

1958

# Salt Lake County v. J. Marvel Hutchinson : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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

*Plaintiff and Appellant,*

vs.

Case No.  
8795

J. MARVEL HUTCHINSON,

*Defendant and Respondent.*

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BRIEF OF APPELLANT

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# IN THE SUPREME COURT of the STATE OF UTAH

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SALT LAKE COUNTY, a Political Sub-  
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## BRIEF OF APPELLANT

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### PRELIMINARY STATEMENT

The parties will be referred to as in the court below. All italics are ours.

### FACTS

The law suit in question is one where the County is seeking a mandatory injunction against the defendant, ordering said

defendant to tear down approximately eight feet of the back end of a building. This building was constructed pursuant to an enlargement of an existing building allowed by the County Board of Adjustment to a point ten feet from the east property line of the land on which said building is located ( R. 1 to 5). The lawsuit arose from an application submitted to the Board of Adjustment by the defendant through his attorney, LaMar Duncan, on April 21, 1955 (Exhibit 1-D). In said application, defendant requested a permit for a 48' x 38' enlargement of a non-conforming grocery store in a residential R-2 zone, located at 3065 South 1700 East, Salt Lake County, Utah. The grocery store in question faces west toward 1700 East Street, with its entranceway being on the southwest corner of said building, the north line of the building being on defendant's property line and the south line of said building being approximately 86 feet north from 3080 South Street. There is a parking area between 3080 South Street and the existing building. The enlargement sought by defendant would extend the existing building easterly to approximately 28 inches from the east property line (Exhibits 1-D, 5-D and 10, R-27 to 29). Subsequently, a hearing on defendant's application was held before the County Board of Adjustment on May 19, 1955. As a result of the hearing, the Board of Adjustment granted the request but provided specifically that a distance of 10 feet be maintained from the east property line (Exhibit 2-D). A letter was sent from the County Board of Adjustment to Mr. Joseph F. Horne, the Chief Building Inspector, dated May 23, 1955, with one copy to Mr. LaMar Duncan, the attorney for defendant, and another copy to the District Planning Commission (Exhibit 3-D). Subsequent to this, a letter dated May 27,

1955, from J. F. Horne to Mr. LaMar Duncan was mailed. Both of these letters contained a statement of the action by the Board of Adjustment providing that a distance of ten feet be maintained from the east property line. Mr. Duncan testified that he was out of town for approximately a week or ten days in the latter part of May, including Memorial Day, and that just before he left town he called the County Surveyor's Office and was informed that the application had been approved. He then called defendant and told him to go ahead with his building. Then when he returned to Salt Lake City, he found the letter, dated May 23rd, (Exhibit 3-D) and learned at that time of the restriction that the building must not be closer than ten (10) feet from the east property line. He further testified that at that time he telephoned defendant and told him of the ten (10) foot restriction (R. 97 to 98). The defendant, J. Marvel Hutchinson, testified that upon receipt of word from his attorney to go ahead, he had the work started in the latter part of May or the first part of June (R-32); that this was before he had obtained his building permit in July (R-33). *The defendant admits that the excavation was all that was done in regard to the work on the new structure at the time he learned of the true decision of the Board of Adjustment with the ten (10) foot restriction and that this excavation work had only taken two days' work by the contractor (R-38).*

It is interesting to note that there is a plot plan on the back of the application for the building permit which provides the information to the building inspector as to the dimensions and location of the building on the lot in question. The building permit was issued on July 5, 1955. The plot plan

on the back of the application shows dimensions of 37' x 40' (Exhibit 5-D). However, Mr. Hutchinson denies that he placed the figures of 10 feet on said plat plan. It is interesting to note that the 37' x 40' dimensions are exactly what was granted to Mr. Hutchinson by the Board of Adjustment although he originally claimed that the application for the building permit had been presented by him in 1951 or 1952 (R-35). Subsequently, Marjorie L. Griffith from the Salt Lake County Surveyor's Office, testified that the form used for the application for the building permit in question was not in use until the year 1954 (R-68). Subsequently, Mr. Hutchinson came back to the witness stand and testified that he could have made the application in the fall of 1954 or the early spring of 1955 before the date of the application to the Board of Adjustment of April 21, 1955 (R-110).

Mr. Hutchinson went on to testify that work on his new addition remained idle at the excavation stage for about a month almost into August. At that time, he started construction again, constructing the building to within 28 inches of his east property line as he had originally started to do. He stated that he had received the impression from his attorney that it was all right to go ahead (R-40). The counsel for Mr. Hutchinson, LaMar Duncan, denied that he told Mr. Hutchinson to go ahead with his building but stated he informed him that he felt it could be ironed out (R-105). Mr. Duncan stated that he talked with Commissioner Gunderson; the Chairman of the Board of Adjustment, Mr. Mulcock, and the County Surveyor in regard to the hardship of his client's case and that the door had never been completely closed on his being



able to obtain approval for the building to be built 28 inches from the east property line.

Mr. Joseph F. Horne, the chief building inspector of Salt Lake County, stated that on October 9, 1955, while out driving on a Sunday afternoon, he observed Mr. Hutchinson's building, which appeared to be two or three feet from the east property line. He then sent one of his inspectors, Mr. George Daly, out to inspect Mr. Hutchinson's building on the 11th or 12th of October (R-79). Mr. Daly testified that on Wednesday, October 12, 1955, he made an inspection of the Hutchinson premises. He states that the building was up to the point where it was ready to have the roof put on and that it was within approximately three feet of the east property line. He states that at that time he informed Mr. Hutchinson that he was in violation and that he was even in violation of his own building permit. Mr. Hutchinson informed Mr. Daly that his attorney told him that it was OK. Mr. Daly then reported the occurrence to Mr. Horne (R-73-74). 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 (R-80).

It may be pointed out that by stipulation, pars. 4 and 5 of plaintiff's complaint were admitted by the defendant (R-24). These paragraphs have to do with the facts that defendant's property is in a residential R-2 zone, that the grocery business which he operates on said property is a non-conforming use and that an addition or enlargement of the non-conforming use may be granted by the Board of Adjustment.

## STATEMENT OF POINTS

### POINT I.

THE DECISION BY THE TRIAL COURT WAS AGAINST THE EVIDENCE.

### POINT II.

THERE IS NO JUSTIFICATION FOR ESTOPPEL OR HARDSHIP TO PREVENT THE COUNTY FROM ENFORCING ITS ZONING ORDINANCES.

## ARGUMENT

### POINT I.

THE DECISION BY THE TRIAL COURT WAS AGAINST THE EVIDENCE.

The trial court sums up its memorandum decision in this case as follows (R-133):

"It is apparent and clear that the error is not any wilful violation on the part of the defendant Hutchinson, but one that would not have occurred at all had Inspector Horne done his duty at the time he should have done it instead of a month or so later when the building was up. 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 because a County Inspector was long dilatory in doing his service, which had he done promptly as he should have done, the regulation would not have been innocently violated and the problem would not have arisen.

“The injunction and order sought by Plaintiff are denied and the cause of action dismissed.”

The court had the following observations in its memorandum decision as to the duties of the building inspector (R-132):

“By the provisions of the County zoning ordinance and also the testimony of Inspector Horne, his duty is not to pass judgment on the material used nor upon the workmanship of the contractor but merely to see that the applicant lays his excavation or wall lines the proper distance from the boundary lines of the property. This, of course, imposes upon him the duty of making immediate contact with the applicant at the place of building to see that the lines are properly put or marked upon the land. There his job is through. Instead of meeting this duty, he did nothing at all until one day when he was driving by defendant’s place, on strictly personal business, he saw the structure ready all but some roofing. So, he stopped and told applicant to tear it down. At the trial it was freely said that the error was not itself serious, but the building as erected was taken as an affront or ornery attitude toward an official, not the Board of Adjustment. The abutting property owners testified that the building in its present structure was not a detriment to their property and so testified that they preferred it as is, as against the authorized plan.”

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. 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 that the county in effect has waived its right to enforce the zoning ordinances. Furthermore, the foregoing language is a clear indication that the trial court considered matters entirely outside of its province, such as the alleged assertion that the building as erected was taken as an affront or ornery attitude toward an official, not the Board of Adjustment. Furthermore, the trial court took upon itself the function of finding that the structure, as it was, was not a detriment to the abutting property owners and relying on the fact that they preferred the building as it is rather than as it should be under the zoning ordinances. Certainly it cannot be disputed that the determination of what is proper zoning and what is not, is exclusively for the legislative branch of the county government and not for the court.

In regard to the trial court's finding of an innocent violation, the evidence, as herefore stated, shows that the defendant, by his own testimony, knew that his building plans were in violation of the order by the Board of Adjustment at a time when the only work that had been done on the property was one or two days of excavation work. Furthermore, this excavation work was admittedly done before defendant had even obtained his building permit. Certainly this testimony is conclusive of the fact that the violation by defendant was not an innocent violation. He knew of the restriction placed on his building by the Board of Adjustment before any sub-

stantial work had been done, and any misunderstandings he may have had were clearly misunderstandings between he and his lawyer. It cannot be contended that the county should be responsible for any misunderstandings that defendant's own lawyer may have created in the mind of defendant. It will be remembered that the testimony of defendant was to the effect that his lawyer advised him to continue on with the work of his building, and the lawyer testified that he had not so advised the defendant but had merely told him that he was confident of getting the county officials to relent in their attitude of strictly enforcing the zoning ordinance.

There is no justification whatsoever for the court holding as it did that the county cannot enforce its zoning ordinances if the building inspector does not find violations early. The most recent pronouncement by this court on this subject is 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. This case involved carports as shown in the picture in the report (apparently an aluminum roof held up by steel poles) and whether or not these carports violated the Salt Lake City Ordinances as to side yards when the structures intruded into the side yards required by the city ordinances. The lower court held that the city ordinance was inapplicable to these carports and that there was no reasonable relationship between prohibiting such a structure in side yards and the public health, safety, morals or general welfare. The Supreme Court of Utah reversed the trial court and held that the ordinance does apply and that there is a reasonable relationship. The following language at page 975 appears to be applicable to the case at bar:

“Authorities generally accepting such a conclusion are in harmony with *Gorieb vs. Fox*, 274 U.S. 603, 47 S. Ct. 675, 71 L Ed 1228, and we are impelled to follow them *even though defendants will suffer in a situation where they acted in apparent good faith not realizing the import of the ordinances existing at the time they erected these structures.*”

The foregoing language shows that the good faith of the defendant in violating zoning ordinances and the fact that he will suffer a hardship cannot relieve him of the consequences of violating the zoning ordinances. Furthermore, the court in the foregoing case held that as to the side yard ordinances, there was a reasonable relationship between prohibiting such structures and the public health, safety, morals or general welfare. This holding would prohibit the trial court from considering such matters as the fact that the structure in the case at bar was not a detriment to the property of the neighbors and that the neighbors preferred it as it is as against the authorized plan.

## POINT II.

THERE IS NO JUSTIFICATION FOR ESTOPPEL OR HARDSHIP TO PREVENT THE COUNTY FROM ENFORCING ITS ZONING ORDINANCES.

Apparently the trial court has based its decision on grounds of estoppel and hardship. The existing case law on this subject clearly would not allow such a defense in the case at bar. In the case of *Provo City, et al vs. Claudin et al*, Utah, 1936, 63 Pac. 2d 570 91 U 60, the city brought suit to enjoin the operation of a funeral home in a residential class B zone.



Among other defenses, the defendants alleged estoppel. This alleged estoppel was based on the reason of a permit to remodel and the remodeling of the building under the supervision of a building inspector, involving, without protest or complaint by the city or its officials, the expenditure of large sums of money. In answer to this contention the court stated at page 574:

“Assuming that the employees of the city granted the permit and supervised the building, it was all knowingly without authority or right by defendants, granting that the Board of Adjustment was acting within its jurisdiction and its decision had not been overturned. An estoppel cannot be erected on such a foundation.”

The following cases from other jurisdictions fortify and substantiate the holding of this court in the Claudin case.

*McCavic vs. DeLuca*, Minn., 46 NW 2nd 873: This was a law suit between private individuals where the plaintiff's residences were located on lots adjoining the lot on which defendant erected a concrete block store building, and the building was so built that it extended seven feet out in front of the residences and violated the setback line established by the city ordinances. The court held that defendant's violation of the ordinance was not so trivial as to bar the plaintiffs from injunctive relief impelling the defendant to comply with the ordinance by removing the portion of the building which protruded beyond the setback line.

*Everett vs. Capitol Motor Transport Company*, Mass., 114 NE 2nd 547: This case held that the doctrine of laches has no application as to the enforcement by a municipality of its ordinances.

*Corning vs. Town of Ontario, N. Y.*, 121 NY S 2nd 288: This case held that the fact that town officers represented to a property owner that he might use a house trailer as a place to live and that such representations were relied upon, did not estop the town from enforcing a zoning ordinance or justify the granting of a temporary injunction restraining such attempted enforcement.

*Raleigh vs. Fisher, N.C.* 61 SE 2d 897: This case involved a suit by the city to enjoin a defendant from conducting a bakery in a residential district. It was alleged that officers of the city had knowingly encouraged or permitted the violation for 10 years and that the defendant would suffer great hardship if the injunction were granted. The court stated at page 902:

“In the very nature of things, the police power of the state cannot be bartered away by contract, or lost by any other mode. This being true, a municipality cannot be estopped to enforce a zoning ordinance against a violation by the conduct of its officials in encouraging or permitting such a violator to violate such ordinance in times past. (Citing cases.)”

*Newton vs. Town of Highland Park et al., Texas*, 1955, 282 SW 2d 266. The property involved in this law suit was located in a single family dwelling district zoned A-area and consisted of a lot 71 feet x 225½ feet with improvements thereon. When the town of Highland Park was zoned in 1929 the improvements consisted of a two-story brick veneer house with accessory buildings, such as a garage. Later a swimming pool was constructed in the rear yard. All of the improvements conformed with the provisions of the town's ordinances. Subsequent to



that time, however, numerous additions were made. In 1941, for instance, application was made for a permit to build a pergola in the rear yard at a cost of \$250.00. When this so-called pergola was finished it turned out to be a structure built to resemble a ship and had cost \$60,000.00. The owners started to use this ship as a commercial center for parties. They also built fences in the rear to a height of 16 to 20 feet. There were numerous fences in the front and side yards. The additions to the structures violated the building code in numerous sections of the ordinance. Over a period of time the town attempted to get removal of the structures that violated the several ordinances. Although agreements were made, they were never kept. Finally the suit was started by the town of Highland Park which sought a permanent injunction ordering the removal of certain of the structures. It was contended among other things, by the owners, that the town of Highland Park was estopped by laches, limitations and lack of diligence from enforcing the ordinance to certain of the structures in controversy. The court states at page 275:

“The general rule is that cities in the discharge of their governmental as distinguished from their proprietary functions cannot be bound or estopped by unauthorized acts of the officers.” (Citing cases.)

\* \* \*

“It is true that there are exceptions to the rule. The rule as to the exceptions has been stated by our Supreme Court in *City of San Angelo vs. Deutsch*, 126 Tex. 532, 91 SW 2d 308, 311; ‘The opinion is expressed in a number of decisions that a city may be estopped even when it is acting in its public capacity

if it has received or accepted benefits from the transaction.' ”

The court went on to hold that there had been no such benefits received by the city in the case in question.

Also see *Sharrow vs. City of Dania, Florida*, 1955, 83 So. 2d 274, and *Town of Eastchester vs. Noble*, N. Y., 1956, 148 NY S. 2nd 592.

It will be noted from the foregoing cases that involve situations where public officials have actively encouraged the violations in question, the courts uniformly hold that a city or county can not be estopped by wrongful and unauthorized action by a public official. In the case at bar, the most that is claimed by the defendant is lack of action on the part of the public official in question. The claim is made that because of the failure of the building inspector to stop the defendant from violating the zoning ordinance at an early stage, the county should now be estopped from enforcing the ordinance. The reasons for denying such a defense in the case at bar are far more persuasive than they were in the foregoing cases in which such a defense was held invalid.

It is stated in *McQuillin, Municipal Corporations*, 3rd ed. vol. 8, page 857:

“Furthermore, it is no defense to the suit that the defendant will suffer hardship from enforcement of the ordinance in the particular involved, at least where the hardship is consequent only on the defendant’s violation of the zoning ordinance.”

## CONCLUSION

We submit that the trial court ignored the evidence that the defendant knew of the restriction when he constructed the major portion of the building in question. Furthermore, the trial court considered improper matters such as the propriety of the restriction in question and the personal relations between the parties involved. The trial court's decision is against existing law in that it is based on a principle of equitable estoppel and hardship which is not applicable in the case at bar according to the clear line of authorities on the subject. We urge that the trial court's decision should be reversed and the County granted its mandatory injunction as it is entitled under the provisions of Sec. 17-27-23, Utah Code Annotated, 1953. The upholding of the trial court's decision will emasculate the power of the County to enforce its zoning ordinances.

Respectfully submitted,

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