

1965

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

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Oscar W. McConkie, Jr., Homer Holmgren, and Jack L. Crellin; Attorneys for Respondents

Recommended Citation

Brief of Respondent, *Naylor v. SLC Corp.*, No. 10373 (1965).
https://digitalcommons.law.byu.edu/uofu_sc2/3639

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 -) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

**IN THE SUPREME COURT
OF THE
STATE OF UTAH**

WILLIAM E. NAYLOR, WILLIAM COS-
SEY, JAMES L. NEVILLE, GEORGE
PERKINS, MELVIN PERKINS and BLAE
E. HANSEN,

Plaintiffs,

vs.

SALT LAKE CITY CORPORATION, a mun-
icipal corporation, J. BRAKEN LEE,
HERBERT F. SMART, GEORGE B. CAT-
MULL, CONRAD B. HARRISON, JOE L.
CHRISTENSEN, RAY ROLFSON, and
ALDER-WALLACE, INC., a Utah corpora-
tion,

Defendants.

Case No.
10378

F I L E D
OCT 29 1965

RESPONDENTS' BRIEF

Clk. Supreme Court

**APPEAL FROM THE JUDGMENT OF THE THIRD
DISTRICT COURT FOR SALT LAKE COUNTY,
HON. STEWART M. HANON, JUDGE.**

OSCAR W. McCONKIE, JR.
1010 Deseret Bldg.
Salt Lake City, Utah

**VAN COTT, BAGLEY,
CORNWALL &
McCARTHY**
141 East 1st Soth
Salt Lake City, Utah
Attorneys for Appellants

HOMER HOLMGREN
City Attorney

JACK L. CRELLIN
Assistant City Attorney
414 City and County Bldg.
Salt Lake City, Utah
Attorneys for Respondents

TABLE OF CONTENTS

	Page
STATEMENT OF NATURE OF CASE	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	8
POINT I.	
The Courts cannot substitute their judgment in the area of zoning regulations for that of a city's governing body	8
POINT II.	
The zoning action is in accordance with the comprehensive plan	9
POINT III.	
There has been sufficient change since 1927 so as to demand amendment of the use district map so as to carry out comprehensive plan	10
POINT IV.	
The instant zoning was done in regular and due course as required by law	12
POINT V.	
Appellants' appeal is moot	13
CONCLUSION	16

CASES CITED

<i>Brownlow vs. Swartz</i> , 43 Sup. Ct. 263, 67 L. Ed. 620, 622 (1923)	15
---	----

City of West University Place vs. Martin, 123 S. W. 2nd 638 (Tex. 1939)	15
Clark N. Town Council of Town of West Hartford, 135 Conn. 476, 144 A2 327	2
Gayland vs. Salt Lake County, 11 Ut. 2nd 307, 358, P2nd 633	11.1
Marshall vs. Salt Lake City, 105 U. 111, 141 P2nd 704	9
Naylor et al. vs. Salt Lake City, et al., 16 Ut. 2nd, 398 P2nd 27	2.9
State ex rel Town of Portales vs. Board of Commissioners, 163, P 1082 (N.M. 1917)	17

STATUTES

10-9-3 U.C.A. 1953	4
Rule 62 (d) U.R.C.P.	13
Rule 62 (g) U.R.C.P.	13

TEXTS

Haar, "In Accordance with a Comprehensive Plan," 68 Harv. L. Rev. 1154	9
Metzenbaum's Law of Zoning	9
Words and Phrases, Per. Ed., Vol. 8	9

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM E. NAYLOR, WILLIAM COSSEY, JAMES L. NEVILLE, GEORGE PERKINS, MELVIN PERKINS and BLAE E. HANSEN.

Plaintiffs,

vs.

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

Defendants.

Case No.
10373

RESPONDENTS' BRIEF

STATEMENT OF NATURE OF CASE

This is an action wherein the plaintiff appellants challenged the validity of a zoning ordinance enacted by the Salt Lake City Board of Commissioners and attempted to enjoin the issuance of building permits in accordance therewith.

DISPOSITION IN LOWER COURT

After hearing testimony and other evidence for three days, and being fully advised in the premises the trial court dismissed plaintiffs' complaint and entered judgment in favor of defendants.

RELIEF SOUGHT ON APPEAL

Two of the plaintiffs seek a reversal of the judgment of dismissal granted to defendants by the District Court.

STATEMENT OF FACTS

The Board of Commissioners of Salt Lake City duly passed an ordinance changing the zoning classification of a major portion of a city block located between Second and Third South Streets and Sixth and Seventh East Streets of said city, on the first day of October, 1963. The change was from Residential R-6 classification to Business B-3 classification. This action was taken after due and regular notice (R. 101; Ex. P 1 p. 8) and after advertised and proper public hearings (R. 101). A copy of the instant ordinance is made a part of this record (R. 8). The use District Map was altered by said ordinance and a copy thereof is a part of this record (Ex. P. 4). The zoning change was instituted by

petition of defendants Alder-Wallace, Inc., (R. 101-2)

This matter has been before this Honorable Court once before, (16 Ut. 2nd 192, 398 P2nd 27), when another division of the trial court granted defendants' motion for summary judgment and rejected plaintiffs' plea for injunctive relief. This court reiterated "the proposition that courts of law cannot substitute their judgment in the area of zoning regulations for that of a city's governing body," but held that the complaint "presented genuine issues of fact which should be resolved by trial." The matter came on regularly for hearing on the 29th day of March, 1965, before the Honorable Stewart M. Hanson who, having been fully advised in the premises, dismissed once again the plaintiffs' complaint. His findings (R. 60-63) furnish a succinct statement of the facts as they unfolded before the trial court. As the prevailing parties the defendants have the right to have the facts reviewed in the most favorable light to them. Documentation by reference to the record is added.

"1. The defendant, Salt Lake City Corporation, is a municipal corporation of the State of Utah. Defendant, J. Bracken Lee, is the Mayor of the City and a member of the Board of Commissioners of the City. Defendants, Herbert F. Smart, George B. Catmull, Conrad B. Harrison, and Joe L. Christensen, were all members of the City Board of Commissioners at all times herein mentioned. Defendant,

Ray Rolfson, is the Chief Building Inspector of the City. Defendant, Alder-Wallace, Inc., is a corporation incorporated under the laws of the State of Utah.

"2. Under the provisions of Utah law, Title 10, Chapter 9, Utah Code Annotated, 1953, the defendant city is empowered "to regulate and restrict the location and use of buildings, structures and land for trade, industry, residence or other purposes and to divide the municipality into districts of such number, scope and area as may be deemed best suited to accomplish such purposes.

"3. On or about September 1, 1927, the Board of Commissioners of Salt Lake City, pursuant to said statutes, enacted a zoning ordinance and adopted a use district map providing a comprehensive zoning plan for Salt Lake City (R. 116). Said use district map and zoning ordinance has been amended from time to time (R. 117). The comprehensive plan and trend of said amendments has been for the industrial and business districts of the city to expand from the center, and particularly to increase business usage south from South Temple Street and eastward from State Street (R. 150; 194; 195; 201; 202). For instance, business usage has been expanded from approximately 5th East Street on 4th South Street to 9th East Street on 4th South Street (*ibid.*). Many other changes have been made in the city

zoning as the population of the city has grown. Included in such changes has been a constant trend, over the years, to increase the area of business-zoned property in residential areas to better serve the public.

"4. On or about May 28, 1963, the defendant, Alder-Wallace, Inc. filed with the city a petition to amend the said use district map and zoning ordinance by changing a certain tract of land located in a Residential "R-6" Use District to a Commercial "C-3" classification. The land was located in a city block between 6th and 7th East Streets and 2nd and 3rd South Streets, and comprised approximately five acres located in the northeast corner of said block (R. 101-2).

"5. In accordance with the procedures established by the laws of the State of Utah, the Board of Commissioners of Salt Lake City published notice of and conducted a public hearing upon the above stated petition of the defendant, Alder-Wallace, Inc., to rezone the property which is the subject of this action. Said public hearing was held on September 18, 1963, in the Salt Lake City Commission Chambers of the City and County Building, and on October 1, 1963, said Board of Commissioners of Salt Lake City passed and adopted the ordinance which changed the zoning of said property from a Residential "R-6" use classification to a Business "B-3" use classification. The date of first publication of said ordinance was October 4, 1963 (R. 101-2; Ex. Pl).

"6. A Business "B-3" use classification under the Salt Lake City Zoning Ordinance is a more restrictive use classification than the Commercial "C-3" use classification contained in said ordinance and does not permit any use which would be prohibited in a Commercial "C-3" Use District (R. 218-21 Ex. P. 3).

"7. The said action of the Board of Commissioners of Salt Lake City was in accordance with and in furtherance of, the comprehensive zoning plan of the city as heretofore established and from time to time modified. Said action permits a restricted business use of the subject property on the periphery of the general commercial area of downtown Salt Lake City in keeping with the historic concept of providing adequate shopping areas to meet the needs of the population and the city in general (R. 192-150; 194; 195; 202-3).

"8. Said action tends to promote the health, safety and general welfare of Salt Lake City and its inhabitants thereof (R. 156-260).

"9. Said action was in the public interest. Plaintiffs herein represented a narrow private interest contrary to the public interest. Their various and conflicting views of comprehensive planning were in their private best interests, unrealistic, and not in accord with the public good and growth of the City. (op. cit.; R. 238; 256).

"10. The subject land was no longer suited for the 1927 zoning use, and the evidence showed a positive need for the rezoning of this area. Circumstances have changed. Unwholesome social conditions have developed in the area including juvenile problems, police problems, and health hazzards. Rezoning will help to minimize these social problems (R. 256-260; 117; 194).

"11. The interests of city renewal and beautification were best served by the rezoning action of the Board of Commissioners of Salt Lake City (R. 335-336; 305-307; 345-347).

"12. The economic interests of the city were best served in the rezoning of the subject land (R. 335-336; 305-307; 345-347).

"13. The city will be saved considerable tax revenue by the rezoning action of the Board of Commissioners of Salt Lake City. (R. 345-347)

"11. The vast majority of all interested persons who made their wants known to the Board of Commissioners of Salt Lake City at the above stated public hearing were in favor of the rezoning action taken by the city (Ex. P. 1).

"15. Mayor Lee testified as to several different reasons for changing the zoning as was done. The

action of the Board of Commissioners was unanimous, all commissioners concurring for varying reasons such as attracting new business, protecting property rights by permitting its highest and best use, eliminating slum conditions, preserving tax revenue to the city, private urban renewal, etc. (R. 304-307).

“16. The Board of Commissioners did not act arbitrarily or capriciously or unreasonably in rezoning the property in question (op. cit.; R. 60).

“17. Said Commission acted wisely in its decision and for the best interests and welfare of the citizens of Salt Lake City and within its police power (op. cit.; *ibid.*).

No objections were made to any of these findings of facts. They stand as uncontested facts and are controlling in this matter.

ARGUMENT

POINT I

THE COURTS CANNOT SUBSTITUTE THEIR JUDGMENT IN THE AREA OF ZONING REGULATIONS FOR THAT OF A CITY'S GOVERNING BODY.

The Court's attention is respectfully directed to its decision wherein this matter was before heard

16 Ut. 2nd 192; 398 P2nd 27. Parties' briefs on file herein are pertinent and the law cited therein is included by reference into this brief.

The plaintiffs appellants in this matter, after the verbage is cut away, simply are asking this Court to substitute its judgment for the judgment of the Board of County Commissioners in the matter of zoning. You have already said in this very case:

"We recognize, and reiterate, the proposition that courts of law cannot substitute their judgment in the area of zoning regulations for that of a city's governing body." (ibid.)

POINT II

THE ZONING ACTION IS IN ACCORDANCE WITH THE COMPREHENSIVE PLAN.

The term "comprehensive plan" as used in our and other statutes has been defined as "a general plan to control and direct the use and development of property in a municipality or a large part thereof by dividing it into districts according to the present and potential uses of property." *Words and Phrases*, Per. Ed., Vol. 8; *Clark N. Town Council of Town of West Hartford*, 135 Conn. 476, 144 A2 327. *Metzenbaum's Law of Zoning*, p. 129. Haar, *In Accordance With a Comprehensive Plan*, 68 Harv. L. Rev. 1154.

In a leading case of zoning this Court, *Marshall v. Salt Lake City*, 105 U. 111, 141 P2nd 704, recog-

nized that the basic zoning ordinance of 1927 and its subsequent several amendments satisfied the "comprehensive zoning plan" required by Sec. 10-9-1 U.C.A. 1953.

The instant amendment to the use district map helps implement this comprehensive plan. The plan is to have B-3 zones zoned as buffers between residential zoning and commercial zoning (R. 192, Ex. P. 4-5). The general development of the comprehensive plan is to have business zoning and usage progress from the center of the city outward (R. 194). From its inception the comprehensive plan has been to have business usage go from the downtown area south and east. (R. 194; 195; 202; Ex. P. 2-10) All of this was done in the questioned ordinance.

POINT III

THERE HAS BEEN SUFFICIENT CHANGE SINCE 1927 SO AS TO DEMAND AMENDMENT OF THE USE DISTRICT MAP SO AS TO CARRY OUT COMPREHENSIVE PLAN.

One might suppose that a court could take judicial notice that population, social problems, economic interests have changed since 1927. Substantially all of plaintiffs' exhibits demonstrate the changes made (Ex. P. 2-12) The zoning and use of land for business use has tended to go eastward and southward from the downtown area. Economic changes were

accounted by economist, Dr. El Roy Nelson. (R. 251-5) Social changes were recounted by police officer Joseph C. Smith. (R. 256-260) Plaintiffs' witness, Vernon Jorgenson, city planning director, told of many changes necessitating amendments such as the one made. This Court has repeatedly held that the various amendments to the 1927 act were proper. (op. cit. R. 117) Mr. Elders testified of population changes and differing demands for food services. (R. 208-215)

It was the unanimous judgment of the city's governing body that the circumstances had changed so as to once again change the use district map and continue to implement the comprehensive plan of expanding the commercial use of land from the center south and east. (Ex. P. 1) This Court wisely ascribed to such governing bodies wide knowledge in the matter of zoning.

"But this (public meetings) is by no means the only source from which the commissioners may obtain such information. From the fact that they hold such public offices it is to be assumed that they have wide knowledge of the various conditions and activities in the county bearing in the question of proper zoning, such as the location of businesses, schools, roads, and traffic conditions, growth in population and housing, the capacity of utilities, the existing classification of surrounding property, and the affect that the proposed reclassification may have on these

things and upon the general orderly development of the county. In performing their duty it is both their privilege and obligation to take into consideration their own knowledge of such matters and also to gather available pertinent information from all possible sources and give consideration to it in making their determination."

Gayland v. Salt Lake County, 11 Ut. 2nd 307, 358, P2nd 633

In the instant case the city's governing body has done precisely and exactly what this Court indicated was proper to do.

POINT IV

THE INSTANT ZONING WAS DONE IN REGULAR AND DUE COURSE AS REQUIRED BY LAW.

Plaintiff appellant's exhibit number one sets forth in detail the regular procedure followed in the amending of the use district map. The regular procedure was followed in the instant case. Page eight of said exhibit contains a copy of the notice published in the matter. Mr. Herman Hogensen, city recorder of Salt Lake City, placed the entire file of the application, consideration and actions of the city commission in the record. (R. 97, Ex. P. 1)

During the hearing of 25 September, 1965, in a proper extension of the advertised meeting, Mayor Lee asked the planning commission if it were according to the established policy of the commission to adopt an amendment in which the use was more restrictive than that for which advertisement was made, but in which use no use could be made of the property that was not included in the notice given, as was the instant case. The planning director, Vernon Jorgensen, answered that such action was the permissible policy of the commission and had been followed heretofore and was and had been the administrative interpretation of the law. Affidavit of Mr. Jorgensen to this effect was made part of the record in this action.

Although plaintiff's complaint generally complained that no notice was given, this contention has not been further mentioned in pretrial, former appeal, second pretrial or trial. Specifically, counsel stated to the Court, "I am not going to dwell on" the contended faulty notice. (R. 102) Nothing was said about notice in the trial. Having thus stipulated, he cannot raise the question on appeal. It has never been argued before.

POINT V

APPELLANTS' APPEAL IS MOOT.

Appellants sought "for judgment and decree enjoining and restraining the defendants . . . from

granting any building permit for erection of any improvements on the tract of land described . . . which are not authorized and permitted in the Residential R-6 Zone. . . ." (R. 7) The trial court dismissed said complaint. (R. 66) Subsequent thereto the defendant city granted the prayed for building permits allowing the land in question to be used for a greater purpose, to-wit: Business B-3 usage in accordance with the amended zoning ordinance. The property is now being used for a purpose consistent with Business B-3 usage.

Rule 62 (d), Utah Rules of Civil Procedure provides:

"When an appeal is taken, the appellant, by giving a supersedeas bond may obtain a stay, unless such is otherwise prohibited by law or these rules. . . ."

Rule 62 (g), Utah Rules of Civil Procedure provides:

"The provisions in this rule do not limit in any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction, writ or mandate, or writ of prohibition during the pendency of an appeal or to make an order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered."

Plaintiff appellants took no steps to stay the effectiveness of the lower court's action pending appeal.

Much of the land has been purchased, the building permit issued, and the land put to a higher usage. Even if this Court reversed the lower Court the building permit would still have been given, construction of new buildings is under way, the land is under a higher usage. (See attached affidavit) Therefore even if the lower court were now reversed, plaintiff-appellants would have no effectual relief nor would the parties be restored to their original position. The matter is moot.

In point is *City of West University Place v. Martin*, 123 S. W. 2nd 638 (Tex. 1939). There, a land owner sought, and a writ of mandamus was issued, to get a building permit. Pending appeal the building permit was issued. The appellate court held it unnecessary to discuss the validity of the zoning ordinance and said:

“The reason or motive governing the issuance of the permit becomes immaterial. Nor does the issuance of the permit by the officers, in response to the judgment of the trial court prevent the question from being moot.”

With reference to the use of the instant land, nothing is left to litigate. The case being moot, further proceedings in this court or in the trial court would be of no avail. See also *Brownlow vs. Swartz*, 43 Sup. Ct. 263, 67 L. Ed. 620, 622 (1923); *State ex rel Town of Portales vs. Board of Commissioners*,

163 P. 1082 (N.M. 1917). The appeal should be dismissed.

CONCLUSION

The Board of Commissioners of Salt Lake City did not act arbitrarily nor capriciously nor unreasonably in rezoning the property in question. Rather it acted wisely and within the police power of the city and according to a comprehensive plan. Its procedure was due and proper as required by law. The trial court, in the premises, could not have acted other than it did. This court must sustain the trial court.

Respectfully submitted,

McCONKIE AND McCONKIE

By
Oscar W. McConkie, Jr.
Attorney for Alder-Wallace
1010 Deseret Building
Salt Lake City, Utah

HOMER HOLMGREN
Salt Lake City Attorney

By
Jack C. Crellin
Assistant Salt Lake City
Attorney

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM E. HAYLOR, 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 ALBER-WALLACE, INC., a :
Utah corporation, :

A F F I D A V I T

No. 76323

~~Comes now H. Marvin Wallace, President of the defendant~~
Alder-Wallace, Inc., and having been duly sworn deposes and says:

1. The sought after building permits in the instant case were issued on the 16th day of April 1965.
2. All of the land in question has now been purchased for the business use under the Business B-3 zoning.
3. The buildings of business usage have commenced on the instant property.
4. The Business B-3 usage is now inconsistent with the former Residential R-6 use.
5. Very considerable expenditures of funds have been made on the instant land to upgrade its use for the present Business B-3 usage.

Dated this 25th day of October, 1965.

H. Marvin Wallace

Subscribed and sworn to before me this 27th day of October, 1965.

Oscar W. McCorkle, Jr.
Attorney for Respondents
1010 Beacon Building
Salt Lake City, Utah

J. B. McConkie
Notary Public residing at
Salt Lake City, Utah
My Commission Expires:
September 15, 1966