1964

W. J. Lund, Willard E. Knibbee et al v. Cottonwood Meadows Company et al : Brief of Respondents Salt Lake County and Persyl Richardson

Utah Supreme Court

Mulliner, Prince & Mangum; Attorneys for Respondent;
Ollie McCulloch; Attorney for Respondents;
Harold N. Wilkinson; Homer F. Wilkinson; George H. Searle; Attorneys for Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

V. J. LUND, WILLARD E. KNIBBEE, ERNIE A. POULSEN and EVAN W. HANSEN, representing a Class of Persons residing and owning real property in Cottonwood Heights, Salt Lake County, Utah,

Plaintiffs-Appellants,

vs.

COTTONWOOD MEADOWS COMPANY, a partnership consisting of W. ALLEN PELTON, and Others unknown, also SALT LAKE COUNTY, a Political Subdivision of the State of Utah, and PERSYL RICHARDSON, Director of the Salt Lake County Building and Zoning Inspection Dept.,

Defendants-Respondents.

Case No. 10015

BRIEF OF RESPONDENTS SALT LAKE COUNTY AND PERSYL RICHARDSON

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

OLLIE McCULLOCH
513 City and County Building
Salt Lake City, Utah
Attorney for Respondents Salt Lake County and Persyl Richardson

MULLINER, PRINCE & MANGUM
315 East 2nd South
Salt Lake City, Utah
Attorneys for Respondent Cottonwood Meadows Company

HAROLD N. WILKINSON
HOMER F. WILKINSON
10 Executive Building
Salt Lake City, Utah
GEORGE H. SEARLE
2805 South State Street
Salt Lake City, Utah
Attorneys for Appellants

TABLE OF CONTENTS

	Page
STATEMENT OF NATURE OF CASE	1
DISPOSITION OF LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF MATERIAL FACTS	2
POINT I. THE TRIAL COURT WAS CORRECT IN FINDING THAT APPELLANTS FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDY.	2
CONCLUSION	13

AUTHORITIES CITED

Cases

Provo City v. Claudin, 73 P. 2d 570	6
Lee v. Board of Adjustment, 226 N.C. 107, 37 SE 2d 128	8
Inzerelli v. Pitney, 30 NYS 129	8
People ex rel Broadway Co. v. Walsh, 196 NYS 672, 203 App. Div. 468	9
Rice v. Van Vranker, 232 NYS 506, 225 App. Div. 179; Affirmed in 255 NY 541, 170 NE 126	10

Page

Ralston Purina Company v. Zoning Board, 64 RI 197, 12 A2d 219 10

Kamerman v. Leroy, 133 Conn. 232, 50 A2d 175.. 10

Mayor and City Council of Baltimore v. Byrd, 191 Md 632, 62 At12d 588 10

Statutes, Ordinances and Texts

Utah Code Annotated 1953, Section 17-27-16 ..... 3, 5, 6, 7, 8, 9, 10

Revised Ordinances of Salt Lake County, Utah, 1953, Section 8-5-2 ..... 3, 4

Utah Rules of Civil Procedure, Rule 73 (a) 5, 6

Revised Statutes of Utah 1933, Section 15-8-98 .... 6, 7

Utah Code Annotated 1953, Section 17-27-23 ..... 7, 8, 9, 10

Metzenbaum, The Law of Zoning 11, 12, 13

IN THE SUPREME COURT OF THE STATE OF UTAH

V. J. LUND, WILLARD E. KNIBBEE, ERNIE A. POULSEN and EVAN W. HANSEN, representing a Class of Persons residing and owning real property in Cottonwood Heights, Salt Lake County, Utah,

Plaintiffs-Appellants,

vs.

COTTONWOOD MEADOWS COMPANY, a partnership consisting of W. ALLEN PELTON, and Others unknown, also SALT LAKE COUNTY, a Political Subdivision of the State of Utah, and PERSYL RICHARDSON, Director of the Salt Lake County Building and Zoning Inspection Dept.,

Defendants-Respondents.

Case No. 10015

BRIEF OF RESPONDENTS SALT LAKE COUNTY AND PERSYL RICHARDSON

STATEMENT OF NATURE OF CASE

These respondents adopt appellants' Statement of the Nature of the Case.

DISPOSITION OF LOWER COURT

These respondents adopt appellants' Disposition of the Lower Court.

RELIEF SOUGHT ON APPEAL

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

STATEMENT OF MATERIAL FACTS

These respondents adopt the Statement of Material Facts previously set forth by respondent Cottonwood Meadows Company.

POINT I

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

The building permit in question was issued and delivered to respondent Cottonwood Meadows Company on September 10, 1962. This lawsuit was commenced in the District Court on February 21, 1963, some five months and eleven days following issuance of the building permit. No appeal to the Salt Lake County Board of Adjustment or any other administrative board was filed at any time by any of the appellants.

Appellants, in their argument under Point I of their brief, rely strongly on four arguments to "excuse" them from following administrative review procedure

established by and pursuant to the Statutes of the State of Utah:

1. Appeal to the Salt Lake County Board of Adjustment would have been fruitless for the reason that said Board lacked the "power" to provide any relief;

2. Bringing of the administrative review was permissive only and not mandatory;

3. The Statutes provide appellants with alternate remedies, either administrative or judicial; and,

4. Appellants are not "persons aggrieved" as intended by the Statutes.

With each of these contentions, these respondents take issue.

1. The pertinent portions of 17-27-16 U.C.A. 1953 have been set forth and variously emphasized in briefs of appellants and the other respondent. Nothing would be gained by duplicating them at this time. Accordingly, these respondents adopt both the content and the emphasis which has been added by both briefs. However, these respondents neither adopt nor agree with the contention set forth on page 6 of appellants' brief that review in this case would have been fruitless because the administrative body would be powerless to afford relief."

The uniform Zoning Ordinance of Salt Lake County (Title 8, Revised Ordinances of Salt Lake County, Utah, 1953) devotes all of Chapter 5 to the establishment, duties and powers of the Board of Adjustment and provides, in part:

"8-5-2. DUTIES AND POWERS OF BOARD.

"(a) It shall be the duty of such Board to hear all appeals taken by any person aggrieved or by any officer, department, board or bureau of the County affected by any decision of the officer in charge of the administration of this Title . . .

"(b) In addition to any other powers given by State Law or County Ordinance, the Board, after proper notice and public hearing, shall have the following powers:

". . . (3) Interpretation.

"(a) The Board may interpret the Zoning Map and the Zoning Ordinance.

"(b) The Board may hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made in the enforcement of this Ordinance."

At first blush, the contention of appellants that the Board of Adjustment lacked "power" to afford them any relief would appear absurd. On a closer examination, this contention is bared of all semblance of logic.

Certainly the act of respondent Persyl Richardson in issuing the building permit in question was a "decision of the officer in charge of the administration of this Title" for respondent Richardson is that officer as designated by the ordinance itself. Certainly the Board had the "power" to interpret the Zoning Map and the Zoning Ordinance, and that is all that was in question. The question was not, as appellants would attempt to stress

on page 6 of their brief, whether or not an ordinance "is arbitrary or unreasonable or . . . invalid."

And, certainly appellants are alleging that there was "error in (an) order, requirement, decision or refusal in the enforcement of this Ordinance." The complaint in this lawsuit makes that allegation clear and part of the relief sought in the trial court was to have the action of respondent Richardson in issuing the building permit declared in error, void, and invalid.

This "excuse" on the part of appellants for not exhausting their administrative remedies lack substantiation.

2. Appellants next dwell, on page 7 of their brief, on what they claim is the "permissive" nature of the words used in Sec. 17-27-16.

This point, these respondents feel, is fairly and adequately covered in the brief filed on behalf of respondent Cottonwood Meadows Company and these respondents, accordingly, adopt the arguments therein contained. In addition, it is of interest that appellants are before the Supreme Court by virtue of the authority of Rule 73 (a) U.R.C.P.

That rule states, as does Sec. 17-27-16, that an appeal "may" be taken. These respondents submit that a fair interpretation of Rule 73 (a) is that in the event an appeal is taken then it MUST be taken in the following manner and within the following time.

By using the permissive "may" in Rule 73 (a) neither the Legislature nor the Supreme Court have provided any means by which an unsuccessful litigant can receive review other than by following the procedure of that Rule.

Both appellants and respondent Cottonwood Meadows Company have cited, with obvious favor, the Utah case of Provo City v. Claudin, 73 P2d 570. These respondents, therefore, add a lustre of unanimity to one portion of this litigation by likewise relying on this earlier pronouncement by this Honorable Court.

These respondents submit that the Utah Supreme Court in the Claudin case has laid to rest the question of whether or not administrative remedies must be exhausted in zoning cases. At page 575, the Court said:

> "The court need not consider such matters in issue until they have been tried administratively, especially where there are channels from administrative rulings to the courts. . . ."

These respondents vigorously question that the Claudin case is a source for the pronouncement which appellants contend for it on pages 6 and 7 of their brief. The Claudin case was interpreting 15-8-89 to 15-8-107 Revised Statutes of Utah 1933 and particularly Section 15-8-98, which stated:

> "Appeals to the board of adjustment may be taken by any person aggrieved. . . ."

This language is identical to that of the present Section 17-27-16. Interpreting the language of Section

15-8-98 Revised Statutes of Utah 1933, this Court announced that administrative remedies must be exhausted. Appellants have submitted nothing to indicate that the Claudin decision should be overruled.

The only difficulty this Court had with exhaustion of administrative remedies in the Claudin case was the fact that the relief sought was to have an ordinance declared "arbitrary and unreasonable" and, hence, in violation of Constitutional rights. This Court, and rightly so, indicated that only the judiciary and not the administrative arm of government can pass upon the arbitrariness and unreasonableness and, hence, the Constitutionality of a law.

3. Appellants would contend that Sections 17-27-16 and 17-27-23 provide them with "alternative" remedies either to proceed administratively or judicially. In doing so, appellants would appear to be attempting to impart to these sections an inconsistency under any other interpretation. These respondents take issue with this contention.

A clear and fair interpretation of these two sections is that the administrative remedies first must be exhausted and then, if the aggrieved party desires to go further, injunction may be sought in addition to mere review of the action of the Board of Adjustment.

Decisions of administrative board of appeal historically are subject to review by the courts through certiorari. Certiorari permits review only of errors of law

committed by the administrative tribunal and solely upon the record before that administrative tribunal. Lee v. Board of Adjustment, 226 NC 107, 37 SE2d 128; Inzerelli v. Pitney, 30 NYS 2d 129. This latter case adds to this rule that, in the absence of express statutory authority for some other relief of procedure on appeal, certiorari is exclusive.

The Utah Legislature obviously did not think that certiorari was sufficient. In enacting Section 17-27-23 they have permitted injunction to issue from a court of competent jurisdiction if all of the other requirements of the various statutes have been met.

A clear and fair interpretation of Section 17-27-16 and 17-27-23 is that appellants had the right to appeal to the Board of Adjustment and, if still dissatisfied, could seek further review in the Courts, which review would amount to a trial de novo and could include issuance of an injunction, if such proved to be an appropriate remedy.

These Sections provided appellants with an "alternative" remedy after they had exhausted their administrative remedies but not an "alternative" remedy to exhaustion of their administrative remedies.

4. Appellants raise, for the first time on appeal, the rather novel question that they are not "persons aggrieved." Their argument would appear to make some distinction between "persons aggrieved" and "persons materially affected." For, if they are not aggrieved then

considerable time of both Courts and counsel has been expended for naught.

These respondents submit that, while Section 17-27-16 does not define "person aggrieved" Section 17-27-23 includes appellants within a class of persons who are entitled to take their grievance beyond the Board of Adjustment and into the Courts and, therefore, designates appellants as a class of "persons aggrieved."

Many courts have faced the problem of who is an aggrieved person in the matter of zoning decisions.

One such case is People ex rel. Broadway Co. v. Walsh, 196 NYS 672, affirmed in 203 App Div 468, wherein the New York Court held:

> "The relator, which was a taxpayer in the city of New York is a person aggrieved within the meaning of subdivision 2 of Section 719 of the Greater New York charter providing that an appeal may be taken by any person aggrieved from an order, requirement, decision or determination made by the superintendent of buildings. . . .
>
> "The relator having failed to exhaust its remedy by appeal to the board of appeals, is not in a position to apply to the court for relief by way of mandamus to compel the superintendent of buildings to cancel and revoke the permit, and its motion for a final order was properly denied."

Variously, other courts have held the following classes of persons to be what is denominated in Utah statutes as a "person aggrieved":

A person who owned improved real property in the same section of the City (of Schenectady), see Rice v. Van Vranker, 232 NYS 506, 225 App Div 179, affirmed in 255 NY 541, 170 NE 126; a lessee, see Ralston Purina Company v. Zoning Board, 64 RI 197, 12 A2d 219; any landowner or resident within the city, adversely affected, see Kamerman v. Leroy, 133 Conn 232, 50 A2d 175; mere taxpayers of the city (of Baltimore) even though they did not live in the neighborhood involved and no near neighbors objected, see Mayor and City Council of Baltimore v. Byrd, 191 Md 632, 62 At12d 588.

Certainly the courts have expanded the definition of "person aggrieved" beyond that advanced by appellants in quoting from the Supreme Court of Oklahoma. Where legislative guidelines have been provided, as Utah has done in enacting Section 17-27-23 to afford relief for any person owning property in the same zoned district those guidelines should not be disregarded in interpreting and defining "person aggrieved" as used in Section 17-27-16.

Short "appeal periods" are essential in acts of zoning boards and administrators, just as they are in judicial review of judgments and final orders of an inferior tribunal. A judgment or final order of a court must have stability — an aura of definiteness — if judicial decrees are to have integrity upon which those affected thereby may exhibit reliance.

So must it be with acts and decisions of zoning boards and administrators.

A zoning board or administrator makes a decision, performs an act. That act always affects valuable rights in real property. Everyone is not always pleased by the decision; some are aggrieved. However, in each instance someone is going to gamble a valuable real property right on that decision or act. In order that those whose rights are affected by the decision or act may rely upon the finality, stability and integrity of that decision or act appeal rights must be stilled early.

Hence, the Legislature of the State of Utah has seen fit to provide for administrative review through boards of adjustment and permitted each county of the State to provide the time within which such review must be sought by appeal, properly entrusting to the boards of county commissioners of the various counties the responsibility of determining what best suits the general welfare of their particular citizens.

Acting under this authority and responsibility, Salt Lake County has provided that such an appeal must be taken within 90 days. The reasonableness of that short appeal period has not been questioned by appellants. Hence, we can but assume that they agree that it is a reasonable length of time.

James Metzenbaum, in his learned, three-volume work on zoning (Metzenbaum, The Law of Zoning) devotes Chapter IX-e to problems of exhaustion of administrative remedies. At Chapter IX-e-(2) the author says, at Volume 1, page 712:

"The general rule is that a complainant attacking the constitutionality or unreasonableness of specific provisions of a zoning ordinance as it applies to a particular property, must exhaust the available administrative remedies before resorting to court.

"This rule applies whether such attacking actions are brought by way of Mandamus or by Injunction or by Declaratory Judgment proceedings. It has been upheld in most states and by the Federal courts.

"This rule is supported not only by the preponderance of court decisions but, also, by logic and reason:

"In each state, there are many thousands of buildings and many thousands of parcels of land.

"If each plaintiff were permitted to engage the courts with proceedings attacking the constitutionality or the unconstitutional-unreasonableness of each zoning ordinance as it applies to such complainant's own property, without first seeking relief by the available administrative remedies, would not the courts of every state be clogged with such actions virtually to the exclusion of other matters?

"Would there not be so great a flood of such proceedings as to overwhelm the courts?"

Again, at Volume 1, page 717, the author says:

"This rule applies in 'injunction' and 'declaratory' actions.

"Not only reason but the array of court pronouncements in Injunction and Declaratory

> Judgment proceedings also testify to this broadly imbedded rule, and that, too, where constitutionality of such specific provisions was in issue."

The author then virtually spans the nation with reported cases from California to New York, including therein the Claudin case heretofore cited.

CONCLUSION

Appellants have failed to exhaust administrative remedies which were provided them both by statute and by ordinance. They have slept on their rights. They should not now be heard to complain of the acts of others who diligently pursued their rights and responsibilities. The judgment of the trial court should be affirmed.

In no event should the relief asked by appellants be granted and summary judgment be entered in their favor. These respondents find nothing in the record nor in appellants' brief to indicate that the refusal of the trial judge to grant summary judgment in favor of appellants was raised by this appeal.

If the judgment of the trial court is to be reversed, which we respectfully submit it should not, this matter should be remanded for determination of all factual questions and a trial on the merits.

Respectfully submitted,

OLLIE McCULLOCH

Chief Deputy
Salt Lake County Attorney
513 City-County Bldg.
Salt Lake City, Utah

Attorney for Respondents
Salt Lake County and
Persyl Richardson