1965

William E. Naylor, William Cossey, James L. Neville and Blae E. Hansen : Appellant's Brief

In the
Supreme Court of the State of Utah

WILLIAM E. NAYLOR, WILLIAM COSSEY, JAMES L. NEVILLE and BLAE E. HANSEN,
Plaintiffs and Appellants,

vs.

SALT LAKE CITY CORPORATION, a municipal corporation. J. BRACKEN LEE, HERBERT F. SMART, GEORGE B. CATMULL, CONRAD HARRISON, JOE L. CHRISTENSEN, RAY ROLFSON, and ALDER-WALLACE, INC., a Utah corporation,
Defendants and Respondents.

Case No.
10373

APPELLANTS' BRIEF

APPEAL FROM THE JUDGMENT OF THE
THIRD DISTRICT COURT FOR
SALT LAKE COUNTY
HONORABLE STEWART M. HANSON, JUDGE

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STATEMENT OF THE KIND OF CASE

This is an action for declaratory judgment and injunctive relief challenging the validity of an ordinance enacted by Salt Lake City Corporation.

DISPOSITION IN LOWER COURT

The trial court, sitting without a jury, tried the case on the merits and entered judgment in favor of the defendants, dismissing plaintiffs' complaint.

RELIEF SOUGHT ON APPEAL

Plaintiffs, William Cossey and Blae E. Hansen, seek reversal of the judgment of dismissal and an order directing the trial court to enter judgment in favor of the plaintiffs, or, that failing, a new trial.

STATEMENT OF FACTS

On the 1st day of October, 1963, the Board of Commissioners of Salt Lake City passed an ordinance changing the zoning classification of approximately one-half of a city block from an "R-6" (apartment house) classification to a "B-3" (business) classification. This suit was instituted on October 30, 1963, for judgment declaring the ordinance invalid and in excess of the City's power and authority.

On March 11, 1964, the case came on for pretrial before the Honorable A. H. Ellett. Upon motion of defendants' attorneys the pretrial judge entered an order dismissing plaintiffs' complaint (R. 50). The cause was then appealed to the Supreme Court and this Court's decision reversed the judgment of dismissal entered by the district court and directed the latter court to try the cause on the merits (16 Utah 2d 192, 398 P. 2d 27). Following the remand to the district court, the case was pretried by the Honorable Merrill C. Faux. On the pretrial order of Judge Faux the case was tried on March 29-31, 1965, before the Honorable Stewart M. Hanson sitting without a jury. The trial judge entered findings of fact, conclusions of law and a judgment in favor of

the defendants, directing dismissal of the complaint (R. 59-60).

Plaintiffs' contentions are summarized in the pre-trial order (R. 53). These are, among other things, that the zoning action is not in accordance with a comprehensive plan as required by the provisions of Section 10-9-3, U.C.A. 1953; that the amendment of the zoning map is not supported by a showing of changed conditions which warrant the amendment, and that no notice of the proposed amendment of the Use District Map was given as required by Section 10-9-5, U.C.A. 1953. Each of these allegations are denied by the defendants. In the opinion of plaintiffs' counsel, there is no material conflict in the evidence or with respect to reasonable inferences to be drawn from the evidence.

On or about September 1, 1927, Salt Lake City enacted a zoning ordinance and adopted a Use District Map in pursuance of a comprehensive plan for the zoning of Salt Lake City. A planning commission was appointed by the City in accordance with the provisions of Title 10, Chapter 9, Utah Code Annotated 1953. On May 28, 1963, the defendant Alder-Wallace filed with the planning commission its petition for amendment of the Use District Map by changing a part of the city block located between Second and Third South and Sixth and Seventh East Streets (Block 46, Plat "B", Salt Lake City Survey) from a Residential "R-6" use district to a Commercial "C-3" classification. The planning commission recommended to the city commission that the application be denied because among other things the proposed change

was contrary to the comprehensive zoning plan and would constitute "spot" zoning and that there was no need or reason shown for additional business or commercial zoning (Exhibit P-1, Pgs. 22-23). The city commission first unanimously voted to deny the application. Subsequently a hearing was held at the request of the petitioners and the commission reversed its previous decision and voted unanimously for the change in zoning. The change effected by the zoning action resulted in reclassification from "R-6" to a "B-3" use district instead of the "C-3" zone sought by the application. The recorder did not publish any notice prior to the hearing informing the public that the commission would consider a proposed change to the "B-3" classification (Exhibit P-1, R. 101).

Block 46 and the properties facing it from the four compass directions are and have been zoned for residential use since the enactment of the 1927 zoning ordinance. There are many old structures in the area and redevelopment and rebuilding have been rapidly taking place with new structures built for purposes consistent with the "R-6" zoning classification (Exhibit P-12). In the opinion of the experts the area involved in the zoning change was a stable residential area with fine prospects for redevelopment consistent with the existing zoning plan (R. 166). The natural effect of the rezoning was to interrupt this stability and cast considerable doubt on the future land use and zoning of all of the abutting property (R. 148-149).

There was no evidence produced either at the hearing or at the trial which would warrant a finding that

additional commercial or business zoning was needed. In the near vicinity of Block 46 there are 41½ acres of Business "B-3" zoning, 27% of which is not used for business purposes; 55½ acres of "C-1" zoning, 40% of which is not used for business purposes; and 243.3 acres of "C-3" zoning, 32½% of which is not used for business purposes (Exhibit P-1, Pgs. 22-23; Exhibit P-13). In the City as a whole 603.4 acres are zoned "B-3" and only 158.4 acres are used for business or commercial purposes (Exhibit P-7, Pg. 32).

The fact that there is ample available commercial or business property in the near vicinity of Block 46 seems to have been clearly recognized by the commission. Mayor Lee, chairman of the commission, testified on cross-examination as follows: (R. 311)

> "Q. One of the grounds stated in here [the planning commission report] one of the grounds for denial, 'there is already considerable land in the general area already zoned for business or commercial, which is not so used.' Now was there any evidence at the hearing that indicated that this statement was not correct?
>
> A. Well, I think that at least I knew and assumed the other commissioners knew, that there was other ground available.
>
> Q. That there was other ground available?
>
> A. Yes.
>
> Q. *And that the other ground that was available was already zoned for commercial or business?*
>
> A. *Yes.*

Q. *You knew that at the time?*
A. *Oh, yes.*"

Commissioner Harrison, also a defense witness, testified: (R. 348)

"Q. Commissioner Harrison, were you aware of the fact that there was considerable land in the city limits and in the vicinity of this zoning change which was zoned commercially, which was not being used for commercial purposes?
A. I was, yes.
Q. And do you know, do you know whether or not that land was available for commercial use?
A. I am sure much of it was, yes."

In the mind of Commissioner Harrison the principal reasons for changing the zone classification from residential to commercial was that private capital was willing to expend money for a commercial development that would "clean up" an old residential area and that there would be additional tax revenue (R. 350). Mayor Lee was motivated by the fact that new business would come into the area and place a new commercial development in the stead of a run-down residential area; that no buffer on Seventh East could be maintained in any event, and that "we have an obligation to these people who own property [in Block 46]" (R. 318).

It does not appear from the evidence that the zoning action was made with reference to any comprehensive or general plan. The planning commission reported that business zoning in Block 46 would be contrary to the

comprehensive plan (Exhibit P-1, Pgs. 22-23). The zoning action was inconsistent with the zoning map in effect on the date of the application (Exhibit P-5) in that it created a new commercial district in the center of a residential district and yet within walking distance of existing commercial districts. Further, the City had previously created a new Residential District (R-7) intended to be a buffer between commercial or business property in the downtown area to the west and residential property to the east (R. 126-128). This new "buffer" zone was located in the block west of Block 46 and the effect of the zoning action was to create business districts on both sides of the buffer.

At the time of application for rezoning the City had in effect a current general land use plan (Exhibit P-10). The general plan did not contemplate a new commercial district in Block 46. The zoning action here in creating an entirely new business district (as opposed to enlargement of an existing business district) is without precedent in city history except in one or two instances where new residential development has required a regional shopping center (R. 184). At least six prior applications for business or commercial zoning in the immediate area had been denied by the city commission before Block 46 was rezoned (R. 272-275).

When asked about the reference which the zoning action had to any general or comprehensive plan, Mayor Lee said: (R. 314)

> *"I don't think anyone can hold to a plan in the building of a city."*

Speaking of the attitude of the city planning commission regarding proposed "B-3" zoning in the immediate area of Block 46, Mayor Lee said: (R-315)

> *"The zoning commission turned it down. Maybe they are right, but I just don't think you can hold to a plan."*

The Salt Lake City planning director, the assistant City planning director, the Salt Lake County zoning administrator, and the former County planning director each testified that in their opinions the zoning action was contrary to comprehensive planning and in many specific respects in violation of recognized planning criteria and acknowledged City policy.

ARGUMENT

POINT I.

THE ZONING ACTION IS INVALID BECAUSE IT IS NOT IN ACCORDANCE WITH A COMPREHENSIVE PLAN AS REQUIRED BY THE ENABLING STATUTE.

Salt Lake City is empowered by statute to "regulate and restrict . . . the location and use of buildings, structures and land for trade, industry, residence or other purposes" and for that purpose to "divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of [the statute]" (10-9-1, 2, U.C.A., 1953). The power of the City to enact zoning ordinances in accordance with the intent and purpose of the statute and within the limitations of the statute is not questioned in this case.

The City, however, does not have the unlimited, undefined and unrestricted power to legislate the use of property. Statutory limitations are specifically imposed by Section 10-9-3, U.C.A., 1953:

> "*10-9-3. Regulations to be in accordance with comprehensive plan.—Such regulations shall be made in accordance with a comprehensive plan* designed to lessen congestion in the streets, to secure safety from fire, panic and other dangers, to promote health and the general welfare, to provide adequate light and air, to prevent the overcrowding of land, to avoid undue concentration of population, to facilitate adequate provision for transportation, water, sewage, schools, parks and other public requirements. *Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the city.*" (Emphasis added)

The decision of this Court in *Marshall v. Salt Lake City,* 105 Utah 111, 141 P.2d 704, fixes some guidelines and standards by which the validity of municipal zoning action is to be determined. There the purpose and limitations of the zoning authority were expressed as follows: (105 Utah 111, 119-125)

> ". . . As shown by the above quotes from the statute, the city is authorized to regulate and restrict 'the *location and use* of buildings, structures and land for trade, industry, residence and other purposes' and to accomplish this 'may divide the municipality into *Districts* of such number, shape and area as may be deemed best suited to carry out the purposes of this Article.' (Italics

ours) This is done under the police power and by the statute must be done in accordance with a comprehensive plan, designed, inter alia, to lessen congestion in the street, promote the general welfare, facilitate transportation, and other public requirements. It shall be done with reasonable consideration of the character of the district, its suitability for particular uses 'and with a view to conserving * * * and encouraging the most appropriate use of land.' Section 15-8-91, supra. That the statute contemplates a division and regulation by *districts*, instead of regulation by single lots or small groups of lots, is evident. The regulation of the use of property by lots or by very small areas is not zoning and does violence to the purpose and provisions of the statute. It would not, and could not, accomplish the purpose of the law as set forth in the statute quoted supra....

"City zoning is authorized only as an exercise of the police power of the state. It must therefore have for its purposes and objectives matters which come within the province of the police power. When exercised by a city, it is of necessity confined by the limitations fixed in the grant by the state, and to accomplishment of the purposes for which the state authorized the city to zone. Those purposes, which control and must be subserved by any zoning, are set forth in Section 15-8-91, U.C.A., 1943, quoted supra. The elements required of a zoning plan are: It must be comprehensive; it must be designed to protect the health, safety, and morals of the inhabitants; to promote the general welfare; avoid overcrowding and congestion in traffic and population; facilitate transportation and other public service; and meet the ordinary or common requirements of happy, convenient and comfortable living by the inhabitants of the districts, and the city as a whole....

• • •

> "The basic purpose of zoning is to 'bring about an orderly development of cities, to establish districts into which business, commerce, and industry shall not intrude, and to fix certain territory for different grades of industrial concerns. * * * The exercise [of this power] must have a substantial relation to the public good within the spheres held proper.' White's Appeal, 287 Pa. 259, 134 A. 409, 412, 53 A.L.R. 1215. 'It is a fundamental theory of the zoning scheme that it shall be for the general good, to secure reasonable neighborhood uniformity, and to exclude structures and occupations which clash therewith.'
>
> "Zoning is done for the benefit of the city as a whole, and the limitations imposed on respective districts must be done with a view to the benefit of the district as a whole, and not from consideration of particular tracts. . . . * * *
>
> "'The tests of validity in such cases are: Does the ordinance bear a reasonable relation to the public health, morals, safety or general welfare: have the districts been created according to a fair and rational plan?'"

The requirement that municipal zoning be "in accordance with a comprehensive plan" is similar to legislative enactments of more than forty states.

The meaning of the term "comprehensive plan" is discussed in appellants' brief in case No. 10114 at pages 18 through 25. In brief, the comprehensive standard requires that the zoning ordinance or any amendments thereto be logically related to considerations broader than the property immediately affected and that it fit into some general or over-all scheme or plan for the development of the City as a whole.

Salt Lake City adopted a zoning map with the enactment of the 1927 ordinance (Exhibit P-2). This map contemplated that general business and commercial land use would not extend east beyond Fifth East Street and that Block 46 would be used for residential purposes. The land was actually developed on the basis of this plan and new development in the area of Block 46 has been consistent with this plan. The City, by its planning commission, conducted a further study in 1943 and published its plan for desirable land use, which plan also contemplated that the general business and commercial district of the City would not extend east beyond Fifth East Street and that Block 46 and the immediate area would be reserved for residential use (Exhibits P-8, P-9). The general plan for land use in effect at the time of the zoning change also directed that Block 46 and the immediate area adjacent thereto continue in its established use (Exhibit P-10).

The city commission was advised by their planning commission that the proposed zoning change in Block 46 was contrary to the comprehensive plan (Exhibit P-1, Pgs. 22-23). *The significant feature of this case, however, is not the departure from the general plan but the fact that the change was not made with reference to any general or over-all purpose or objective in the division and regulation of land in the city by districts.* The reason for the zoning action is apparent from the evidence offered by defendants and particularly from the testimony of Mayor Lee and Commissioner Harrison. Defendant Alder-Wallace selected a site for a commercial development (which happened to be in an area zoned and

used for residential purposes) and represented to the city that if the city would rezone that portion of the block which it had selected for commercial use, the developer would remove the deteriorated structures in the rezoned area and construct commercial buildings. Defendant Alder-Wallace told the commission and the court that the landowners in the area selected would receive more money for their land than they could hope to get for residential purposes and that the city would in turn derive more revenue from Block 46 in terms of sales and property taxes. The reason for the selection of residential property rather than expensive nearby commercial property is obvious. Zoning action based solely upon such considerations is invalid because it does not take into account the requirements that the ordinance "secure reasonable neighborhood uniformity," "bring about an orderly development of cities . . . establish districts into which business . . . shall not intrude . . .," and "divide the municipality into Districts of such number, shape and area as may be deemed best suited to carry out the purpose [of the statute]" (*Marshall,* supra).

By ignoring its comprehensive plan in this instance the City hopes for economic gain in the improvement of an old residential area and increased taxes from Block 46. The short-sighted nature of this sort of thinking is pointed up in the City's own study of 1943 (Exhibit P-8, Pg. 26).

> ". . . changes to lower forms of land use should be very thoughtfully studied as to necessity and location. Furthermore, it is especially easy for a . . . commercial area to blight or reduce

> the economic usefulness of an adjacent residential area. This is happening in thousands of cases in Salt Lake City today with an annual economic loss probably in the millions. Unless, as is seldom the case, the speculative value for business . . . of this blighted land can be capitalized upon immediately, both city and the owner lose. One of the important results of planning is stability in land use, and one of the most dramatic manifestations of poor planning or lack of planning in any city is unstable property values which are a harbinger of the more serious forms of blight."

There is no precedent for the action of the City in this case (R. 184). The change of zoning interrupted a stable District created 36 years before and cast great doubt and speculation on land use in the entire area. While this result is being brought about, the Chairman of the Board of Commissioners is saying, "I don't think anyone can hold to a plan in the building of a city" (R. 314).

A similar situation was presented in the case of *Kuehne v. Town of East Hartford,* 136 Conn. 452, 72 A.2d 474. The facts are similar to those involved in the case at bar. The zoning authority of the Town of East Hartford rezoned property in a residential zone for business use. The applicant intended to erect facilities for six or eight stores in the nature of retail stores and small business establishments calculated to serve the needs of residents in the vicinity. A small area already zoned for business was located relatively close. Fifty-one of the residents of the area filed their petition in support of the change. An appeal from the zoning action was

taken to the Connecticut trial court where the action of the zoning authority was affirmed. On appeal the Connecticut Supreme Court reversed, holding: (72 A.2d 474, 478, 479)

> "A limitation upon the powers of zoning authorities . . . is that the regulations they adopt must be made 'in accordance with a comprehensive plan.' . . .
>
> "In the case before us it is obvious that the council looked no further than the benefit which might accrue to Langlois and those who resided in the vicinity of his property, and that they gave no consideration to the larger question as to the effect the change would have upon the general plan of zoning in the community."
>
> "The action of the town council in this case was not in furtherance of any general plan of zoning in the community and cannot be sustained."

Appellants respectfully submit that the zoning action in this case is not in furtherance of any general or comprehensive zoning plan and that it cannot be sustained.

POINT II.

THE ZONING ACTION IS INVALID BECAUSE THERE HAS BEEN NO CHANGE OF CONDITIONS WHICH WOULD WARRANT OR JUSTIFY THE AMENDMENT OF THE ZONING MAP.

Block 46 and lands surrounding it have been zoned for residential use since enactment of the 1927 ordinance. The action in the instant case constitutes the creation of an entirely new business district. The new business dis-

trict is a substantial departure from the existing map or plan in that it is an independent district of some consequence and size located in the center of a residential area and yet in close proximity to the existing commercial and business area of the City.

Presumably, the plan existing at the time of the amendment (which classified the property as residential) was a fair, rational and comprehensive plan. This presumption is recognized in the case law. See e.g. *Northwest Merchants Terminal Inc. v. O'Rourke,* 191 Md. 721, 60 A.2d 743, where the court said:

> "There is a presumption that zones are well planned and arranged and are to be more or less permanent *subject to change only to meet genuine change in conditions.*" (Emphasis added)

One of the formal requirements underlying the validity of any change in the zoning ordinance is that there must be a corresponding change of conditions justifying the zoning amendment. In *Page v. City of Portland,* 178 Ore. 632, 165 P.2d 280, the Oregon Supreme Court, in striking down an amendatory ordinance, said:

> "Police power must be exercised to promote the general welfare of the people at large, and not for the interests of any private group [citing authorities]. *Amendments to zoning ordinances should be made with caution and only when changing conditions clearly require amendment. Otherwise, the very purpose of zoning will be destroyed.*" (Emphasis added)

To the same effect is *Wilcox, et al. v. City of Pittsburgh,* 121 F.2d 835 (C.C.A. 3rd, 1941), where the trial court had

dismissed on motion a complaint attacking an amendatory ordinance. The dismissal order was reversed by the circuit court in an opinion which read in part as follows:

> "In the juristic sense we think the council have been fully put upon their proof. The general principle is conceded. Changes in the plan, like the enactment of the original ordinance, are an exercise of police power. . . . *As conditions are the basis and justification for zoning, clearly a change in the former is essential to a change in the latter.*" (Emphasis added)

The general rule requiring "change of conditions" as a basis for amendment of a zoning ordinance is stated in 101 C.J.S. 837 and the cases are collected in footnotes in the same volume and in the pocket parts.

In a period of 36 years there will be some change of conditions, but the "change of conditions" referred to in the cases refers to facts or circumstances existing at the time of the change which did not exist at the time of the original ordinance and which renders the property more suitable for a new or different use. Block 46 and the surrounding property were used for residential purposes at the time of the amendment and redevelopment with new structures was rapidly taking place consistent with the residential zone. There is adequate property in the near vicinity already zoned for business or commercial purposes. Both of the commissioners who testified recognized this fact (R. 311, 348). The undisputed evidence shows that Block 46 was stable and redeveloping consistent with the existing zone classification; that there is existing commercial within close proximity which is

available for commercial use, much of which is in need of redevelopment for commercial or business purposes, and that the City already has far more commercial zoning than its needs require. There is no justification whatever for the interruption of 36 years' stability in Block 46. There being no "change of conditions" such as to warrant the amendment, the zoning action is invalid.

POINT III.

THE ZONING ACTION IS INVALID BECAUSE NOTICE OF THE PUBLIC HEARING WAS NOT PUBLISHED AS REQUIRED BY LAW.

The zoning power of the City is limited by the statutory grant of authority of the legislature. The legislature has specifically required that "all proposed amendments be first submitted to the planning commission for its recommendation" and that there be "15 days' notice and public hearing" in connection with any such amendment (10-9-5, U.C.A., 1953). The language of the statute is mandatory and not permissive. In the case at bar the petitioner did not submit any proposal for "B-3" zoning to the planning commission. The planning director did testify that "B-3" zoning would also have had an unfavorable recommendation from the planning commission (R. 160, 161). The purported notice of the public hearing informed the general public of a proposed change from "R-6" to "C-3" (Exhibit P-1, Pg. 8). Never at any time was there any publication of notice prior to the hearing indicating that the city commission would consider an amendment to "B-3" zoning for Block 46. It is thus

apparent that the literal requirements of the enabling statute were ignored in this instance. It is respectfully submitted that this furnishes another reason why the action of the zoning authority may not be upheld.

CONCLUSION

The zoning authority has not acted in the furtherance of any general or comprehensive plan for zoning in the City. The amendment of the ordinance is in direct violation of the existing plan for orderly development of the City as a whole. There is no change of conditions which warrants the interruption of the area where the zone change was made, and no notice was given to the public with respect to the proposal for creation of a new "B-3" district. The judgment of the trial court should be reversed with directions to enter a decree declaring the amendatory ordinance void.

Respectfully submitted,

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