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Henry Bawden, et al. v. Othello P. Pearce, et al. v. Doxey-Layton Co., et al. : Brief of Appellants

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

HENRY BAWDEN, et al.,
Plaintiffs and Appellants,

—vs.—

OTHELLO P. PEARCE, et al.,
Defendants and Respondents.

—vs.—

DOXEY-LAYTON CO., et al.,
Intervenors and Respondents.

Case No. 10459

BRIEF OF APPELLANTS

Appeal from the Judgment of the
Third District Court for Salt Lake County
Honorable Aldon J. Anderson, *Judge*

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STATEMENT OF THE KIND OF CASE

This is an action brought by 35-40, Inc., and six other owners of real property within the Hunter-Granger Planning District in Salt Lake County, State of Utah, against the Salt Lake County Building Inspector, Planning Commission and Commissioners, seeking an injunction restraining the defendants from issuing building permits or permitting construction of commercial buildings in violation of the terms and provisions of the applicable zoning ordinance and the R-2 classification thereof, governing the use of property owned by intervenors in said planning district at the location of approximately 2700 West and 3500 South, Salt Lake County, Utah.

DESIGNATION OF PARTIES

To avoid confusion in this brief, the seven plaintiff-appellants will be referred to as 35-40, Inc., et al., inasmuch as 35-40, Inc. is a major property owner. The defendant-respondents will be referred to as Building Inspector, et al., and intervenor-respondents will be referred to as Doxey-Layton Co., et al., inasmuch as Doxey-Layton Co. is the principal intervenor.

DISPOSITION IN LOWER COURT

At the hearing on the Motion of 35-40, Inc., et al. for a Temporary Restraining Order (R. 12-14), Doxey-Layton Co., et al. were permitted to intervene and the Court requested that legal argument be made before any testimony was received. (R. 128) During the legal argu

ment, Doxey-Layton Co., et al., moved the Court to dismiss the complaint of 35-40, Inc., et al., and at the conclusion of the argument, 35-40, Inc., et al. moved the Court for a summary judgment on their Motion for a Temporary Restraining Order. At the conclusion of the arguments of counsel and before any substantial evidence had been introduced and before 35-40, Inc., et al. were given any opportunity to be heard in regard to the issuance of a temporary injunction, the District Court granted the motion of Doxey-Layton Co., et al., to dismiss the complaint of 35-40, Inc., et al. and denied the motion of 35-40, Inc., et al., for summary issuance of a restraining order. (R. 97, 98) 35-40, Inc., et al., appeal from such judgment.

RELIEF SOUGHT ON APPEAL

35-40, Inc., et al. seek reversal of the District Court's Order dismissing their Complaint and reversal of the Order denying their Motion for the summary issuance of a Temporary Restraining Order pursuant to their petition. 35-40, Inc., et al. further request that the Building Inspector, et al. be summarily restrained during the pendency of this action, from issuing permits to Doxey-Layton Co., et al. or allowing construction of buildings in violation of the terms of the applicable zoning ordinance and R-2 classification thereof governing the premises involved.

In the event this Court reverses the District Court Order, whereby the complaint was dismissed but should

be unwilling, on the record as it now stands, to reverse the Order of the District Court denying the motion of 35-40, Inc., et al. for the summary issuance of a Temporary Restraining Order, then in that event, 35-40, Inc., et al. seek to have the Court remand this matter to the District Court with instructions to proceed with a hearing on the motion of 35-40, Inc., et al. for a Temporary Restraining Order.

In any event, the District Court should be instructed to proceed to a trial on the complaint of 35-40, Inc., et al., whereby a permanent injunction is sought.

STATEMENT OF FACTS

The issue involved in this appeal stems from an extended and involved zoning procedure and hearings and litigation in connection therewith; therefore, to see the issue in its proper perspective it becomes necessary in the following statement of facts to set forth at length the history and background of the case giving rise to the issue now before this Court.

Doxey-Layton Co., et al. own real property in the Hunter-Granger Planning District in Salt Lake County, Utah. (R-1, 153-154) For several years Salt Lake County has been conducting studies and holding hearings to enact a well-planned zoning ordinance for the Hunter-Granger Planning District, which would enable that area to have an orderly development and preserve the values of the

property therein. A Zoning Ordinance was finally enacted on or about February 12, 1965, which Ordinance zoned the property that is in dispute herein of Doxey-Layton Co., et al. for residential use, R-2 classification, which does not permit commercial buildings, regional shopping centers or any other commercial use. The Zoning Ordinance provided for a regional shopping center and zoned the property now owned by 35-40, Inc. for that use.

Because of the time involved in holding hearings, etc., Salt Lake County, on December 18, 1963, under the provisions of Title 17, Chapter 27, Section 19, Utah Code Annotated, 1953, promulgated zoning regulations of a temporary nature to continue in effect for a six-months period, to June 18, 1964. (R. 155-156) On March 28, 1964, while the temporary zoning regulations were in effect, Doxey-Layton Co., et al. filed an application for a building permit for the construction of commercial-type buildings in a shopping center arrangement. (R. 158) Said petition was denied on the grounds the temporary zoning regulation would not permit such construction. Thereafter, on May 2, 1964, which was still within the period of the temporary zoning regulations, Doxey-Layton Co., et al., acting as aforesaid, petitioned for another building permit to construct commercial-type buildings in connection with a regional shopping center. (R. 159) On May 23, 1964, still within the period of temporary zoning regulations, the Building Inspector again

denied this second application, on the ground that the temporary zoning regulations would not permit such. (R. 159) Thereafter, Doxey-Layton Co., et al., appealed from the decision of May 23, 1964, denying its application. On the appeal, the decision of May 23, 1964, was sustained. (R. 159) As a result of their loss on appeal, Doxey-Layton Co., et al. brought an action in the District Court of Salt Lake County, Civil No. 152766, seeking to require the Building Inspector to give them a building permit to construct commercial buildings.

The case was tried before the Honorable Ferdinand Erickson, sitting as one of the judges of the Third Judicial District Court. During the trial, Doxey-Layton Co., et al. contended that a second zoning ordinance of a temporary nature, enacted by the Salt Lake County Commission on June 19, 1964 (which was after intervenors' application for a building permit had been denied by the Commission but before the appeal of that decision had been finally decided) was improper and void. (R. 156) On February 24, 1965, the Honorable Ferdinand Erickson decided the case and ordered that an extraordinary writ be issued, requiring the Building Inspector of Salt Lake County to consider and process the application of Doxey-Layton Co., et al., without reference to the use of the land. (R. 162-165) The writ was issued the following day, February 25, 1965. (R. 166-168)

Building Inspector, et al. appealed to the Supreme Court from said order and while the appeal was pending, Doxey-Layton Co., et al. obtained a building permit, No. E3189, for the construction of "footings and foundations only for Building C." (Exhibit P-4) Following the issuance of Permit No. E3189, Doxey-Layton Co., et al., on J-19 1965, ^{filed with the Supreme Court} ~~(Exhibit P-1) On the second day of August,~~ State of Utah a Motion to Dismiss Appeal for Mootness, contending that "said permit is the building permit referred to and contemplated by the extraordinary writ in the nature of mandamus issued herein on February 25, 1965." (Exhibit P-1) On the second day of August, 1965, the Supreme Court heard the motion and entered the following minute entry:

"Upon motion of plaintiff, that the appeal be dismissed, being represented by counsel for both parties that the defendants have complied with the writ of mandate and the matter is moot, and upon stipulation of counsel that the appeal is to be dismissed, it is hereby dismissed." (Exhibit P-2)

Notwithstanding the fact that Doxey-Layton Co., et al. stipulated that the permit issued was the one contemplated by the writ of mandamus, and that the writ had been complied with, Doxey-Layton Co., et al. continues to apply and threatens to continue to apply for additional building permits for the construction of commercial-type buildings on its property in the area zoned R-2 classification, which does not permit commercial buildings. (R. 122)

When 35-40, Inc., et al. learned of the intentions of Doxey-Layton Co., et al., after the dismissal of the appeal, to obtain additional building permits, 35-40, Inc., et al. brought this action in the District Court as property owners in the Hunter-Granger Planning District, seeking the Court to restrain Building Inspector, et al. from issuing any more building permits contrary to the zoning ordinance.

Included in the complaint of 35-40, Inc., et al., was a petition for a Temporary Restraining Order to restrain Building Inspector, et al. from issuing any permits during the pendency of this action. (R. 12-14)

Near the commencement of the hearing, Aldon J. Anderson, one of the judges of the Third Judicial District Court, requested the parties to present legal arguments before the presentation of any testimony. (R. 128) However, prior to the legal arguments, several documents had been introduced and received in evidence. (Exhibits 1, 2, and 4) In the presentation of its legal argument, Doxey-Layton Co., et al. made a motion to dismiss 35-40, Inc., et al.'s complaint, and following the argument, 35-40, Inc., et al, moved the Court for a summary judgment on its motion for a temporary restraining order. Judge Anderson, after hearing legal argument and without permitting any testimony, granted the motion of Doxey-Layton Co., et al. to dismiss the complaint of 35-40, Inc., et al. and denied the motion of 35-40, Inc., et al. for summary judgment. 35-40, Inc., et al. now appeal from Judge Anderson's order.

ARGUMENT

POINT NO. I

35-40, INC., ET AL., AS OWNERS OF REAL PROPERTY WITHIN THE DISTRICT, ARE ENTITLED BY STATUTE TO BRING THIS ACTION TO ENJOIN BUILDING INSPECTOR, ET AL. FROM ISSUING BUILDING PERMITS CONTRARY TO THE ZONING ORDINANCE.

Title 17, Chapter 27, Section 23, Utah Code Annotated, 1953, provides in part as follows:

" . . . In case any building or structure is or is proposed to be erected, constructed, reconstructed, altered, maintained or used, or any land is or is proposed to be used in violation of this act or of any regulation or provision of any resolution, or amendment thereof, enacted or adopted by any board of county commissioners under the authority granted by this act, such board, the district attorney or the county, *or any owner of real estate within the district in which such building, structure or land is situated*, may, in addition to other remedies, provided by law, 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." (emphasis added)

The above-quoted statute is explicit in providing that owners of real estate within the district may bring an action to enjoin and even abate or remove any building or structure and may enjoin any building that is pro-

posed, when such are in violation of the applicable zoning ordinances. As owners of real property, 35-40, Inc., et al. are specifically granted a right to bring an action not only to enjoin but if necessary abate and remove any unlawful erection, construction, reconstruction, alteration, maintenance, or use of property in the Planning District.

Neither the temporary zoning regulations in effect at the time Doxey-Layton Co., et al. made application for a building permit, nor the final zoning ordinance enacted February 12, 1965, which is now applicable, permit the construction of commercial buildings or shopping center arrangement on the property of Doxey-Layton Co., et al. For Building Inspector, et al. to issue a permit for the construction of commercial buildings or a shopping center would be in violation of the zoning ordinances and would be the very act which Title 17 of the Utah Code permits 35-40, Inc., et al. as owners of real property to enjoin.

Doxey-Layton Co., et al. contend that the writ of mandate signed by Judge Erickson on February 24, 1965 supersedes the zoning ordinance and requires Building Inspector, et al. to consider and process its application without consideration of land and building usage. (R-161) However, such contention is now without merit by reason of the subsequent order of the Supreme Court of the State of Utah, finding:

"That defendants (Building Inspector, et al.) have complied with the writ of mandate and the matter is moot." (Exhibit P-2)

As held in *Christie vs. Morris*, 119 Mont. 383, 176 P. 2d 660, 663:

"It is a well-established rule . . . that the records of a court of justice, including the record of a judgment, import absolute verity; and no one, whether or not a party to the proceeding in which they were made, may in a collateral proceeding impeach them by adducing evidence in denial of the facts of which they purport to be a memorial."

The Supreme Court of Montana went on in that case to comment in regard to the party that was trying to take an inconsistent position to a prior decree:

" . . . he cannot complain that the Court did what he asked it to do. . . ."

Doxey-Layton Co., et al. are likewise bound by the judicial order of the Utah Supreme Court which they procured, which found that the writ of mandate had been complied with by the issuance of the single building permit No. E3189, and they cannot now complain that the Court found just what they asked the Court to find. With the writ of mandate satisfied, the zoning ordinances in regard to the Hunter-Granger Planning District remain in full force and effect without any exceptions thereto, and 35-40, Inc., et al. as property owners are entitled to bring this action to enjoin the construction of commercial

buildings or the use of the property in the Planning District in violation of such zoning ordinances beyond that contemplated by the single Permit No. 3189.

POINT NO. II

DOXEY-LAYTON CO., ET AL. BY THEIR STIPULATION THAT THE WRIT OF MANDATE HAD BEEN COMPLIED WITH, WHICH WAS FINALIZED IN THE ORDER OF THE SUPREME COURT OF UTAH, ARE ESTOPPED FROM NOW TAKING AN INCONSISTENT POSITION.

The essential issue now before the Court in this appeal is the consequences that flow from the dismissal of the appeal of Case No. 152766 which Doxey-Layton Co., et al. procured. There can be no doubt what those consequences are when the said dismissal and the basis for the same are examined.

In Exhibit P-1, which is a copy of Intervenor's Motion to Dismiss Appeal for Mootness, together with affidavit and memorandum in support of said motion in said Civil Case 152766, Graham W. Doxey of Doxey-Layton Co., et al., referring to Permit No. E3189 for footings and foundations only for Building C, stated under oath:

“ . . . that said permit is the building permit referred to and contemplated by the extraordinary writ in the nature of mandamus issued herein on February 25, 1965.”

In the Memorandum of Authorities, Doxey-Layton Co. et al. stated on Page 2 in part:

"By issuing the permit, defendant-appellants (Building Inspector, et al.) eliminated any controversy . . ."

and on Pages 5 and 6 of the Memorandum Doxey-Layton Co., et al. further stated:

"Following issuance of the writ, defendant-appellants (Building Inspector, et al.) took no action of any kind to stay its effective force, and obedience was therefore required. The defendant-appellants did obey and issued ~~the~~ building permit authorizing the construction of the shopping center . . . The writ has been obeyed, the judgment carried out to this point . . . Whatever the decision of this court may be as to the judgment, it cannot restore the status quo of the parties, the judgment has been complied with, and the appeal proceedings are therefore moot." (Exhibit P-1)

The above representations by Doxey-Layton Co., et al. elicited a determination by the Supreme Court as follows:

"Upon motion of plaintiffs that the appeal be dismissed, and it being represented by counsel for both parties that defendants have complied with the writ of mandate and the matter is moot, and upon stipulation of counsel that the appeal be dismissed, it is hereby dismissed." (Exhibit P-2)

At the hearing of the instant case in the District Court, Doxey-Layton Co., et al. took an entirely inconsistent position with the above allegations, culminating in the above-stated order of the Supreme Court. During the hearing, Mr. McMurray for 35-40, Inc., et al. asked the following question to counsel for Doxey-Layton Co., et al. and received the following answer:

“ ‘Mr. Worsley (who represents Doxey-Layton Co., et al.), do you on behalf of your clients seek any other permit similar to 3189, which you seek the issuance of, any further receipt and permits from the Salt Lake County Planning, Zoning and Building Department, other than 3189?’ ”

“Mr. Worsley: ‘Your Honor, making it crystal clear, we will seek quite a substantial number of supplemental permits. . . .’ ” (R-122)

The principle of estoppel has long been established in the law and prohibits such inconsistent positions as Doxey-Layton Co., et al. are attempting to take. The broad principle is stated in 31 C.J.S. 548, under the section entitled “Estoppel”:

“The doctrine of equitable estoppel precludes a person from maintaining a position or attitude inconsistent with another position or attitude which is sought to be maintained at the same time or which was asserted at a previous time.”

The Utah Supreme Court has stated the principle in the case of *Tanner v. Provo Reservoir Company*, 76 Utah 335, 289 P. 151, 154 as follows:

“ . . . The doctrine of estoppel requires of a party consistency of conduct, when inconsistency would work substantial injury to the other party.”

The Utah Supreme Court went on to say in the same case that fraud or intent to deceive did not have to be found before estoppel could be applied. The Court stated:

"This Court in *Hilton v. Sloan*, 37 Utah 359, 108 P. 689, 694, became committed to the doctrine that: 'It is not necessary that in all cases and under all circumstances there must be shown an actual intention to deceive in order (to) estop a person'."

The Utah Supreme Court went on to hold in the above stated Tanner case that the appellant was estopped to claim a right which he obviously had under a deed for diversion of water at one point by reason of his acts and requests over a period of time before the action that the water be diverted to him from another point not authorized under the deed.

The doctrine of estoppel as it applies directly to the instant matter is stated in 31 C.J.S. 610 as follows:

"An estoppel may come into existence because of the conduct or action of a person in a court and it is generally recognized that a party who has knowingly and deliberately assumed a particular position in judicial proceedings is estopped to assume a position inconsistent therewith to the prejudice of the adverse party. Accordingly, it has frequently been stated that where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a position to the contrary, especially if it is to the prejudice of the party who has acquiesced in the position formerly taken by him."

A case directly in point with the above-stated principle and with the facts in the instant matter is the case of *Porter v. Oklahoma Bacone College Trust*, 346 P. 2d 328, 333-334 (Okla.). The case involved an ancillary probate proceedings in Oklahoma wherein one Mr. Porter attempted to assert the validity of a codicil to a will. Mr. Porter had previously stipulated in a domiciliary probate proceedings in Texas that the codicil was void. Mr. Porter contended in the Oklahoma proceedings that the codicil was valid on the theory that the time for objecting to the validity of the codicil had passed by law, but the Supreme Court of Oklahoma held that even though the time for objecting to the validity of the codicil had passed, Mr. Porter, by his stipulation that the codicil was void in the prior proceedings in Texas, was estopped from asserting the validity of the codicil in the ancillary proceedings.

Another case directly in point is the case of *Hardgrove v. Bowman*, 10 Wash. 2d 136, 116 P. 2d 336, 337. The appellant in that case was insisting on appeal that he was entitled to damages for breaches under a contract which he had previously requested the court to hold invalid and unenforceable, which the court did. In rejecting the appellant's claim the court held:

"A litigant will not be heard to say in one breath that a contract is of no force or effect and in the next assert a right to recover upon it. He may not defeat his adversary's cause on the

theory that the contract is invalid and in the same or subsequent action, claim any rights under it. The agreement cannot be treated as a nullity for one purpose and as a binding contract for another (citations omitted)."

Likewise, Doxey-Layton Co., et al. cannot in the prior proceedings allege that the writ of mandate had been complied with and that the matter was moot and nothing further had to be done, and then in this proceeding contend that it is entitled to further building permits under the writ of mandate. See also the case of *Christie v. Morris*, 119 Mont. 383, 176 P. 2d 660, 663, where the appellant was contesting the title of a party to certain property which appellant had in a previous proceeding joined in the partial distribution of the property to such party. The court held in part:

"... it is not permissible for plaintiff who joined in the request for the order to now complain that the court did what he asked it to do. It is a well established rule. . . that the records of a court of justice, including the record of judgment, impart absolute verity; and no one, whether or not a party to the proceeding in which they are made may in a collateral proceeding impeach them by adducing evidence in denial of the facts of which they purport to be a memorial."

The court continued on by stating:

"... but certainly he cannot complain that the court did what he asked it to do, viz., distribute the property to Morris."

The principle of estoppel is applicable in the instant case even though Doxey-Layton Co., et al. claim they will lose rights they had under the writ of mandate, because if they are granted additional building permits for commercial buildings 35-40, Inc., et al. will lose rights that they had as property owners. The procuring of the dismissal in said Case No. 152766 by Doxey-Layton Co., et al. by their representations that the writ of mandate was fully satisfied with the issuance of Permit No. E3189 cut off all rights of the parties to correct any errors of the District Court in granting the writ of mandate.

The Utah Supreme Court has stated the law that where a dilemma arises whereby one of two must suffer, the proper party to suffer the consequences is the one who has caused the circumstance. As stated by the Utah Supreme Court in *I. X. L. Stores Company v. Success Markets*, 98 Utah 160, 97 P. 2d 577, 580:

“When one of two innocent persons, each of whom is guiltless of an intentional moral wrong, must suffer a loss, it should be borne by that one of them who by his conduct has rendered the injury possible (citations omitted).”

The court went on to hold:

“The vital principle is, that he who by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such a person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. This remedy is always applied so as to promote the ends of justice . . .”

Doxey-Layton Co., et al. is the party that knowingly led the Supreme Court of Utah to find in its order that the writ of mandate had been complied with. If injury must necessarily result from such finding, then Doxey-Layton Co., et al. and not innocent parties should bear the results of the court order they procured.

POINT NO. III

THE DISTRICT COURT ERRED IN SUMMARILY DISMISSING THE COMPLAINT OF 35-40, INC., ET AL. AT A HEARING ON A MOTION FOR TEMPORARY RESTRAINING ORDER WITHOUT RECEIVING ANY TESTIMONY AND WITHOUT HAVING A PROPER TRIAL OF THE ACTION.

The District Court erroneously dismissed 35-40, Inc.'s complaint at the hearing on its motion for a temporary restraining order during the pendency of the action, without giving 35-40, Inc., et al. any opportunity to present testimony and other evidence, and without giving any consideration to the other matters requested in the complaint. The allegations contained in the complaint of 35-40, Inc., et al. and the circumstances involved in the case justified a full hearing.

To summarily turn 35-40, Inc., et al. out of court under the circumstances was contrary to well established law. A good statement of the law is found in *LaVere Kidman et ux. v. Lavine H. White, et al.*, 14 Utah (2d) 142, 378 P. 2d 898, 900, where the Utah Supreme Court stated:

“In confronting the problem presented on this appeal we have been obliged to remain aware that a summary judgment, which turns a party out of court without an opportunity to present his evidence, is a harsh measure that should be granted only when, taking the view most favorable to a party’s claim and any proof that might properly be adduced thereunder, he could in no event prevail.”

“See statement in *Samms v. Eccles*, 11 Utah (2d) 289, 358 P. 2d 344 (1965).”

As shown in the transcript, approximately half of the hearing was consumed by arguments in relation to Doxey-Layton Co., et al.’s Motion to Intervene. (R-109-129) After Doxey-Layton Co., et al.’s Motion to Intervene had been granted, the District Court, in relationship to 35-40, Inc., et al.’s Motion for Temporary Restraining Order, stated:

“I would rather hear legal argument first. It may obviate the necessity of testimony...” (R-128)

As is shown in the remaining part of the transcript (R-129-150) the District Court listened to arguments of counsel, by far the greater portion of which was consumed by counsel for Doxey-Layton Co., et al. The District Court received no testimony, although witnesses were present and available.

It is apparent from the statements of the Court, on Pages 148 and 149 of the Record, that the District Court based its order dismissing the complaint of 35-40, Inc., et al., on its erroneous conclusion that Doxey-Layton Co., et al. and Building Inspector, et al. mistakenly or for some other "ill-advised" reason, stipulated to the Supreme Court that the writ of mandate had been fully complied with by the issuance of Permit No. E3189 and that the matter was moot and that the appeal should be dismissed. It appears that the District Court felt that the solution to the problem was to force the parties to go back to the Supreme Court and re-open the appeal, rather than hearing the issues as set forth in the complaint, and therefore dismissed the complaint of 35-40, Inc., et al.

35-40, Inc., et al. attempted to intervene and have the Supreme Court of the State of Utah reinstate the appeal in Civil No. 152766, but their intervention was opposed by Doxey-Layton Co., et al., and by Building Inspector, et al., and this Court denied 35-40, Inc., et al. the right to intervene in that proceeding. Neither Doxey-Layton Co., et al., nor Building Inspector, et al., made any attempts to reinstate the appeal, even after the obvious error was brought to their attention. If Doxey-Layton Co., et al. and Building Inspector, et al. desire, as they apparently do, to stand on their representations to the Supreme Court that Permit No. E3189 completely satisfied the writ of mandate, and accept the benefits of the dismissal of the appeal, then they must also suffer

the consequences and 35-40, Inc., et al. as property owners in the planning district with definite rights by statute should be permitted to pursue its action herein and present its testimony and evidence to substantiate its claim for a permanent injunction, restraining Building Inspector, et al. from issuing permits in violation of the applicable zoning ordinances.

SUMMARY

35-40, Inc., et al., as owners of real property, are granted a right by statute to bring this action to enjoin the violation of the zoning ordinances by Building Inspector, et al. The contentions of Doxey-Layton Co., et al. that there is an exception to the zoning ordinance in the writ of mandate of the District Court is unfounded because the order of the Utah Supreme Court which Doxey-Layton Co., et al. procured finds that said writ was satisfied by the issuance of the single Permit No. E3189. The resulting consequences are that the zoning ordinance applicable to the Hunter-Granger Planning District are in full force and effect without any exceptions thereto.

The complaint of 35-40, Inc., et al. clearly stated a cause of action and the District Court erred in dismissing said complaint at the hearing on a motion for temporary restraining order without permitting the presentation of testimony or allowing a proper trial of the matters stated in the complaint.

35-40, Inc., et al. are entitled to an order reversing the District Court's judgment dismissing its complaint, also an order reversing the District Court's judgment denying the summary issuance of a temporary restraining order as sought by 35-40, Inc. The record substantiates the summary issuance of a temporary restraining order, restraining Building Inspector, et al. from issuing building permits for commercial buildings contrary to the applicable zoning ordinances. The record also substantiates a judgment in favor of 35-40, Inc., et al. permanently enjoining Building Inspector, et al. from issuing building permits as above indicated, and that failing, the case should be remanded to the District Court for a proper trial of the matter.

Respectfully submitted,

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