

1964

W. J. Lund, Willard E. Knibbee et al v. Cottonwood Meadows Company et al : Brief of Respondent

Utah Supreme Court

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APR 16 1964

IN THE SUPREME COURT OF THE STATE OF UTAH

V. J. LUND, WILLARD E. KNIBBEE,
ERNE A. POULSEN and EVAN W.
HANSEN, representing a Class of Persons
residing and owning real property in Cot-
tonwood Heights, Salt Lake County, Utah,
Plaintiffs-Appellants,

vs.

COTTONWOOD MEADOWS COMPANY, a
partnership consisting of W. ALLEN PEL-
TON, and Others unknown, also SALT
LAKE COUNTY, a Political Subdivision
of the State of Utah, and PERSYL RICH-
ARDSON, Director of the Salt Lake Coun-
ty Building and Zoning Inspection Dept.,
Defendants-Respondents.

Case No.
10015

BRIEF OF RESPONDENT COTTONWOOD MEADOWS COMPANY

Appeal from a Summary Judgment Rendered Against
the Appellants by the Honorable Stewart M. Hanson,
Judge of the Third District Court in and for
Salt Lake County, State of Utah

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Case No.
10015

BRIEF OF RESPONDENT COTTONWOOD MEADOWS COMPANY

STATEMENT OF NATURE OF CASE

Respondent adopts appellants' Statement of the Na-
ture of the Case.

DISPOSITION OF LOWER COURT

Respondent adopts the appellants' statement of the
Disposition in the Lower Court.

RELIEF SOUGHT ON APPEAL

Respondent is seeking affirmance of the judgment
granted by the Third District Court in and for Salt Lake
County, Utah, awarding summary judgment in favor of
Defendants-Respondents.

STATEMENT OF MATERIAL FACTS

Respondent finds the Statement of Material Facts in Appellants' Brief so incomplete that we set forth herein our own Statement of Material Facts, arranged in the sequence to fit not only the chronological happenings but the arguments of our own brief.

Defendant-Respondent Cottonwood Meadows Company, hereinafter referred to throughout this brief as "Respondent", entered into an earnest money agreement on January 12, 1962 to purchase certain lands hereinafter referred to as "Cottowood Meadows Estates." (R. 35) Prior to the execution of the earnest money receipt on January 12, 1962, Respondent ascertained from the Salt Lake County Planning Commission that the applicable zoning ordinances then in effect permitted construction of a mobile home park on said premises, which were then classified as Agricultural Zone A-2. (R. 36) On January 30, 1962 Evan W. Hansen, one of the plaintiffs herein, filed a written application to change the area from a classification of Agricultural Zone A-2 which permitted trailer courts, to Residential Zone S-1A, which did not permit same. (R. 106) One of the reasons for the request to amend the zoning from A-2 to S-1A was to stop a mobile home park from being built. (R. 107) On February 8, 1962, Respondent completed the earnest money agreement by purchasing said Cottonwood Meadows Estates and taking formal assignment of a Uniform Real Estate Contract. (R. 36) As of July 1, 1963, Respondent had actually paid for the purchase of said premises the sum of \$44,491.41. (R. 26) On March 5 Respondent engaged engineers to prepare plans and to do the required engineering work in order to make application for a building permit. (R. 36-7) On March 27 Respondent made application for a building permit for said mobile home trailer park (R. 37), and paid the building permit fee on April 3, 1962. On April 10, 1962, the subdivision committee of the Planning Commission gave approval to the general lay-out for the mobile home park. (R. 105) The plans were approved by the Planning Commission on April 24, 1962, with the condition

that an alternate plan be submitted changing the mobile home spaces, and the set-backs to conform to the zoning and mobile home park ordinances. (R. 108) *The staff* of the Planning Commission was opposed to permitting a mobile home park in the Cottonwood Meadows Estates (R. 108) but the *Planning Commission* was never reluctant in planning the mobile home park and actually approved it on April 24, 1963. (R. 87 and R. 108)

Pursuant to requirements of section 5-4-7 of the Salt Lake County mobile home park ordinance Respondent was required to, and did, dedicate a portion of its property for street purposes as a condition to the issuance of the building permit. (R. 37) Salt Lake County on April 25, 1962, adopted an amendment to its zoning ordinances changing the classification of the area herein involved from Agricultural Zone A-2 to Residential Zone S-1A, which amendments became effective on May 10, 1962. (R. 37 and R. 110-111) On June 12, 1962, the Planning Director signed the plan for the mobile home park, dating it back to the time when it was approved by the Planning Commission, April 10, 1962. On June 12, 1962, there was nothing of an administrative nature remaining to be done by the Planning Commission before issuance of the building permit. (R. 108) A letter was written by the Salt Lake County Planning Commission to the County Attorney asking whether a building permit should be issued. (R. 87) Under date of June 8, 1962, four days before the Planning Director actually signed the plan for the mobile home park, the County Attorney by written inter-office memo to Doug Campbell, Planning Commission, answered this inquiry by stating "that the Planning Commission should sign and approve the plat and the building and zoning inspection department should issue the building permit." (Exhibit D-4) The County Attorney's inter-office memo recites that the above conclusion is based upon the following facts:

"Application was made for the building permit and fees tendered and the plat filed with your

offices. Changes in the engineering were necessary requiring amended plats at various times, each one at the request of your office. In the interim, the Planning Commission approved the park subject to some further changes being made in the plat to the satisfaction of the subcommittee. Prior to this satisfaction, the zoning ordinances was changed prohibiting such parks in this area.

“It would appear that all that remained to be done were basically ministerial acts, that all of the requirements of the ordinances had been met by the applicants except making requested changes in the plat. This would appear to be similar to the interim between preliminary approval and final approval of a subdivision where the preliminary approval is the key date subject to the making of any required changes in the plat.”
(Exhibit D-4)

On September 10, 1962, the building permit was issued to Respondent for the mobile home park, which is now substantially built. (R. 28) But for the changes required by the Salt Lake County Planning Commission the building permit would have been issued prior to the purported zoning change. (R. 37)

The area involved in this action is a more or less wooded area. (R. 99) No particular physical change occurred in the neighborhood in the year 1962. (R. 106) Nothing occurred up to August 29, 1963 to change the neighborhood from an agricultural classification to something else. (R. 107) The reason given by the applicants for the zoning change from A-2 to S-1A in January, 1962 was that applicants wanted to stop a certain mobile park from coming in. (R. 107) The Director of the Salt Lake County Zoning Department of the Planning Commission, Mr. Ralph McClure, testified that the application for the zoning amendment filed on January 30, 1962, specifically referred to the fact that the subject area was originally classified agricultural because of the desire of

property owners to maintain the area as agricultural to be used for farming and raising and grazing of farm animals. (R. 110) Mr. McClure further testified the area still remains substantially agricultural today. (R. 110)

When Salt Lake County was considering the adoption of the general Mobile Home Park Ordinance in March of 1961, they also considered a recommendation made by the staff that would have deleted mobile home parks from the permitted uses in an Agricultural Zone A-2. However, this was not adopted pursuant to that recommendation. (R. 111-112) The area was rezoned effective May 10, 1962 from Zone A-2 to S-1A. Some time much later than this Salt Lake County amended the permitted uses in an agricultural Zone A-2 by deleting the right to have a trailer court therein. (R. 112)

Plaintiffs Lund, Knibbee, Poulsen and Hansen filed their complaint as representatives of a class of persons residing and owning real property in Cottonwood Heights, Salt Lake County. (R. 1) Plaintiff-Appellant Hansen had personal knowledge that a building permit had been issued to Respondent for the construction of a mobile home park, and said Hansen acquired this knowledge at about the time of the issuance of the permit, which was issued on September 10, 1962. (R. 137)

On January 11, 1963, Respondent made an offer to purchase the Bayou Country Club property, which offer was accepted by the Receiver in Civil Case No. 136319, Third Judicial District, on or about the 20th of January, 1963, and confirmed by the Court on February 6, 1963. (R. 39) The Bayou Country Club property is contiguous to the Cottonwood Meadows Estates and contains club house facilities, and a swimming pool; Defendant purchased this property for a total purchase price of \$112,500.00 for use in connection with the proposed mobile home park in order to enhance its attractiveness for business purposes. (R. 38) Respondent would not have made this purchase except for the contemplated utility to the mobile home park. (R. 39)

This pending lawsuit was commenced by plaintiffs on February 21, 1963. (R. 39)

Salt Lake County and Persyl Richardson, Director of the Salt Lake County Building and Zoning Inspection Departments, Defendants and Respondents herein, by their answer filed in the lower court on June 26, 1963, assert that the building permit was legally and properly issued to Respondent Cottonwood Meadows Company on September 10, 1962, which permit has never been revoked or cancelled. (R. 33)

In addition to the "Uniform Zoning Ordinances of Salt Lake County" (Exhibit D-3) which are quoted from in Appellants' "Statement of Material Facts," Respondent calls attention to the Mobile Home Park Ordinance of Salt Lake County (Exhibit D-1) adopted on September 6, 1961. This ordinance provides in part as follows:

"5-4-2: DEFINITIONS.

* * *

"(b) 'Mobile home' means any vehicle or similar portable structure having been constructed with wheels (whether or not such wheels have been removed) and having no foundation other than wheels, jacks or skirtings and so designed or constructed as to permit occupancy for dwelling or sleeping purposes.

"(c) 'Mobile home park' means any plot of ground upon which two or more mobile homes, occupied for dwelling or sleeping purposes, are located, regardless of whether or not a charge is made for such accommodation.

* * *

"5-4-3: LICENSE; TEMPORARY PERMIT.

(a) It shall be unlawful for any person to maintain or operate a mobile home park within the limits of Salt Lake County, Utah, unless such

person shall first obtain a license, and permit, except that:

* * *

"5-4-5: APPLICANT FOR PERMIT

(a) Before an application for a Mobile Home Park permit can be filed, plans and specification therefor shall be submitted to the Salt Lake County Planning Commission for its investigation and approval. (Four (4) B & W prints of the proposed park shall be filed on paper not smaller than 17 x 22 inches and shall include the following:

- (1) The name and address of the applicant.
- (2) The location and legal description of the Mobile Home Park.
- (3) Finish contour lines at one foot intervals.
- (4) Location of all existing public streets within two hundred (200) feet of the proposed park.
- (5) The number, size, location, and type of all Mobile Home spaces.
- (6) The location, size, and specifications for construction of roadways and walkways.
- (7) Plans and specifications of all buildings, improvements, and facilities to be constructed within the Mobile Home Park.
- (8) The location and size of all public utility lines within the Mobile Home Park.
- (9) Such further information as required by this Ordinance or that may be required by the Salt Lake County Planning Commission to enable it to determine if the proposed park will comply with legal requirements.

* * *

"5-4-6: LOCATION

"Location of mobile home parks shall be regulated by the Zoning Ordinance of Salt Lake County. Where any boundary of a park directly abuts property which is improved with a permanent residential building or directly abuts unimproved property which may under existing laws and regulations be used for permanent residential construction, a six(6) foot high fence, wall, or hedge properly related to surrounding topography and the character of the surrounding development shall be provided along such boundary.

"5-4-7: STREET DEDICATION

"The developer of the mobile home park shall be required to dedicate and improve to county standards all streets within the proposed mobile home park that are determined by the County Planning Commission necessary to provide adequate neighborhood circulation.

* * *

"5-4-9: MINIMUM MOBILE HOME PARK AREA

"The minimum area for any Mobile Home Park shall be five (5) acres.

"5-4-10: MOBILE HOME PARK PLAN

"The mobile home park shall conform to the following requirements:

"(a) The park shall be located on a well-drained site, properly graded to insure rapid drainage and free from stagnant pools of water.

"(b) Each park shall provide mobile home spaces, and each such space shall be clearly defined or delineated. Each space shall have an area of not less than 3,000 square feet exclusive

of streets and sidewalks and a width of not less than 40 feet.

“(c) Mobile homes shall be so located on each space so that there shall be at least a 15 foot clearance between mobile homes, provided, however, that with respect to mobile homes parked end-to-end, the end-to-end clearance may be less than 15 feet but shall be not less than 10 feet. No mobile home shall be located closer than 15 feet to any building within the park or to any property line of the park which ~~does not abut~~ ^e upon a public street or highway. No mobile home shall be located closer to any property line of the park abutting upon a public street or highway than 25 feet or such other distance as may be established by ordinance or regulation as front yard set-back requirement with respect to conventional buildings in the zoning district in which the mobile home park is located.

“(d) All mobile home spaces shall abut upon a driveway street. Driveway streets within the mobile home park shall be continuous wherever reasonably possible; where it is necessary to provide a driveway street that is not continuous adequate paved vehicular turning space shall be provided at the closed end thereof.

“(e) Walkways constructed of asphalt or concrete not less than two feet wide shall be provided from the mobile home spaces to the service buildings.

“(f) All driveway streets and walkways within the park shall be hard surfaced and lighted from sunset to sunrise with lamps of not less than 100 watts each, spaced at intervals of not more than 100 feet.

“(g) Each park shall provide service buildings to house such toilet, bathing and other sani-

tation facilities as are hereinafter more particularly prescribed.

“(h) An electrical outlet supplying at least 100-115 volts, 50 amperes shall be provided for each mobile home space.

“(i) Sufficient parking space shall be provided for the parking of at least one motor vehicle upon each mobile home space.

“(j) Mobile home pads shall be not less than 10 ft. by 40 ft. and constructed of concrete at least four (4”) inches thick.”

“5-4-11: WATER SUPPLY”

(Pure drinking water and adequate hot water must be available at all times.)

“5-4-12: SANITATION FACILITIES”

(Toilets, urinals, showers, or tub baths must be available.)

“5-4-13: SERVICE BUILDINGS”

(Well lighted, screened, and ventilated service buildings to house sanitation facilities must be provided.)

“5-4-14: SEWAGE AND REFUGE DISPOSAL”

(Waste from showers, tubs, toilets, urinals, lavatories and slop sinks must be discharged into public sewer system.)

“5-4-15: GARBAGE RECEPTACLES”

(Sanitary garbage cans must be available in adequate numbers to permit disposal of all garbage and rubbish ,and must be collected at least twice a week.)

“5-4-16: INSECT AND RODENT CONTROL”

(All harborage places for rodents, etc., shall be eliminated or effectively treated.)

“5-4-17: FIRE PROTECTION”

(Adequate fire extinguishing equipment, properly located to assure proper fire protection must be available at all times.)

“5-4-18: SUPERVISION”

(A duly authorized attendant or caretaker shall be in charge at all times to assure clean orderly and sanitary condition.)

* * *

“5-4-20: BUILDING INSPECTOR TO ENFORCE

* * *

“That all ordinances or parts or ordinances in conflict herewith are repealed.

* * *”

POINT I

THE TRIAL COURT WAS CORRECT IN FINDING THAT APPELLANTS FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDY.

Respondent has quoted at length from the Mobile Home Park Ordinance so that this Court will have a true perspective of the nature of the trailer court here involved. Obviously it is not a “sheepherders camp” or a “cattle camp” as suggested by appellants in their brief.

The building permit authorizing the construction of a mobile home park on the subject lands was formally issued to the Respondents on September 10, 1962. No appeal of any kind was ever filed by any of the appellants requesting a review of the issuance of the building permit. This lawsuit was commenced by the plaintiffs on February 21, 1963. Appellants in their argument under Point I of their brief lay great stress on certain permissive language appearing in Section 17-27-16, Utah Code Annotated, 1953. They have italicized the language showing that an appeal to the Board of Adjustment

“may be taken” by any person aggrieved * * * by a decision of any administrative officer * * * made in the course of the administration or enforcement of the provisions of the zoning resolution. The key language in this section of the Code which is mandatory was completely overlooked by appellants. The sentence of Section 17-27-16 overlooked by appellants provides

“the time within which such appeal *must be made* and the form or other procedure relating thereto *shall be* as specified in the general rules provided in writing by the Board of County Commissioners.”

The Board of County Commissioners have adopted a regulation which is in evidence in this case which again, using mandatory language, provides that an appeal to the Board of Adjustment *must* be taken within ninety days after the cause arises.

Thus, the real crucial question before this Court is whether the Appellants are persons aggrieved by a decision of an administrative officer made in the course of the administration of the zoning resolution. There can be no doubt that the issuance of a building permit involves a decision by an administrative officer in the course of the administration of the zoning resolution. Appellants argue that they are not “persons aggrieved.” Appellants quote from Webster’s International Dictionary, which defines “aggrieved” as follows: “adversely affected in respect of legal rights; suffering from an infringement or denial of legal rights.” They then take the position that they are not aggrieved by any action because the action was not taken directly against them. However, the whole gist of Appellant’s lawsuit is that they have been injured and adversely affected in respect of their legal rights by the issuance of the building permit. Why else are Appellants involved in this lawsuit except the fact that they believe they have been adversely affected by the issuance of the building permit. From

their standpoint, to argue that they are not adversely affected is to approach the ridiculous.

Appellants had timely knowledge of the fact that a building permit had been issued as Appellant Hansen, who represents a class of persons residing and owning real property in Salt Lake County, personally knew about the issuance of the building permit around September 10, 1962.

In considering the doctrine of exhaustion of administrative remedies, courts almost invariably make a distinction between a situation where the Appellant challenges in its entirety the validity of a zoning ordinance and a situation where the Appellant is simply challenging the propriety of administrative action taken by administrative personnel and in which the ordinance itself is not under attack. Most courts say that if the challenges are to the entire ordinance there may not be the same basic reasons for requiring exhaustion of administrative remedies where the appeals body who would hear and make the administrative review would simply be reviewing their own adoption of the ordinance. However, it seems that almost without exception where the challenge in the courts is made, not upon the validity of the ordinance, but upon administrative action such as the issuance of a building permit, that the applicant must exhaust his administrative remedies as provided and authorized by law before a court will grant relief. That is precisely the situation before this Court in the subject case. The challenge is entirely one related to administrative action taken by administrative personnel of the county. The entire reason for the rule requiring the exhaustion of administrative remedies is thus applicable to the facts of this case.

The mandatory language of the Utah statute which requires that the appeal *must be* taken pursuant to the time deadline set forth in the regulation adopted by the County recognizes and, in fact, puts Utah in that group of states which has actually codified the rule that the

administrative remedy must be exhausted before resort may be taken to the courts.

In the face of the mandatory language in Section 17-27-16, U.C.A., 1953, and the mandatory language of the County ordinance requiring the exhaustion of the administrative remedy, the construction which Appellants have placed upon Section 17-27-23, U.C.A., 1953, would, in effect, nullify the provisions of Section 16, and the ordinance adopted thereunder. To adopt the construction requested by Appellants in their brief would mean that the court would have to ignore completely the mandatory provisions of Section 16. It is a fundamental rule of statutory construction that whenever possible, construction be placed upon each section of a statute which would make each section operative. This can be done by simply construing Section 16 as being mandatory and Section 23 as being declarative of the common law right to take the matter to court after exhaustion of the statutory administrative remedy. *Provo City v. Claudin*, 63 P. 2d 570. Any other construction of Sections 16 and 23 would result in a conflict between the two sections of the same law.

Under Appellants' theory with respect to Section 17-27-23, Utah Code Annotated 1953, appellants would have their election whether to take an administrative appeal or whether to commence an independent action in the courts. If they made their election to forego the administrative appeal, under their theory they would be entitled to file their suit in the District Court under Section 23 at any time within the applicable general statute of limitations. This could mean that the holder of a building permit from the county would not be in a position to commence construction with complete safety until the statute of limitations had run. Let us take the facts of this case for purposes of illustration. If Appellants are correct, they would have until the exhaustion of the general statute of limitations before they would necessarily have needed to commence the present suit to revoke the building permit which was

issued on September 10, 1962. By the very terms of the building permits issued by Salt Lake County, they expire themselves if construction is not commenced within one year from the date of issuance. A nervous builder might have to choose between commencing construction before the permit expires or awaiting the tolling of the general statute of limitations, at which time, not having a valid permit in effect, he would have to re-apply for one and start all over on the same merry-go-round. This construction of section 23 would make it impossible for building and construction entrepreneurs to proceed without the risk of a court case upsetting their plans after having made heavy investments.

If we assume, on the other hand, that Respondent's position is correct, then anyone desiring to contest the issuance of a building permit would have to do so within ninety days. If no contest is filed within the ninety days, then the entrepreneur could proceed with full safety that no remedy would be available at a later date to upset his expenditure of funds in the construction of the enterprise. In order to make the zoning and building laws workable from the standpoint of the public at large, we submit that the only construction which can work with fairness to all concerned is to require any aggrieved parties to exhaust their administrative remedies as provided in the ordinance, to-wit: within ninety days, rather than allowing them the full time permitted by the general statute of limitations within which to commence an original action in court.

For a case that gives an exhaustive discussion of the whole theory back of the rule that one must exhaust one's administrative remedies before resorting to the courts, see *Abelleira v. District Court of Appeals*, 109 P. 2d 942. In this case there is a complete review of the doctrine of exhaustion of administrative remedies including the conclusion of the court that relief must be sought from the administrative body and this remedy exhausted before the courts will act where an administrative remedy is provided by statute. In fact, the court

held that no one is entitled to judicial relief for an imposed or threatened injury until the prescribed administrative remedy has been exhausted.

For a Utah case in which the litigants exhausted their administrative remedy and then appealed to the courts, see *Walton v. Tracy Loan and Trust Company*, 92 P. 2d 724. This case involved a supposed violation of zoning ordinances. It was unnecessary to discuss the doctrine of administrative remedies in this case simply because Walton followed the prescribed statutory administrative steps and then appealed to the courts, where he was successful in reversing the adverse administrative rulings.

To the same effect, see *Cliff v. Bilett*, 241 P. 2d 437, decided in 1952 by the Colorado Supreme Court; *Metcalf v. Los Angeles County*, 148 P. 2d 645.

Appellants in their research found one case so completely identical to the ordinances, statutes and the general factual situation present in this case that we feel compelled to set forth the case in some detail. We refer to *Rosenthal v. City of Dallas*, 211 S.W. 2d, 279. In this case the state statute provided:

“Appeals to the Board of Adjustment may be taken by any person aggrieved or by any officer department, board or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time as provided by the rules of the Board by filing with the officer from whom the appeal is taken and with the board.”

Another section of the same statute provided:

“In case any building or structure is erected, reconstructed, altered, repaired, converted or maintained or any building, structure or land is used in violation of this act, or of any ordinance

or other regulation made under authority conferred hereby, the proper local authorities of the municipality in addition to other remedies may institute any appropriate action or proceedings to prevent such unlawful erection, construction, etc."

This case was brought by the City of Dallas charging the defendant with violation of zoning ordinances and maintaining a public and private nuisance. A building permit had been issued by the proper administrative officer. Subsequent thereto notices were sent to the Respondent advising him to stop work on the project because the permit was issued in error. This notice to quit, however, was many months after the original issuance of the permit and after start of actual construction was well under way. The court at page 293 said:

"In the instant case the permit issued to appellant for operation of a cold storage plant including meat curing, was based on a specific finding of the evidence of a nonconforming use by the building inspector who is charged with the duty of enforcing this ordinance, from which no appeal was prosecuted by either *city officials or interested individuals*. In my opinion the action of the building inspector became in a sense *res judicata*."

The opinion continues by quoting from a Texas Law Review article by Professor Davis as follows:

"To some extent this theory of direct and collateral attack has been carried over into administrative law. The theory is that a party who fails to make a direct attack on an administrative order is barred by *res judicata* from making a collateral attack except when the order is void on account of such a reason as fraud, lack of jurisdiction, or denial of a fair hearing."

The decision continues by further quoting from *Bassett on Zoning* at page 106, as follows:

“Where a building department, through an employee, has issued a permit for a nonconforming building and construction has proceeded and no appeal to the Board of Appeals has been taken by neighbors, a permit will not be revoked.”

In summary, the Texas appellate court held that in the face of no appeal having been taken by the city from the original issuance of the permit, that the permit holder acquired a vested property right in the permit and that the attempted revocation, even though by the city itself, was arbitrary and unreasonable. The City of Dallas was estopped from any further action to enjoin the building project despite the statutory language which provided that *in addition to other remedies* the city might institute appropriate action or proceedings to prevent unlawful erection, construction, etc. (It is interesting to note that what was originally shown as the dissenting opinion of Justice Looney, from which these quotes have been made, by virtue of the Chief Justice changing his opinion, apparently on rehearing, actually became the prevailing opinion of the court. See the last sentence of the concurring opinion of the Chief Justice.)

Had an administrative appeal been taken by the Appellants as provided by state statute and by Salt Lake County ordinance, a complete record could have been made with respect to all of the administrative detail which preceded the issuance of the building permit. For example, there is evidence in this abbreviated record that the subordinate administrative staff of the Salt Lake County Planning and Zoning offices were opposed to the granting of a building permit for the erection of the mobile home park. There is also evidence in the record that the Salt Lake County Planning Commission was never reluctant in planning the mobile home park and actually approved it, as reflected in their April

minutes. It is entirely possible that despite the policy decision of the Commission the subordinate administrative personnel being opposed to that policy decision may have slowed down the administrative actions and actually retarded the final issuance of the building permit. This is the type of matter that should have been straightened out by a timely appeal at the administrative level so that a complete record could have been made of those actions and decisions while it was still at the administrative level.

In the area of planning and zoning the County is actually functioning in a quasi legislative area and when it has completed its function, including the review of its own actions, its decision becomes "the law of the case," unless it is modified or overruled by appropriate *appeal* therefrom. In the absence of appeal from an administrative decision it becomes final and is the "law of the case" forever, to be applied in any subsequent dispute involving that same issue.

In the case of *Provo City v. Claudin*, decided by the Utah Supreme Court in 1936 and reported at 63 P. 2d 570, some most interesting comments are made with respect to the doctrine of exhaustion of administrative remedies. Mr. Claudin made an application to establish a funeral home upon certain described premises. It appears from allegations recited that a permit to remodel a home was issued but that the application for permission to construct a funeral parlor was denied. Mr. Claudin took the matter before the Board of Adjustment, the appeals body, who made findings of fact and conclusions of law, etc., and denied the right of the Claudins to convert this property into a funeral home. The statutes provided that a person aggrieved by a decision of the Board of Adjustment could maintain a plenary action for relief therefrom in any court of competent jurisdiction. Despite this provision, no appeal was taken from the decision of the Board of Adjustment, but instead Claudin remodeled the home for use as a funeral parlor. Provo City brought this

action to enjoin Claudin from using the home as a funeral parlor. As a defense to the injunction suit Claudin hit the city with the plea of an unfair ordinance. The Utah Supreme Court held that the trial court need not consider such matters in issue until they have been tried administratively. Not having appealed the decision of the Board of Adjustment, Claudin had failed to exhaust his administrative remedies and had no standing in court to challenge the fairness of the ordinance.

Section 17-27-16, Utah Code Annotated, 1953, in describing the functions of the Board of Adjustment at the county level provides that persons aggrieved have a permissive right of appeal. Upon appeals the Board of Adjustment has, among others, the power to authorize a variance under certain specified conditions. This is the same power referred to in the Claudin case where owners might suffer special hardships by the ordinance. The variance may be granted to make the ordinance pliable enough so as not to militate against the public welfare. Had Appellants exhausted their administrative remedy by appealing to the Board of Adjustment, it is entirely possible that the Board might have considered a variance in favor of Respondent even though they might have first determined that the building permit should not have issued. The Appellants, therefore, by ignoring the requirement that they exhaust their administrative remedy have effectively precluded the Board of Adjustment from even considering the necessity or wisdom of granting a variance to the defendants. This is but one more reason why appellants must be required to exhaust their administrative remedy before taking the matter to the courts. This is particularly true where the County itself, by its pleadings in this case, is even now asserting that the permit was properly issued, and never having been revoked, is valid today. Under this state of the record, laches, estoppel and failure to exhaust the available administrative remedies all stare Appellants squarely in the face.

POINT II

ESTOPPEL, LACHES, OR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES MAY JUSTIFY REFUSAL TO REVOKE A PERMIT EVEN THOUGH IT WAS ORIGINALLY ISSUED IN VIOLATION OF A HASTILY ADOPTED ZONING AMENDMENT.

Appellants assert that a building permit which is issued in violation of the existing zoning ordinance is null and void and that no vested rights could be acquired thereunder even though the permit holder acted in reliance on said permit. Circumstances may be present in any given case to justify the court's applying the doctrines of estoppel, laches or failure to exhaust administrative remedies in support of a building permit issued in violation of a hastily adopted zoning amendment. Under proper circumstances the invocation of any of these defenses may prevent the granting of relief to an adjoining landowner who is protesting construction pursuant to such a building permit. Respondents in this case are not claiming estoppel against Salt Lake County and have no need to make such a claim because Salt Lake County is, even today, asserting the validity of the issuance of the building permit. The estoppel which Respondents claim is an estoppel against Plaintiff-Appellants who stood by with knowledge of the issuance of the permit without challenging it through administrative channels, as authorized by law and ordinance.

Illinois courts have specifically recognized that even the City may be estopped to deny the validity of a permit where the permit was issued under authority of the *legislative body* of the municipality. See *People ex rel Deddo v. Thompson*, 209 Ill. App. 570, and *Hurt v. Hejhal*, 259 Ill. App. 221.

In the *Deddo v. Thompson* case it appears that the City Council passed an order directing the Com-

missioner of Buildings to issue a permit for the construction of a garage near a hospital and school despite the existence of an ordinance which made it unlawful to build or maintain a garage within a specified distance from a hospital or school. The court held that the council could not amend an ordinance by simply issuing such an order but when the individual to whom the building order was issued, in reliance upon such a permit, proceeded and constructed a garage at large expense and without objection by the school and hospital authorities and all interested parties, the City would be estopped to refuse to issue a license for the conduct of the garage and mandamus would lie to compel its issuance.

Similarly, in the *Hurt v. Hejhal* case, the City was held estopped to enjoin the erection of a building as in violation of a zoning ordinance where the owner obtained a building permit and the *City Council* affirmatively authorized him to proceed with the work after it had been temporarily suspended by the City upon the complaint of adjoining property owners, and in reliance upon this act the owner expended a large sum of money.

The situation is almost identical in the case before this Court. The building permit was issued by the subordinate administrative personnel of Salt Lake County, the neighboring land owners slept on their rights and did not exhaust their administrative remedies by appealing the issuance of the permit and when this lawsuit was filed by the neighboring property owners Salt Lake County, the quasi sovereign body, filed its answer asserting that the permit was validly and properly issued and that it has never been revoked. *Salt Lake County even required Respondent to dedicate a portion of its property for street purposes as a condition to the issuance of the building permit.* In reliance upon all of these facts and the possibility of the permit lapsing for non-use, Respondent commenced heavy construction immediately after summary judgment was entered in the trial court

and have now substantially completed a major portion of the mobile home park. This has been done with the obvious approval of Salt Lake County as witnessed by their pleading and activities in this appeal.

Some courts have held that the zoning law in effect at the time that the permit application was made should control. The case that best states this position is *State v. Woodmansee*, 72 N. E. 2d 789 (Ohio 1946). In this case the petitioner applied for a permit for a poultry store, which business was allowed under the zoning law then in effect. The permit was withheld while the zoning law was amended. The court held that the amendment would not affect property owners' rights with respect to an application for a permit filed before the ordinance was amended where the proposed use of the building would not violate the ordinances at the time the request for the permit was made. Other cases supporting this view include *State v. Village of Wickliffe*, 80 N.E. 2d 200; *Vine v. Zabriskie*, 3 Atl. 2d 886 (N. J. 1936); *Dubow v. Ross*, 175 Misc. 219, 22 N. Y. S. 2d 610 (New York 1938); *Hardy v. Superior Court*, 284 Pac. 93 (Wash. 1930).

The case of *Munns v. Stenman*, 314 P. 2d 67 (Calif. 1957) generally holds that a municipal council cannot, by the enactment of an emergency amendment to a zoning ordinance, or by ministerial delay, deprive a property owner of his right to a permit in accordance with the ordinance in effect at the time of his application for the permit. To the same general effect see *State v. City of Bellview*, 275 P. 2d 899 (Wash. 1954), which case held that the law in effect, when the only items left undone are purely ministerial, should control.

This court in *Parrish v. Richards*, 336 P. 2d 122, announced the doctrine that "in the construction of uncertain or ambiguous restrictions as to the use of property, the courts shall resolve all doubts in favor of the free and unrestricted use of the property." We submit that if the court believes there is any uncertainty surrounding the effect of amendment of the zoning ordinance or surround-

ing the Utah statute and Salt Lake County ordinances with respect to the doctrine of exhaustion of administrative remedies then this court should apply the doctrine announced in *Parrish v. Richards*.

Appellants themselves recognize the rule of law at page 14 of their brief "that if before the ordinance is amended a party substantially changes his position in reliance on the ordinance or if only ministerial acts are left to be performed before a permit is issued, the permit may, nevertheless, issue despite the adoption of the amendment." Appellants argue that since we knew that someone else was trying to get the ordinance changed that we were on notice during this interval of time. Respondents assert that not every effort to amend the zoning ordinances is successful and that not every effort to change them requires those holding building permits or those acquiring property to await the outcome of the efforts or to assume that in all cases the proposed changes will be enacted. Appellants also assert at page 15 of their brief that since there was an application to amend the ordinance staring the "Board" in the face which they must rule on prior to issuing a building permit, that you could hardly say that there was a ministerial act to be performed. We know of no rule of law which requires the County Board to act on an application to amend the ordinance just because an application is filed. The legislative body, to-wit: the County Commission, might simply table such an application.

POINT III

THE AMENDING ORDINANCE CHANGING THE SUBJECT LANDS TO RESIDENTIAL ZONE S1-A WAS AN ILLEGAL SPOT ZON- ING PROVISION.

Prior to 1962 the subject lands were classified as agricultural Zone A-2. Under this classification the following is a partial list of permitted uses; grain storage elevators, farms, livestock raising and grazing,

fruit and vegetable storage and packing plants, fruit and vegetable stands, fur farms, dairy or creamery, kennels, public stables, riding academies, mortuaries, cemeteries, hay chopping, hospitals, sanitariums, airports, circus or transient amusements, dude ranches, golf driving ranges, gun clubs, trailer camps, mines, quarries and gravel pits. (Exhibit D-3, page 48.)

None of the foregoing uses are permitted in an area classified as Residential zone S1-A.

On January 30, 1962 Evan W. Hansen, one of the Appellants herein, filed a written application to change the area from a classification of Agricultural Zone A-2 which permitted trailer courts, to Residential Zone S1-A, which did not permit trailer courts. The reason for the request to amend the zoning was to stop a mobile home park from being built. (R. 106-7)

The record shows that this area is more or less wooded; that no particular physical change occurred in the area in 1962; *that nothing had occurred to change the neighborhood from an agricultural classification.* The Director of the Salt Lake County Zoning Department of the Planning Commission testified that the area was originally classified agricultural because of the desire of the property owners to maintain the area for farming and raising and grazing of farm animals. He further testified that the "area still remains substantially agricultural today."

Despite these uncontroverted facts the area was rezoned Residential S1-A as of May 10, 1962. This was, therefore, an illegal spot zoning ordinance.

As this Court so aptly put it, "Spot Zoning" cases are "generally cases where a particular small tract within a large district was specially zoned *so as to impose upon it restrictions* not imposed upon the surrounding lands, * * * not done in pursuance of any general or comprehensive plan." *Marshall v. Salt Lake City*, 141 P. 2d 704 at 711. Generally, where a parcel of land is classified differently from all the surrounding

area for no apparent reason or purpose except to favor the applicant for the zoning change, it is referred to as spot zoning, and is invalid because it is discriminatory. That is the situation in this case as shown by the record.

The Third Circuit in *Wilcox v. Pittsburgh*, 121 F. 2d 835, held that a complaint which alleged that an amended zoning ordinance selected one block out of a larger area; that the amendment to the zoning ordinance had an instigator; and finally that there had been no change in conditions between passage of the original ordinance and the amendments, stated a good cause of action. The opinion points out that courts have not been unworldly enough to ignore the effect of an anxious client and persistent counsel on the minds of councilmen. If in addition, there has been no change of the neighborhood character, then amendment is unjustified. As conditions are of necessity the basis and justification for zoning, clearly a change in the former is essential to a change in the latter. ✓

Obviously, Plaintiff-Appellant Hansen and those who also signed the petition to amend the zoning ordinance in this case were the instigators. We even have their self confessed motive. They didn't want a mobile home park to be built near their homes. But is this enough to justify an amendment changing the area from one classification to another? We submit that it is not.

Salt Lake County, if it did not want to permit mobile home parks in this area which was obviously classified properly as an agricultural zone, should have merely amended the permitted uses in that zone by deleting mobile home parks therefrom, instead of improperly reclassifying the zone.

POINT IV

THE MINIMUM LOT AREA FOR EACH
AND EVERY MOBILE HOME IS NOT RE-
STRICTED TO ONE FULL ACRE.

Salt Lake County adopted the Mobile Home Park Ordinance on September 6, 1961. This ordinance specifically provided in Section 20 "that all ordinances or parts of ordinances in conflict hereof are repealed." This ordinance also defines a mobile home "as any vehicle or similar portable structure having been constructed with wheels whether or not they have been removed and having no foundation other than wheels, jacks or skirtings and so designed or constructed so as to permit occupancy for dwelling or sleeping purposes." A mobile home park is defined "as any plot of ground on which two or more mobile homes occupied for dwelling or sleeping purposes are located regardless of whether or not a charge is made for such accommodation." Upon the adoption of this 1961 ordinance there can be no question that "trailer camps" or any other form of mobile home previously referred to by ordinances in Salt Lake County was now to be controlled by the new Mobile Home Park provision. Appellants sarcastically argue at page 17 of their brief that "trailer camps" in an agricultural area such as Zone A-2 would contemplate the same being sheepherder's camps or cattle camps. Such an assumption, of course, completely ignores the fact that the Mobile Home Park Ordinance had been adopted in 1961 and further ignores the fact that all ordinances and parts of ordinances in conflict therewith have been repealed. Appellants also argue in this section of their brief that the residential home owners had great and important investments in their homes and, by inference at least, indicate that this should have controlled the decision of the trial court. Zoning laws by their very nature always restrict the use of someone's property in a manner which may create unhappiness on at least part of those within the zoning district. It is invariably true that one living on one side of the boundary of the zoning district will be precluded from doing something which the neighbor across the artificial line can do. Zoning ordinances, therefore, are in all cases a restriction on the free and untrammelled right of property

owners to use their property as they may individually desire. Nevertheless, Salt Lake County adopted its general zoning ordinances (Exh. D-3), which were effective on June 15, 1957, and which specifically authorized trailer camps in Agricultural Zone A-2. In this general ordinance an automobile trailer is defined as "a vehicle with or without motive power used or designed to be used for human habitation." In the same ordinance a trailer camp is defined as "Any area or tract of land used or designated to accommodate two or more automobile trailers or camping parties." (Section 8-1-5, subsections (67) and (68)). There can be no question that the subsequent 1961 "Mobile Home Park Ordinance" amended these provisions with respect to trailer camps.

There can also be no doubt but that the general 1957 Zoning Ordinances which permitted *trailer camps* in Agricultural Zone A-2 must, of necessity, after the 1961 amendments, permit *mobile home parks* in Agricultural Zone A-2.

The 1961 ordinance controlling the construction and use of mobile home parks, provides in Section 5-4-9 that "the minimum area for any mobile home park shall be five acres". Section 5-4-10 provides that each park shall provide

"mobile home spaces and each such space shall be clearly defined or delineated. Each space shall have an area of not less than 3,000 square feet, exclusive of streets and sidewalks, and a width of not less than 40 feet".

The latest ordinance of Salt Lake County with respect to spacing and size therefore specifically provides that each mobile home must have not less than 3,000 square feet. One cannot read the 1961 mobile home park ordinances without realizing that Salt Lake County has provided here for attractive, beautiful, well-planned, coordinated and engineered parks with modern sanitary sewage, lighting, and heating facilities to be available for

each mobile home. This Court should not be misled into believing that the mobile home parks under discussion would be "shepherd camps or cattle camps".

There is nothing inconsistent with the fact that Salt Lake County provided lots for residences in Agricultural Zone A-2 should be of not less than one acre in size for homes and at the same time by independent ordinances also provided that mobile home parks should be no smaller than five acres for each park with not less than 3,000 square feet for each mobile home. It is further provided that where any boundary of a mobile home park abuts on a residential home or on property zoned for residential construction that a "six foot high fence wall or hedge properly related to surrounding topography and the character of the surrounding development shall be provided along such boundary."

The detailed requirements for the construction of such a mobile home park assure all property owners that when completed such a park will be a credit to the area in which it is constructed. At any rate, this is a legislative matter which Salt Lake County has concluded by the adoption of the aforesaid ordinances. Appellants are in no position to challenge the wisdom of these provisions of the Salt Lake County Ordinances.

CONCLUSION

Judge Hanson granted Respondent a summary judgment in the trial court, dismissing Plaintiff-Appellants' cause of action. He gave as his reasons for this ruling that Appellants failed to exhaust their administrative remedies, that they slept on their rights and "are not in a position at this date to resort to the courts for the purpose of prohibiting Respondents' building program". Other reasons were urged by Respondents as justification for their summary judgment. Although not cited by the trial court as reasons for deciding the case in favor of Respondents, estoppel and the illegality of the amending ordinance (for example, it was "spot zoning")

were argued and briefed for that court. Each and every-one of these reasons for justification of the lower court's ruling are properly present for consideration and adoption by this Court. These issues were framed for trial below and obviously should this Court conclude that summary judgment was inappropriate at this stage, Respondents must be afforded an opportunity to fully try these framed issues. Under no circumstances should this court reverse the trial court without requiring that the disputed factual issues be fully tried.

However, Respondent reasserts its position that there is ample undisputed evidence to sustain the summary judgment in favor of Defendants. The summary judgment issued below should be affirmed.

Respectfully submitted,

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