

1967

Bion Tolman And Lucille Tolman, His Wife; Karl J. Hawkins, Jr. , And Miriam Hawkins, His Wife; Bruce B. Anderson And Dorothy O. Anderson, His Wife; K. Jay Holdsworth And Dona S. Holdsworth, His Wife; And Emerson Kennington And Audrie M. Kennington v. Salt Lake County; Oscar Hanson, Jr., Philip Blomquist And Marvin G. Jensen, Individually And As Members Of The Board Of County Commissioners of Salt Lake County; Ralph Y. McClure, County Zoning Administrator; And Lane Rennow, Director Of Building Inspection Department Of Salt Lake County;

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

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.K. Jay Holdsworth and J. Randolph Ayre; Attorneys for Plaintiffs-Appellants

Recommended Citation

Brief of Appellant, *Tolman v. Salt Lake County*, No. 10935 (1967).
https://digitalcommons.law.byu.edu/uofu_sc2/4335

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

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

BION TOLMAN and LUCILLE TOLMAN, his wife; KARL J. HAWKINS, JR. and MIRIAM HAWKINS, his wife; BRUCE B. ANDERSON and DOROTHY O. ANDERSON, his wife; K. JAY HOLDSWORTH and DONA S. HOLDSWORTH, his wife; and EMERSON KENNINGTON and AUDRIE M. KENNINGTON, his wife,

Plaintiffs-Appellants,

vs.

SALT LAKE COUNTY; OSCAR HANSON, JR., PHILIP BLOMQUIST and MARVIN G. JENSEN, Individually and as Members of the Board of County Commissioners of Salt Lake County; RALPH Y. McCLURE, County Zoning Administrator; and LANE RONNOW, Director of Building Inspection Department of Salt Lake County,

Defendants-Respondents,

vs.

BILL RODERICK, INC., a Utah corporation,

Intervenor-Respondent.

APPELLANTS' BRIEF

APPEAL FROM A JUDGMENT OF THE
THIRD DISTRICT COURT OF SALT LAKE COUNTY
Honorable Leonard W. Elton

T. Quentin Cannon
Deputy County Attorney
Metropolitan Hall of Justice
Salt Lake City, Utah

*Attorney for Defendants-
Respondents*
Salt Lake County

Everett E. Dahl
760 East Center
Midvale, Utah

*Attorney for Intervenor-
Respondent*

K. Jay Holdsworth
J. Randolph Ayre
FABIAN & CLENDENIN
800 Continental Bank Bldg.
Salt Lake City, Utah 84101
*Attorneys for Plaintiffs-
Appellants*

FILED
AUG 7 1967

Clerk, Supreme Court, Utah

Case No.
10935

TABLE OF CONTENTS

STATEMENT OF CASE	Page 1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	3
PLAINTIFFS' POSITION	4
ARGUMENT	5
I. SALT LAKE COUNTY HAS NEITHER INHERENT NOR UNLIMITED POWER TO AMEND ZONING ORDINANCES.	5
II. SALT LAKE COUNTY FAILED TO GIVE ADE- QUATE NOTICE OF THE HEARING TO BE HELD DECEMBER 28, 1966, AS REQUIRED BY LAW.	6
(a) The County Did Not Use an Adequate Mode or Manner of Giving Notice.	8
(1) Posting Were Not Made at Public Places as Re- quired by Law.	9
(2) Postings Were Made at Only Two, Not Three Places.	11
(3) Places of Postings Were Not "Designed to Give Notice Thereof to the Persons Affected" as Required by Law.	13
(b) The Contents of the Legal Descriptions Which the County Used in Attempting to Give Notice Were Not Adequate.	16
(c) The County Failed to Cause Writings Which At- tempted to Give Notice to be Exposed to the View of the Public for the Required Period of Time.	21
III. IF WHAT WAS DONE IN THIS CASE MEETS THE STATUTORY REQUIREMENT, THEN THE PRO- CEDURE AND ACTION TAKEN BY THE COUNTY PURSUANT THERETO DEPRIVES AFFECTED PROPERTY OWNERS OF THEIR CONSTITUTIONAL RIGHT OF DUE PROCESS.	25
IV. DEFENDANTS FAILED TO OBSERVE STATUTORY AND PROCEDURAL REQUIREMENTS OTHER THAN REQUIREMENTS FOR NOTICE AND SUCH FAILURE INVALIDATES THE ATTEMPTED CHANGE OF ZONING.	31
V. DEFENDANT COMMISSIONERS' ACTIONS WERE ARBITRARY AND CAPRICIOUS.	36
(a) In Refusing to Permit Property Owners Affected by the Attempted Change of Zoning from Having an Opportunity to be Heard, the Defendant Commis- sioners Acted Arbitrarily and Capriciously.	37
(b) Both the Method by Which the Subject Property was Rezoned and the Result of the Rezoning are	

TABLE OF CONTENTS—Continued

	Unreasonable and Unconstitutional.	41
(c)	It is Clear that the Decision Rezoning the Southeast Corner of 2300 East and 4500 South is Not Grounded Upon Reason or Based Upon the Policy of the Statute.	45
(d)	When Looked at Cumulatively the Acts and Omissions of Salt Lake County are Flagrantly Discriminatory, Arbitrary and Unconstitutional.	53
(e)	The Unreasonableness of Defendants Actions Vitiates the Legality of the Rezoning.	57
	CONCLUSION	58

AUTHORITIES CITED

CASES

Appley v. Township Committee, 128 N.J.L. 195, 24 A.2d 805 (1942)	44, 45
Armourdale State Bank v. Kansas City, 131 Kan. 419, 421, 422, 292 Pac. 745, 746 (1930)	35
Armstrong v. New LaPaza Gold Mining Company, 107 F.2d 453 (9th Cir. 1939)	10
Barker v. Switzer, 209 App. Div. 151, 205 N.Y. Supp. 108 (1924)	6
Berrata v. Sales, 82 Cal. App. 324, 255 Pac. 538 (1927)	20, 24
Board of County Commissioners of Sarpy County v. McNally, 168 Neb. 23, 95 N.W. 2d 153, 160 (1959)	16
Brachfeld v. Sforza, 114 N.Y.S. 2d 722, 725 (1952)	18
Callahan Road Improvement Company v. Town of Newburgh, 167 N.Y.S. 2d 780, 783 (Sup. Ct. 1957) aff'd 173 N.Y.S. 2d 780 (2d Dept. 1958)	23
Cassel v. Mayor and City Council of Baltimore, 195 Md. 348, 73 A.2d 486 (1950)	50
City of New York v. New York N.H.&H. Ry. Co., 344 U.S. 293 (1953)	29, 30
Clark v. City of Boulder, 146 Colo. 526, 362 P.2d 160 (1961)	36, 51
	52, 53
County Commissioners of Arundel County v. Ward, 186 Md. 330, 46 A.2d 684 (1946)	34
Crone v. Town of Brighton, 119 N.Y.S. 2d 877 (1952)	45
Dacus v. Knoxville Outfitting Company, 9 Tenn. App. 683 (1929)	12
DeBlasiis v. Bartell, 143 Pa. Super. 485, 18 A.2d 478 (1941)	44
DeLuca v. Board of Supervisors, 134 Cal. App. 2d 606, 286 P.2d 395 (Cal. 1955)	6
Dewey v. Doxey-Layton Realty Co., 3 Utah 2d 1, 277 P.2d 805, 808 (1954)	6
2525 East Avenue, Inc. v. Town of Brighton, 33 Misc. 2d	

TABLE OF CONTENTS—Continued

	<i>Page</i>
1029, 228 N.Y.S. 2d 209 (1962)	16
Ellicott v. Mayor of Baltimore, 180 Md. 176, 23 A.2d 649 (1942)	49
Ford v. City of Hutchinson, 140 Kan. 309, 37 P.2d 39 (1934).....	35
Freeman v. Yonkers, 205 Misc. 947, 129 N.Y.S. 2d 703 (1954) ..	44
Gayland v. Salt Lake County, 11 Utah 2d 307, 358 P.2d 633, 636 (1961)	8, 36, 39, 40, 41, 48, 54, 58
Graham v. Fitts, 53 Miss. 307 (1876)	12
Grimmer v. City of Spokane, 64 Wash. 388, 116 Pac. 878 (1911)	24
Hamm Construction Co. v. Dempster Bros., 36 Tenn. App. 356, 255 S.W. 2d 712 (1953).....	10
Harrington v. Board of Alamo Heights, 124 S.W.2d 401, 407 (Tex. 1939)	49
Hofer v. Carino, 4 N.J. Super. 244, 72 A.2d 335 (1950).....	18, 19
Holly Development Inc. v. Board of County Commissioners of Arapohoe, 140 Colo. 95, 342 P.2d 1032 (1959).....	18
Hurst v. City of Burlingame, 207 Cal. 134, 277 Pac. 308 (Cal. 1929)	6
In re Howard's Estate, 2 Utah 112, 269 P.2d 1049 (1954).....	12
In re Phillips' Estate, 86 Utah 358, 44 P.2d 699, 703 (1935).....	14
Lake v. Riutcel, 249 S.W. 2d 450 (Mo. 1952).....	10
Cassinari v. Union City, 1 N.J. Supp. 219, 63 A.2d 891 (1949) ..	44
Linden Methodist Episcopal Church v. Linden, 113 N.J.L. 188, 173 173 Atl. 593 (1934)	54
Lockhard v. City of Los Angeles, 33 Cal. 2d 453, 202 P.2d 38 (1949)	37
MacMahon v. Davis, 284 Ill. 439, 120 N.E. 326 (1918).....	40
McConoughey v. Jackson, 101 Cal. 265, 35 Pac. 863 (1894).....	40
Marculescu v. City Planning Commission, 46 P.2d 308, 310 (Cal. 1935) 7 C.A. 2d 371	8
Marshall v. Salt Lake County, 105 Utah 111, 141 P.2d 704, 709 (1943)	44, 47
Mayhew v. Standard Gilsonite Co., 14 Utah 2d 52, 376 P.2d 951 (1962)	41
Monument Garage Corp. v. Leavey, 266 N.Y. 339, 194 N.E. 848 modifying 241 App. Div. 856, 271 N.Y. Supp. 966, affirming 149 Misc. 491, 268 N.Y. Supp. 213 (1933).....	25
Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306, 314 (1950)	7, 25, 26, 27, 29, 30
Naisbitt v. Herrick, 76 Utah 575, 290 Pac. 950 (1930).....	28, 29, 31
Naylor v. Salt Lake City Corporation, 17 Utah 2d 300, 410 P.2d 764, 766 (1966)	36, 37, 46
Northwest Merchants Terminal, Inc. v. O'Rourke, 191 Md. 171, 60 A.2d 743, 752 (1948)	37
People v. Village of Oak Park, 228 Ill. 256, 109 N.E. 11 (1915) ..	24
Schroeder v. New York, 371 U.S. 208 (1962).....	27, 30

TABLE OF CONTENTS—Continued

	Page
Standley v. Knapp, 113 Cal. App. 91, 298 Pac. 109, 112 (Cal. 1931)	12
Sundlund v. Zoning Board of Pawtucket, 50 R.I. 108, 145 Atl. 451 (1929)	49
Town of Greenburgh v. Bobandal Realities, Inc., 203 N.Y.S. 2d 328 (1960)	6, 24
Tranfaglia v. Building Commissioner of Winchester, 306 Mass. 495, 28 N.E.2d 537 (1940)	5
Tuell v. Meacham Contracting Co., 145 Ky. 181, 140 S.W. 159 (1911)	40
United States v. Abendon, 24 Philippine Report, 169 (1913)....	57
Walker v. Board of County Commissioners, 208 Mo. 72, 116 A.2d 393, 401 (1955)	24
Walker v. City of Hutchinson, 352 U.S. 112, 116 (1956)....	20, 26, 30
Wood v. Town of Avondale, 72 Ariz. 217, 232 P.2d 963 (1951)..	24
STATUTES	
Beerhouse Act, 1830, s. 32.....	7
XIVth Amendment, Federal Constitution.....	2, 26, 28, 31
Nebraska Statute, §904.....	30
Nebraska Statute §905.....	30
8-1-2 Revised Ordinances of Salt Lake County, 1953.....	47
Utah Code Annotated 1953, as amended	
17-27-4	41
17-27-5	41
17-27-11	44
17-27-15	50
17-27-17	2, 7, 8, 10, 11, 16, 21, 23, 25, 31, 34, 58
57-1-8	32
Utah Constitution	
Article I, section 1	31
Article I, section 7.....	31
OTHER AUTHORITIES	
51 A.L.R. 2d 63	45
90 A.L.R. 2d 1211	11
149 A.L.R. 292	45
8 McQuillan on Municipal Corporations § 25.245.....	24
8 McQuillan on Municipal Corpoartions § 25.253.....	34
Master Plan of Salt Lake County	42, 44, 47
Metzenbaum, Law of Zoning (2nd ed., 1955) p. 19.....	43
Metzenbaum, Law of Zoning, (2nd ed., 1955) p. 1517(b).....	49
37 Nebraska Law Review 232 (1958)	29
Planning Goals and Policies for the Salt Lake County Master Plan	42, 43
6 Powell on Real Property 202 (Section 890).....	18
Zoning Map of Salt Lake County Section A.....	43
Zoning Map of Salt Lake County Section B.....	43

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

BION TOLMAN and LUCILLE TOLMAN, his wife; KARL J. HAWKINS, JR. and MIRIAM HAWKINS, his wife; BRUCE B. ANDERSON and DOROTHY O. ANDERSON, his wife; K. JAY HOLDSWORTH and DONA S. HOLDSWORTH, his wife; and EMERSON KENNINGTON and AUDRIE M. KENNINGTON, his wife,

Plaintiffs-Appellants,

vs.

SALT LAKE COUNTY; OSCAR HANSON, JR., PHILIP BLOMQUIST and MARVIN G. JENSEN, Individually and as Members of the Board of County Commissioners of Salt Lake County; RALPH Y. McCLURE, County Zoning Administrator; and LANE RONNOW, Director of Building Inspection Department of Salt Lake County,

Defendants-Respondents,

vs.

BILL RODERICK, INC., a Utah corporation,

Intervenor-Respondent.

Case No.

10935

APPELLANTS' BRIEF

STATEMENT OF CASE

This is an action by appellants (hereinafter plaintiffs) on behalf of themselves and on behalf of other property

owners similarly situated for a preliminary injunction restraining and preventing respondents (hereinafter defendants) Salt Lake County, its officers and employees from issuing any building or other permit which would affect property controlled by an ordinance signed January 11, 1967, which purportedly reclassified 1.22 acres of property located at the southeast corner of 2300 East and 4500 South, Salt Lake County, Utah, from Residential R-3 to Commercial C-1, and for an order invalidating the aforementioned ordinance. The complaint alleges that defendants failed to give notice of the proposed zoning as is required by section 17-27-17 Utah Code Annotated, 1953, as amended, and as guaranteed by the XIVth Amendment to the Federal Constitution and that the actions of defendants were arbitrary and capricious.

DISPOSITION IN LOWER COURT

The case was decided by the trial court following a hearing on plaintiffs' motion for a preliminary injunction. The court after making findings of fact concluded that the notice procedure required by the Utah statutes was complied with, that the amended zoning ordinance is valid, that the temporary restraining order then in effect should be vacated and that plaintiffs' complaint should be dismissed.

RELIEF SOUGHT ON APPEAL

The plaintiffs seek reversal of the judgment below and a judgment in their favor based on the record made before the trial court or, if the court finds that additional facts are necessary to determine whether the defendants'

decision results in unlawful "spot zoning" then for remand of the case to the District Court for development of a trial record on this issue.

STATEMENT OF FACTS

On or about November 3, 1966, Bill Roderick, Inc. applied to amend the zoning map of Salt Lake County by reclassifying property located at 2300 East and 4500 South from Residential R-3 to Commercial C-1. (Def. Ex. D-20)

The Zoning Administrator's staff, the zoning subcommittee and the County Planning Commission on November 18, 1966, unanimously recommended that the application be denied.¹ A so-called hearing on the application before the Salt Lake Board of County Commissioners was scheduled for December 28, 1966. Between November 23 and November 26, 1966, the county purported to give notice of this hearing by affixing two pieces of paper to utility poles near the subject property, one piece of paper on a posting board at the west steps of the City and County Building in Salt Lake City, Utah, and by a single newspaper publication. (R. 26, 30, 155) No other notice was given.

On or about December 28, 1966, Marvin G. Jensen, W. G. Larson and John Preston Creer, who were then the duly elected and qualified Commissioners of Salt Lake County purported to adopt an amendment to the zoning ordinance making the requested change, subject to final approval at a later date. (Def. Ex. D-35)

¹On November 21, 1966, the zoning office received a writing purporting to approve the application from a single member of the Holladay District Planning Commission. (R. 4)

Subsequent to December 28, 1966, citizens and owners of dwellings in the area surrounding 2300 East and 4500 South first learned of the hearing and the action of the Commission; on January 10, 1967, they presented to the Commission a written petition requesting reconsideration of the zoning change and asking for an opportunity to be heard. (Pl. Ex. P-48) The written petition was presented to the newly elected Commissioners, Oscar Hanson, Jr. and Philip Blomquist. (R. 128) At that time the purported zoning change was not in effect.

The following morning, January 11, 1967, Commissioner Blomquist, acting as temporary chairman of the Salt Lake County Commission (in the absence of Chairman Hanson) signed an ordinance purporting to place into effect the amendment of section 8-10-4 of the Revised Ordinances of Salt Lake County to reclassify the subject parcels of property from Residential R-3 to Commercial C-1. (Def. Ex. D-39)

Pursuant to a prior appointment, Holladay citizens appeared at the Commission's January 17, 1967, meeting to present their position. However, they were informed by the Commissioners that the ordinance had been signed and that consequently the matter would not be reconsidered or reheard.

PLAINTIFFS' POSITION

The trial court's decision should be reversed since the ordinance attempting to change the zoning of the subject parcels at 2300 East and 4500 South is invalid in the following particulars:

1. Defendant county lacked jurisdiction to hear the matter on December 28, 1966, because it failed to give adequate notice of the hearing to interested persons as required by law.

2. Even if the applicable notice statute were complied with, the procedure undertaken by Salt Lake County to give notice to affected property owners was so inadequate that the action of the County based thereon deprives such owners of rights guaranteed by the Due Process clauses of the Federal and Utah Constitutions.

3. In addition to failing to give adequate notice defendants failed to observe other statutory and procedural requirements and such failure invalidates the attempted change of zoning.

4. The refusal of defendant County Commissioners to permit interested property owners to be heard was arbitrary, capricious and in contravention of their public trust and duty.

ARGUMENT

I.

SALT LAKE COUNTY HAS NEITHER INHERENT NOR UNLIMITED POWER TO AMEND ZONING ORDINANCES.

Municipal corporations do not have inherent power to enact zoning regulations¹ nor does the Utah Constitution bestow them such power.

¹*Tranfaglia v. Bldg. Comm'r of Winchester*, 306 Mass. 495, 28 N.E. 2d 537 (1940).

The power to regulate land for the health, welfare and safety of the community is an attribute of police power which is delegated in the first instance to the state legislature. In turn, the state legislature, through enabling acts, authorizes municipalities to regulate the use of land; but it also imposes limitations upon the substance of such regulation and upon the procedures used. *Baker v. Switzer*, 209 App. Div. 151, 205 N.Y. Supp. 108 (1924).

In *Dewey v. Doxey-Layton Realty Co.*, 3 Utah 2d 1, 277 P. 2d 805, 800 (1954), this Court quoting from *Hurst v. City of Burlingame*, 207 Cal. 134, 277 Pac. 308 (1929) referred to the status assumed by a municipality in passing zoning measures, as well as some of the critical procedural conditions precedent to its exercise of this power:

When the statute requires notice and hearing as to the possible effect of a zoning law upon property rights, the action of the legislative body becomes *quasi judicial* in character, and the statutory notice and hearing then becomes necessary in order to satisfy the requirements of due process and may not be dispensed with.

See *DeLuca v. Bd. of Supervisors*, 134 Cal. App. 2d 606, 286 P.2d 395 (Cal. 1955).¹

II.

SALT LAKE COUNTY FAILED TO GIVE ADE-
QUATE NOTICE OF THE HEARING TO BE
HELD DECEMBER 28, 1966, AS REQUIRED
BY LAW.

¹A zoning ordinance is in derogation of the common law. Hence, the procedural requirements for adoption and effectiveness must be strictly followed. *Town of Greenburgh v. Bobandal Realities, Inc.*, 203 N.Y.S. 2d 328 (1960).

Section 17-27-17, Utah Code Annotated, 1953, as amended, provided:

Before finally adopting any such amendment the board of county commissioners shall hold a public hearing thereon, at least 30 days' notice of the time and place of which shall be given by at least one publication in a newspaper of general circulation in the county and by posting in three public places designed to give notice thereof to the persons affected.

This particular concept of notice has its roots in the ancient English custom of attaching notice of various applications to the door of the church or chapel of any parish in the licensing district. For example, the Beerhouse Act, 1830, s. 32 provides that notice shall be given as follows:

To insure that the persons likely to be affected by the opening of a new inn should have proper notice of the proposals and, as it is the people near the site who will be affected, the nearest church being the one they are likely to visit, is the one where the notice should be put. A notice on the main church of Birmingham, for example, near the city's centre, relating to the new inn at the uttermost limits of the city would seldom be seen by persons living near the site of the proposed inn; it is likelier to be seen by them if posted on a church in the area. 119 J. P. 829 (1955).

In more recent times the United States Supreme Court has voiced itself on the purpose and method required in giving notice. As stated by Justice Jackson in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950):

The fundamental requisite of due process of law is the opportunity to be heard.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice *reasonably calculated* under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. A notice must be of such nature as reasonably to convey the required information and it must afford reasonable time to those interested to make their appearance. [Emphasis added]¹

That an adjacent property owner is such an interested party is the court's holding in *Marculescu v. City Planning Comm'n*, 46 P.2d 308, 310 (Cal. 1935), 7 C.A.2d 371:

It needs no argument to show that an adjacent property owner is interested in the use to which his neighbor may legally put his property, for obviously such use must affect the value of his adjoining property, either injuriously or beneficially.

Reiterated, Section 17-27-17 of the Utah Code provides that notice be given by posting in three public places designed to give notice thereof to the persons affected. The following discussion is centered on analyzing the intent of this statutory mandate and in showing that the County Commission failed to observe the notice requirements of the section.

(a) The County Did Not Use an Adequate Mode or Manner of Giving Notice.

¹This court recently held in *Gayland v. Salt Lake County*, 11 Utah 2d 307, 358 P.2d 633 (1961), that citizen-owners of dwellings in an area to be affected by a change of zoning are entitled to due process of law.

At the hearing one witness, Mr. Evans, gave testimony from which the court could find that the Zoning Administrator caused to be affixed on November 23, 1966, to the probate notice board of the west steps of the City and County Building a summary of several applications for zoning amendments which were to be heard by the Salt Lake County Commission on December 28, 1966. (Def. Ex. D-55) This document was in two pages, the first page being in regular type and entitled "Notice of Zoning." The subject property was mentioned on the second page.

There is also some evidence from which the court could find that on the 25th day of November, 1966, the Zoning Administrator caused a separate piece of paper to be tacked to each of the first two utility poles which run along the east side of 2300 East south of the intersection of 4500 South and 2300 East. (R. 30-31)¹

Neither the County nor the intervenors could produce a copy of the pieces of paper allegedly tacked to the utility poles. The recollection of one witness, Mr. Clair Y. Hardman, was that the pieces of paper were of the usual form used by the County (see Plaintiff's Exhibit 2) and contained a legal description of the subject property. (R. 26)

The above described pieces of paper represent the sum total of postings made by the County with respect to the subject property.

(1) Postings Were Not Made at Public Places as Required by Law.

¹The utility poles stand on a piece of ground which lies between the street and the sidewalk.

One of the posting requirements of section 17-27-17 is that notice be posted in *public places*.

A public place is defined as one of public resort, i.e., where people frequently meet or have occasion to be. *Hamm Constr. Co. v. Dempster Bros.*, 36 Tenn. App. 356, 255 S.W. 2d 712 (1953). As expressed in *Armstrong v. New LaPaza Gold Mining Co.*, 107 F. 2d 453 (9th Cir. 1939):

We find no Arizona cases defining the term "public place" but cases arising in other jurisdictions are quite uniform in their definitions, and we are certain that Arizona would follow. We quote the definition contained in *Words and Phrases*, 2nd Series, vol. 4, p. 23: "The term public place as used in St. 1898, section 1130, providing for the posting of tax sale notices in at least four public places in the county, was used in its ordinary common sense to designate a place where the public resorts, so that the exposure of the document was likely to give notice." *Bauchier v. Hammer*, 140 Wis. 648, 123 N.W. 132, 134.

Practically no one frequents, meets, or has occasion to be at a vacant lot (2300 East and 4500 South) during the middle of the winter. True, cars pass by the poles, but the probability that the occupants traveling 30 to 40 miles an hour could read a piece of paper posted to face the street is extremely doubtful. *Lake v. Riutcel*, 249 S.W. 2d 450 (Mo. 1952).

Similarly no one who lives in Holladay frequents, meets at or could reasonably be expected to be looking regularly at the west steps of the City and County Building for notices of proposed change of zoning of real property

located in Holladay, miles away. No reasonable governmental administrator could expect the "public" residing in Holladay to stop at the west steps of the City and County Building once each 30 days to look at legal descriptions to learn if any proposed change of zoning affected their properties in Holladay. Until something draws the attention of a property owner, he assumes that his property is safe. A notice that his property is in danger must be reasonably calculated to draw his attention; otherwise, he never learns of it. The County and respondents would have us believe that members of the "public" residing in Holladay would be alerted by a legal description on the under-sheet of two pieces of paper placed on the west steps of the City and County Building. No reasonable man could believe such to be so.

A public place is precisely that — a place where the public meets; and, in the Holladay area there are many such places, viz., post office, library, shopping centers, churches, schools (see 90 A.L.R. 2d 1211). The County's complete failure to post *any* notice in *any* public place frequented by Holladay residents is fatal to the requisite jurisdiction needed by the County in zoning matters.

(2) Postings Were Made at Only Two, Not Three, Places.

A second posting requirement of section 17-27-17 is that the notice be posted in *three* places.

Statutes requiring posting of three notices in public places have been interpreted as meaning posting at three

different geographical locations.¹ In *Standley v. Knapp*, 113 Cal. App. 91, 298 Pac. 109, 112 (Cal. 1931) the court said:

In *Corpus Juris*, volume 23, at page 637, we find as follows: "A public place, as the term is used in the statutes, has been held to mean such a place that an advertisement posted on it would be likely to attract general attention so that its contents might reasonably be expected to become a matter of notoriety in the vicinity." In *National Loan & Inv. Co. v. Doren Blazer*, 30 Tex. Civ. App. 148, at page 151, 69 S.W. 1019, the court holds that a statute requiring that a notice of sale under a deed of trust be given by posting written or printed notices thereof in three public places in the county where the sale is to take place is not complied with by posting one notice at the courtroom door, another on a telephone pole at the northeast corner of the courthouse square, and another on a telephone pole at the northwest corner of the courthouse square.²

The County's act of posting two notices at *one* place — the east side of the corner of 2300 East and 4500 South — amounted to one, not two, postings.

It is not the number of pieces of paper posted that counts, but rather the number of different places at which they are posted. The intent of the statute could not be complied with by posting three separate pieces of paper on a single pole. Nor should a similar result be gained

¹*Graham v. Fitts*, 53 Miss. 307 (1876); *Dacus v. Knoxville Outfitting Co.*, 9 Tenn. App. 683 (1929).

²In *In Re Howard's Estate*, 2 Utah 2d 112, 269 P.2d 1049 (1954), the Utah Supreme Court tacitly recognized that three public places means three different geographic locations. In this case, a will contest proceeding, "notice was posted at the west entrance to the City and County Building, another on a public bulletin board on 33rd South and State Street, on which corner a church was located, and the third in the Murray Post Office."

by posting two separate pieces of paper on adjacent poles. At most, the county only posted notice at two places — viz., the City and County Building and one side of the corner of 2300 East and 4500 South.¹

(3) Places of Postings Were Not “Designed to Give Notice Thereof to the Persons Affected” as Required by Law.

The applicable statute does not stop with requiring postings “in three public places.” It contains an express directive about where the postings must be. By statutory mandate, the postings must be in three public places “*designed to give notice* thereof to the persons affected.”

It is not to be supposed that the legislature, when enacting this statute, intended this language to be meaningless. At a minimum, this language means some place other than just any place which is not private or secret.

In defining what is a public place designed to give notice, this Court has said:

The paramount controlling principle which should guide the posting of notice [in probate matters] is that the two notices which are to be posted other than at the courthouse should be placed in the county at places *most* likely to reach parties inter-

¹The subject property consists of two parcels one at the southeast corner of the intersection of 2300 East and 4500 South and the other at the Southwest corner of the intersection of 4500 South and Russell Street. Even though there are utility poles between the traffic lanes of Russell Street and the east parcel of the subject property and on the east side of the traffic lanes of Russell Street immediately east of the east parcel of the subject properties no piece of paper purporting to give notice was affixed to any of these poles or to any other place near the second parcel.

ested. . . . These should be customary places at which all such notices should be posted, which places should be *conspicuously public points and not on the byways*. *In re Phillips' Estate*, 86 Utah 358, 44 P.2d 699, 703 (1935). [Emphasis added]

No greater "byway" exists to citizens living in the vicinity of 2300 East and 4500 South than the west steps of the City and County Building in downtown Salt Lake City.

In *Phillips'* the court was concerned with the notice provisions of the probate statute. That statute rationally provides for posting at the courthouse, for it is there that people interested in probate matters gather. But, with zoning matters¹ nothing is further from the truth. Citizens living and working in what is in effect a town within the county — Holladay — have neither reason nor purpose for gathering at or passing by a board located miles from their daily activities.²

More disturbing is that even if citizens interested in this particular zoning matter by happenchance walked by this board, the notice posted there would not catch their eye as it was placed on a board clearly designated for "probate" matters, was not in a form which would be likely to attract

¹The zoning statute, unlike the probate statute, contains no specific directive that notice be posted at a courthouse.

²Even if it were assumed that those persons who live in the Holladay Planning District would frequent the west steps of the City and County Building, no one could rationally conclude that such persons would be likely to wade through a series of legal descriptions on pieces of paper tacked on top of each other on the probate posting board to determine whether there was to be a hearing on a change of zoning of property in the Holladay Planning District that would affect them. It tests the credulity of the mind for anyone to urge that such a posting would be "designed" to give notice.

attention and was "buried" underneath a cover sheet.
(Def. Ex. D-55)

The vice of the procedure of posting notice followed by Salt Lake County is that none of the places at which the postings are made are designed to give notice thereof to the persons affected. More is required than mere token compliance with the statute. It is not enough to say that any public place would be "designed" to give notice. There must be something of substance — some rational effect contemplated from the place chosen to give notice.¹

The posting in "byways" and nonfrequented "public" places, coupled with a procedure by which flimsy pieces of paper are affixed to utility poles and not subsequently policed (R. 146) cannot possibly be "designated to give notice thereof to the persons affected." In fact, the procedure of posting notices followed in the instant case is so inadequate that one wonders whether the notices posted were

¹Some attention should be given to the plight of an owner of land in Salt Lake County. If the interested property owner (such as plaintiff Audrie Kennington) happened to know that a particular parcel within the Holladay Planning District were under consideration, he could watch that property. But, if the instant case is typical, he would experience nothing but frustration because no notice was ever placed on any part of the subject property inside of the boundary fences. Further, whatever pieces of paper were tacked to utility poles near one corner of one parcel of the subject property didn't stay there very long, and would have been visible only if a particular utility pole were viewed from a certain angle.

On the other hand, consider the person who has *not* been alerted by the rumor or otherwise that property — or for that matter his own home — is the subject of an application for a change of zoning filed by someone who is not the record property owner. No notice would appear at any post office, shopping center, church, town hall, liquor store, library or other place within the Holladay Planning District where the public frequents or goes. Such person would have to make monthly checks of every utility pole in the Holladay Planning District.

designed so that home owners who would be affected would *not* be informed.

(b) The Contents of the Legal Descriptions Which the County Used in Attempting to Give Notice Were Not Adequate.

Section 17-27-17, Utah Code Annotated, provides that "thirty days' notice of the time and place . . . [of a public hearing] shall be given by at least one publication in a newspaper . . ."

The whole pupose of this requirement is to inform — actually to put on notice; it was not meant to be a mere mechanical formality requiring only token compliance.

In describing what is required of a published notice, the court said in *Board of County Comm'rs of Sarpy County v. McNally*, 168 Neb. 23, 95 N.W. 2d 153, 160 (1959);

Notice is futile unless a property owner is able to determine from such notice that his property is or is not affected. This would seem to be the obvious purpose of the statutory requirement for publication
 . . .

The content of the notice is sufficient if it gives the average reader reasonable warning that the property in which he has an interest may be affected by the proposed zoning legislation and affords him an opportunity by the exercise of reasonable diligence to determine whether such is the fact. *2525 East Ave. Inc. v. Town of Brighton*, 33 Misc. 2d 1029, 228 N.Y.S. 2d 209 (1962).

The actual notice of the subject property appeared in the Salt Lake Tribune on November 26, 1966, as follows:

NOTICE OF ZONING HEARING

NOTICE IS HEREBY GIVEN OF a public hearing to be held in Room 206, City and County Building, Salt Lake City, Salt Lake County, Utah on Wednesday, December 28, 1966, at 10:00 a.m. o'clock before the Board of County Commissioners of Salt Lake County on the following applications requesting rezoning of the following described areas in Salt Lake County, Utah.

1. To amend the map of the Sandy-Union-East Midvale Planning District by reclassifying the following described property from Commercial Zone C-2 to Residential Zone R-2:

Beginning at the NE corner of the SW $\frac{1}{4}$ of Section 29, T2S, R1E, SLB&M; thence South 600'; thence West 1621' m. or l. to the center line of 900 East Street; thence Northeastly along said center line 850' m. or l. to the Quarter Section line; thence East along the Quarter line to beginning.

2. To amend the map of the Loraine Heights Planning District by reclassifying the following described property from Residential Zone R-2A to Residential Zone R-5:

Commencing 285' m. or l. North from the Southeast Corner Lot 3, Block 21, 10 Acre Plat "A", Big Field Survey; thence West 519'; thence North 100'; thence East 519'; thence South 100' to beginning.

3. To amend the map of the South Cottonwood Planning District by reclassifying the following described property from Residential Zone R-2 to Commercial Zone C-1:

Commencing at a point 167' West of the West line of 1300 East Street, said point being North 89 deg. 51 min. 19 sec. West 574.37' and North 0 deg. 27 min. East 224.37' from the SE corner of Section 17, T2S, R1E, SLB&M; running thence North 0 deg. 27 min. East 100' m. or l. to fence line; thence westerly along said fence line 523.12'; thence South 255' m. or l. to the North line of Wasatch Village Subdivision; thence Easterly along said line 526' m. or l.; thence North 131' m. or l. to point of beginning.

4. To amend the map of the Sandy-Union-East Midvale Planning District by reclassifying the following described property from Residential Zone R-2A to Commercial Zone C-2:

Commencing 1320' West and 1231.5' North from the center of Section 29, T2S, R1E, SLB&M; thence East 366'; thence South 218' to canal; thence Westerly along canal 12.6'; thence North 72 deg. 51 min. West 176.5'; thence Westerly along curve to left 75.7' North 80 deg. West 73.9'; thence North 82 deg. 15' West 112.20'; thence North 48 deg. 45 min. West 89.10'; thence North 27 deg. 15 min. East 33'; thence East 158' to beginning. 1.73 Ac.

5. To amend the map of the Cottonwood Planning District by reclassifying the following described property from Residential Zone R-1B to Residential Zone R-1:

Beginning at a point created by the intersection of the center lines of Donelson Lane (5165 South Street) and 2100 East Street, said point being North 73' m. or l. and West 379' m. on l. from the Southeast corner of the Northwest $\frac{1}{4}$ of the Southwest $\frac{1}{4}$, Section 10, T2S, R1E, SLB&M; thence North 79 deg. 48 min. West 191' m. or l.; thence North 2 deg. 46 min. 50 sec. East 363.73'; thence North 75 deg. 12 min. 40 sec. West 123.68'; thence North 1 deg. East 191.50'; thence East 305.06' to the center line of 2100 East Street; thence South 0 deg. 04 min. East along said center line to point of beginning.

6. To amend the map of the South Cottonwood Planning District by reclassifying the following described property from Residential Zone R-1 to Commercial Zone C-2:

Beginning 325' m. or l. East and 398' m. or l. South from the NW corner of Section 16, T2S, R1E, SLB&M; thence East 551.02' to a point on a 3,744.83' radius curve to the right; thence southeasterly along said curve 48.38'; thence South 19 deg. 26 min. East 201.88'; thence West 100.28'; thence South 180.00'; thence East 150'; thence South 541' to the center line of 5600 South Street; thence West along said center line 687.06'; thence North 0 deg. 07 min. East 957' to beginning.

Beginning 325' m. or l. East and 398' m. or l. South from the NW corner of Section 16, T2S, R1E, SLB&M; thence East to the center line of the Cottonwood Diagonal Expressway; thence South 19 deg. 26 min. East along said center line to a point of intersection with the center line of 5600 South Street; thence West along the center line of 5600 South Street to a point due South of beginning; thence North to the point of beginning.

7. To amend the map of the Holladay Planning District by reclassifying the following described property from Residential Zone R-3 to Commercial Zone C-1:

Commencing 253.09' South from the center of Section 3, T2S, R1E, SLB&M; thence Easterly along a 1186.3' radius curve to the left 460' m. or l. to the center line of Russell Street; thence South 8 deg. 25 min. East 200' m. or l.; thence South 86 deg. 30 min. West 477.70' m. or l. to the center line of 2300 East Street; thence North to beginning.

DATED THIS 23rd day of November, 1966.

BOARD OF COUNTY COMMISSIONERS OF SALT LAKE COUNTY
By MARVIN G. JENSON
Chairman

ATTEST:
By JACOB WEILER,
County Clerk

(C-78)

In *Brachfeld v. Sforza*, 114 N.Y.S. 2d 722, 725 (1952) the court held:

A notice of hearing as the basis of a local ordinance should *unambiguously* set forth reasonable information concerning the subject matter of the hearing to the end that adequate warning be given to all persons whose rights might be affected by action of the local board . . . What is said in *Palmer v. Mann* . . . is pertinent, to wit . . . when a statute requires a notice to be given to the public, such a notice should fairly be given the meaning it would reflect upon the mind of the ordinary layman and not as it would be construed by one familiar with the technicalities solely applicable to the laws and rules of the zoning commission . . . It is at least not too much to ask that any ambiguity in a notice to the public of so important a change, which is the only notice that the public has, should be resolved against the notice.

See also, *Holly Development Inc v. Board of County Commissioners of Arapahoe*, 140 Colo. 95, 342 P.2d 1032 (1959).

An average person reading the above newspaper publication would be bewildered.¹ To him what does an apostrophe mean, where is the center of section 3, how large is section 3, what does T2S mean, what is R1E, what or where is SLB&M, which way is a radius curve to the left, is it "m. or l." or is it "m or one."²

¹To make things even more confusing, the so-called legal description fastened to the probate board at the City and County Building differs from the legal description contained in the newspaper publication. (Because the county could not produce a copy of the description posted on the utility poles, there is no way of knowing its contents.)

²The so-called legal description used by the county is so inadequate and inaccurate that even lawyers and other professional persons would be confused. The cardinal rule for legal descriptions is that monuments take precedence over courses and distances and over plats. 6 *Powell on Real Property* 202 (Section 890); *Hofer v. Carino*, 4 N.J.

Super 244, 72 A.2d 335 (1950) (intersection of center lines of two roads). It is fundamental that a complete and accurate legal description should start with a monument. But, the so-called legal description contained in the newspaper publication starts from the center of section 3 which is not a monument at all. It is merely a dot on a plat — a piece of paper. In this instance, the legal description should have started with a monument such as the intersection of the center line of 2300 East Street and the center line of 4500 South Street. As such the legal description would have read:

Commencing at the intersection of the center line of 2300 East Street and the center line of 4500 South Street, which point is about 253.09 feet south from the center of section 3, Township 2 South, Range 1 East, Salt Lake Base and Meridian. . . .

If the legal description had said nothing more than that much, a reader immediately would have known that the property involved was abutting the intersection of 2300 East and 4500 South Street and would have been given a warning. Similarly, the legal description should have continued by reference to physical monuments and should have said:

. . . thence Easterly along the center line of 4500 South Street on a 1186.3 foot radius curve to the left . . .

Again, if the legal description had been tied into the existing monument (4500 South Street), a reader would have been immediately aware that 4500 South Street was involved. The legal description to be adequate for a lawyer should have continued:

. . . 460 feet more or less to the intersection of the center line of 4500 South Street and the center line of Russell Street . . .

Again, if the legal description had been tied into existing monuments in this manner, a resident on Russell Street near 4500 South could have immediately determined that the property abutting the intersection of Russell Street and 4500 South Street was to be the subject of a change of zoning.

The so-called legal description which was used then continued:
. . . thence South 8 deg. 25 min. East 200' m. or l.; . . .

The words did not say what m. or l. meant. Even more important, if "m." meant more and "l." meant less, the words did not say more or less to what. The only proper way to use a "more or less" phrase in an accurate legal description would be to say "more or less" to a monument. This was not done. The distance on this course therefore could be any number of feet — as few as a score, or as many as several hundreds.

It would not be possible, therefore, to determine with certainty where the next leg turned westward. Nor would it be possible to work backwards from the last leg — the one that extended northward to the point of beginning. The reason is that this last leg did not reflect the distance from the intersect with the center line of 2300 East Street to the point of beginning.

While it is true that the language of the legal description refers to the center line of Russell Street and also the center line of 2300 East Street, the average reader would know that both Russell and 2300 East Street are very long streets, and roughly parallel each other. And, because there is no language indicating what south street is involved, the reader could reasonably suppose that the application for commercial use would affect property along that part of 2300 East which runs through the downtown Holladay business district.

In *Berrata v. Sales*, 82 Cal. App. 324, 255 Pac. 538 (1927), omission of street descriptions in a public notice invalidated a proposed zoning ordinance. Here, similar defects in description exist which make notice impossible to even an avid newspaper reader.

Effectiveness of newspaper publication in giving notice was commented upon by Justice Black in *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956) :

It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property.

When the above fact is compounded, as it was in the present instance, by failing to describe the property in question in such a way that the description is meaningful to the reader, the notice requirement of the statute is not complied with.¹

¹It should be noted that each of the following referred to the subject property as 23rd East and 45th South; the original application of the subject property (Def. Ex. 20), the document forwarded to Henry S. Florence (Pl. Ex. 1), the staff reproduction of the application for zoning amendment (Def. Ex. 22), the zoning committee meeting agenda, the staff analysis (Def. Ex. 25), the Planning Commission agenda (Def. Ex. 26), the minutes of the Planning Commission (Def. Ex. 27, p. 13), communication between the Zoning Administrator and the Board of County Commissioners (Def. Ex. 28), the minutes of the Board of County Commissioners (Def. Ex. 29), and so forth. See, Defendants' Exhibits No.'s 31, 32, 34, 35, 40, 41.

In spite of the common use of this most obvious and most descriptive reference, it was *omitted* in the newspaper publication and in the piece of paper posted at the City and County Building and we assume it was likewise omitted in the pieces of paper tacked on utility poles, a copy of which the County could not produce.

(c) The County Failed to Cause Writings Which Attempted to Give Notice to Be Exposed to the View of the Public for the Required Period of Time.

The notice contemplated by Section 17-27-17, Utah Code Annotated, is not a one-shot thing. As heretofore discussed, there is evidence from which this Court can find that on November 25, 1966, the County caused two pieces of paper to be attached to utility poles on 2300 East. The County failed, however, to prove that this notice remained posted for one day, one week, or the required one month. In fact, the evidence to the contrary is almost conclusive and the trial court should therefore have found that whatever pieces of paper were tacked to these poles did not stay on the poles very long.¹

One of the plaintiffs' witnesses, Audrie Kennington, had been advised by the Zoning Administrator in the summer of 1966 that she should watch for pieces of paper in the form of a notice tacked to utility poles near the subject property. (R. 17). Mrs. Kennington testified that she watched for said notices but was never able to find one. (R. 19-21)

¹The only evidence possibly to the contrary came from Dennis Leon Ekins, a friend of the intervenor-applicant's son. He gave some heresay testimony to the effect that an occupant in his car had observed a notice sign. On cross-examination, Mr. Ekins admitted that the notice and utility pole observed by his friend "might have been on a pole at another intersection . . ." in the Holladay area. (R. 64)

Witness Harold Henrichsen, whose property adjoins the subject property, testified that he resided next to the property in question between Thanksgiving and December 28, 1966 (R. 86); that during this time he worked in his yard, put up Christmas decorations and removed snow from the walkway directly in front of one of the utility poles supposedly carrying the posted notice; and that during this time he saw no such notice, though he did observe a "For Sale" sign on the subject property and saw persons who appeared to be surveying the property. (R. 87, 89, 90, 91).

Another witness, Mrs. Agnes Keller, who does not drive and who walked from her home which is on Russell Street along the pathway between the two utility poles and the properties fronting on the east side of 2300 East, fourteen or fifteen times during the period between Thanksgiving and December 28, 1966, testified that she observed the utility poles but saw no notices tacked to them. (R. 76, 77)

Similarly, other area citizens who passed through the intersection of 2300 East and 4500 South many times each week, including Sundays, testified that in ascertaining that approaching traffic eastward along 4500 South was not a hazard, they looked in the direction of the northernmost of the two utility poles and that they saw no papers or signs of the type testified to by Mr. Hardman (R. 100, 110-114, 119, 139, 140)

The legislature provided that affected parties should have thirty days worth of posted notice.¹ In determining what is sufficient compliance with such a statute, the court said in *Callahan Rd. Improvement Co. v. Town of Newburgh*, 167 N.Y.S. 2d 780, 783 (Sup. Ct. 1957) aff'd 173 N.Y.S. 2d 780 (2d Dept. 1958):

A slavish and technical adherence to the notice is not required. On the other hand there cannot be substantial and extensive deviations from the expressed objectives of the public hearing.

Or, as stated by courts of sister states:

. . . [T]he general law prevails and unless the [zoning] procedure there specified is substantially followed the proposed ordinance does not become effective. It needs no citation of authority to sup-

¹That more than a single day's notice is required is clear from the provisions of section 17-27-17, Utah Code Annotated. The first part of this section involves zoning certain portions of the unincorporated area within the County. When such action is taken, the following notice, is required:

A notice of the time, the place and purpose of such hearing and containing a description of the boundaries of the proposed district shall be given by publication in a newspaper of general circulation within the County by one publication at least 30 days prior to the date of such hearing.

Note: The above notice provision clearly says that the publication shall be at least 30 days *prior* to the date of such hearing. This should be contrasted with the notice language with respect to changing a zoning ordinance which appears in the latter portion of this statute:

At least 30 days notice of the time and place of which shall be given by at least one publication in a newspaper of general circulation in the County and by posting in three public places designed to give notice thereof to the persons affected.

There is a substantial difference in the text between the two notice provisions found in section 17-27-17. The former says one publication "at least 30 days *prior* to the date of the hearing." The second says "at least 30 days' notice of the time and place shall be given." If the legislature had intended the same meaning to apply in each case, the legislature would have used the same language. As it did not, it is clear that with zoning changes 30 days notice is required and not one notice 30 days prior to the day of the hearing.

port the statement that notice of a proposed passage of a zoning ordinance limiting the use of property which, otherwise naturally attracts to the property in question, is a substantial matter and is one of which property owners are entitled to notice. The property owners, as has been so frequently said in other cases, is entitled to have his day in court. *Berrata v. Sales*, 82 Cal. App. 324, 255 Pac. 538 (1927).

See also *Wood v. Town of Avondale*, 72 Ariz. 217, 232 P.2d 963 (1951); *People v. Village of Oak Park*, 228 Ill. 256, 109 N.E. 11 (1915); *Grimmer v. City of Spokane*, 64 Wash. 388, 116 Pac. 878 (1911).

Substantial compliance with a statute requiring that thirty days' notice be given is not complied with through the simple act of affixing two pieces of paper to two poles and one piece of paper to a probate notice board. To give notice, the sign must remain where it is posted for the requisite number of days or a period of time substantially equivalent thereto.¹ Compare *Walker v. Bd. of County Comm'rs*, 208 Mo. 72, 116 A.2d 393, 401 (1955). The overwhelming weight of the evidence demonstrated that neither requirement was met in this instance.

No one on behalf of the County verified that the pieces of paper fastened to the probate notice board or to the utility poles remained so fastened for thirty days or for any sub-

¹In some jurisdictions procedural requirements outlined in zoning ordinance must be strictly followed. 8 *McQuillan on Municipal Corporations*, §25.245; *Town of Greenburgh v. Bobandal Realities, Inc.*, 203 N.Y.S. 2d 328 (1960).

stantial part thereof. There is no evidence at all of any policing of the pieces of paper.¹

The zoning ordinance must be applied according to its letter and spirit. *Monument Garage Corp. v. Leavey*, 266 N.Y. 339, 194 N.E. 848, modifying 241 App. Div. 856, 271 N.Y. Supp. 966, affirming 149 Misc. 791, 268 N.Y. Supp. 213 (1933). Both the letter and spirit of Section 17-27-17 require more than the mere tacking up of a piece of paper. The section requires that the notice remain conspicuous for the requisite period of time in order that an actual warning is given to those affected.

III.

IF WHAT WAS DONE IN THIS CASE MEETS THE STATUTORY REQUIREMENT, THEN THE PROCEDURE AND ACTION TAKEN BY THE COUNTY PURSUANT THERETO DEPRIVES AFFECTED PROPERTY OWNERS OF THEIR CONSTITUTIONAL RIGHT OF DUE PROCESS.

Many recent United States Supreme Court cases have dealt with this problem of notice. The landmark decision, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), involved notice by publication to the beneficiaries of a common trust fund. The Court thoroughly canvassed the problem of sufficiency of notice under the Due Process

¹The affidavit of the posting of notice signed by witness Hardman was not only flagrantly false but was executed by him on December 15, 1966. (R. 35) The County Commission should not have acted until it had proof that thirty days' notice was given pursuant to statute. An affidavit signed December 15, 1966, of a posting asserted to have occurred on November 26, 1966, could not possibly be proof that thirty days' notice was given on a hearing to be held December 28, 1966.

clause. It found that notice by publication did not give the persons sought to be bound proper notice which would accord them their constitutional rights. Here the trustee knew the names and addresses of the beneficiaries and there was no tenable ground for not giving them personal notice. The reason the published notice was defective was that it was not reasonably calculated to give notice, i.e., a means better than publication was readily available which, if employed, would have more adequately insured that interested parties were informed of a matter affecting them.

The upshot of the *Mullane* case is that if the person seeking to give notice has the name and address within his personal reach, there is no constitutional reason for not giving personal notice to one in danger of being divested of some legal interest. The best notice possible under the circumstances must be given.

In *Walker v. City of Hutchinson*, 352 U.S. 112 (1956), the plaintiff owned land in the city of Hutchinson, Kansas. Pursuant to statute, defendant city moved to condemn land by determining that it was needed for public use. Three appointed commissioners assessed the damages. By statute, the commissioners were required to give notice to landowners and lien holders of record, either by giving ten days' notice in writing or by publishing notice once in the official city newspaper. Published notice was made and damages determined. Plaintiff sought to enjoin the city from trespassing upon his property, contending that he had been denied his constitutional right under the Due Process clause of the Fourteenth Amendment. Both the trial court and the Kansas Supreme Court held that published notice accorded to the plaintiff all of the notice and opportunities for hear-

ing to which he was entitled. The state court reasoned that this was true since the proceeding was *in rem.*, and that historically, published notice was sufficient. The plaintiff appealed and was granted review.

Resting on *Mullane*, the Supreme Court held that procedural due process had not been afforded to this plaintiff and reversed the prior decision. The rule enunciated by the Court was:

. . . [I]f feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests.¹

In *Schroeder v. New York*, 371 U.S. 208 (1962), the Court was asked to review a New York notice statute. The City of New York instituted proceedings to acquire the right to divert a portion of a river some 25 miles upstream from plaintiff's property. In compliance with notice provisions of the applicable act, the city published notice in several New York newspapers and it also posted 22 notices on trees and poles in the general vicinity of plaintiff's premise. Although the name and address of plaintiff was readily ascertainable from both the deed records and the tax roll, there was no attempt personally to notify plaintiff. The Court stated:

We hold that the newspaper publications and the posted notices in the circumstances of this case did not measure up to the quality of notice which the Due Process clause of the Fourteenth Amendment requires.

* * *

As was emphasized in *Mullane*, the requirement that parties be notified of proceedings affecting their

¹The essence of Mr. Hardman's testimony is that the signs posted by him were not of the type that people would readily notice. (R. 37-40) (Notice too small to be seen from across the street (R. 37); Drivers going north on 23rd East would "have to bend up and look up the window" (R. 38, 39); Drivers coming along 45th South would have difficulty seeing the sign due to topography and "because of its height above the ground" (R. 39); Pedestrians would have to walk "around the pole" to see the sign (R. 40)).

legally protected interests is obviously a vital corollary to one of the most fundamental requisites of due process—the right to be heard. “This right . . . has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appeal or default, acquiesce or consent.” 339 U.S. at 314.

* * *

The general rule that emerges from the *Mul-lane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question.¹

¹In *Naisbitt v. Herrick*, 76 Utah 575, 290 Pac. 950 (1930), the plaintiff below brought suit to quiet title against various defendants. Plaintiff attempted to secure service of summons upon appellant by publication even though appellant had been in actual possession of the disputed property. On appeal, the Utah Supreme Court said:

In proceedings to open default judgments, . . . where there has been merely constructive service of process . . . [t]he rule of law deductible from the adjudicated cases . . . is that: if a moving party shows (1) that he has not been personally served with process, (2) that he has had no actual notice of the pendency of the action in time to appear and make his defense, (3) that he is injuriously affected by the judgment and (4) that he has tendered an issue to the merits of the claim of his adversary, then and in such case he has an absolute right to have the judgment opened. 290 Pac. at 953.

In defining constructive service of process, the court went on to say:

If it can be said that the particular manner in which constructive service is had is well calculated to give notice to the person served, then there is a presumption, in the absence of proof to the contrary, that such person had actual notice. On the other hand, if the manner in which constructive service of process is had is not calculated to give actual notice to the person served, then there is no presumption that such person had actual notice, and the burden is cast upon the opposing party to show actual notice. *Due process of law requires that before one can be bound by judgment affecting his property rights, some process must be served upon him which in some degree at least is calculated to give him notice.* 290 Pac. at 954. (Emphasis added.)

In finding service defective in this particular case, the court concluded:

If it be true that appellant was in possession of the premises involved in this proceeding at the time suit was begun and thereafter, respondent may not be heard to say that appellant was an unknown claimant of the premises and thereby secure service of process by publication as was done in this case . . . 290 Pac. at 954.

It is true that in addition to publishing in newspapers, the city in the present case did put some signs on trees and poles along the banks of the river. But no such sign was placed anywhere on the appellant's property or ever seen by her.¹ 371 U.S. at 211-213.

See also *City of New York v. New York N.H. & H. Ry. Co.*, 344 U.S. 293 (1953).

The applicability of *Mullane* and its progeny to zoning matters was the topic of an article appearing in 37 *Neb. L. Rev.* 232 (1958). The author noted that Nebraska had a zoning statute providing for publication of zoning changes, plus the posting of "notices . . . in a conspicuous place on or near the property . . ."² The author posed the following question:

Has the Due Process clause of the Constitution of the United States been met when personal notice is *not* given under said section 904 nor given except as to a certain class under section 905?³

His reasoned answer was as follows:

In considering the decisions of the Supreme Court of the United States [*Mullane*, *Walker*, *City of New York*] such decisions indicate that notice

¹In the present proceeding, neither of the pieces of paper on the two utility poles was "ever seen" by affected parties. Nor was the piece of paper at the west steps of the City and County Building ever seen by the affected parties.

²The Nebraska statute further provided that "it shall be unlawful for anyone to remove, mutilate, destroy or change such posted notice prior to any hearing. Any person so doing shall be guilty of a misdemeanor." The Utah statute has no comparable provision.

³Section 904 of the Nebraska statute pertains to original zoning by a municipality and section 905 pertains to amending, changing, modifying or repealing zoning regulations theretofore enacted.

required under 904 and 905 are *not* sufficient to meet the Due Process clause of the Constitution. [Emphasis added.]

In summary, the essence of *Mullane, Walker, City of New York*, and particularly the recent case of *Schroeder*, is that where a better way of giving notice is readily available, use of a lesser method is in deprivation of the rights guaranteed by the Due Process clause.

In the present instance, the County knew of or could readily have ascertained the names and addresses of neighborhood property owners who would be affected by the change of zoning. A simple form letter would have apprised such persons of their rights without unduly hampering or burdening the County.¹ And, from *Mullane*, it appears that such a notice need not reach everyone, but only those most likely to safeguard the interest of all.²

The failure of section 17-27-17, Utah Code Annotated, to require notice calculated to insure compliance with the

¹The County's own procedural regulations for processing zoning applications require the applicant to submit a list of names of property owners within 150 feet of the subject property. Such an expanded list, furnished by applicant at its expense, could readily provide the basis for a mailing. By way of analogy to a judicial suit, an applicant for a zoning change could be required to serve, under affidavit, notice to adjacent property owners. The County processed the application even though applicant failed to supply these names and addresses.

²The over-all unfairness of the defendants' notice procedure is further compounded by the fact that a personal letter was sent to Mr. Roderick, the applicant, advising him of the public hearing and requesting him or his authorized representative "to attend this hearing to present any information which may be pertinent to this application." (Def. Ex. D-32) No similar notice was sent to the other side, i.e., affected homeowners. Such action is patently discriminatory in violation of Article I, section 1 of the Utah Constitution.

XIVth Amendment to the Federal Constitution renders action of the County based on the "Notice" part of that statute unconstitutional. Likewise, the statute is in juxtaposition to the due process guaranty of Article 1, section 7 of the Constitution of Utah.¹

IV.

DEFENDANTS FAILED TO OBSERVE STATUTORY AND PROCEDURAL REQUIREMENTS OTHER THAN REQUIREMENTS FOR NOTICE AND SUCH FAILURE INVALIDATES THE ATTEMPTED CHANGE OF ZONING.

The instant change of zoning commenced when Bill Roderick, on behalf of Bill Roderick, Inc., delivered to Ralph Y. McClure, Salt Lake County Zoning Administrator, a \$20 filing fee and an application for zoning amendment. (Def. Ex. D-20). He did not comply with the remainder of the procedure of the zoning office (as set forth in Def. Ex. D-19)—i.e., he did not submit names of property owners within 150 feet of the subject parcels; he did not supply a signed statement from property owners whose property was a subject of zoning change indicating their attitude concerning the rezoning, and he was not a proper applicant. Each of these things is required by the County's own zoning procedure (Def. Ex. D-19)

Of the three noncompliances the most fatal is that Bill Roderick was *not a proper applicant*. The County's zoning

¹*Naisbitt v. Herrick*, *supra*, note 1 at p. 28.

procedure requires that applications for zoning amendments be filed by the owner of the property involved or by his authorized agent.¹ (Def. Ex. D-19 p. 3)

At the time Bill Roderick filed the application for a zoning amendment he was not the owner of the subject property and was likewise not authorized by the owners of the property to make the application on their behalf. (R. 19-20)²

On or about November 4, 1966, the Zoning Administrator caused to be mailed to Henry S. Florence of the Holladay District Planning Commission a letter requesting action by that body. (Def. Ex. D-24.) Contemporaneously and before receiving any response from any member of the Holladay District Planning Commission, the staff of the Zoning Administrator met and considered the application (Def. Ex. D-25.)

¹The wisdom of this requirement is obvious. Without it conceivably the owner of a commercial site could awaken one morning to find that someone else had caused his property to be rezoned residential or vice versa.

²The subject property consists of two parcels, one of which was owned by Pearl B. Henrichsen, the other by Milton P. Matthews. (Def. Ex. D-3) Bill Roderick had no authority from Pearl Henrichsen and only oral authorization from Matthews. The latter, however, is not legally sufficient to permit Bill Roderick to apply since section 57-1-8 Utah Code Annotated 1953, as amended, requires a written power of attorney or other written instrument granting power to an agent in instances where real estate is to be conveyed or otherwise affected.

On or about November 18, 1966 — again before receipt of any response from any member of the Holladay District Planning Commission — the zoning subcommittee and the Salt Lake County Planning Commission met and considered the application.

On November 21, 1966 (being subsequent to action by the staff, the zoning subcommittee and the planning commission) the zoning office received a response from a single member of the Holladay District Planning Commission. (Pl. Ex. P-1)

The written procedure of the zoning office for processing applications for change of zoning requires that an application be submitted first to the District Planning Commission which is allowed 30 days in which to act *before* the application is considered by the Planning Commission. No explanation was given about why this application was given preferential treatment.¹

A municipal legislative body must substantially follow the internal regulations it has itself established relative to

¹The procedure of the County on change of zoning applications calls for a minimum of three months for processing. (Def. Ex. D-19) First the application is submitted to the District Planning Commission which has thirty days in which to respond. Thereafter the County Planning Commission has thirty days in which to consider the matter. Following that, an additional thirty days is necessary for providing notice of the hearing before the County Commission. This is not to say that in every case ninety days must be taken in which to process an application. But it is obvious that there is greater opportunity for persons affected to learn about a hearing to be held before the County Commission if the usual length of time is taken in processing the application. Unlike interested parties in most cases, property owners affected by this proceeding had far less chance of learning of the hearing because of the hasty and preferential treatment given this particular application.

zoning. *County Comm'rs. of Arundel County v. Ward*, 186 Md. 330, 46 A.2d 684 (1946). It cannot deviate from existing regulations or make exceptions therefrom on behalf of individuals. 8 *McQuillan on Municipal Corporations*, § 25.253.

The opening sentences of section 17-27-17, Utah Code Annotated, provide:

But any such amendment shall not be made or become effective unless same shall have been proposed by or first submitted for the approval, disapproval, or suggestions of the district planning commission and shall have approval by the county planning commission. If any such amendment be disapproved by either the county or the district planning commission within thirty days after such submission, to become effective, it shall receive the favorable vote of not less than a majority of the entire membership of the board of county commissioners.

It is clearly the intent of the statute that the Board of County Commissioners should have the benefit of the thinking and recommendation of the District Planning Commission prior to its own action. This consideration is lacking in the present case.

Testimony of Mr. Hall, a member of the District Planning Commission, demonstrates that he acted alone; that there was never a meeting of the District Planning Commission on this matter and that residents in the area contacted by him unanimously opposed a change of zoning. (R. 3-10)

From the evidence, the trial court should have held that the Holladay District Planning Commission did not act as a commission. Consequently, the County Commission was denied the chance of considering the thinking and feeling of the District Planning Commission and those citizens whose recommendations it should properly reflect.¹

This deviation from the statute is of no small moment. As stated in *Armourdale State Bank v. Kansas City*, 131 Kan. 419, 421, 422, 292 Pac. 745, 746 (1930):

A preliminary consideration of a proposed change in a zoning ordinance by a competent body of disinterested persons is not a mere formality but an essential and important prerequisite to official action affecting the value and use of the private property. The power to ordain city zoning ordinances, and to amend, supplement, or change them, is not a mere perquisite attaching to the office of the mayor and councilmen or city commissioners, to be granted or withheld at their grace or caprice. The legislature devised what it considered an effective barrier against such a possibility when it provided that zoning matters should first be considered by an impartial body of resident taxpayers chosen for that purpose.²

See also, *Ford v. City of Hutchinson*, 140 Kan. 309, 37 P.2d 39 (1934).

¹Defendants' exhibits D-34, p. 9 and D-35, p. 2 demonstrate that the specious document of the District Planning Commission was a factor considered by the County Commissioners in arriving at their decision.

²The impartiality of Mr. Hall's recommendation is questionable due to the impropriety of the applicant in contacting Mr. Hall and urging him to return the recommendation of the District Planning Commission to the Zoning Administrator post haste. (R. 5)

V.

DEFENDANT COMMISSIONERS' ACTIONS
WERE ARBITRARY AND CAPRICIOUS.

At the County Commission level all parties to a zoning matter stand at parity. That is, each need only prove or disprove the merits of the application for a change of zoning. A different situation exists, however, on appeal for judicial review. At this level a court will not substitute its judgment for that of the commission even though the court itself might have come to a different conclusion. *Naylor v. Salt Lake City Corporation*, 17 Utah 2d 300, 410 P.2d 764 (1966). Consequently on judicial review the only chance of upsetting a zoning decision other than by showing a deprivation of rights without due process of law is by being able to demonstrate that the County Commission acted arbitrarily and capriciously. *Gayland v. Salt Lake County*, 11 Utah 2d 307, 358 P.2d 633 (1961).

The rule heretofore stated has merit in cases such as *Gayland* and *Naylor* where the party opposing the zoning had a chance to make a record before the County Commission. However, in the present case this rule should not be strictly applied as appellants have been denied in the first instance a chance to present evidence before the County Commission.¹

Notwithstanding that the Court should not apply harshly to appellant this "arbitrary and capricious" rule, this Court may — from the record which was established —

¹In addition because plaintiffs' complaint was dismissed the posture of the case on appeal is that the evidence must be viewed in the light most favorable to appellants. *Clark v. City of Boulder*, 146 Colo. 526, 362 P.2d 160 (1961).

interfere with the decision of the Commission since "there is no reasonable basis whatsoever to justify it and its actions must therefore be regarded as capricious and arbitrary." *Naylor v. Salt Lake City Corporation*, 410 P.2d at 766.

Further in reviewing the decision below this Court should bear in mind that:

Findings and conclusions of a trial court as to the reasonableness [constitutionality] of zoning ordinance are not binding on appellate courts if the record shows that that question is debatable and the appellant court may consider in some detail the basic physical facts appearing on the record, such as character of the property of the objecting parties, nature of the surrounding territory, use to which each has been put, recent trends of development, etc. *Lockard v. City of Los Angeles*, 33 Cal. 2d 453, 202 P.2d 38 (1949)¹

(a) In refusing to permit property owners affected by the attempted change of zoning from having an opportunity to be heard, the defendant Commissioners acted arbitrarily and capriciously.

Immediately upon first learning that the County Commission had held a hearing upon the subject property, interested homeowners in the area signed a petition for reconsideration. (Pl. Ex. P-48) Significantly, over 200 home-

¹In rezoning matters the presumption of reasonableness of the zoning amendment does not have the same weight as does the original zoning; hence the courts are more free to scrutinize the merits of the rezoning. *Northwest Merchants Terminal, Inc. v. O'Rourke*, 191 Md. 171, 60 Atl. 2d 743, 752 (1948). The reason for this difference is obvious. An amended zoning ordinance does not have the same thought and study behind it as exists behind a master or comprehensive zoning plan.

owners signed the petition.¹ The petition was addressed to the Salt Lake County Commission and on January 10, 1967, was personally delivered to Commissioners Hanson and Blomquist (R. 128). Notwithstanding the petition, the following morning, January 11, 1967, Commissioner Blomquist signed an Ordinance, reclassifying the subject property.

The County Commission's intemperate act of refusing to hear or even consider the evidence proposed to be offered by citizens who had no prior opportunity to be heard and who would be most immediately affected by its decision amounts to a clear abuse of the Commission's power and an infringement upon citizen rights.

In outlining procedures and considerations required of Salt Lake County in administering its zoning powers, this Court has stated:

¹Among those who petitioned the County Commission in a desperate attempt to be heard were adjoining property owners:

(i) the property owner abutting to the south (H. R. Hendrichsen, also known as Harold R. Hendrichsen 4555 South 2300 East, exhibits D-48 (7th sheet) and D-3);

(ii) the property owners adjoining the east side of Russell Street which adjoins the subject property to the east, (Emerson H. Kennington and Audrie M. Kennington, 4507 Russell Street, Agnes Helen Keller, 4503 Russell Street, and Hazel W. Fisher, 4505 Russell Street, exhibits D-48 (7th sheet) and D-3);

(iii) a property owner adjoining the north side of 4500 South Street which adjoins the subject property to the north, (Darwin Dowsett, 2361 East 4500 South, exhibits D-48 (9th sheet) and D-46);

(iv) the property owner at the northwest corner of the intersection of 2300 East and 4500 South, kitty-corner from the subject property (Ellen Pihl, 4482 South 2300 East, exhibits D-48 (12th sheet) and D-47), and

(v) thirty-five owners of dwellings in Carriage Lane Condominium, directly southwest across 2300 East from the subject property (exhibits D-48 (5th and 6th sheets) and D-47).

Thus, owners of property adjoining all sides of the subject property sought to be heard.

It [the County Commission] has the responsibility of advising itself of all pertinent facts as a basis for determining what is in the public interest in that regard. For this reason, it is entirely appropriate to hold public hearings and to allow any interested party it desires to give information and to present their ideas on the matter . . . In performing their duties, it is both their privilege *and obligation* to take into consideration their own knowledge of such matters *and also to gather available pertinent information from all possible sources and give consideration to it in making their determination.* *Gayland v. Salt Lake County*, 11 Utah 2d 307, 358 P.2d 633, 636 (1961) [Emphasis added]

The consequence attendant to failure to observe these requirements was also spelled out by the Court:

[T]he court can impede decisions of legislative bodies where the actions of the latter are "unconstitutional" for some such reason as it deprives one of property without due process of law, or capriciously and arbitrarily infringes upon his rights therein or is unjustly discriminatory. 358 P.2d at 636.

In this case, a highly responsive "source" — affected citizens — tried desperately to supply to the County Commissioners considerable information and facts pertaining to the subject matter. This offer was summarily rejected.

As noted from the *Gayland* decision, there is nothing requiring or limiting the Commission from considering information brought to its attention subsequent to the date of a public hearing; and, in fact, it would seem that such action is required for as long a time as the ordinance is under advisement.

That the ordinance was still under advisement at the time the citizens' petition was tendered to the Commissioners is clear from the contents of a letter sent by the Commissioners following their December 28, 1966, meeting to the Zoning Administrator requesting the latter "to prepare an ordinance on same [the subject property] which will be presented at a later date for the Board's final approval." (Def. Ex. D-37)

It is well settled that a municipal legislative body may reconsider its action and rescind an ordinance that has been previously enacted or enact an ordinance that has previously been defeated, and it may act thusly at any time before the rights of third parties have become vested.¹ In other words, the municipal legislative body has a right to reconsider under properly adopted parliamentary procedure its votes upon questions properly pending before it, and such body may rescind action previously taken.²

On January 10, 1967, no one had a vested interest in the zoning ordinance covering the subject property, and the Commission, if it had properly discharged its duties as outlined in the *Gayland* case, could have withheld signing the ordinance until proper consideration was given to the position of the abutting property owners and other citizens requesting the right to be heard.

The Commission's action "capriciously and arbitrarily infringe[d] upon the rights . . ." of those citizens who peti-

¹*MacMahon v. Davis*, 284 Ill. 439, 120 N.E. 326 (1918); *Tuell v. Meacham, Contracting Co.*, 145 Ky. 181, 140 S.W. 159 (1911); *McConoughey v. Jackson*, 101 Cal. 265, 35 Pac. 863 (1894).

²*Id.*

tioned for reconsideration of the zoning change and who had not had their "day in court."¹ *Gayland*, supra, at 636.

(b) Both the method by which the subject property was rezoned and the result of the rezoning are unreasonable and unconstitutional.

Section 17-27-4 Utah Code Annotated, 1953, as amended is a directive to the County to "make and adopt a master plan for the physical development" of the County. The purpose of the plan is to accomplish "a coordinated, adjusted and harmonious development of the county which will, in accordance with present and future needs and resources best promote the general welfare of the inhabitants . . ." of the county. Section 17-27-5 Utah Code Annotated.

Pursuant to legislation, Salt Lake County in 1965 adopted a Master Zoning Plan. (Def. Exs. D-42, D-43) A review of the Master Plan of Salt Lake County and the Master Plan map clearly shows that the area in which the subject property is located was earmarked for residential development only (Def's. Ex. D-42, p. 43)²

¹A parallel to the action of the County Commission is the abuse of discretion of a trial judge in not setting aside a default judgment of a party who makes a timely request in cases where there is reasonable justification for setting aside the default. *Mayhew v. Standard Gilsonite Co.*, 14 Utah 2d 52, 376 P.2d 951 (1962).

²Defendants and intervenor stipulated to plaintiffs proffer of evidence that the area surrounding 2300 East and 4500 South consists of expensive homes. (R. 161-2). See also plaintiffs' exhibits P-15, 16, 17 and defendants' exhibit D-34, p. 9. (Testimony of a witness for applicant, Mary Metcalf, at the County Commission level said that this "is a very highly developed residential area . . .")

In its petition for reconsideration directed to the County Commissioners and in its complaint below, appellants sought to prove that the decision of the County Commission was erroneous. In each instance appellant has had to make the best record possible over the refusal of the Commission and court to hear such evidence. (R. 184)

Further, scrutiny of the Master Zoning Plan shows no provisions for commercial zoning of the type in question here. With reference to commercial zoning the Master Zoning Plan refers to three types: i.e., a central business district, regional shopping centers, and community and neighborhood shopping centers. At no point does the plan recommend, suggest or propose permitting spot zoning.¹ Central business districts are intended to serve the over-all needs of communities. Regional shopping centers such as the Cottonwood Mall are designed to serve each planning district. Community and neighborhood shopping centers on the other hand are "proposed to be conveniently located to serve local shopping needs throughout the valley." (Def. Ex. D-42, p. 3) (Salt Lake County Master Zoning Plan)

The smallest recognized and permissible commercial development is the community and neighborhood shopping centers. To conform with the Master Plan these community and neighborhood shopping centers must be designed and located in an area appropriate to provide for the convenient needs of people living in their immediate vicinity. Further, these small centers must "range from three to ten acres in

¹The goals and policies which guided the preparation of the Master Plan were formulated by the Salt Lake Valley Citizens' Council. (Def. Ex. D-42, p. 22.) This particular council was extremely concerned about strip zoning which is simply an outgrowth of spot zoning. In this regard the Salt Lake Valley Citizens' Council stated:

An excessive amount of strip or thoroughfare commercial development which results in traffic congestion, lack of sufficient parking, rapid turnover of tenants and consequent physical deterioration of buildings because of unsatisfactory business volume. These strip developments, for the most part, began prior to the adoption of zoning. Such development is still going on in unzoned areas such as Hunter-Granger and to a limited extent in zoned areas through the granting of additional commercial zoning. (Planning Goals and Policies for the Salt Lake County Master Plan, p. 11) [Emphasis added]

size." (Def. Ex. D-42 p. 31.)¹ That the subject property fails to meet these standards is clear. The property is only slightly over one acre — considerably below the size requirements necessary to develop a neighborhood center. (Def. Ex. D-20) Neighborhood shopping centers for the area surrounding the subject property have already been provided for. Commercially zoned property of the neighborhood shopping size, or greater, within a short distance of the subject property includes the downtown Holladay shopping area, the Cottonwood Mall, much of both sides of 33rd South between Highland Drive and Wasatch Blvd., large shopping centers at 39th South and Wasatch Blvd., at 45th South and Wasatch Blvd., and neighborhood shopping centers at 39th South and 2300 East and 27th East and 40th South. (Def. Exs. D-44, Zoning Map Section A and Zoning Map Section B, and Def. Ex. D-33.)

The very use of the terms "zoning" has come to mean land use regulation pursuant to a "comprehensive zoning ordinance." *Metzenbaum, Law of Zoning*, p. 19 (2nd ed., 1955). Utah courts are clearly concerned with the orderly development of communities:

The basic purpose of zoning is to "bring about an orderly development of cities, to establish districts into which business, commerce and industry shall not intrude, and to fix certain territory for different grades of industrial concerns. * * * The exercise [of this power] must have a substantial relation to

¹With reference to the size of community and neighborhood shopping centers it was the recommendation of the Salt Lake Valley Citizens Council that the centers have five to ten acres as an average number of acres to be developed. See, final report of Planning Goals and Policies for Salt Lake County Master Plan, p. 18.

the public good within the spheres held proper. *White Appeal*, 287 Pac. 259, 134 Atl. 409, 412, 53 A.L.R. 1215. It is a fundamental theory of the zoning scheme that it shall be for the general good, to secure reasonable neighborhood uniformity, and to exclude structures and occupations which clash therewith. *Marshall v. Salt Lake County*, 105 Utah 111, 141 P.2d 704, 709 (1943).

The only way of keeping the Master Zoning Plan viable is by requiring that amendments to it conform to and be in accordance with it. *Freeman v. Yonkers*, 205 Misc. 947, 129 N.Y.S. 2d 703 (1954).¹ Consequently where the amendatory action is not in accordance with the comprehensive plan, is in no way calculated to achieve the statutory objectives and results in unwarranted discrimination in favor of the owner of the lot in question, the reclassification is invalid. *Cassinari v. Union City*, 1 N.J. Supp. 219, 63 A.2d 891 (1949); *Appley v. Township Committee*, 128 N.J.L. 195, 24 A.2d 805 (1942). See also *Marshall v. Salt Lake City*, supra.

In order to achieve the purpose of the Master Zoning Plan uniformity is required. For example, section 17-27-11 Utah Code Annotated provides that:

All such regulations shall be uniform for each class or kind of building or structure throughout any zone.

The intent of language such as this was set forth in *DeBlasis v. Bartell*, 143 Pa. Super. 485, 18 A.2d 478 (1941):

¹In this regard the Master Zoning Plan states:

Revision of Salt Lake County Zoning ordinance should be carried out as a special program by participation by concerned governmental agencies as well as representatives of the public. Def. Ex. D-42, p. 57. [Emphasis added]

The enabling statute on which the zoning ordinance must rest declares that regulations under the ordinance must be uniform for each class or kind of buildings, structures or land throughout each district. And this is in harmony with the general rule that the ordinance adopted under a zoning law must not be unreasonably discriminatory. While the City Council has broad powers in this respect, it has no right or authority to place restrictions on one person's property and arbitrarily and by mere favor remove such restrictions from another's property there being no reasonable grounds or basis for their discrimination.

The important language quoted which is fundamental in zoning is that *all* property similarly situated is to be classified alike. Arbitrary discrimination is improper and unconstitutional. Amendatory action must be grounded in reason and judgment based upon the policy of the statute. *Appley v. Township Committee, supra.*

(c) It is clear that the decision rezoning the southeast corner of 2300 East and 4500 South is not grounded upon reason or based upon the policy of the statute.

Amendments to zoning plans are permissible only if (i) they conform to the master or comprehensive zoning plan or (ii) they benefit the general public. 149 A.L.R. 292; 51 A.L.R. 2d 63. A possible third ground used in instances where the amendment appears contrary to a comprehensive plan is where either the plan is outdated or the neighborhood has deteriorated to the extent that the plan is no longer applicable to it. *Crone v. Town of Brighton*, 119 N.Y.S. 2d 877 (1952).

Taking the above points in reverse order, there was no evidence before the County Commission at its December

28, 1966 meeting or before the trial court in this action which indicates that there has been any deterioration in the high quality residential nature of the area.¹ All of the evidence that is in the record is to the contrary.²

Similarly there is not one scintilla of evidence in the record before the County Commission or the court indicating a public need or demonstrating a benefit to the public

¹The present case is easily distinguishable from this Court's decision in *Naylor v. Salt Lake City Corporation*, 17 Utah 2d 300, 410 P. 2d 764 (1966). In *Naylor* there was a record which supported the decision rendered:

From the record viewed in the light most favorable thereto there are a number of considerations which can be regarded as tending to support the rezoning ordinance and the trial court's judgment sustained as valid. Among these are: that there has been a gradual extension of the business and commercial usage of the property outward from the center of the city in the direction of this area; that there is some congestion and deterioration of residence, the removal of which may tend to alleviate health hazards and an increasing crime rate, particularly among juveniles in that locality; that the Commission has in other similar situations used the classification of "Business B-3" as buffer zones between residential and commercial and business areas. 410 P. 2d at 766.

No such reasons exist in the present case.

²Mary Metcalf, one of the witnesses supporting intervenor (then the applicant for change of zoning) at the so-called hearing before the County Commission on December 28, 1966, recognized the existing residential character of the area. Def. Ex. D-34, p. 9. The text of her comment is: "It is a very highly developed residential area . . ." Pl. Ex. P-1, P-17 and P-18 which are photographs of the area introduced to reflect the absence on any utility pole of any piece of paper or other notice of the hearing to be held December 28, 1966, shows its existing high class residential character. See also the Master Plan (Def. Ex. D-42) and the Master Plan map (Def. Ex. D-43) which reflect the same. Because of the ruling of the trial judge not to receive evidence "on the merits" plaintiffs were not permitted to submit evidence such as photographs of dwellings in the area as a whole to reflect its general high-class residential character. On the other hand there is no evidence from defendants or intervenor that the residential character of the neighborhood has deteriorated. Furthermore, defendants and intervenor stipulated that the area surrounding 23rd East and 45th South consists of expensive homes. R. 161-2.

generally to come from zoning the subject property commercial.¹ And in fact the evidence clearly demonstrates the opposite.

For the public generally to benefit from an amended zoning ordinance, that ordinance must promote the "health, safety, morals, convenience, order, prosperity and welfare of the present and future inhabitants of Salt Lake County . . ." Section 8-1-2 Revised Ordinances of Salt Lake County, 1953. That the commercial zoning of the subject property would run contrary to the intent of the above quoted section was the unanimous recommendation of the Salt Lake County zoning staff and the Salt Lake County Planning Commission:

Twenty-three Hundred East is a major artery and future widening is proposed. Traffic on the street at present is very heavy and the Staff feels that granting this zoning change would only contribute to the congestion . . . its nearness to other commercial zones raises the question as to whether additional commercial sites are necessary. (Def. Ex. D-25)²

The Zoning Staff, the Zoning Committee and the Planning Commission unanimously voted to *deny* the zoning

¹In *Marshall v. Salt Lake City* 105 Utah 111, 141 P. 2d 704 (1943), the Court upheld a comprehensive zoning ordinance as it contributed to the general welfare. Basically the general zoning plan in question provided that within reasonable walking distance of all homes, daily family conveniences and necessities must be available. The Court merely found that the ordinance in question accomplished this result; was consequently in harmony with the City's comprehensive zoning plan and did not violate the following principle:

But the principle is fundamental that the city in zoning, must do so by districts and not by *indiscriminate spot zoning*. 141 P. 2d at 709. [Emphasis by the Court]

²The Master Zoning Plan provides that two of the future major arterial roads in the Big Cottonwood Planning District will be 23rd East and 45th South. (Def. Ex. D-42, p. 42).

application. (Def. Ex. D-25) Despite this and in the absence of any evidence to the contrary the Salt Lake County Commission overruled its own zoning staff and Planning Commission and approved the application. Such action is patently arbitrary and capricious. *Gayland, supra*.

The only other ground for amending a master plan viz., —that the amendment conforms to the intent of the master plan — is not satisfied in this case. The Salt Lake County Master Zoning Plan clearly provides that the area in question is intended to be used for residential development. (Def. Ex. D-42, D-43.) Nor can the rezoning be justified as a permitted change in the Master Plan, such as for a neighborhood shopping center because the subject property is not large enough and because no need has been shown.¹

Where the above grounds cannot be readily shown, the rezoning is not favored because in too many instances the

¹The whole intersection or a major part of property surrounding it must be changed to commercial if it is to be justified as a permitted deviation from the Master Plan. Owners of property abutting the subject property are the ones who are hurt. The rezoning did not change their property to commercial. They cannot reap any of the financial benefits of commercial zoning, but are damaged by its detriments. Herein lies the grossly unfair discrimination by this act of the Commission. The abutting property owners have not been treated uniformly. There is no evidence of record to justify any specially favored treatment of the subject property for commercial use which is not equally applicable to the abutting property. If an area large enough for a neighborhood shopping center (from 3 to 10 acres) had been zoned commercial at this location the action of the Commission conceivably might be justified as in keeping with the purposes of the Master Plan. But there is no justification at all for permitting this tiny spot of commercial property, unconnected with, and blocks away from any other commercially zoned property, to intrude into a residential area. Otherwise, a tiny spot of commercial use could be created at every intersection in the County and thereby prevent any planned development, resulting in all of the problems of no zoning at all, the removal of which is the only constitutional justification for inference with property rights by zoning, in the first instance.

rezoning is only an aid to some private owner or parcel rather than being for the general welfare of the entire community. *Metzenbaum, supra*, p. 1517(b). As stated in the syllabus to *Ellicott v. Mayor of Baltimore*, 180 Md. 176, 23 A.2d 649 (1942):

An exception of a single lot from operation of city ordinance zoning area in which it is located as residential district, in order to permit erection of a filling station hereof is illegal, though attempted by municipal ordinance, unless made because of *exceptional conditions* under authority of enabling act and there can be no valid exception thereof merely as a favor to a lot owner because it is more profitable to him if used for such purpose.¹

On January 10, 1967, 204 citizens in the affected area presented to Defendant Commissioner Blomquist a written petition requesting that the County Commission reconsider its action and permit them to be heard. The very next day Commissioner Blomquist in the absence of Chairman Hanson signed the ordinance amending the zoning classification of the subject property. This was done in spite of the petition before the Commission.

The trial judge would not permit plaintiffs to examine Bill Roderick, president of Bill Roderick, Inc., as to any possible relationship between Commissioner Blomquist and Mr. Roderick. However, prior to having this line of questioning completely cut off, plaintiff did establish that Com-

¹Or as stated in *Harrington v. Board of Alamo Heights*, 124 S.W. 2d 401, 407 (Tex., 1939):

The Board may not destroy the general restriction by piecemeal exemption of pieces of land equally subject to the hardship created in the restriction, or arbitrarily grant a special privilege denied to others.

See also, *Sundlund v. Zoning Board of Pawtucket*, 50 R.I. 108, 145 Atl. 451 (1929).

missioner Blomquist is a good friend, "business-wise" of Bill Roderick, president of Bill Roderick, Inc. (Testimony of Roderick, R. 15)

The plaintiff was prevented from developing a complete record on this point. Nonetheless, and in view of even the sketchy information developed, there is sufficient reason to conclude that Commissioner Blomquist should have abstained from acting on this matter.¹

The evils arising from facts such as exist in the present record were clearly spelled out in *Cassel v. Mayor and City Council of Baltimore*, 195 Md. 348, 73 A.2d 486 (1950):

"Spot zoning" the arbitrary and unreasonable devotion of a small area within a zoning district to use which is inconsistent with the use to which the rest of the district is restricted, has appeared in many cities in America as a result of pressure put upon councilmen to pass amendments to zoning ordinances solely for the benefit of private interest. While the City Council has wide discretion in enacting zoning ordinances, it has no authority to place restrictions on one person's property and by mere favor remove such restrictions from another's property, unless there is reasonable ground for the dis-

¹By way of analogy, section 17-27-15 Utah Code Annotated 1953, as amended with respect to membership on the Board of Adjustment, states:

The Board of County Commissioners may appoint associate members of such board, and in the event that any regular member be temporarily unable to act owing to absence from the county, illness, *interest in a case before the Board*, or any other cause, his place may be taken during such temporary disability by an associate member designated for the purpose. [Emphasis added]

Here is an express directive that an interested public official should temporarily absent himself from a zoning matter in which he has an interest. The same rule should equally apply to a member of the County Commission, i.e., he should be disqualified from acting in zoning matters in which he has an interest — no matter how remote.

crimination. Moreover, increase in "spot zoning" in course of time would subvert the original soundness of the comprehensive plan and tend to produce conditions almost as chaotic as existed before zoning. It is universally held that a "spot zoning ordinance" which singles out a parcel of land within the limits of a use district and marks it off into a separate district for the benefit of the owner, thereby permitting a use of that parcel inconsistent with the use permitted in the rest of the district, is invalid if it is not in accordance with the comprehensive zoning plan and is merely for private gain.

. . .

The end result of the zoning change attempted by Salt Lake County is an arbitrary and capricious act. Supporting this conclusion is *Clark v. City of Boulder*, 146 Colo. 526, 362 P.2d 160 (1961), a decision which cannot be distinguished from the instant case. In *Clark*, the City of Boulder attempted to change to commercial zoning three lots within a residential area for the erection of a filling station. The action was taken contrary to the recommendations of the City Planning Board. Further the area in which the property in question was located was zoned residential under a comprehensive plan and ordinance adopted in 1954. Though the three lots involved were within a residential area, the comprehensive plan established an area to the east of the tract in dispute as a shopping center with various retail outlets, including a filling station. Intervenor, petroleum products distributors and operators of filling stations, had purchased the lots in question. The trial court held for the intervenors, dismissed the complaint and owners of the dwellings in the area appealed. The Colorado Supreme Court reversed with directions to enter judgment in favor

of appellants. Citing authorities, the court stated:

The principles of these cases are applicable here. In determining whether spot zoning is involved, the test is whether the change in question was made with the purpose of furthering the comprehensive zoning plan or designed merely to relieve the particular property from restrictions of the zoning regulations. . . .

Under the facts of this case it cannot be said that re-zoning part of a planned residential area to permit a filling station is other than an arbitrary act and a proper exercise of the police power. It clearly fails to take into account the need for reasonable stability in zoning regulations . . . That the property may not be used as profitably for residential purposes as for commercial use, furnishes no justification for special treatment thereof . . .

One of the difficulties with intervenors' position is that it fails to recognize that unless a zoning line is drawn somewhere there can be no zoning at all.

Property owners have the right to rely on existing zoning regulations when there has been no material change in the character of the neighborhood which may require re-zoning in the public interest . . . In addition, the development and growth of a comprehensively zoned area in accordance with the uses permitted under the plan, does not permit emasculation of such plan under the guise of "changed conditions" as defendants here contend. . . .

We conclude that the ordinance under review does not promote any of the statutory purposes under which zoning ordinances are enacted, and violates the previously adopted comprehensive plan. On the basis of this record it cannot be upheld. 362 P.2d at 162-163.

The decision in the *Clark* case is good law and supported overwhelmingly by the decisions of other jurisdictions and is not only applicable and controlling, but indistinguishable from the instant case.

(d) When looked at cumulatively the acts and omissions of Salt Lake County are flagrantly discriminatory, arbitrary and unconstitutional.

A number of acts and omissions of defendant County Commission demonstrates the arbitrariness of their decision. We list a few:

1. In summarily overruling the decision of the Zoning Staff, Zoning Committee and the Planning Commission without reason therefor, the County Commission wrecked havoc with the statutory framework which created the Planning Commission and provides for a Master Plan. Simply stated, the statute creating a Planning Commission and a Master Plan must have some meaning. If the County Commission need pay no heed to the findings and work of the Planning Commission and may, notwithstanding the Planning Commission's decision and the absence of any economic evidence to the contrary, change a comprehensive zoning plan, then the statutory framework creating the Planning Commission and the Master Plan is meaningless and the function of the Planning Commission and the Master Plan is meaningless.

2. On January 10, the County Commission was presented with a petition of 204 owners of dwellings in the area asking for reconsideration of the rezoning

and for an opportunity to be heard. The following morning, January 11, the ordinance officially adopting the change was signed by Commissioner Blomquist although all pertinent evidence had not been received. In *Linden Methodist Episcopal Church v. Linden*, 113 N.J.L. 188, 173 Atl. 593 (1934) the court held a rezoning invalid where it was passed by the common council with *unseemingly haste* and without having taken testimony. Cf., *Gayland v. Salt Lake County*, *supra*.

3. Commissioner Blomquist as a friend — “businesswise” — of Bill Roderick, president of Bill Roderick, Inc. should have abstained from participating in the decision on this matter. See *Linden Methodist Episcopal Church v. Linden*, *supra*. (Owner of property in question a member of city council.)

4. The scanty and pedantic attempts of the County to comply with the notice requirements of the statute are constitutionally inadequate. (See discussion in sections II and III, *supra*.) In fact, in reviewing the actions of the County Commission it appears that the attempts at “notice” were calculated not to inform or at most to misinform interested parties.

Had the County been discharging its duty to inform homeowners in the area to be affected it would, among other things, have

(i) required the applicant to supply names and addresses of owners of property within 150 feet of the subject property (as its rules provide and as all other

applicants for a change of zoning are required to do) before proceeding with the application;

(ii) required the District Planning Commission to have a chance to meet and discuss the change with homeowners in the area before the Planning Commission acted (as is required for all other applicants);

(iii) required the District Planning Commission to be fully staffed and capable of informing residents in the area before proceeding (as the statute requires).

(iv) taken the normal amount of time required to process an application, (usually three months), rather than trying to rush it through to decision by the lame-duck Commissioners before they left office;

(v) required written proof by the applicant that he owned the property or had a written power of attorney from all owners before proceeding with the application. (It was only 35 days between the time applicant purchased the property [and thereby had the right to cause it to be rezoned] and the time he supposedly had it rezoned);

(vi) required a policing of the flimsy pieces of paper which were tacked on utility poles to make certain that they were viewable for at least a reasonable part of thirty days and were not torn off by applicant or some other person before the property owners in the area had a chance to see them; and

(vii) required that the affidavit of publication of notice given by the zoning staff be accurate and

truthful.

The general flavor from the attempts of the prior County Commission to do only what they thought the notice statute required, and not one jot or tittle more, and the outright refusal of the new County Commission to permit owners of dwellings in the affected area to present any evidence can lead to only one conclusion — the County Commissioners did not want to be put to the trouble of hearing from owners of dwellings directly affected by their acts; they were perfectly satisfied to follow archaic notice procedures (such as publication of a legal description only and posting on the west steps of the City and County Building miles away from the subject property in the hope that no affected property owner would learn about their intended act and appear to oppose), notwithstanding that civilization and methods of communication have taken great leaps forward and almost everyone today reasonably expects to learn about important happenings via much faster, simpler and easier methods of communication, such as by a letter or by a phone call. Obviously the decision of the prior Commission to destroy a residential neighborhood by the intrusion of a pitifully small commercially zoned spot is much easier to slip through if the owners of dwellings do not learn about it; further, such action then makes it possible for the new Commission to deftly hide from realities and duck their responsibilities to dwelling owners and taxpayers merely by saying to irate owners of homes that no opposition appeared at the so-called hearing, the prior Commission is to blame, and we're sorry — you had

your chance and we can do nothing about it. The flavor of this kind of abdication of the responsibilities of government to the general public when viewed as a whole, can lead to no other conclusion than that both Commissions acted arbitrarily, capriciously, unreasonably and with reckless and wanton disregard of the rights of owners of dwellings to be informed of proposed zoning changes, to be heard impartially and to be treated fairly and forthrightly in keeping with modern times and the comparative ease with which at least adjoining property owners could be told about the proposed change of zoning.

The conclusion is inescapable that each of the Commissions did not really want to be bothered — each wanted to put this commercial island in the middle of a residential area no matter who of the citizens was hurt, and as such the actions of both Commissions cannot stand, being arbitrary, capricious and unreasonable.

(e) The unreasonableness of defendants actions vitiates the legality of the rezoning.

In reviewing legislative acts the Court may properly consider the over-all "reasonableness" of the exercise of power. As stated in *United States v. Abendon*, 24 Philippine Report, 169 (1913):

Although ordinances may not contravene a constitution or statute and may be within the scope of charter powers, yet, if they seem to the court oppressive, unfair, partial or discriminatory they are declared *unreasonable* and void whether this appears from their face or from proof aliunde. (*Elliott Municipal Corporation*, 198-202; *Lakeview v. Tate*, 130 Ill. 247; *Kip v. Peterson*, 26 N.J.L. 298; *Ex parte*

Frank, 52 Cal. 606; Toney v. Macon, 119 Ga. 83; Carrollton v. Bazette, 159 Ill. 284; Mt. Vernon Bank v. Sarlls, 129 Ind. 201; State v. Mahner, 43 La. Ann. 496; Red Star Steamship Co. v. Jersey City, 45 N.J.L. 246.)

Nothing could be more oppressive, unfair, discriminatory and unreasonable than defendants County Commissioners refusal to permit affected home owners the right to present their case before a body supposedly representing their interest. *Cf., Gayland v. Salt Lake County*, 358 P. 2d at 636.

CONCLUSION

Defendants' actions were legally deficient as the notice requirements of the zoning statute were not complied with; viz., there was no posting in a "public place"; at most two, not three, notices were posted, none of the postings was "designed" to give notice; and the contents of the various legal descriptions were inaccurate and insufficient. The aforementioned facts notwithstanding, the notice provision of section 17-27-17 deprived property owners of their constitutional rights of due process. Finally, the arbitrary and capricious acts of the various defendants were violative of their respective duties and therefor invalid.

Respectfully submitted,

K. Jay Holdsworth
J. Randolph Ayre
Fabian & Clendenin
800 Continental Bank Building
Salt Lake City, Utah
*Attorneys for Plaintiffs-
Appellants*