving the report from Mr. Daly called Mr. Hutchinson on the telephone and asked him in effect why he had built in violation, and Mr. Hutchinson informed him that Mr. Duncan had told him to go ahead, that the County wouldn't do anything anyway."

This is not a fact, but a statement attributed to Mr. Hutchinson by Mr. Horne two years after it was claimed to have been made. On direct examination Mr. Hutchinson made a direct denial of this statement to him. (R-43, lines 17 to 30 and R-44, lines 1 to 4).

3. At least one addition to the facts as stated, is appropriate, and that concerns the form of permit used by Salt Lake County in this case. Attention is called to Exhibit 6-D, which is entitled "Receipt and Building Permit," and to testimony concerning it (R-70, and 71). This permit, which was the one direct communication issued to defendant, Hutchinson, contains no identification of the restriction contained in the Board's decision

and is distinguished by its informality and lack of direction to permittee and is even made a part of the routine receipt for two dollars.

STATEMENT OF POINTS

POINT 1

THE DECISION BY THE TRIAL COURT IS IN ACCORD WITH THE EVIDENCE.

POINT 2

THERE IS JUSTIFICATION IN HARDSHIP FOR A COURT OF EQUITY TO DENY THE COUNTY THE RIGHT TO WORK IRREPARABLE DAMAGE WHERE SUCH ACTION WILL SERVE NO USEFUL PURPOSE.

POINT 3

THE UPHOLDING OF THE TRIAL COURT'S DECISION WILL NOT "EMASCULATE THE POWER OF THE COUNTY TO ENFORCE ITS ZONING ORDINANCES."

ARGUMENT

POINT 1

THE DECISION BY THE TRIAL COURT IS IN ACCORD WITH THE EVIDENCE.

Appellant submits what are claimed to be 3 errors, namely: (1) There is no support in the record for the finding made by the trial court that the violation of the

zoning ordinance by the defendant Hutchinson was an innocent violation; (2) there is no support in the law for the trial court imposing the duty on a building inspector to immediately find violations of the zoning ordinances, and if he does not find said violations, holding the county in effect has waived its right to enforce the zoning ordinances; and (3) the trial court considered matters entirely outside its province, such as an official's reaction to an attitude considered as an affront or ornery, that abutting property owners did not consider the enlargement as made a detriment.

Concerning (1), the record is replete with evidence of defendant Hutchinson's painstaking efforts both to comply with the ordinance as interpreted, and as his attorney advised him they would be interpreted, and to protect his life's investment in his business. When advised by his attorney that his application for enlargement to within 28 inches of the property line had been "approved," his contractor dug the foundation and laid the footings. When advised, later by his attorney of the 10 foot restriction, he held up construction until further enlightenment. After approximately two months, with his foundation lying idle and winter approaching, he was encouraged by his attorney that total approval would be granted. The attorney testified (R-106) that this advice was based upon encouragement from appropriate officials, and (R-107) personal legal research. The permit to build (Exhibit 6-D) issued directly to defendant Hutchinson by Salt Lake County, contained no identification of the restriction. During the several months period between the digging of the foundation and erection of the building "to the square" no communication passed

to defendant Hutchinson from the building inspectors. When the inspectors made an examination and ordered him to stop construction, he then had the choice of making an expensive and apparently perfectly pointless removal of 10 feet of building, or putting on the roof to keep out the winter. Appellants cite the case of *H. C. Hargraves, Building Inspector for Salt Lake City, vs. Harry L. Young, Kenneth L. Anderson and William Walkenhorst*, 1955, 280 P2, 974, 3 U2d. 175. as authority for the right of the county to enforce its zoning ordinances if the building inspector does not find violations early. That case did not involve equity, but rather the application of a zoning ordinance to a carport and whether such carport was a "structure" under the ordinance such as to bear a reasonable relationship to public health, safety, morals or general welfare.

As to the second alleged error, pertaining to the duties of the building inspector, defendant Hutchinson does not claim that as a matter of law, the building inspector is clothed with the responsibility of making specified inspections, but rather that the failure of the building inspectors to perform such authorized duties was a contributing factor to Hutchinson's own clean hands.

In answer to the third alleged error of the Court in considering material such as the inspector's interpretation of defendant's conversation as ornery and as an affront to authority, and attitude of abutting property owners, these and related matters are patently pertinent to the question of whether a court of Equity will allow an action which will serve no useful purpose. The abutting property owners to Defendant Hutchinson's property (R-87) and

(R-90) testified that they preferred the enlargement as made to the restriction which the County now seeks to enforce. They testified that the present enlargement did not depreciate their property, that it was preferable to a 10 foot clearance between defendant's store and their property. "In determining the question of the reasonableness of a zoning restriction, the Courts will disregard mere form in order to insure protection of right injuriously affected by unreasonable and arbitrary action." 117 ALR, 1128. 168 ALR 17.

POINT 2

THERE IS JUSTIFICATION IN HARDSHIP FOR A COURT OF EQUITY TO DENY THE COUNTY THE RIGHT TO WORK IRREPARABLE DAMAGE WHERE SUCH ACTION WILL SERVE NO USEFUL PURPOSE.

Appellants rely heavily on the case of *Provo City, et al vs. Claudin et al*, 1936 63 Pac. 2d 570 91 U 60.

That was a case involving a permit to enlarge an existing structure for the purpose of operating a *funeral home* in a *residential class B zone*. While the Court in that case properly denied relief despite lack of objection by the building inspector during construction, the case is clearly distinguishable from the instant case in at least two particulars: (1) In the Claudin case, defendant was constructing his building in clear and conclusive opposition of the Board of Adjustment, and (2) a useful purpose was being served in that depreciation of property values

to abutting property owners and the opposition of the same was clearly proved.

In *McCavic vs. DeLuca*, 46 NW 2nd 873, also cited, the Court also held that the violation and consequent damage could not be considered trivial.

The trial court's language on this point in the present case, is particularly significant. "And now the inspector seeks to compel the defendant to tear down the new structure or a part thereof, which would just wreck the building and its business, and serve no useful purpose. Reason and equity revolts against such action on a record and a situation such as this. To make a man who earnestly tried to improve his store to insure a livelihood for his family *without detriment to anyone* and, believing he was in full compliance with the law and was so advised, must suffer wreck and ruin" (R-133).

Defendant Hutchinson's hardship under the county's action is clearly set forth in the record. He has testified (R-83) that the enlargement is necessary to the survival of his business due to (1) new and close chain store competition, (2) changes in food inventories, particularly need for increased space to provide floor space for frozen foods and prepared foods, and that the county's action would not only cost him the opportunity to compete but would cost him up to \$2000.00 (R-84) for expenses of removal. His testimony is supported by expert testimony. (R-92-93).

That no useful purpose would be served is conclusively supported by the previously cited testimony of abutting property owners, and by the complete absence of any

testimony in the record by plaintiff that any useful purpose would be served. It is significant on this point, that the county's only witnesses at the trial were paid officials of the county. Not a single property owner or unpaid citizen presented evidence of deleterious effect.

In *Marshall v. Salt Lake City*, 105 Ut.-111, this Court stated: "The restriction imposed must bear a substantial relation to the public health, safety, morals, or general welfare." While this was applied to the zoning laws in general, its application in equity to a hardship case, and in the total absence of testimony that this purpose is being served, is appropriate.

Appellant has cited the landmark zoning case of *Goreib v. Fox*, 274 U. S. 60, 47 S. Ct. 675, 71 L Ed. 1228, cited by this Court in the Hargraves case as authority for the proposition that the authority of the state should take precedence over the hardship to an individual. We have already distinguished the Hargraves case as involving the question of whether the definition of "structure" should include a carport, and that the hardship involved is not of such consequence that Equity would place it paramount to a precedent which would strike at the heart of zoning itself.

In the instant case we are not striking at a foundation stake of zoning as in the Hargraves case, but simply submitting that the individual's case should, in such impelling circumstances as these, be given status. Here is a hardship, proved by the evidence to be of great consequence, perhaps eventually the life or death of a business into which an individual has poured his life's investment of effort and means. His present position has resulted

from the good faith reliance upon advice which he had every reason to believe was competent. The advice was occasioned by both formal research and oral communication with pertinent officials. While the building inspectors may not have had the duty, they clearly did have at least the authority and ability to protect defendant Hutchinson from arriving at his present position. Now appellant seeks to inflict this hardship upon defendant without showing that a good and useful purpose will be served, and when all the evidence at the trial indicates the exact opposite.

POINT 3

THE UPHOLDING OF THE TRIAL COURT'S DECISION WILL NOT "EMASCULATE THE POWER OF THE COUNTY TO ENFORCE ITS ZONING ORDINANCES."

This point is made because of the last sentence in appellant's CONCLUSION. No reasoning supports the assertion and the Court is asked to accept it at its face value. Obviously such a bald and extremist alarm must be answered.

Appellant cites Sec. 17-27-23, Utah Code Annotated, 1953 for its authority to receive a mandatory injunction. The validity of this authority is not attacked by defendant, nor is this Court being asked to over-rule the precedent in the Hargraves and Claudin cases.

The facts of the instant case stand alone as have been painstakingly delineated. No additional responsibility is being foisted upon the appellant or its officials. No avenue

of escape is being afforded future violators where the hardship is not of sufficient material degree, or where a useful purpose is shown, or where the information and guidance to defendant has been less misleading.

CONCLUSION

It is submitted that the trial court gave proper weight to the evidence; that a mandatory injunction would serve no useful purpose but would inflict irreparable injury and hardship; that the upholding of the trial court's decision will not emasculate the power of the County to enforce its zoning ordinances, but will do substantial justice.

Respectfully submitted,

SHERMAN P. LLOYD

Attorney for Respondent