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Jack B. Wood and Shirl W. Hales v. North Salt Lake : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JACK B. WOOD and SHIRL W. HALES,
Plaintiffs-Appellants,

vs.

NORTH SALT LAKE, a municipal corporation,
Defendant-Respondent.

Case No. 9985

BRIEF OF APPELLANTS

Appeal from the Judgment of the Second District Court of Davis County, Honorable Thornley K. Swan, Judge

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BRIEF OF APPELLANTS

STATEMENT OF KIND OF CASE

This is an action brought by the plaintiffs against the defendant for a Writ of Mandamus to compel the defendant to issue to the plaintiffs a building permit which would enable them to build a dwelling house in a subdivision located within the corporate limits of North Salt Lake, Davis County, Utah.

DISPOSITION IN LOWER COURT

The lower court having heard the matter upon stipulated facts, oral argument and written memorandums of authority from both sides, entered judgment denying plaintiffs' application for a Writ of Mandamus and ordered the dismissal of plaintiffs' complaint.

RELIEF SOUGHT ON APPEAL

Plaintiffs-Appellants seek a reversal of the trial court's decision and the issuance of a Writ of Mandamus to compel the defendant-respondent to issue to the plaintiffs a building permit to build a dwelling house in Paul Subdivision, North Salt Lake, Davis County, Utah.

STATEMENT OF FACTS

A tract of land located in North Salt Lake, a municipal corporation, Davis County, Utah, was subdivided into lots and streets in 1955. The subdivision consisted of 106 lots, and was named Paul Subdivision. Thereafter the town of North Salt Lake approved the subdivision and the plat was duly recorded in the office of the Davis County Recorder on the 18th day of October, 1955, as Entry No. 150887, Book "P" of "L&L" at page 231. The lot sizes are 60 feet by 100 feet and 61 feet by 100 feet. This lot size complied with the zoning requirements of North Salt Lake in force in 1955. Title to the various lots located in Paul Sub-

division was transferred to the Modern Housing Corporation, a Utah corporation, who undertook to build a number of houses and do the necessary improvement work required such as streets, gutters and water. Exhibit "A" indicates the areas of Paul Subdivision which were developed and the areas in which nothing was done in the way of development, except to run the water mains in the proposed streets and provide connection tees in front of all the lots. In addition, water connection fees were paid to North Salt Lake for 26 of the undeveloped lots. To date the connection fees have not been refunded to either the Modern Housing Corporation or the plaintiffs-appellants. The sewer came into existence after the subdividing of the land and the building of homes in the developed portion of the subdivision, and a connecting tee was installed at the end of the completed street so that the sewer could be extended into the undeveloped area of the subdivision.

On August 6, 1957, North Salt Lake enacted an amended zoning ordinance which effected and encompassed Paul Subdivision. Paul Subdivision was classed in what is known as Zone "R-S", for residential and suburban use. This classification provides that any building lot in this classification must contain a minimum of 7,000 square feet, or in other words rectangular lot sizes of 70 feet by 100 feet or 60 feet by 110 feet.

All of the lots in Paul Subdivision fail to meet this size requirement, but do comply with the zoning requirements in all other particulars.

At the time of the passage of the amended ordinance no sewer lines were available in the general area of North Salt Lake and all homes were on septic tanks. Several years later the sewer system was financed and constructed and made available to Paul Subdivision.

In January of 1963 the plaintiffs purchased from Modern Housing Corporation Lots 15 through 19, 74 through 79, and 90 through 95. Subsequently they applied for a building permit to build a residential house on Lot 90 from North Salt Lake. This application was denied and thereupon plaintiffs filed a petition for review with the Board of Adjustment of North Salt Lake. A hearing on this petition was had on February 25, 1963, and on the 9th day of March, 1963, the board notified the plaintiffs that the petition was denied, however no findings of fact were prepared as required by Section 2-10-5 and Section 2-10-11 (2) of the Comprehensive Zoning Ordinance of North Salt Lake. Thereafter, on March 13, 1963, an action for a Writ of Mandamus was filed with the Davis County Clerk's Office, the denial and dismissal of which is the basis of this appeal. Attached hereto and marked Annex "A" are the sections of the Zoning Ordinance deemed pertinent to this law suit. Ordinance 1-11 as it appears in Annex A attached hereto is exactly as it is in the official original ordinance as enacted. In the stipulated facts the ending words "in Section —" were omitted by mistake.

ARGUMENT

POINT I

THE REFUSAL BY NORTH SALT LAKE TO ISSUE A BUILDING PERMIT AND THE TRIAL COURT'S REFUSAL TO GRANT A WRIT OF MANDAMUS HAS DEPRIVED PLAINTIFFS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW OR JUST COMPENSATION.

Paul Subdivision as originally platted provided for lots having a rectangular size of 60 feet by 100 feet and 61 feet by 100 feet. Under the amended zoning law, which provides for 7,000 square feet, the lots would have to be changed to a rectangular size of either 70 feet by 100 feet or 60 feet by 110 feet. An examination of the plat map, marked Exhibit "A," shows that the lots could not be replatted to provide a size of 60 feet by 110 feet without relocating the existing dedicated streets in some portion of the subdivision.

Title to the streets in Paul Subdivision has vested in North Salt Lake by operation of law, specifically Section 57-5-4, Utah Code Annotated, 1953, and therefore these plaintiffs or the Modern Housing Corporation are powerless to replat Paul Subdivision in any way which would encroach upon the existing dedicated street locations. North Salt Lake alone can accomplish this and this must be done in the manner provided by the statutes. Hall v. North Ogden City, 109 U. 304, 166 P.2d 221. Assuming that North Salt Lake

attempted to move the street locations by abandonment of the existing dedicated streets, still other property owners in the area have acquired vested rights by reason of the creation of a private easement. As stated in the Utah case of Boskovich v. Midvale City Corp., 121 U. 445, 243 P.2d 435:

> "We have held * * * that if the dedicated streets of a subdivision are laid out and right to the use thereof has arisen, a private easement arises therein which constitutes a vested proprietary interest in the owners, which easement survives extinguishment of any co-existing public easement calling for just compensation."

The relocation of the streets is further complicated by the fact that the water mains have been laid in the streets and the water district has acquired an easement or right-of-way over the land which cannot be removed without its permission. White v. Salt Lake City, 121 U. 134, 239 P.2d 210.

The zoning ordinance prohibits streets narrower than those presently platted, therefore the streets could not be narrowed to provide the necessary footage to bring the lot size up to 7,000 square feet.

The only other solution to the replatting problem would be to resurvey the lots to a size of 70 feet by 100 feet. This would require the elimination of one lot for every six lots increased in size. This however would create problems of cost in the water connections as the existing tees are located for the shortest distance to the proposed location of the house. A relocation would

necessitate a longer connection pipe and the use of an angle fitting at the main water line. This additional cost, the cost of resurveying and platting and the value of the lost lot, would have to be borne by the plaintiffs. This procedure would constitute a taking and a depriving of property without compensation or due process of law. Boskovich v. Midvale City Corporation, 121 U. 445, 243 P.2d 435.

POINT II

THE AMENDED ZONING ORDINANCES CONSTITUTE A LAW WHICH ABROGATES A BINDING CONTRACT UNDER THE INTERPRETATION GIVEN IT BY THE TRIAL COURT.

Upon the approval of the Paul Subdivision by the Town of North Salt Lake, and the recordation of the plat as required by 57-5-3, Utah Code Annotated, 1953, as amended, the plaintiffs' predecessors irrevocably dedicated the land set aside as streets to North Salt Lake. 16 Am. Jur. 410, Dedication, Sec. 64. For this dedication and in consideration thereof, the Town of North Salt Lake granted to the plaintiffs' predecessors the right to sell and build upon the lots so subdivided as shown on the recorded plat. This action on the part of North Salt Lake and the plaintiffs' predecessors created a binding contract which is enforceable. North Salt Lake cannot disallow the contract on the theory that it did not accept the dedication of the land upon

which streets were to be constructed as no formal acceptance is required. Sowadzki v. Salt Lake County, 36 U. 127, 104 P. 111.

To attempt to impair this contract by the subsequent passage of a new zoning ordinance is to violate the constitutional guarantees against such impairment. Article I, Section 10, Constitution of the United States, Article 1, Section 18, Constitution of Utah. In State v. Tedesco, 4 U.2d 31, 286 P.2d 785, 789, the Utah high court said:

> "It is only when 'property' is created by contract, as in the case of a franchise or a lease, that the protection of the constitution can be invoked."

The town of North Salt Lake had the right to accept or reject the plat of Paul Subdivision and when it elected to accept it and to take title to the land upon which roads were to be built, it entered into a binding agreement to permit the development of the subdivision as platted on the recorded instrument. To deny this right to the plaintiffs is to abrogate this contract.

Defendant has made no effort to restore to plaintiffs or to their predecessors in interest the property which defendant took title to, or the water connection fees paid to it. Further the defendant has failed to take any steps to revoke the approval of Paul Subdivision as originally platted and recorded. Therefore, the defendant is estopped to plead a rescission of the contract by its failure to restore the plaintiffs to their original position.

POINT III

THE NORTH SALT LAKE ZONING ORDINANCE SPECIFICALLY EXEMPTS NONCONFORMING USES FROM THE PURVIEW OF THE AMENDED ZONING ORDINANCE.

Attached hereto as Annex "A" are the applicable zoning ordinances. It is interesting to note in Section 1-11 that no restrictions are enumerated. In the actual official zoning ordinance the last line of 1-11 reads, "and any nonconforming building lot may be used for any lawful use set forth in the regulations for the zone in which it is located subject to the restrictions set forth in Section—." The dash appears in ink; the rest of the ordinance is typewritten except for the numeral 8, which likewise is in ink. This specifically shows that it was the intent of the zoning board and of the Town Council in adopting this particular ordinance to exempt from its purview any restrictions in any of the other revised zoning ordinances, and specifically 8-5 and 8-6 of the said ordinances.

POINT IV

THE TOWN ORDINANCES RELIED UPON BY DEFENDANT AND THE TRIAL COURT ARE NOT APPLICABLE OR IF APPLICABLE ARE UNCONSTITUTIONAL AND CONTRARY TO STATUTORY LAW.

Defendant relied upon certain ordinances upon which is based its contention that the plaintiffs had waived their rights to claim a nonconforming use. These ordinances are 8-2 and 8-6 set out in Annex A to this brief.

A careful reading of 8-2 shows that this nonconforming use ordinance is for buildings, signs or other structures located upon land. Land itself is not the subject of the ordinance. 8-2 sets forth that registration by affidavit of a nonconforming use shall be by: (1) "The owner of the land *upon which* a nonconforming use *is located*"; (2) the owner of the "structure and structures *in which* a nonconforming use *is located*"; (3) and "the owner of land *on which* a nonconforming use *is located.*" (Emphasis ours.)

The court in its Conclusions of Law holds in effect that if all of the homes were not built upon all unimproved lots in this subdivision within one year from the enactment of the revised zoning ordinance then the rights under the subdivision plat were abandoned. To so hold is to deprive one of his property rights arbitrarily and without due process of law. Such an ordinance is unconstitutional and contrary to state law.

Section 10-9-6, Utah Code Annotated, 1953, states inter alia:

> ". . . that the powers by this article given shall not be exercised so as to deprive the owner of any property of its use for the purpose to which it is then lawfully devoted."

Upon the subdividing of the lots comprising Paul Subdivision and the acceptance of the plat and the recording of it in accordance with the laws of the State of Utah, this property was put to a lawful use. Nothing more needed to be done. Whether there was a house on the property was immaterial, the lot size had been established and nothing short of replatting could change it.

The amended zoning ordinances do not change the type or the size of the building, but limit the lot size. However, once the lot size has been created and accepted by the town in conformance with the existing zoning laws, the town cannot later say that the lot, by reason of its size, can no longer be permitted. It is submitted that the town could say what size of house or type of business could be put on the lot, but could not limit the size of the lot once that lot size has been created under the official sanction of the town. So far as the lot size is concerned the rights of the parties became vested upon the approval of the lot size by the acceptance of the subdivision plat.

CONCLUSION

It is respectfully submitted that the trial court erred in refusing to grant plaintiffs a Writ of Mandamus to compel the City of North Salt Lake to issue to plaintiffs a building permit to build a dwelling house on Lot 90, Paul Subdivision, and that the trial court's failure to grant plaintiffs their relief has operated to deprive

plaintiffs of their constitutional rights and property without just compensation or due process of law.

Respectfully submitted,

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ANNEX A

ZONING ORDINANCES
NORTH SALT LAKE

1-11. *Nonconforming Building Lots, Buildings and Uses.* The lawful use of any building, structure, or land existing at the time of the adoption of this ordinance may be continued subject to all of the provisions of Chapter 8 though such building or use does not conform to the regulations of the zone in which it is located, and any nonconforming building lot may be used for any lawful use set forth in the regulations for the zone in which it is located subject to the restrictions set forth in Section —.

8-2. *Continuation of Nonconforming Uses and Signs.* Subject to all limitations herein set forth, the operation of a nonconforming use and the maintenance of a nonconforming sign may be continued after the effective date of this ordinance. On or before January 1, 1958, or January 1st of any following year, following the effective date of this ordinance or of any amendment hereto by which the use or sign became nonconforming, the owner or owners of both the land on which a nonconforming use is located, and the structure or structures in which a nonconforming use is located, and the owner of land on which a nonconforming use is located shall register such nonconforming use or sign by filing with the Zoning Administrator a registration statement for such nonconforming use or sign, which shall include a notarized affidavit setting forth the time that such use or sign came into existence, the size of the sign and the size and extent of the nonconforming use existing on the effective date of this ordinance. The Zoning Administrator shall preserve such statements and affidavits and on the basis of such documents and upon the approval of the Planning Commission, certificates of occupancy

shall be issued for each nonconforming use, one copy of which shall be sent to the owner of the nonconforming use or sign, one copy to the license assessor, and one copy shall be retained in the file of the Zoning Administrator. Permits for nonconforming signs shall be issued by the Zoning Administrator as if application for permits for new signs were made. A careful record of such signs shall be maintained by the Zoning Administrator.

8-6. *Termination of Nonconforming Uses and Signs.* (1) BY ABANDONMENT. A nonconforming use of a building or a nonconforming use of land or a nonconforming sign which has been abandoned shall not thereafter be returned to such nonconforming use. A nonconforming use or sign shall be considered abandoned (a) when the characteristic equipment and the furnishings of the nonconforming use have been removed and have not been replaced by similar equipment within one year, (b) when the nonconforming sign has been removed, (c) when the building or premises occupied by a nonconforming use are left vacant for a period of one (1) year or more, (d) when the use or sign has been replaced by a conforming use, (e) when the use or signs has been replaced by a use which is not conforming to the provisions of the zone in which it is located, (while the changing of a nonconforming use or sign to a not conforming or illegal use does terminate the right to continue such nonconforming use, the replacement use shall not be permitted to be operated), (f) when the intent of the owner to discontinue the use is apparent as evidenced by his failure to register a nonconforming use of land or structure which was not in operation on the effective date of this ordinance, or a nonconforming sign in the manner and within the time required by this chapter.