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Chevron Oil Company, Doing Business As Standard Oil Company of California v. Beaver County, A Legislative Corporation of The State of Utah, Hyrum L. Lee, Eugene H. Mayer, Howard J. Pryor, Constituting The Board of Commissioners of Beavercounty : Respondent's Brief

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Plaintiff and

— vs. —

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of the State of

Defendants

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Delaware corporation,

Plaintiffs and

— vs. —

AVER COUNTY,

of the State of

Defendants

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In the
Supreme Court of the State of Utah

CHEVRON OIL COMPANY, doing business as STANDARD OIL COMPANY OF CALIFORNIA,
Plaintiff and Appellant,

— vs. —

BEAVER COUNTY, a legislative corporation of the State of Utah, HYRUM L. LEE, EUGENE H. MAYER, HOWARD J. PRYOR, constituting the Board of Commissioners of Beaver County,
Defendants and Respondents Case No. 11,317

PHILLIPS PETROLEUM COMPANY, a Delaware corporation, DESERET INVESTORS GROUP, INC., a Utah corporation,
Plaintiffs and Appellants,

— vs. —

BEAVER COUNTY, a legislative corporation of the State of Utah, HYRUM L. LEE, EUGENE H. MAYER, HOWARD J. PRYOR, constituting the Board of Commissioners of Beaver County,
Defendants and Respondents. Case No. 11,318

RESPONDENT'S BRIEF

RESPONDENT'S STATEMENT OF THE NATURE OF THE CASE

Case No. 11317 and Case No.11318 were consolidated for trial and were actions brought attacking (1) a zoning resolution adopted by Beaver County, and (2) the validity of the resolution as applied to the Plaintiffs' property, and

Case No. 11318 further attacked the denial by the Board of County Commissioners of Beaver County of Plaintiffs' petition to have Plaintiffs' property rezoned.

DISPOSITION IN THE LOWER COURT

The trial court (C. Nelson Day) held in a memorandum decision that (1) the zoning resolution of Beaver County is valid and is valid as applied to the Plaintiffs' properties, (2) the Board of County Commissioners of Beaver County did not act unreasonably in denying the Plaintiffs' petition to amend the ordinance and reclassify Plaintiffs' properties, and (3) that the Defendants are entitled to judgment of no cause of action.

From this decision, the Plaintiffs have appealed.

RELIEF SOUGHT ON APPEAL

Defendants seek an affirmance by the Supreme Court of the District Judgment.

EXPLANATION OF ABREVIATIONS

The abbreviations used in this Brief, referring to parts of the Record, are: (H), the hearing before the Beaver County Commission; (R), Record of the trial; and (D), as the deposition of Dr. Milton Matthews, which was accepted as part of the record of the case, by stipulation of the parties, subject to certain objections of the Defendants, which were overruled by the Court (R-175-6).

STATEMENT OF FACTS

Defendants agree with plaintiffs' Statement of Facts contained in their respective Briefs with the following exceptions:

Defendants contravert that portion of th 1st paragraph of Chevron's statement which states: "No master plan was ever designed or adopted either by the Board of Commissioners of the Planning Commission and no survey or study of the physical, social or economic conditions within the area was ever made, so far as the records disclose." No master plan as provided for by Section 17-24-4, U.C.A., 1953, has been adopted in Beaver County, but considerable study as to the existing and future economic and social conditions in the County was made at the time of the preparation of the Zoning Resolution of Beaver County. (R-263-93).

Defendants contravert that portion of the 10th paragraph of Chevron's Statement of Facts which states that the incorporated area of Beaver County contains 200 farms. Such unincorporated area contains approximately 285 farms. (Pretrial order) Defendants further contravert that portion of the said 10th paragraph which states: "There are no commercial enterprises of any kind in the unincorporated area of the county except a small, recently-built service station which is located just outside the city limits of Beaver." The northern limits of Beaver City are approximately 80 feet north of 600 North Street and the Commercial Zone in the County extends 1,979 feet to the north of said limits as shown by the Zoning Map attached to Exhibit 1 and said zone has been extended several hundred feet further to the north since the preparation of said Zoning Map. At the time of the trial, there existed

in said Commercial Zone 5 service stations, 2 restaurants and 2 petroleum storage plants including one of Phillips Petroleum Company. Since the trial, a portion of a Travelodge Motel has been constructed in the Commercial Zone.

Defendants contravert that portion of the 5th paragraph of Chevron's Statement of Facts which states: "No other property in the county, except that of the companion plaintiffs, has such access to the interstate freeway." Other interchanges have comparable access. (Exhibits 14 and 15)

Defendants state the following additional facts:

The zoning resolution of Beaver County, Utah, adopted by the Board of County Commissioners on May 18, 1959, being Resolution No. 1-59 and introduced in evidence in this case, has not been modified or amended in any respect insofar as the subject property in the present case is concerned. (Pre-trial Order).

The only plan for zoning the unincorporated area of Beaver County which the Planning Commission or the Board of County Commissioners ever adopted consists of the zoning resolution itself which was passed by the Board of County Commissioners as above stated. The text of said Zoning Resolution has been amended since the adoption of said resolution, but such amendments do not affect this litigation since neither the requirements governing the G-1 Grazing Zone nor the requirements governing the H-1 Highway Service Zone were thereby modified. Said zoning resolution covers all of the unincorporated territory in the County, but no master plan, as provided for by Section 17-27-4, Utah Code Annotated, 1953, was ever adopted. (Pre-trial Order).

The only map of such unincorporated territory made by the Planning Commission as part of the plan is the map which was introducd in evidence at the pre-trial as a part of Exhibit No. 1. Some of the property shown on said map have been rezoned by preceedings which have identified the properties affected by metes and bounds descriptions; however, none of the property involved in this action and no property in the near vicinity thereof has been rezoned. (Pre-trial Order).

Chevron Oil Company is the record owner of the property described in paragraph "1" of its complaint on file in this matter. At the time of the adoption of said zoning resolution. said property was a part of a larger tract consisting of at least 360 acres owned by one Ellis Yardley. The property now owned by Chevron Oil Company was first severed from the said larger tract by a conveyance thereof from the said Yardley to Deseret Investors Group in November, 1964, and conveyed from Deseret Investors Group to Chevron Oil Company in August, 1965. (Pre-trial Order). Said property belonging to Chevron contains approximately 5 acres. (Chevron's Complaint).

Phillips Petroleum Company is the record owner of the property described in paragraph "1" of its complaint on file in this matter. At the time of the adoption of said zoning resolution, said property was a part of a larger tract consisting of 120 acres owned by one Turner. The property now owned by Phillips Petroleum Company was first severed from the said larger tract and conveyed to Phillips Petroleum Company in September, 1964. (Pre-trial Order) Said property belonging to Phillips containing approximately 10 acres. (Phillips Complaint)

The property which Deseret Investors Group seeks to have rezoned was acquired by Deseret Investors Group in 1964. The land sought to be rezoned is a small portion of the land so acquired. (Exhibits 28 and 29; Deseret's Complaint).

The properties owned by Chevron Oil Company and Phillips Petroleum Company above mentioned abut on U.S. Interstate Highway 15 and on the proposed Milford Highway, and are located at what is called the Pine Creek Interchange, which interchange is south of the boundary line between Millard County and Beaver County, and is approximately twenty-one (21) miles North of the city of Beaver. (Pre-trial Order) The town of Kanosh in Millard County and the towns of Joseph and Sevier in Sevier County are within 25 miles of the Pine Creek Interchange and are located North and Northeast, respectively, of the Pine Creek Interchange. (R-48-50) The settlement of Cove Fort is located approximately 3 miles north of the Pine Creek Interchange.

The unincorporated area of Beaver County is for the most part public domain and state-owned land. A large part of it is either mountains or uncultivated land. There are about 285 farms in the area. The census fixes the entire population of the county at 4,235. This includes a population of 1,653 in the city of Beaver, 1,556 in the city of Milford and about 550 in the town of Minersville. The county consists of approximately 2,750.00 square miles and all of the area is unincorporated with the exception of the cities of Beaver and Milford and the town of Minersville. (Pre-trial Order).

The lands involved in these actions were used for grazing and suited for grazing when the Zoning Resolution was adopted in 1959, (R-266-268; Exhibit 1) and such lands are still

suited for grazing. (R-101).

When the freeway is completed, it will pass along the western edge of Beaver City 5 blocks west of the existing Main Street. (R-53). There is no zoning in Beaver City so there is no restriction on the use of property within the city boundaries. There is vacant space in the Commercial Zone north of Beaver City where commercial businesses could be established, (D-73) and there is also considerable area south of Beaver City bordering Highway U.S. 91 which will provide access to the freeway where commercial businesses can be located if the property is rezoned. (D-70-72). Plaintiffs Chevron and Phillips have petroleum outlets in Beaver City, (R-45; H-31) and said plaintiffs were invited by the Beaver County Planning Commission to come into the available space in or near Beaver City to construct their proposed new facilities. (Exhibit 17) The economy of eastern Beaver County is heavily dependent on tourist business with substantially more than one-third of the retail sales in Beaver City being made at service stations, restaurants, motels, etc. (D-64-65) The existing tourist facilities in and near Beaver City are generally sufficient. (D-67).

Most of the existing communities of Southern Utah are in serious need of economic growth. They are already too small to provide all of the community services that modern living demands. Beaver City has one doctor, one drug store, one hospital recently acquired, one laundromat, on dry cleaning establishment, one barber shop, one ladies clothing store, one mens clothing store, one moving picture theater, etc. Any substantial reduction in the business activity in or near Beaver City would likely result in the loss of any one or all of those services. (R-288-9).

Since the trial in this action, the State Highway Department of Utah and the Bureau of Public Roads have changed their policy and have redesigned the interchanges at both ends of Beaver City so as to enable traffic at either interchange traveling in either direction to both leave and return to the freeway and proceed in either direction when returning to the freeway, commonly called 4-way movement interchanges. This will permit easy access to and from the freeway at each end of Beaver City for all freeway travelers, at least equal to the access at Pine Creek Hill. Beaver City is now in the process of annexing to its corporate area the properties contained in the present Commercial Zone north of Beaver City as well as the additional properties to the interchange and it is virtually certain that such annexation will be completed in the near future thus enabling commercial development to the interchange. The traveling public can be better served in and near Beaver City than at Pine Creek because of the additional services available in the community.

Beaver County furnishes fire protection in the unincorporated territory of the County. The law enforcement personnel which the County finances consists of a county sheriff, one full-time chief deputy and one part-time deputy and a county attorney. Beaver County has a health department consisting of the Board of County Commissioners, a health officer and a public health nurse.

There are other interchanges along Highway I-15 in in Beaver County which provide access to the freeway comparable to that at Pine Creek Interchange and which could be adapted to commercial uses. (Exhibits 14 and 15).

The Beaver County Commissioners provided for an

H-1 Highway-Service Zone in the Zoning Resolution so that land could be zoned for that use at some future time if and when need therefor arises, but they made no legislative determination that such a zone was needed at the time of the adoption of the Resolution or at any other specific time. (R-287-8). As contrasted to the 24 miles from Beaver City north to Cove Fort and the 31 miles from Beaver City south to Paragonah, it is approximately 70 miles from the city of Milford in Beaver County west along Highway U-21 to the next community which is Garrison in Millard County. (Exhibit 1). U 21 is an improved highway in that area and provides a direct route from Highway I-70 where it dead ends near Cove Fort, Utah, to central Nevada and central California points. Therefore, the highway running west of Milford to the Beaver-Millard county line is an area where highway services between existing communities would be most needed in the future.

The County Planning Commission which originally drafted the Zoning Resolution of Beaver County and the County Planning Commission which considered plaintiffs' petition for rezoning, and the Board of County Commissioners which originally adopted the Zoning Resolution and the Board of County Commissioners which considered plaintiffs' petition for rezoning, represented a variety of economic and social interests in the county and much study was made before the Resolution was adopted. (R-405-409; R-263-293).

POINTS RELIED UPON

POINT I

THE ZONING RESOLUTION OF BEAVER COUNTY IS NOT UNCONSTITUTIONAL AS BEING CONFISCATORY OF PLAINTIFFS' PROPERTIES.

POINT II

NEITHER THE INITIAL ADOPTION OF THE ZONING RESOLUTION OF BEAVER COUNTY, NOR THE REFUSAL BY THE BOARD OF COUNTY COMMISSIONERS TO REZONE PLAINTIFFS' RESPECTIVE PROPERTIES PURSUANT TO PLAINTIFFS' PETITIONS, WAS UNREASONABLE, ARBITRARY OR CAPRICIOUS.

A.

ELIMINATION OF COMPETITION WAS NOT COUNTY'S OBJECTIVE.

B.

PUBLIC NEED MUST BE WEIGHED AGAINST PRIVATE INTEREST.

C.

STABILITY OF ZONING PLAN NECESSARY.

D.

TOTAL TAX BASE MIGHT BE REDUCED.

E.

INCREASED COST OF COUNTY POLICE, FIRE, HEALTH AND OTHER SERVICES.

F.

NO PUBLIC NEED FOR PINE CREEK FACILITIES.

G.

ALL INTERCHANGES COULD DEMAND REZONING.

H.

DIFFICULT TO SUPERVISE CONDUCT IN REMOTE AREA.

I.

PLAINTIFFS HAVE NO COMPELLING PRIVATE NEED.

J.

COUNTY COMMISSION KNOWS LOCAL NEEDS.

POINT III

THE ZONING RESOLUTION OF BEAVER COUNTY DOES NOT CONSTITUTE A LEGISLATIVE DETERMINATION THAT HIGHWAY SERVICE FACILITIES ARE NEEDED AT PINE CREEK HILL THEREBY REQUIRING A REZONING OF PLAINTIFFS' PROPERTIES AS H-1 HIGHWAY SERVICE.

A.

ZONING RESOLUTION OF BEAVER COUNTY DOES NOT FREEZE BUSINESS.

B.

INTENTION WAS TO DEFER DESIGNATION OF LAND AS HIGHWAY SERVICE UNTIL FUTURE DEVELOPMENTS.

POINT IV

THE ZONING RESOLUTION OF BEAVER COUNTY IS NOT VOID AS CONTENDED BY PLAINTIFFS PHILLIPS PETROLEUM COMPANY AND DESERET INVESTORS GROUP BY REASON OF THE FACT THAT IT STATES

IN ITS PREAMBLE TO BE FOR THE BENEFIT OF THE INHABITANTS OF BEAVER COUNTY RATHER THAN THE INHABITANTS OF THE STATE OF UTAH.

POINT V

THE ADOPTION OF A MASTER PLAN IS NOT A PRE-REQUISITE TO THE ADOPTION BY A COUNTY OF A ZONING RESOLUTION.

POINT VI

BEAVER COUNTY'S ZONING IS NOT A BURDEN ON INTERSTATE COMMERCE.

POINT VII

THE ABSENCE OF FORMAL FINDINGS OF FACT AND CONCLUSIONS OF LAW PROVIDES NO GROUND FOR ALTERATION OF THE DISTRICT COURT'S ACTION.

ARGUMENT

POINT I

THE ZONING RESOLUTION OF BEAVER COUNTY IS NOT UNCONSTITUTIONAL AS BEING CONFISCATORY OF PLAINTIFFS' PROPERTIES.

Plaintiffs' contention that the Zoning Resolution of Beaver County is unconstitutional and void in that it is confiscatory of plaintiffs' properties is without merit.

In all of the cases relied upon by plaintiffs in support of their contention, either the property involved was not suited for the purpose for which it was zoned at the time of the adoption of the zoning ordinance or the property became unsuited for the purpose for which it was zoned after the adoption of the zoning ordinance because of a change in circumstances.

In the case at bar, the lands involved were used for and were suited for grazing at the time of the adoption of the Zoning Resolution in 1959 and they continue to be as suited for grazing now as they ever were so far as their productivity and other characteristics are concerned. The difference is that the plaintiffs, several years after the adoption of the Zoning Resolution, voluntarily severed the lands involved in this litigation from the larger tracts of which they were formerly a part. Grazing lands of this character must be used in relatively large tracts. The plaintiffs speculated that the lands could be rezoned and now, upon learning that they miscalculated the attitude of the zoning authority, they wish to have the court rectify their mistake. If a land owner can divide his land into small parcels and force a rezoning on the basis that the land as so divided is no longer suited for the purpose for which it was zoned as plaintiffs are attempting to do in this case, no zoning authority can hereafter adopt a binding regulation zoning land as agricultural, grazing or other use that necessarily requires a large tract. The presence of the freeway has not deprived the land of its suitability for grazing any more than the presence of Highway U.S. 91 has done in the past.

An argument similar to that made by the plaintiffs in this case was presented to this court in the case of *Douse* v. *Salt Lake City,* 123 U. 107, 255 P. 2d 723, wherein the plaintiff alleged that his property was zoned for residential but it was not suited for residential and it had a greater value as commercial or industrial property and the existing zoning was, therefore, unconstitutional as to his property as being confiscatory. In rejecting the plaintiffs' argument in that case, this court said:

> "In this jurisdiction the discretionary power to district and zone cities for various purposes incident to the public interest is granted to the governing body of the city by statute. Sec. 10-9-1, 2, 3, U. C. A. 1953. Palpably the excercise of the zoning power is a legislative function and activity. *Walton* v. *Tracy Loan & Trust Co.,* 97 Utah 249, 92 P. 2d 724, 726. The wisdom of the plan, the necessity, the number, nature and boundaries of the district are matters which lie in the discretion of the City authorities, and only if their action is confiscatory, discriminatory or arbitrary may the court set aside their action. *Marshall* v. *Salt Lake City,* 105 Utah 111, 141 P. 2d 704, 149 A. L. R. 282. The fact that plaintiff's one-half lot might be more profitably used for commercial than for residential purposes, or indeed, the fact that it has become unsuited for residential purposes does not show discrimination or reveal arbitrary action.

POINT II

NEITHER THE INITIAL ADOPTION OF THE ZONING RESOLUTION OF BEAVER COUNTY. NOR THE REFUSAL BY THE BOARD OF COUNTY COMMISSIONERS TO REZONE PLAINTIFFS' RESPECTIVE PROPERTIES PURSUANT TO PLAINTIFFS' PETITIONS, WAS

UNREASONABLE, ARBITRARY OR CAPRICIOUS.

The decision on a zoning question of the county commissioners, city council or other zoning authority will not be set aside and the court will not substitute its judgment for that of the zoning authority unless the decision of the zoning authority is unreasonable, arbitrary or capricious. This proposition has been the holding of several decisions of this court including the following: *Gayland* v. *Salt Lake County,* 11 U. 2d 307, 358 P. 2d 633; *Salt Lake County* v. *Hutchinson,* 8 U. 2d 154, 329 P. 2d 657; *Marshall* v. *Salt Lake City,* 105 U. 111, 141 P. 2d 704; *Dowse* v. *Salt Lake City,* 123 U. 107, 255 P. 2d 723; *Phi Kappa Iota Fraternity* v. *Salt Lake City,* 116 U. 536, 212 P. 2d 177; *Naylor* v. *Salt Lake City,* 17 U. 2d, 300, 410 P. 2d, 764.

In *Gayland* v. *Salt Lake County,* supra, the foregoing principle is clearly stated as follows:

> "In zoning, as in any legislative action, the functioning authority has wide discretion. Its action is endowed with a presumption of validity; and it is the court's duty to resolve all doubts in favor thereof and not to interfere with the Commission's action unless it clearly appears to be beyond its power; or is unconstitutional for some such reason as it deprives one of property without due process of law, or capriciously and arbitrarily infringes upon his rights therein, or is unjustly discriminatory. The burden was upon the plaintiff to show that the Commission's action was suffused with one or more of those faults, which burden has not been sustained. Even though it be true that information was presented at the hearing which would have justified the Commission in amending the zoning ordinance as advocated, it is also true that the situation

> presented can be so viewed as to point to the conclusion that the action taken was reasonable and proper. Under such circumstances it was not the prerogative of the court to substitute its judgment for that of the Commission."

The statute which defines the purposes for which zoning may be done by a county is Section 17-27-13, Utah Code Annotated, 1953, which states:

> "Such regulations shall be designed and enacted for the purpose of promoting the health, safety, morals, convenience, order, prosperity or welfare of the present and future inhabitants of the state of Utah, including, amongst other things, the lessening of congestion in the streets or roads or reducing the waste of excessive amounts of roads, securing safety from fire and other dangers, providing adequate light and air, classification of land uses and distribution of land development and utilization, protection of the tax base, securing economy in governmental expenditures, fostering the state's agricultural and other industries, and the protection of both urban and nonurban development."

As the subjunctive "or" is used in this statute, the county commissioners act within the power granted if the zoning regulations fulfill any one of the stated purposes. Zoning the plaintiffs' properties involved in these actions as G-1 Grazing is reasonable and within the power granted as shown by the following:

A.

ELIMINATION OF COMPETITION WAS NOT COUNTY'S OBJECTIVE.

It is contended by plaintiff that the Zoning Resolution

of Beaver County was adopted and is being administered for the purpose of eliminating competition for the business men in Beaver City. Defendants deny this contention. There are several locations within the corporate limits of Beaver City and in the Commercial Zone north of Beaver City where commercial businesses to serve the traveling public as well as local residents can be established. (D-73) There is also considerable area south of Beaver City bordering Highway U.S. 91 which will provide access to the freeway where commercial businesses can be located. (D-70-72) This area is presently zoned A-1 Agricultural but it can be rezoned to C-1 Commercial if and when demand and need dictate. (Exhibit 1) Such new businesses would compete with the now existing businesses. The existing businesses include numerous service stations, motels and restaurants and they presently compete among themselves. It is obvious that competition has not been eliminated in the area and is not likely to be done in the future. Whenever an application is made to rezone property for commercial use and there are existing similar commercial areas in the same vicinity, the same question of elimination of competition can arise; however, although zoning cannot be used for the expressed purpose of eliminating competition to existing businesses, the zoning authority may deny such applications for rezoning if such denial is otherwise proper even though competition is in fact incidentally thereby reduced.

In *Gayland* v. *Salt Lake County, supra,* the dispute was as to the attempt to rezone 10 acres of land in the vicinity of 1300 East and 5600 South Streets in Salt Lake County south east of Salt Lake City from residential (R-2) to commercial (C-2). The County Commissioners denied the application and the Supreme Court upheld that action. The applicant desired

to construct a shopping center on the land to be rezoned. By denying this application, the competition which the proposed new shopping center would have presented to other existing shopping centers which could serve the same customers was eliminated. This fact, however, did not deprive the County Commissioners of the right to deny the application.

In *Douse* v. *Salt Lake City, supra,* the property sought to be rezoned was zoned residential in an area where several blocks in the immediate vicinity were zoned commercial. The applicant alleged that his property had potential commercial or industrial value. The application for rezoning was denied and the Supreme Court upheld the denial. It is obvious that competition with the nearby commercial areas was thereby eliminated.

Since there are numerous service stations in Beaver City, one of which is owned by plaintiff Phillips Petroleum Company and one of which is owned by plaintiff Chevron Oil Company, it is ridiculous to suppose that the Beaver County Commissioners would attempt to prohibit competition by these plaintiffs and other oil companies at Pine Creek Hill from the existing facilities of these two plaintiffs and other oil companies located in Beaver City.

B.

PUBLIC NEED MUST BE WEIGHED AGAINST PRIVATE INTEREST.

In determining whether or not a zoning decision is unreasonable, arbitrary or capricious, the public need must be weighed against the private interest of the property owner.

Most of the existing communities of Southern Utah are in serious need of economic growth. They are already too small to provide all of the community services that modern living demands. Beaver City has one doctor, one drug store, one hospital recently acquired, one laundromat, one dry cleaning establishment, one barber shop, one ladies clothing store, one men's clothing store, one moving picture theater, etc. Any substantial reduction in the business activity in or near Beaver City would likely result in the loss of any one or all of those services. A lack of such services makes it difficult if not impossible to attract teachers, industry and other residents to come to the area and the disintegration of community life continues until it is virtually eliminated. (R-288-9) What is in the best interest of the inhabitants of the incorporated areas of Beaver County is also in the best interest of the inhabitants of the unincorporated areas as each is dependent upon the other. Therefore, it is in the best interest of all of the residents of Beaver County that future commercial businesses be encouraged to locate in or near the existing communities. Permiting the small business centers to be divided into more smaller business centers which will occur if plaintiffs' property at Pine Creek Hill is rezoned for commercial use, will result in a break down of the business climate and a scattering of the small population centers into still smaller centers and the deterioration of community life. (R-288-9). There is nothing in this record to indicacte any effort to freeze business at its present level. The theory of plaintiffs' evidence seems to be that a commercial development at Pine Creek Hill will bring new tourist business into the area, but such is not the case. Such a development will create no new market demand. Either the traveling public will acquire their goods and services at Pine Creek Hill or at some other location in the same area for they will not and cannot continue to some

remote area to acquire gasoline, food, sleeping accomodations and other facilities. Therefore, a development at Pine Creek Hill would not add to the economic growth of the area in any respect.

The business at Pine Creek Hill would be dependent almost entirely upon tourist trade, and, as tourist trade fluctuates greatly between the summer and winter seasons, the personnel needed to operate the Pine Creek Hill installations would also fluctuate and would probably be imported from remote areas so that the opportunity for employment at these facilities for the local residents would be diminished compared to what it would be if the facilities were near the existing communities where the business would be more dependent on local trade and more uniform. Contrary to plaintiffs' contention, there is no assurance that the employees at Pine Creek Hill would reside or spend their money in Beaver County. (R-45-51)

C.

STABILITY OF ZONING PLAN NECESSARY.

Another public need is stability in land use so that land owners can anticipate with some degree of certainty the future economic and social development. This is one of the purposes for which zoning was devised. Development without zoning is peace meal and eratic. To rezone whenever a land owner is displeasd with the present arrangement jeopardizes such stability. Rezoning should be done only upon a determination that it will not seriously and adversly affect the remainder of the community. If the County Commissioners in the case at bar are not sustained in their designation of where commercial

developments are to be located in Beaver County, then the legislative power of zoning authorities throughout the state to classify land according to its use will be seriously jeopardized.

D.

TOTAL TAX BASE MIGHT BE REDUCED.

Plaintiffs' attempt to show that the proposed development at Pine Creek Hill would increase the tax base of Beaver County. It is true that the assessed value of plaintiffs' property would increase when the proposed improvement would become completed, but the damage which the development would have on the rest of the county as above shown would eventually result in a greater decrease of tax base elsewhere than plaintiffs' property would be increased. As the general business climate and community life disintegrated and residents moved out of the county. the tax base would eventually seriously decrease.

E.

INCREASED COST OF COUNTY POLICE, FIRE, HEALTH AND OTHER SERVICES.

A commercial development at Pine Creek Hill would result in increased cost of county government services. Beaver County does have a fire department and has law enforcement officials and both would be called upon to render aid when the need would arise. (R-60-61) Families residing at Pine Creek Hill would also need to have their children transported to school. (R-290) An area so remote from the community would attract those persons who wish to escape the restrictions

of the law and a law enforcement problem would result. Health and sanitation at this remote location would also create additional cost and law enforcement problems to the county. It is inevitable that these governmental services would be required regardless of plaintiffs' present plans to provide some of these services by themselves. If all of the properties involved in these two actions were to be zoned Highway-Service, numerous facilities of various types could be constructed thereby involving the county to a much greater extent than the two service stations now anticipated by Chevron and Phillips. (Exhibit 1, 8-5-2; H-41-42; R-50-51)

F.

NO PUBLIC NEED FOR PINE CREEK FACILITIES.

There is no public need for commercial facilities at Pine Creek Hill. The proposed development is approximately 21 miles north of Beaver City and approximately the same distance south of the town of Kanosh, and that distance requires less than 20 minutes of driving at permitted freeway speed and slightly more than one gallon of gasoline. The occasional motorist who finds himself in immediate need of service between Beaver and Kanosh can acquire most automotive services at Cove Fort which is approximately 3 miles north of Pine Creek Hill. The tourist facilities at Beaver are healthful, decent and generally sufficient (D-65-67) and can be added to as need requires. The same can also be done at Kanosh, Fillmore, Cedar City and other communities along the highway. The evidence in the record indicates that highway traffic must leave the freeway when going into Beaver City and

continue through the entire length of Beaver's Main Street in order to return to the freeway at the interchange on the other end. Since the trial in this action, the State Highway Department of Utah and the Bureau of Public Roads have changed their policy and have redesigned the interchanges at both ends of Beaver City so as to enable traffic at either interchange traveling in either direction to both leave and return to the freeway and proceed in either direction when returning to the freeway, commonly called 4-way movement interchanges. This will permit easy access to and from the freeway at each end of Beaver City for all freeway travelers, at least equal to the access at Pine Creek Hill. Beaver City is now in the process of annexing to its corporate area the properties contained in the present Commercial Zone north of Beaver City as well as the additional properties to the interchange and it is virtually certain that such annexation will be completed in the near future, thus enabling commercial development to the interchange. The traveling public can be better served in and near Beaver City than at Pine Creek because of the additional services available in the community.

G.

ALL INTERCHANGES COULD DEMAND REZONING.

If rezoning is done at the interchange at Pine Creek Hill, the county will have no justification to refuse rezoning at all other interchanges along the freeway. Modern engineering techniques make it possible to adapt an area to the structural and topographical needs of a commercial installation so that topographic considerations now have lesser importance.

Other interchanges provide comparable access with Pine Creek Hill for highway travelers. (Exhibits 14 and 15) The result would be a series of small oases in the desert.

H.

DIFFICULT TO SUPERVISE CONDUCT IN REMOTE AREA.

With the development of motels, trailer courts and restaurants at Pine Creek Hill, its distance from incorporated communities would make it attractive for young people who wish to escape from the supervision of their parents and law enforcement officials. The result could be liquor violations, gambling, sexual offenses, drug traffic and other associated offenses which would be difficult to control, thereby causing a serious threat to morals.

I.

PLAINTIFFS HAVE NO COMPELLING PRIVATE NEED.

As contrasted to the public need to sustain the district court's decision, as above set forth, there is no substantial private interest to be served by rezoning Pine Creek Hill. Plaintiffs' and other petroleum dealers have numerous outlets up and down the freeway. Their customers must obtain their products and services in order to travel and they can be obtained whereever available. A development at Pine Creek Hill will neither add to the number of plaintiffs' customers nor to the number of travelers upon the highway nor to the amount of products and services which plaintiffs would sell. Plaintiffs

will incure no loss in the operation of their businesses. The same principals apply to other facilities that might be constructed at Pine Creek Hill.

J.

COUNTY COMMISSION KNOWS LOCAL NEEDS.

The County Planning Commission which originally drafted the Zoning Resolution of Beaver County and the County Planning Commission which considered plaintiffs' petition for rezoning, and the Board of County Commissioners which originally adopted the Zoning Resolution and the Board of County Commissioners which considered plaintiffs' petition for rezoning represented a variety of economic and social interests in the county and much study was made before the Resolution was adopted. (R-405-409; R-263-293)

The evidence is adundant that Eastern Beaver County is highly dependent upon tourist business in its economy, and the county Commissioners should be left to determine how best the County can benefit from that tourist business. Mr. Burnham testified that rezoning Pine Creek Hill would be in the best interest of the county while Mr. Dispain testified that it would not be in the best interest of the County to rezone Pine Creek Hill. If these two informed experts honestly differ on the question, how can it be said that the County Commissioners were unreasonable, arbitrary and capricious in their decision?

POINT III

THE ZONING RESOLUTION OF BEAVER

COUNTY DOES NOT CONSTITUTE A LEGISLATIVE DETERMINATION THAT HIGHWAY SERVICE FACILITIES ARE NEEDED AT PINE CREEK HILL THEREBY REQUIRING A REZONING OF PLAINTIFFS' PROPERTIES AS H-1 HIGHWAY SERVICE.

A.

ZONING RESOLUTION OF BEAVER COUNTY DOES NOT FREEZE BUSINESS.

In support of plaintiffs' contention that such a legislative determination was made thereby requiring a zoning of their properties for highway service facilities, they cite the cases of *Ex Parte White,* 234 Pac 396; *Wickham* v. *Becker,* 274 Pac. 397.

Both of those cases were apparently decided upon the fact that the zoning regulation adopted provided no land for commercial use other than that then being used for that purpose so that no commercial expansion was possible. In the case at bar there is additional land provided in the Commercial Zone that is not now being used for commercial purposes (D-73) and the plaintiffs, rather than being denied of the right to conduct business, were invited into the established commercial area: (Exhibit 17.)

B.

INTENTION WAS TO DEFER DESIGNATION OF LAND AS HIGHWAY SERVICE UNTIL FUTURE DEVELOPMENTS.

The intention of the County Commissioners was clearly stated by Dale Dispain in his testimony: (R-287-8) The only legislative determination that was made was that there might be a need at some future time for highway service facilities along a freeway several miles from an existing community, but no determination as to place, time or condition was made. The decision of whether or not to create a highway-service zone and, if so, where, how many, etc., were left for future determination. That question was defered by the County Commissioners at the time of the adoption of the Zoning Resolution and it should continue to be defered for decision by them in their continuing legislative function in the zoning field. Plaintiffs' contention that Pine Creek Hill is *the* logical place for a highway-service zone becomes untenable when the zoning map attached to Exhibit 1 is examined and the long distance appears between the City of Milford along the highway running west to where it intersects with the northern boundary line of Beaver County. It is approximately 50 miles from Milford to the county line and approximately 70 miles from Milford to the next community which is Garrison, in Millard County. If and when a freeway were to be built connecting Milford and Garrison as a connecting link between Highway I-70 and the West Coast, highway-service facilities would be far more logical in that area than along I-15 north of Beaver City.

POINT IV

THE ZONING RESOLUTION OF BEAVER COUNTY IS NOT VOID AS CONTENDED BY PLAINTIFFS PHILLIPS PETROLEUM COMPANY AND DESERET INVESTORS GROUP

BY REASON OF THE FACT THAT IT STATES IN ITS PREAMBLE TO BE FOR THE BENEFIT OF THE INHABITANTS OF BEAVER COUNTY RATHER THAN THE INHABITANTS OF THE STATE OF UTAH.

A county zoning resolution is not void be reason of the fact that its preamble states that it is adopted for the benefit of the inhabitants of the county adopting it. Such a statement contains no implication that the purpose of the ordinance is contrary to the interest of the remaining inhabitants of the state. It is not necessary that a zoning resolution have a preamble at all. The determining test is what the ordinance actually does, that is, whether its provisions in fact benefit the present and future inhabitants of the State of Utah or whether they actually are against the interest of such inhabitants. The Zoning Resolution of Beaver County does benefit the present and future inhabitants of the State of Utah and it contains no provision to the contrary. (Exhibit 1)

POINT V

THE ADOPTION OF A MASTER PLAN IS NOT A PRE-REQUISITE TO THE ADOPTION BY A COUNTY OF A ZONING RESOLUTION.

While plaintiffs do not argue in their briefs that the adoption of a master plan is a pre-requisite to the adoption by a county of a zoning resolution, they do assert the fact that Beaver County did not adopt a master plan prior to the adoption of the Zoning Resolution of Beaver County in 1959. The adoption of a master plan is provided for by Section 17-27-4, et seq, Utah Code Annotated, 1953, and the adoption

of a zoning resolution is provided for by Section 17-27-9, et seq, Utah Code Annotated, 1953. Either can be adopted by a county but neither is a pre-requisite to the other. This question was decided as herein stated by the case of *Gayland* v. *Salt Lake County*, 11 U. 2d 307, 358 P. 2d 633.

POINT VI

BEAVER COUNTY'S ZONING IS NOT A BURDEN ON INTERSTATE COMMERCE.

The contention of plaintiffs Phillips Petroleum Company and Deseret Investors Group that the Zoning Resolution of Beaver County burdens interstate commerce is without merit. If such a contention is valid, then interstate travelers have been similarly burdened throughout all of the time that they have been using the highways of the nation because highways used by interstate travelers have customarily passed through communities and interstate travelers have been required to pass through communities whether needing services or not until the very recent development of the freeway system in some parts of the nation. Even viewing the Zoning Resolution of Beaver County in the light proposed by plaintiffs, travelers needing services while in Beaver County would be required to travel only a few city blocks further than their fellow travelers who do not need such services. However, with the recent developments since the trial of the planned four-way interchanges at each access from Highway I-15 to Beaver City and the anticipated commercial expansion particularly to the northern interchange, travelers on I-15 will have as convenient access to highway services in and near Beaver City as can be made available at Pine Creek Hill and the services available will probably be more extensive.

POINT VII

THE ABSENCE OF FORMAL FINDINGS OF FACT AND CONCLUSIONS OF LAW PROVIDES NO GROUND FOR ALTERATION OF THE DISTRICT COURT'S ACTION.

In view of the rulings contained in the Memorandum Decision of the district court in these actions and in view of the fact that it was obvious that an appeal would be on the whole record as has been the case, it is difficult to see that findings of fact and more formal conclusions of law would have served any worth while purpose. However, defendants have no objection to the entry of formal findings of fact and conclusions of law and judgment so long as they are in accord with the Memorandum Decision. It is to be observed that no plaintiff proposed or requested any additional documents and that the respective notices of appeal were based upon the Memorandum Decision. Therefor, findings of fact and conclusions of law were in effect waived so far as the appeal is concerned.

If the failure to make findings of fact does not prejudice any party, the error is harmless. (*Leighton* v. *One William Street Fund,* 343 F 2d 565) No prejudice has been alleged in the case at bar.

SUMMARY

The Zoning Resolution of Beaver County is valid in its entirety and as applied to plaintiffs' properties, and the Board of County Commissioners acted reasonably and within their lawful powers in denying plaintiffs' application for rezoning. The Supreme Court should affirm the District Court's judgment.

Respectfully submitted,

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