

1961

## Gayland v. Salt Lake County et al : Brief of Intervenors

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED  
JAN 8 - 1961

GAYLAND, a Utah Corporation,

*Respondent,*

vs.

SALT LAKE COUNTY, STATE OF  
UTAH: LAMONT B. GUNDER-  
SON, EDWIN Q. CANNON, SR.,  
and WILLIAM G. LARSON, Indi-  
vidually and as members of the  
Board of County Commissioners of  
Salt Lake County,

*Appellants.*

Clerk, Supreme Court, Utah

Case No.  
9280

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BRIEF OF INTERVENERS

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ROBERT R. DANSIE  
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## II

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STATEMENT OF THE CASE

This matter is before the court on appeal by Salt Lake County from a judgment by the lower court reversing the determination of a zoning question by the Board of County Commissioners.

These interveners were requested by this court to file a memorandum, at the time of the argument. We desire this court to remand the matter to the trial court so that the issues may be tried out fully, with all necessary parties before the court. On the other hand, if this court chooses not to so remand, then the judgment of the lower court should be reversed.

The interveners are the parties who appeared before the County Commissioners and made a record at the hearing against the issue of rezoning residential property, but were not advised of the lower court's review of the matters heard and determined in the lower court.

## STATEMENT OF THE FACTS

Gayland applied for a change of zoning on a tract at 56th South at 13th East in Salt Lake County from residential to commercial. The District Planning Commission had opposed said application. The Salt Lake County Planning Commission, after Gayland reduced the size of the tract from 80 acres to 18, and then to 10 acres, recommended the change. (Ex. 1) As required by the statute, the attempt by Gayland to amend the district maps was at the legislative and administrative discretion of the Board of County Commissioners; (17-27-14 UCA 1953) and pursuant to law and notice, a public hearing was had on November 4, 1959 at which fourteen persons made statements opposing the proposal to amend. An equal number appeared in favor. The transcript, exhibit 3, is the record of proceedings. A large number of maps and exhibits were introduced and used at the

hearing, but for reasons not known to interveners, not one of these maps was before the lower court, and is not before this court for review.

Mr. Brockbank, president of Gayland-applicant, made a statement showing the general character of the area as being residential, and under considerable development. (Tr. 6) He reviewed the traffic patterns manifest by the maps showing the principal arterial highways existent and projected on which there was no controversy. He stated there were no shopping facilities in the area and stated his desire to have the privilege of building same at the above stated location, stating it was strategic. He and others stated that 13th East was to be an "express-way", intended by the county, state road commission and other authorities to move traffic rapidly in and out of the city and beyond the south boundaries of the county. (Tr. 8, 10) He did not say how the commercial facility he hoped to build would avoid traffic congestion and a slowing down of automotive movement on that important junction. Most of the witnesses against the change made specific reference to those dangers and pointed out that the overall importance of the express-way would be jeopardized and nullified if the historic policy of the county were changed, and commercial facilities allowed to come onto 13th East. The express-way planning had precluded any extension of commercial zoning thereon. A witness said: "For these reasons, you gentlemen have shown excellent judgment over the years gone by in designating Thirteenth East as a *no-access traffic-carrying artery*." (Tr. 32) Other competent witnesses referred to the folly of allowing com-

mercial development along 13th East to defeat the long-planned purpose to move traffic rapidly there-along. (Tr. 39, 45, 60)

It was disclosed by many witnesses that there already existed many separate tracts of commercially-zoned land in the general area, aggregating in excess of 167 acres. (36, 42, 45, 47, 52, 56, 60, 63, 64, 67) The opponents of the proposed change showed these areas on the maps, now absent in the record, undertaking to show the commission that there was excess commercial zoning already existent. Pertinent to this important question, a witness said: (Tr. 52)

“In the Murray area alone right now there is considerable zoned property that is not being used because the population has not grown sufficiently to develop that. It now stands as a *blighted area*. People do not wish to build homes in the zoned area and the business will not justify all of the area at the present time being built upon.”

An issue developed at the hearing as to the seriousness of intentions of the owners of the existing commercially zoned land to proceed, to build shopping facilities to serve the people of the area. Counsel for Gayland chided: “What good will one hundred sixty acres or two thousand zoned commercially do the people that want to shop if there is nothing on there? I think it is material *when* these things are going up. They come in and say that they have all this land zoned. What good is it if there is nothing on it? . . .” To which the chairman responded: “I think it is material.” (Tr. 69)



The witnesses had developed that one of the reasons immediate development had lagged was that tenants, commercially intending service units, were terrified, frightened “with the confusion and the zoning that comes up, that is perpetually coming up.” (Tr. 43, 44, 34, 35) It was not the owners of the lands, but the potential tenants, the grocers, druggists, clothiers, that were and are still, uncertain. All of the land owners, including the applicant, were and are in competition, unable to make plans and commitments to service units that have wanted to come into the central-county area. The record makes it plain that the real problem was not the owners of the lands, but the potential tenants, the service units that were and are hoping for some “stability” of zoning so that they may make decisions. As we will later develop in our argument, this represented the central problem, not the landowners. And the question before the county commission for decision was whether to grant additional commercial zoning before the existent tracts went into development.

In a lively discussion between Gayland’s counsel, and the representative of extensive lands three-and-a-half blocks to the west owned by Hi-Land Dairyman’s Association, it was said: “I would like to say if Mr. Rampton — had he asked Hi-Land if we will be building next year, Hi-Land will do and build; we *will* so do. We are going to build a very, very large shopping center.” (Tr. 71) A current view of the tracts at 9th East at 5600 South will show the honesty of these words. Hi-Land is going ahead as planned, as are the Howe

Brothers. But a real problem of "Stability" of zoning existed, and still does.

The county commissioners by a two-to-one vote rejected the application, giving as reasons, as shown on exhibit "1":

"There is sufficient commercial zoning in the area; not warranted at this time."  
That cleared the air.

Immediately following this decision, Gayland entered the court asking alternative relief: that the entire zoning ordinance of the county be declared void, or that the court rezone the Gayland area. (R. 5) No notice appeared to advise these vocal and interested opponents, whose identity and interest was well known to Gayland "on the record." Not one of them was made a party to the serious but secret contest that followed.

The county defaulted. A belated attempt was made to create the semblance of an issue for the lower court, but the record before us, together with what follows in this brief, will disclose that the interests of the public were not preserved in this important area of determination. It was but five days before the petition for intervention was filed that any of the interveners learned of the lower court action, and the imminence of argument before this court. The only way interveners came to knowledge then was a publicized hearing on two additional applications for extension of commercial zoning on 13th East just four blocks south of the Gayland property. The interveners, intent on showing diligence

in the protection of their lawful interests in respect to the 62nd South applications, learned then that quietly, and without notice, the 56th South denial by the county Commission had been overturned. These interveners acted immediately to enter this appeal.

The Findings of Fact and Conclusions of Law entered in the court below, not being predicated on evidence, and contrary to the evidence and of law, require, compel correction. Hence the application of these interveners, who not alone demand a right to be heard on their own account, but for the benefit of the public.

## POINT

### I. THE INTERVENERS HAVE A CLEAR RIGHT TO INTERVENE.

## ARGUMENT

### I. THE INTERVENERS HAVE A CLEAR RIGHT TO INTERVENE.

The status of interveners in this case is governed by Rule 24 of the Rules of Civil Procedure, under the following sub-sections:

(A) INTERVENTION OF RIGHT. Upon *timely* application anyone shall be permitted to intervene in an action:

(1) when a statute confers an unconditional right to intervene; or

(2) when the representation of the applicant's interest by existing parties *is or may be*

inadequate and the applicant *is or may be* bound by a judgment in the action; or

(3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

The interveners are clearly within all of the above conditions. We shall discuss these conditions in relation with intervener's position, in the order of the rule.

#### (A) TIMELY APPLICATION:

In our Petition for Intervention, filed with this court on the 8th day of December, 1960, it is stated:

"3. That the above-entitled action was commenced and went to judgment in the District Court without any of the parties hereto being made parties to said action, or being given any notice whatsoever of the commencement or pendency of said action, and the parties hereto have, *within the past week*, first learned of the above-entitled action."

Interveners acted promptly, and in less than a week after learning of the above action, the application and petition to intervene was served and filed. In the case of *Leary v. United States*, 224 U.S. 567; 32 Sup. Ct. 599, it was declared by Justice Holmes that there is no presumption that a citizen has knowledge of a pending action. The record is devoid of any evidence or shred thereof that these interveners had any knowledge of these proceedings thereof. That should dispose of the question of *timely application*.

(B) THE STATUTES OF UTAH CONFER  
TWO UNCONDITIONAL RIGHTS TO INTERVENE:

This action was brought by plaintiff below under the Declaratory Judgments Act, 78-33-1 et sec. The cause of action not only sounds in declaratory relief, (R. 5, Resp. Br. 3) but respondent Gayland, unsatisfied with the result below on the alternative grounds, comes before this court on “cross-appeal” from the refusal of the court below to “declare the zoning resolutions invalid.” (Respondent’s brief, p. 4, middle).

The Declaratory Judgments Act states in section 2 thereof that “any person interested . . . may have determined any question of construction or validity arising under the . . . statute, ordinance . . . and obtain a declaration of rights, status or other legal relations thereunder.” 78-33-2

In 78-33-11, the parties *required* to be brought before the court are stated:

“When declaratory relief is sought *all persons shall* be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings. . . .”

Respondent cannot say that it was unaware of the existence of these interveners and their vital interests. Each and every one of them was present in person or by counsel, at the public hearing before the Board of County Commissioners, and gave his name, and in most cases, his address. Exhibit 3 is the brown transcript of the said hearing, referred to and admitted on page 17

of the record here and consists of 73 pages of testimony. It is not numbered as an exhibit. On pages 2 and 3 of said exhibit three the names of all of the interveners appear in the index. Their respective statements appear. It is assumed that plaintiff had the matter reported as the commission does not ordinarily do such.

The basis of the vice of the plaintiff or the court in failing to notify or join these interveners in the court proceedings below may be found on page 1 of exhibit 3 wherein the schedule of "appearances" includes only the name of the county planning director, and counsel for the plaintiff, along with the names of the county commissioners. Good reporting procedures would at least include the names of counsel who formally appeared. These would include Grant Macfarlane and Warwick C. Lamoreaux, both of whom spoke for parties in interest; and counsel for plaintiff-respondent was well aware of their presence, as may be seen from their colloquy. (Tr. 69, 71) Sufficient to repeat, none of the 14 parties appearing against the applicant before the county commission were noticed nor joined as parties. 78-33-11 unequivocally says these parties "shall" be made parties.

Thus above appears the first of two statutory "unconditional rights to intervene" as required by Rule 24.

The *second* such unconditional right to intervene is set forth in 17-27-23 UCA 1953. This section has reference to the rights of individuals to bring private actions in case persons violate the zoning ordinance if

they are not satisfied with enforcement by constituted authority. The section specifically authorizes the requisite owners to . . .

“...institute injunction, mandamus, abatement or any other appropriate action or actions, proceeding or proceedings to prevent, enjoin, abate or remove such unlawful erection, construction, reconstruction, alteration, maintenance or use.”

Because of the abbreviated state of the record below, of which these interveners were not a part, and could not under the circumstances obviate, the trial record does not disclose the exact location of intervener's lands, homes and interests. Some of the interveners live within the district and have lands immediately therein. Others are located within 3 or more blocks of the respondent's tract. Certainly under the provisions of 17-27-23 the interveners thus have a *second* statutory status which “confers an unconditional right to intervene.” If we or any of us may bring collateral proceedings in the use of the extraordinary writs above enumerated, then we have the right to intervene.

We will delay citing case authority until all of the provisions of Rule 24 have been discussed. Our case research brings excellent authority to light covering all points of Rule 24.

(C) THE REPRESENTATION OF INTERVENER'S INTERESTS, BY THE EXISTING PARTIES DEFENDANT WAS AND IS INADEQUATE.



We are loathe to elaborate this matter for obvious reasons, but intervener's statutory right under the rule compels reference to the record of inadequacy. There can be no doubt but that the county substantially defaulted below. Any reasons for such are not stated in the record. At page 15 of the record, under the statement of "appearances" the following text appears:

"For the plaintiff Calvin Rampton

For the defendants (Ollie McCulloch physically present but not formally appearing."

Mr. Rampton proceeded to make his record, calling Miss McNeal, Clerk of the Board of County Commissioners, who brought to court certain, but not all of the proceedings and records, presented at the public hearing. In identifying the first exhibit, the following appears at page 16 of the record:

"Q. I offer Exhibit 1 in evidence.

THE COURT: Any objection, Mr. McCulloch? Or are you here?

MR. McCULLOCH: I am officially not here, your honor.

THE COURT: I see. Well, we will let the record show that you are physically here.

Whether you are appearing or not is up to you and the Exhibit will be received.

Three exhibits then came in without objection, whereupon the following appears:

"Q. Now, Miss McNeil, there were some additional Exhibits in the form of maps and so forth?



A. Yes.

Q. That you say have been taken back. I don't know that they are *material* and so I won't press the point of getting them in evidence. . . ."

A reading of the transcript (exhibit 3) will show that the maps became the basis of much of the testimony of all parties. Brockbank predicted his testimony thereon, (Tr 7) as did these interveners, as where one of counsel pointed to one of them as being colored in purple, The Hi-Land-Nielson tracts, Mr. Rampton specifically requesting opposing counsel to make the location clear. The Hi-Land-Nielson tracts referred to on the maps, had they been before the court below, and this court now, would be seen to be but three blocks from the tract of plaintiff-respondent. Of course the numerous "maps and so forth" were and are *highly material*. They constitute the basis upon which the county commissioners later rejected the application of plaintiff to zone *additional* commercial lands. It is clear in the record that those maps proved that there was in excess of "one hundred sixty-seven acres" of land zoned commercially in the immediate area under consideration, (Tr. 36) and a great deal more close by. The burden of intervenor's case before the county commission was to this very point, by use of adequate and pertinent maps. (Tr. 7, 8, 10, 11, 12, 40, 46, 47, 51, 52, 53, 56, 57, 66)

It is to be deeply regreted that the trial court below did not have access to those maps; for only with and by reference to them, could the court attempt to understand

the transcript, and approach the question under attack, as well as see the many and varied locations of the several parcels of land zoned commercial in the area.

Under the point at present issue, we comment only on the inadequacy of representation. The County Attorney did not represent the opponents on the record, nor these interveners, when he did not call for, or make an attempt, to produce those valuable, important and crucial maps. The trial court needed them. Its disposition might have been altogether different had the proceeding not turned into an ex-parte default committed in the dark, without public notice, and without the official voice of protest, objection, cross-examination for whatever it might have been worth.

Nor is this the end:

Later, after the ex-parte record was made, and the counsel of record were fighting in briefs, the subject of "motives" came into focus, and is the subject of argument.

In its Findings of Fact, number 11 (a) the court says:

"The denial was based *wholly* upon the premise that such a denial would protect an economic advantage already obtained by owners of other land zoned commercially in the general marketing area in which the land in question is located." (R. 28)

It is interesting to search for the evidence to warrant such a strange finding. There are only two places to look:

1. The reasons assigned by the commission in its official action are contained in exhibit 1 at the bottom thereof:

“Basis of action: there is sufficient commercial zoning in the area; not warranted at this time.”

It is submitted that this is a good, sufficient and valid reason for such action, based on the statutory powers found in the general zoning laws of Utah. If counsel predicates his argument that “the denial was based wholly” upon this language, he is clearly in error. We believe that no court would overturn a legislative body for giving such a reason for its use of discretionary legislative power. Counsel for appellant has adequately treated this subject.

2. The real but ephemeral basis for the above finding by the lower court is the following *leading* question by Mr. Rampton of Miss McNeal:

“Q. Is it, or is it not, true that Commissioner Cannon said the reason that he was voting against it was because of its impact on other commercial zones in the area?”. . . .

“Q. Is that substantially what he said?

A. Substantially, yes.” (R. 18,19)

Q. I think that is all. . .” whereupon the record closes.

Clearly this testimony was inadmissible: it was leading and suggestive. Counsel did not ask her to state what was said. He phrased it to suit his purpose. By this time he knew that the county attorneys present in body only

would not object, and they did not! It should have also been resisted for the reason of hearsay!

Had the matter been material and competent, and the proceeding adversary in nature, the able counsel for plaintiff would have called Mr. Cannon himself. But in ex-parte fashion the inadmissible came in without objection; and to add insult to injury, the trial court predicated its fundamental finding on this patently inadmissible shread! Fundamental?—yes.

Sections one and two of respondent's brief are devoted to testing the question of jurisdiction of the lower court to examine a proceeding before the county commission on claim of arbitrary abuse of discretion. Coming there to the conclusion that the court has such visitorial power, Point III of respondent's brief labors the question of whether or not in fact the trial court was arbitrary, and engaged in an abuse of sound discretion. The burden of his argument is stated at page 16 of respondent's brief as follows:

“Commisioner Cannon, when casting his vote, *and the other commissioners* when putting down the basis for their action, were frank to state that their action was not based upon the things properly within the police power, but was based solely upon the question of whether or not they felt additional zoning for commercial purposes would have *an adverse effect upon the lands already zoned commercially.*”

The court will realize that the above language is not a proper summary, due to the natural bias of respondent's counsel; but it clearly points up the importance of the

irrelevant, incompetent, immaterial, hearsay, and leading language that entered the record because the issue was “inadequately represented,” to return to the burden of Rule 24. And it is upon this inadmissible testimony that the lower court predicates its finding that the county commission acted solely to “protect an economic advantage already obtained by the owners of other land zoned commercially in the general marketing area. . .” (R 28) The county attorney should have done something about this within the time allowed to alter Findings and Conclusions. Nothing was done to correct the record, nor to even try. Again we say, it is clear the intervener’s rights were “inadequately represented” below.

Further, we call attention to the belated answer filed by counsel for appellant:

1. In paragraph 6 of the complaint, respondent falsely alleges:

“There was no opposition at said hearing from persons residing in the vicinity of the lands in question. The only opposition came from the owners of other comerial properties located at various places from one-half to four miles distant from the lands in question.”

This allegation was never denied nor traversed in the answer, and it should have been.

In paragraph 5 of the complaint, it is stated that “a *complete investigation* and consideration of the matter” was made by the planning commission. *Complete* is a mighty big word to go unchallenged, at least from the standpoint of 14 protestants who were in the dark as to

these allegations. This should have been denied, and plaintiff put to his proof by calling as witnesses those who made such investigation. And orderly procedure might suggest that such persons be subject to cross examination! Not even theoretically possible here.

Paragraph 9 of the complaint in sub-section (c), (d) and (e) raise searching questions as to the manner in which zoning has been carried on historically in Salt Lake County. In view of the use of the word “integrity” in 17-27-7.10 U.C.A. (supplement) as to zoning maps, and the words “encouraging stability” as the objects of planning and zoning appearing in *WOLPE v. PORETSKI*, 144 F2d 505, hereafter to be discussed, it is enlightening to find counsel for appellants did not traverse those important allegations. As the “inadequately” presented answer stands, the county has admitted as to sub-section (d) that “the zoning of the county has proceeded on a piece-meal basis without legally established standards. . . Zoning has been established and changed solely on the basis of awarding or withholding economic benefits and advantages to or from the owners of various tracts of land desiring zoning according to their desires.” (R 3) We will repent of an earlier suggestion that the finding of the court is not predicated on competent, admissible evidence. In the state of this pleading, such was not even necessary, when the county admitted by its virtual silence, such allegation; but of course the county may not be defaulted in such a manner.

Rule 55(e) says:

“No judgment by default shall be entered against the state of Utah or against an officer or

agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.”

Affirmation by this court of the unproven Findings and Conclusions, not based on evidence, and contrary to the evidence and law, cannot be viewed by this court as “satisfactory” and would become a woeful precedent.

Lastly, on this point, and out of caution, interveners could have hoped that counsel would have included in its answer a blanket denial of all matters not specifically admitted, to the end that the burden of proof would truly have lain on the party challenging the action. As it is, and by the manner of “inadequate representation” the burden has shifted to the wrong party; it now rests on the county! Intervenors feel they could aid the appellant, as well as defend their own statutory right of representation and status on the record.

Again we refrain from citing authority until all of the criteria under Rule 24 have been discussed as rules.

#### D. INTERVENERS WILL BE BOUND BY THE JUDGMENT.

The second aspect of part (2) of rule 24 embraces the showing, on application for intervention, that the applicant “is or *may be bound* by a judgment in the action.” Indeed, these intervenors *will be bound* if this court determines the matter adverse to the appellant. The crux of the issue if adversely decided, will be stare decisis, and as stated in KOZAK v. WELLS, 8th CCA, 278 F2 104, 1960, it may well constitute an “adverse precedent for the intervenors.”



The novel position interveners face is this: if we are not permitted to intervene, then under the Declaratory Judgements Act (78-33-11) we are not bound, for the statute expressly says that as to parties not joined that “no declaration shall prejudice the rights of persons not parties to the proceeding.” This means that all or some of the interveners may bring *mandamus*, *injunction*, *abatement* or institute any other appropriate action in the event Gayland hereafter applies for a building permit, or commences construction; this under 17-27-23. Circuity? Multiplicity? But these interveners would then be faced with the task of asking this court to reverse itself, and declare contrary to what it might resolve in the instant case. Certainly this court and the interveners would all be put in a difficult position of preserving the inviolate statutory rights of the interveners in the face of a decision that would operate against them as *stare decisis*. This problem will later be discussed under the excellent cases of *Kozak v. Wells*, and *Wolpe v. Poretsky*, post, squarely in point.

#### E. THE INTERVENERS HAVE BEEN ADVERSELY AFFECTED BY THE JUDGMENT BELOW:

Under subsection (3) of Rule 24 the third condition precedent to intervention states that interveners must show that they would “be adversely affected” by the disposition of the property or subject-matter in question below. Certainly these interveners will be injured, and have been, by the unwarranted action of the trial court. But in considering this aspect of the case, we desire this



court to separate our argument into two parts: the interest of the interveners, as distinguished from the public interest, the problem of serving the public in the area.

At the outset, let us examine the zoning statutes to determine the statutory purpose of planning and zoning: 17-27-5 shows the ultimate scope of zoning power is aimed at the "*harmonious* development of the country" to the end that there shall be such attention paid to the "distribution of population and of the uses of land for urbanization, trade, industry" as will tend to create conditions favorable "to health, safety, *transportation*, prosperity . . . tend to reduce *wastes* of physical, financial or human resources which result from either excessive *congestion* or excessive scattering of population; and will tend toward an efficient and economical utilization, conservation and production of the supply of food and water," etc. . . .

The inquiry of the county commission in this case concerns the amount and location of commercial zoning in respect to shopping centers, neighborhood and regional. Notice in the hearing transcript the county planner Mr. Johnson, said, with the approval of the chairman of the County Commission:

"Perhaps it will be well to mention at this point any reference to a *regional shopping area* of ten acres is certainly *not a shopping center*."  
(Tr 51)

Let it be kept in mind that two schools of thought were at work at the hearing on the large question of where commercial, shopping facilities would be located,

to serve this fast-growing area. The president of plaintiff corporation stated:

“This shows that the whole middle section of this area is an area that will be developed very materially and has no shopping facilities in it whatsoever, (indicating) (Tr. 11)

The issue the county commission had to decide was whether to allow, in addition to the 167 acres already zoned commercial (Tr. 36, 43) the 10 acres proposed by Mr. Brockbank at the northwest intersection of 13th East at 5600 South. (Tr. 11 bottom) He projected a future population in the area to be served by commercial facilities of over 48,000 people. (Tr. 13) But that remains for the future. It was not, and is not yet, an actuality. It is the commission that must ultimately take into account the ultimate needs of the area, in terms of its own appraisal and estimate of the growth and facilities that should be available if and when that population comes in. Mr. Brockbank wanted to get ready to serve this influx of population. He wanted to serve them from his ten acre tract. But to do so, he had the burden of convincing the county commission that his hazardous area was better suited than the acreage already zoned commercial, and which was and is in development by interveners and others.

The other idea at work before the hearing, and which question the commission had to decide, was whether there should be one very large *regional* center, or several small *shopping centers*. It is for this reason planner Johnson stated the difference in the 10 acre tract from the “regional shopping area” on page 51 of transcript.

Interveners Hi-Land Dairyman's Association, together with Nielson and Scott had near fifty acres under planning and development 3 and 1/2 blocks to the west of plaintiff (Tr. 45, 40) and interveners Earl and John Howe and near thirty acres just across 56th South from the Hi-Land-Nielson property, (Tr. 33) making a total of 80 acres, with serious intentions of going forward. These lands were already zoned commercial.

Thus there was the real problem of whether there should be a "regional" or several "neighborhood shopping" centers, or the chaos that would bring none!

If this court is to have any real understanding of the large issue before the county commission then and now, it must come to grips with the difference the county planner noted above between the small 10 acre, neighboring shopping center, and the large 80 to 100 acre "Regional Shopping Center" idea. A casual interest in the subject will not reveal the immensity of the contrast, the philosophical considerations back of the planning, and the financial risks attached to both.

That the large powers of city and county commissions exist to plan and zone is because of the blight that historically grows in residential, commercial and industrial areas which do not reflect planning and zoning administration. The vast expenditures of our times for such activities, together with urban re-development compels more than superficial considerations of specific applicants, litigants and land owners. It was and is to avoid "substandardness and stagnation or deterioration" in residential and commercial areas that zoning came into

our society. The police powers of the state enter to avoid these blights. The enormous powers of controlling "land use" set forth in the statutes allowing zoning are intended to substitute wise, advance planning for the historic exploitation by private interests alone.

The meaning of the decision of the Commission is that the residential area, that is, the area roughly from 33rd South to the mountains east of State Street, one vast partially developed residential area, has within it sufficient area designated for commercial uses so that the requirements of the people living in the area for the services and facilities provided in commercial areas will adequately and sufficiently satisfy their needs. It is basic in zoning that in a residential area such as this it is the welfare of the residents that is of primary concern to the zoners and not the welfare of those in the commercial area. In other words, the extension of the commercial areas will be determined entirely by the demands of the residential areas. The reason for this is that our experience has taught us that commercial areas are unfriendly neighbors and that blight tends to spread from the commercial areas, and if you are to protect your residential areas the commercial areas must be tightly contained and restricted so that there is not a surplus of such land because it breeds unnecessary commercial uses and further expands the blight.

A 1959 casebook on the "Use, Misuse, and Re-Use of Urban Land," edited by Chas. M. Haar, professor of law, Harvard University, entitled "LAND-USE PLANNING" opens this subject with vast illumination. As the very

words used in the title are constantly used within the Utah zoning statutes, this court ought to construe them carefully. That case book, after printing the excellent decisions of the Massachusetts court on “departures from zoning ordinances” in *PENDERGAST v. BOARD OF APPEALS OF BARNSTABLE*, 331 Mass. 555, 120 NE 2d 916, and the Connecticut court in *KUEHNE v. TOWN COUNCIL OF EAST HARTFORD*, 136 Conn. 452, 72 A.2d 474, challenged the student mind with the following “problem” quotes from Stein and Bauer, *STORE BUILDINGS AND NEIGHBORHOOD SHOPPING CENTERS*, 1, 2-3, 13-14 (1934: and the same appears at the page 282 of said case book:

“3. ‘To plan a successful neighborhood shopping center, we must first know what to plan for, how many stores, and what kind. Numerous painstaking surveys of existing conditions have been made for the purpose of setting up a basis for future planning. These have attempted to find the number and kinds of stores that would be needed by counting the number of existing stores or measuring the number of front feet occupied by existing stores and comparing that with the neighboring population. All these studies serve but one purpose: they show us *what not to do*, for any one who looks around his own neighborhood knows that there are too many stores. And so we can only use most of these analyses of existing conditions as a warning. They show why the great majority of shopkeepers make something less than the barest living and die off like flies before they even get started. They explain the long rows of empty stores in every neighborhood. They explain the *enormous and expensive turnover* in store property. They explain decreased values, empty lots, blighted streets and uncollected taxes. . .

“*Chaotic waste* in construction of stores, in store operations and in cost of distribution, is not a necessary and unavoidable condition. It is possible by scientific analysis of the problem and by planned large scale construction and control to set up *shopping centers* that will fulfill the requirements of the five interests concerned.

“Any approach to scientific store planning must be based on one simple fact, namely, that any given community has a fairly definite and ascertainable purchasing power, and the modifying factors — income, general character, buying habits, location in relation to larger centers, etc. — are quite capable of analysis and forecast. . .

“What is the use of developing a scientific method of store planning? None whatever, if present methods of subdivision and *chaotic development* are allowed to continue. None whatever, unless the complete, planned neighborhood is accepted as the minimum unit of development. No scientific store-planning method can be applied to *speculative method of development*. . .

“Interesting cases reflecting the traffic-generating considerations are *Temminck v. Board of Zoning Appeals of Baltimore*, 128 A2d, 256 . . .” other cases cited.”

Plaintiff had in a real sense become a competitor with these named interveners and others. He had tried before the Planning Commission to get a full 80 acres zoned commercial. Failing, he reduced its size to 18 acres. Failing, he reduced it to ten acres. See exhibit “1”, both sides, together with action by the various authorities having jurisdiction. (See respondent’s brief, p. 4.) Plaintiff



failed to persuade anyone for a regional size center. In the end, the planning commission recommended his smaller area, but the ultimate decision was solely under the jurisdiction of the county commission, not the planning group. It was at the public hearing on the 10 acre application that the problems and the solutions become evident. The county commission had for years held the respondent's land reserved only for residential. Because of the express-way plans on 13th East, it had not allowed any commercial development along that right-of-way. (Tr. 32) It alone had the statutory authority to make any changes, or give additional acreage for commercial use-age. On the issue of abuse of discretion of that authority, in refusing to zone the additional ten acres, along the 13th East Expressway, let us examine the statutory mandate clothing the county commission with legislative power to make decisions:

Under 17-27-9: "The county planning commission may, . . . and upon order of the board of *county commissioners* . . . shall make a zoning plan or plans for zoning all *or any part* of the unincorporated territory within such county . . . for the regulation by districts or zones of the location, heights, bulk, and size of buildings and other structures, percentages of lot which may be occupied, the size of lots, courts, and other open spaces, the density and distribution of population, the location and use of buildings and structures for trade, industry, residence, recreation, public activities or other purposes, and the uses of land for trade, industry, recreation or other purposes."

The specification of the same powers, with regulations, are repeated in 17-27-11 by amendment in the supplement,

with no derogation. In 17-27-7.10 the powers of enforcement are stated to the end that “integrity” shall be maintained in the official maps of the county, of which the zoning maps are a part.

Under 17-27-12 the board of county commissioners is authorized to withhold a building permit in aid of these powers.

Under 17-27-13 the county commission is ordered to establish regulations in aid of upholding this authority, to the end of

“lessening of congestion . . . 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* . . . fostering the state’s agricultural and other industries, and the protection of both urban and non-urban development.”

Clearly the county commission had the sole and exclusive power to determine the location of commercial area and whether they should be large, small, regional or neighborhood. And in these connections, it had knowledge of the planning of other municipalities, the state road commission, the state planning commission. It also knew of the existence of 167 variously located acres of prior commercially zoned areas in the vicinity of respondent’s interest. How did that commission dispose of the question? Was it arbitrary, capricious, or an abuse of its legislative discretion under the powers and duties of these statutes, to find:

“There is sufficient commercial zoning in the area; not warranted at this time”?



Certainly not! Not only was it within the power; it was the duty of the commission to act as it did. And no court should substitute its judgment for that of the legislating commission, in the absence of a clear abuse of that discretion. There was no abuse of discretion. This court in *MARSHALL vs. SALT LAKE CITY*, 141 P2d 704, 149 ALR 282 wisely held:

“It is primarily the duty of the city to make the classifications. If a classification is reasonably doubtful, the judgment of the court will not be substituted for the judgment of the city . . .

“As to what restrictions and limitations should be imposed upon property, and what uses thereof should be permitted, has been by the legislature, committed to the judgment and discretion of the governing body of the city. As long as that body stays within the grant, and purposes fixed by the legislature, the courts will not gainsay its judgment. (cases) No one would doubt that the exercise of the zoning power is definitely a legislative function and activity.”

That interveners are the incidental beneficiaries of the use of such discretion is immaterial, so long as the result in terms of public policy and administration is within the police power and scope of the statutory enactment. The commission had to decide the vexing question before it, and it was and is under no mandate to use “magic words” in the disposition. Had exhibit “1” simply said “no” as the record of its action, it would be difficult to challenge, based on the record made at the public hearing. But its reasons were good and valid. Everything pointed in the record to 13th East being an *expressway*, expensively

designed to move traffic rapidly. To put a 10 acre Commercial area thereon would or might violate the statutory mandate against “waste of excessive amounts of roads” in 17-27-11. A commercial use at these important cross-roads might be found to increase congestion. “To prevent heavy traffic from going through a residential area” is an expression to which zoning authority is constantly on guard. The consequences of allowing such is the subject of much reference in the text: “URBAN REDEVELOPMENT PROBLEMS AND PRACTICES” at page 6 in the note. See the warning of a witness at the hearing at page 60 of the hearing transcript. The courts presume that legislative bodies like county commissions regularly pursue their authority; they do not presume, as was done here, the abuse. The trial court is to be excused for substituting its judgment for that of the county commission because of the default referred to above, and the contracted record before it; but it must be reversed ultimately on the merits.

Certainly interveners have been “adversely affected” by the substitution of the trial court’s judgment over the regularly constituted Salt Lake County Commission. It begs the question for respondent’s counsel to labor our position as that of simple competitors. We are citizens, with rights to challenge, but never to subvert. We appeared before the hearing, presented our rights under notice, made our positions known on this difficult legislative question. Our position was never presented as mere competitors; the commission honored our presentations with their confidence, as shown by the vote.

The real question was not favoritism, nor the protection of any vested interest. Respondent's counsel well puts it on page 12 of its brief:

“If an economic advantage is conveyed upon the owner of land by coincident in the course of the exercising of the police power for the protection of the public health, safety, moral or welfare, such a conferring of economic advantage does not invalidate the zoning regulation.”

As he quotes in LIEB'S APPEAL, 116 Atl (2) 860: “This is a by-product of zoning.”

The County commission concluded by apt words that the public interest would not warrant additional commercial zoning. It announced in the press its disposition as shown on exhibit “1”. All of the interveners, ignorant of any appellate procedures, have gone to work in reliance on that decision. Tenants have signed leases with these interveners; ground has already been broken on the 80 acres north and south of 5600 south at 9th East in preparation for a giant regional center. Architectural plans have been bid upon by contractors looking for spring construction, only to now find that in the quiet that the certainty achieved by the county commission has been overruled and that Gayland has, virtually as a secret, reintroduced the frightening nightmare of uncertainty and chaos.

Indeed these interveners have been “adversely affected” as has the *public interest*. The fields that have been leveled and filled, the water-courses that have been moved to make way for millions of dollars of construction, must be abandoned. Contracts with builders, tenants

and the host of service personnel connected with these projects have been seriously jeopardized during the week in November that this appeal brought our first knowledge that stare decisis was unfixed. Competitive interests? It has always been thought that our economy in all of its greatness was bottomed thereon, subject to proper regulation in the public interest. But even with the competition existent between Mr. Brockbank and the interveners, the public interest is still paramount. And the Board of County Commissioners of Salt Lake is still charged with the fundamental responsibility and legislative authority to decide where, how and when commercial land shall be made available to serve the growing population in Salt Lake Valley. It made that decision after a well-fought public hearing, and after five months of careful reflection. There is evidence to uphold the judgment of that commission. No court should ever up-root such a legislative body in such an important and far-reaching decision, and above all, in a default situation where so many interest were unrepresented, and unaware! Indeed, interveners as well as the public have been seriously injured.

## THE CASES

In *WOLPE v. PORETSKY*, 144 F2d, 1944, 505 the U. S. District Court of Appeals for the District of Columbia, reviewed a case from below virtually “on all fours” with the one at bar. The decision articulates the issue of the right to intervene under Rule 24 of the Federal Rules, identical with Utah’s. The zoning statutes were of the

same compass. The decision is dispositive of the case at bar. Certiorari was denied by the U. S. Supreme Court, 65 Sup.Ct. 190. It has been followed in the 8th Circuit, post.

The plaintiff there, being denied by the local zoning ordinances and authority, the right to build an apartment house on residentially zoned land, entered the district court claiming the ordinance and refusal to rezone were illegal, arbitrary, capricious and an abuse of discretion. The trial court found such was the case, and ordered the zoning authority to amend its code and allow him to build an apartment. The zoning authority immediately complied, deciding not to appeal, and changed the ordinance classification.

Interveners there filed an application to enter the case, after judgment, asking in the alternative for a new trial, or the status to appeal, both being denied, the court stating the interveners had nothing that could cause it to change its mind.

On appeal, the entire proceedings were reviewed and reversed. All of the elements treated above by this brief in sub-sections (a) to (e) are well discussed by the unanimous court.

The court adverts to the basic zoning law of the District of Columbia, stating that one of its objectives is "*encouraging stability* of districts and of land values therein." The Utah statute uses the word "integrity" among many others, at 17-27-7.10. The testimony of Carpenter and Webber at pages 31 and 42 of the tran-

script shows the importance of *stability, integrity*, in the field of uncertainty, confusion. The court said:

“The interest of individual property owners in protecting the stability of districts and of land values therein is expressly recognized by Sect. 5-422 of the Code. That section puts neighboring property owners, specially damaged by the violation of a zoning order, on an equal footing with the Corporation Counsel in the enforcement of that order. They are given the direct right to enjoin the unlawful construction of a building. Their right to bring that independent action is the basis of appellants’ right to intervene in this case.”

Apposite to this is 17-27-23 UCA 1953, discussed at page 11 of this brief.

The court further said:

“It seems clear that a judgment which declares a zoning order to be void would bind adjoining property owners to the extent of taking away their statutory right to an independent action based on the order. Otherwise, adjoining property owners could *relitigate* the issues in the case any time the plaintiff began construction, on the theory that their right to bring an independent action was not concluded by the decree. The *practical result* of such an interpretation would be to compel any one bringing a suit like the present one to join all property owners who may *conceivably* be damaged. We believe that the Zoning Commission, in the absence of intervention by adjoining property owners sufficiently represents their interests so that a decree setting aside a zoning order *may bind them*.

“It follows from Rule 24 (a) that appellants may intervene *as of right* in the case provided (1)



that the representation of their interests by the Zoning Commission is or may be inadequate, and (2) that the application is *timely*. Both of the above requirements appear in this case. The failure of the Zoning Commission to take an appeal clearly indicates that its representation of the interests of the interveners was inadequate. We do not go so far as to hold that adequate representation requires an appeal in every case. But here an administrative body is charged with arbitrary and capricious action in the face of a strong presumption that they properly performed their duties. Some of the reasons relied on by the court in declaring the zoning order void are more pertinent as arguments to influence the judgment of the Commission in balancing the various considerations laid down by the act than they are to support a ruling that the commission's order was arbitrary and capricious. It is not the function of the courts to substitute its judgment for that of the Commission even for reasons which appear most persuasive. A suit to declare a zoning order void is not an appeal on the merits of the issue presented to the Commission at the hearing. We do not pass on the merits of the court's findings or decree because the evidence is not before us. We only indicate that there is enough in the record to show that in refusing to take an appeal the Commission did not adequately represent the interests of interveners."

"The application to intervene was timely. Intervention may be allowed after a final decree where it is necessary to preserve some right which cannot otherwise be protected. Here, at least one of the rights which cannot be protected without intervention is the *right of appeal*. The court was, therefore, in error in denying appellants leave to *intervene as a matter of right*.

“In their motion to intervene appellants rely solely on Rule 24 (b) of the Federal Rules of Civil Procedure, which relates to permissive intervention. However, had the intervention been permissive we think it would have been an abuse of discretion to deny it under the circumstances of this case. Adjoining property owners in a suit to vacate a zoning order have such a vital interest in the result of that suit that they should be granted permission to intervene as a matter of course unless compelling reasons against such intervention are shown. (cases)

“When they filed their petition for intervention appellants had all the rights of a party at that stage of the proceedings. This, of course, includes the right of appeal. Since the time for appeal had not expired when appellant sought to intervene they should be made parties with the right to appeal and all other rights a party might exercise at the time their intervention was filed. Reversed and remanded.”

When the highest court of the land refused to disturb the Wolpe case, and the rules, statutes and facts are so similar, it ought to set the precedent for disposition here!

The Wolpe case has been twice cited, importantly in *KOZAK v. WELLS*, 278 F.2d 104 by the 8th CCA in 1960. Intervention was there allowed one year after filing by plaintiff. Inadequacy of representation was well discussed, as is the binding effect required of intervener under Rule 24. The Court said:

“ . . . we think that in a very real sense the applicants-interveners, would be bound . . . and the result would certainly establish an *adverse precedent* for the interveners.”



The case also articulates principles of “liberality toward third party practice” that are important here. Emphasis is given to the words in Rule 24 “may be:”

“And if the case is close and there are any doubts, the ‘may-be’ language twice repeated in Rule 24 (a) (2) convinces us that they are to be resolved in favor of the interveners.”

**TIMELY INTERVENTION:** The facts show these interveners acted promptly, once they came to knowledge of the action in the courts. The general subject of when intervention may be had is discussed in 67 CJS 997 under which we find *SENNE v. CONLEY*, 133 P2d 381 helpful. The broad rule is stated in CJS *supra*:

“Where there is no statutory provision as to the time within which application to intervene shall be made, a person who makes his application at the earliest possible opportunity has been held to have made it in time . . .”

In *LEARY v. UNITED STATES*, 224 U. S. 567, 32 Sup.Ct. 599, Mr. Justice Holmes writes, concerning intervention after four years lapse:

“As to laches, there is no legal presumption that the petitioner knew of this suit and still less that she knew the position taken by Kellog. . .”

and the court allowed intervention.

The first Utah case is *Houston Real Estate vs. Hechler*, Utah, 1914, 138 P. 1159, in which plaintiff issued a writ of attachment and levied upon property purporting to be defendant's. The Intervener was denied the right to intervene for the purpose of establishing his ownership of property. The Court laid down the following rule:

“As we understand the purpose of the statute relating to intervention, it is not intended to be applied only where a third person may have such an interest in the subject of the action which makes him an indispensable party; but the statute applies where such third person at some stage of the proceedings before trial is shown to have an interest which would make him a proper party.”

This case was followed in *Dayton vs. Free, Utah* 1916, 162 P. 614, where the Court quoted with approval from *Coffey v. Greenfield* as follows:

“And the Code does not attempt to specify what or how great that interest shall be, in order to give a right to intervene. *Any interest is sufficient.* The fact that the intervener may or may not protect that interest in some other way is not material. *If he has an interest in the matter in litigation, or in the success of either of the parties, he has a right to intervene.*”

In the same case the Court quoted with approval from *Pomeroy's Code Remedies* as follows:

“The doctrine may be expressed in the following manner: The intervener's interest must be such, that if the original action had never been commenced, and he had first brought it as the sole plaintiff, he would have been entitled to recover in his own name to the extent at least of a part of the relief sought.”

The court in 1934 in the case of *Commercial Block Realty vs. U.S.F. & G.* 28 P. 2d 1081 allowed intervention and quoted the rule as follows:

“Before one can intervene, he must come within the provision of the statute. He must have an

*interest in the matter in litigation, in the success of either of the parties, or an interest against both. He can join with the plaintiff in claiming what is sought by the compliant, or he can unite with the defendant in resisiting the claim of the plaintiff, or he can demand anything adversely to both the plaintiff and the defendant. But before he can do any of these, he must have an interest in the matter which is in litigation. His right to intervene is wholly dependent upon his interest in the subject-matter of the litigation. The test usually applied to the right to intervene is whether a person seeking to intervene may gain or lose by a direct legal operation and the effect of the judgment. Faricy v. St. Paul Investment & Sav. Society, 110 Minn. 311, 125 N.W. 676; Henry v. Travelers' Insurance Co., supra. Do the allegations in the answer in intervention bring appellant within this class?*

In one case the question of the right to intervention in a mandamus action arose, *State vs. Blake* 1933, 20 P. 2d 871, where intervention was allowed, and in this matter quoted the rule as follows:

“It is equally well established that a permanent writ of *mandate* will not issue when the rights of a third party, who is not before the court, are involved and where such rights may be adversely affected.”

The court in its most recent case, *Stone vs. Salt Lake City*, 356 P. 2d 631, stated that it would be proper for the Court to allow intervention by parties whose interest was identical with that of plaintiff after the Court had remanded the case to the District Court following the appeal.

IN SUMMARY, interveners say without hesitation, that the conditions precedent in Rule 24 (a) are fully and completely met:

a. Our application was timely, immediately upon learning of the action.

b. We have to statutory, unconditional rights to intervene.

c. The representation of the intervener's interest, and that of the public, was inadequate.

d. The interveners will be bound by the judgment, not technically in res adjudicata, but actually by stare decisis; the net effect of a decision affirming the trial court will amount to their being bound.

e. Intervenors have been adversely affected.

We submit that interveners should and must be allowed intervention as of right under Rule 24 (a) of the Utah Rules of Civil Procedure.

A careful reading of this court's decision in MARSHALL v. SALT LAKE CITY, 141 P2, 704 will aid in the application of established law to the problems of review in this case.

We respectfully request this court to read:

TIMMINK v. BOARD OF ZONING APPEALS  
128 A2d 256, 1957, Maryland

KUEHNE v. TOWN, EAST HARTFORD  
72 A2d 474, Conn. 1950

PENDERGAST v. BD. OF APPLS. BARNSTABLE  
120 N.E.2d 916, 1954 Mass.

CONCLUSION

Intervenors regret the length of this brief; but we have tried to demonstrate that the effect of this court's decision can be far-reaching for evil or for good, in preserving the "integrity" of planning, and in the avoidance of blights that snuff out the lights of residents who seek the green and spacious country-side, away from the incidence of commerce.

If our new open residential areas are to be quarantined from blight, screened-off from death-dealing traffic, removed from the contagion of commerce, isolated from congestion, then the courts that set precedent for the occupancy of the powers of land-use and land-management must be alert to their larger prerogative in guarding the gardens of men's homes against incipient encroachment of the specifics that spawn blight.

This case offers such an opportunity.

Respectfully,

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December 1960

## APPENDIX

In a larger sense, a statement of the case should embrace the philosophical suggestion that courts, the Salt Lake County Commission, counsel on all sides, are manipulators in the current exodus from worn-out, decadent cities and into the country. Whether we have the capacity to admit it or not, a vast evolutionary remaking of urban life is here at work. It is said by men wiser than the interveners:

“New Towns are essential. This is because the existing cities cannot fit the needs of this age without a complete rebuilding . . . one must begin with a clean slate and a large one . . . the sane policy is first to direct our energy toward building new and complete communities from the ground up: that is to say on open land outside developed urban areas. This we should do until such time as we have adequately demonstrated, by contrast, how unworkable and wasteful are the obsolete patterns of the old cities, and how completely they demand replacement. It is futile to attempt this in a small piecemeal manner.”

If we in this case approach the problems at bar with the old spectacles, we will be remembered only for our folly. Whether we know it or not, the redevelopment evolution, the “survival value” rudiments are at work in the open fields and vacant lands of the Great Salt Lake Valley, where the litigants and interveners bring to focus the privileges for growth or sterility to those spacious acres in terms of the lives of citizens, children, and corporations!

STEIN, in his TOWARD NEW TOWNS FOR AMERICA, 218-226, (Rev. ed. 1957) said the above, and challenges with the following criteria against which we all act in the case at bar :

“The strained nerves, tension, physical disabilities, declining birthrate, breakdown, and madness resulting from ‘normal’ urban life. Death at every street crossing perpetually haunting parents. Sunless, insanitary, filthy, congested slums spreading blight throughout the towns. . .

“Buses and subways are packed tight with human indignity; 100 m.p.h. machines crawl snail-like as traffic is congealed . . . Life and movement is imprisoned by gridiron streets forming an archaic pattern within which houses, factories, shops, and offices are crammed. Sunlight and breezes are blocked; privacy and effective working conditions are lacking . . . Man is submerged in the colossal, human swarm, his individuality overwhelmed . . . In the canyons of the city nature is obliterated by the hard masonry. Man is lost in the stony urban desert . . . In the city people are always going somewhere instead of doing things . . . The growing costliness of great cities absorbs an ever-larger share of the incomes of individuals and municipalities. . .

“The grave faults of the obsolete urban environment inevitably lead one to seek physical patterns more in harmony with present-day culture. The developments described in the preceding chapters have been proving grounds, and partial demonstrations of the evolving forms of the future, in which —



SAFETY will take the place of danger when pedestrian and automobile traffic are entirely separated by the use of properly designed *super-blocks* and specialized means of circulation throughout our cities. SPACIOUSNESS will banish congestion. . . THE NEIGHBORHOOD, which will have a limited area and a central meeting place, will provide a setting for friendship and co-operative participation in common activities . . . ECONOMY of money, time, and energy . . . will come from . . . efficient planning for use, in place of speculative sale. . . In the distribution of industry in relation to living quarters we have made little progress.

“New Towns mean new plans and different physical arrangements, with green belts and inner-block parks, neighborhoods and superblocks, community centers, and the separation of roads and walks. These modern urban forms are bound to replace the obsolete, socially repellent, barren real-estate gamblers’ checkerboard. . .

“A new technique is required. . . It requires another kind of legislative background and different ownership or control — at least control of land if not of building . . .

The OBJECTIVE of New Towns is fundamentally social rather than commercial. Bluntly, the distinction is that between building for people or building for profit. . .”

That the above quotations are pertinent, and within the statement of this case, should be apparent from their inclusion in the 1959 Law School Case Book LAND-USE PLANNING by Charles M. Haar, professor of Law at

Harvard University. (page 56). Indeed, the facts before this court evolve from the current buliding of what must be termed new cities within Salt Lake County. The impact of locating shopping facilities within or near-by vast new housing districts is the compass this court uses. Whether it is cognizant of the amplitude of its decision in terms of contemporary concepts of the new planning, or whether it makes resort to the old norms we do not know. Interveners try here to elaborate the problem in the larger ambit of what is good for people, not individual self-interest. That the owners of commerical property may benefit by the legislative determination of the location of shopping facilities, in relation to where people live, must be ancillary, never primary.

In elaborating our self-interest, we yet challenge the court to view the problem for what it is. We are all a part of the current exodus. In the not-too-distant-future, Salt Lake Valley will be filled in with growth. Shall it take the form of planning, on high-principles of the general welfare, or shall predatory interest, intent on the quick profit, retain the assendency?

This is the question.