1964

Dorothy M. Bird v. Olive Sorensen et al : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

DOROTHY M. BIRD,
Petitioner and Appellant,
vs.
OLIVE SORENSON,
City Recorder,
Respondent,
HAROLD L. WELCH and
DEE GLEN SMITH,
Intervenors and Respondents.

Case No. 10050

BRIEF OF APPELLANT

Appeal from the Judgment of the
2nd Judicial District Court in and for Weber County
Hon. Parley E. Norseth, Judge

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STATEMENT OF NATURE OF CASE

This is an action to obtain a writ of mandamus compelling respondent Olive Sorenson, City Recorder, of Washington Terrace, Utah, to perform the duties set forth in Title 20, Chapter 11, Utah Code Annotated 1953, in connection with referendum proceedings as they relate to a zoning ordinance passed by the City Council of Washington Terrace rezoning residential property to commercial property.

DISPOSITION IN LOWER COURT

The trial court dismissed appellant's petition for a writ of mandamus upon the ground that a zoning ordinance reclassifying property from a Residential Zone

R-2 to a Commercial Zone C-2 is an administrative act and not subject to referendum proceedings (R. 8 & 13).

RELIEF SOUGHT ON APPEAL

The appellant seeks an order vacating the trial court's order dismissing appellant's petition for a writ of mandamus and for an order directing the trial court to issue a writ of mandamus directed to respondent Olive Sorsenson as per the prayer in appellant's petition (R. 4).

STATEMENT OF FACTS

The appellant is a resident, taxpayer and legally qualified elector of the City of Washington Terrace, Utah, (R. 4 & 10). Respondent Olive Sorenson is the City Recorder of Washington Terrace and respondents Harold L. Welch and Dee Glen Smith have contingent interests in the property which is the subject of the zoning ordinance under consideration (R. 4, 10 and Answer In Intervention).

On November 14, 1963, the City Council of Washington Terrace passed a zoning ordinance re-zoning Residential R-2 property to Commercial C-2 property which appellant and others desire to have submitted to a vote of the electors of the City by way of referendum proceedings (R. 4 & 10).

On November 27, 1963, appellant tendered to respondent Olive Sorenson an application for petition copies, a check for $10.00, a copy of the proposed petition for referendum, and five copies of said ordinance passed by the City Council of Washington Terrace. Respondent refused to accept said papers or do any of the duties

required by Title 20, Chapter 11, Utah Code Annotated 1953, as they relate to referendum proceedings (R.4, 10 and Exhibit A).

Appellant and others caused copies of the petition for referendum and circulation sheets to be printed and circulated among the qualified electors of said City for signatures (R. 4, 10 &Exhibit C).

The petition sections were then delivered to the Weber County Clerk who certified that 493 qualified voters had signed the said petition sections (R. 4 & Exhibit B).

On December 11, 1963, appellant again tendered to respondent Olive Sorenson all documents and papers previously tendered on November 27, 1963, and also tendered the original petition and five petition sections with the signatures of the electors together with the letter of certification from the Weber County Clerk which were all refused by respondent (R. 4 & 10).

Appellant then filed her petition for a writ of mandamus and a hearing was had thereon (R. 12). Respondents Harold L. Welch and Dee Glen Smith were allowed to intervene. The parties then stipulated that the matter may be heard on the pleadings as a law question and after argument, the trial court ordered appellant's petition dismissed on the ground that a zoning ordinance reclassifying residential property to commercial property is an administrative act and not subject to referendum proceedings (R. 8 & 13).

ARGUMENT

POINT 1.

THE COURT ERRED IN DISMISSING APPELLANT'S PETITION FOR A WRIT OF MANDAMUS, IN THAT A ZONING ORDINANCE RECLASSIFYING PROPERTY FROM A RESIDENTIAL ZONE R-2 TO A COMMERCIAL ZONE C-2 IS THE PROPER SUBJECT OF REFERENDUM PROCEEDINGS.

In deciding whether or not a zoning ordinance reclassifying property from residential to commercial is the proper subject of referendum proceedings, Article VI, Section I of the Constitution of Utah, is material and provides that the legal voters of any legal subdivision of the State may cause any desired legislation to be submitted to a vote of the people of said subdivision for approval or rejection, or may require any law or ordinance passed by the law-making body to be submitted to the voters thereof before such law or ordinance shall take effect.

Also material to this issue is Section 20-11-21, Utah Code Annotated, 1953, which provides as follows:

> "Direct legislation in cities and towns -- Subject to the provisions of this chaper, legal voters of any city or town, in such numbers as herein required may initiate any desired legislation and cause the same to be submitted to the law-making body, or to a vote of the people of such city or town for approval or rejection, or may require any law or ordinance passed by the law-making

body of such city or town to be submitted to the voters thereof before such law or ordinance shall take effect."

Even though the foregoing constitutional and statutory provisions seem to indicate that any law or ordinance is subject to referendum, the courts, including this jurisdiction, have placed a limitation on this language by holding that only legislative acts are the subject of referendum proceedings and not administrative acts. In the case of Keigley et al. v. Bench, City Recorder, 97 U. 69, 89 P. 2d 480, this court indicated at page 484 of the opinion, that the test of whether an ordinance was legislative or administrative is whether the ordinance is one making a new law, or one executing a law already in existence. This court went on to say that acts constituting a declaration of public purposes and making provisions of ways and means of accomplishment may be generally classified as calling for the exercise of legislative power. This court further stated that actions which relate to subjects of a permanent or general character are considered to be legislative, while those which are temporary in operation and effect are not. It was then held that a change in time payment on bonds from fifteen years to twenty years was a legislative act and subject to referendum.

Certainly, in using the tests set forth in the Keigley et al. v. Bench case, the zoning ordinance under discussion is a legislative act since the change in the use of land is certainly permanent if commercial buildings are allowed to be placed thereon, and can hardly be considered as temporary in operation and effect as administrative acts are considered to be.

In 122 A. L. R. 789, the general rule is stated that it is generally held that zoning ordinances are within the purview of the referendum provisions.

In the leading California case of Dwyer v. City Council of Berkeley, 253 P. 932, where plaintiff was petitioning the court for a writ of mandate to compel the City Council to either repeal or submit to a referendum vote an ordinance passed by the said City Council re-classifying as a business and public use district of class 4, certain property designated in the comprehensive zoning ordinance of said city as a residential district of class 1, wherein stores were not permitted; and where plaintiff was a resident, taxpayer and elector of said city who owned and resided upon property in the vicinity of the property described in said ordinance of re-classification, and one of the signers of the referendum petition, the court held that the ordinance reclassifying the residential property to commercial property was a legislative act and subject to referendum.

In this case the California court was working with the Berkeley City Charter which provided that any ordinance was subject to initiative or referendum proceedings. However, the language of the Berkeley City Charter is no broader than the provisions in the Constitution of Utah and the Utah State Statute hereinbefore referred to.

The California court then made the following pertinent observations:

A. Only ordinances of a municipality which involve an exercise of the legislative prerogative are subject to the initiative and referendum (page 934).

B. The court further indicated that if it be conceded that the ordinance is local in character and directly affects only a small portion of the population, there is nothing theoretically inconsistent in permitting the electorate of the entire city to pass upon it by referendum election since the legislative power of the municipality resides in the people thereof who simply withdraw from the legislative body, and reserve to themselves the right to execise part of their inherent legislative power by the enactment of initiative and referendum laws (page 935).

C. The court further stated that it must be presumed that the electorate will act in the interests of the entire city (page 936).

D. The court went on to say at page 936 of the opinion that the people in each zone are interested not only in having a comprehensive zoning law but in what that law shall be and that a zoning ordinance as amended becomes in effect a different ordinance.

The Dwyer v. City Council of Berkeley case, supra, is a case directly in point insofar as the instant proceedings are concerned and treats the various arguments extended against the right of referendum proceedings in zoning situations with scholarly care.

In the case of L. E. Dewey v. Doxey-Layton Realty Company, 3 U. 2d 1, 277 P. 2d 805, at page 808 of the opinion, the Utah Supreme Court cited the Dwyer v. City Council of Berkeley case, supra, approvingly, and also indicated that there are many cases which apply the provisions of a referendum act to zoning ordinances. In the Dewey case, this court held that zoning by initiative

was in effect collaterally attacking the state zoning statute and was therefore void. However, no such objection applies to referendum proceedings reviewing a zoning ordinance which has been validly passed by the City Council and where the state zoning statute has been carefully complied with.

In the case of Hurst v. City of Burlingame, 277 P. 308, the Supreme Court of California held that a zoning ordinance adopted by the electors of the City of Burlingame under the initiative law was void since it did not comply with the requirements of the state zoning statute relating to public hearings. This holding was entirely consistent with the holding of the Utah Supreme Court in the case of Dewey v. Doxey-Layton Realty Company, supra. At page 312 of the opinion, the court, by way of dicta, in distinguishing between the initiative and referendum provisions as they relate to zoning cases, made the following observation:

> ". . . it would undoubtedly be conceded that, had the board of trustees of the City of Burlingame adopted a zoning ordinance, as provided by the statute, its final action would be subject to the referendum provisions of the constitution and laws of the state, for the obvious reason that there is embodied in the enactment of a zoning ordinance such elements of legislative action as to subject the ordinance when adopted to the reserved legislative power of the electors of the city, when properly invoked, to approve or reject it."

In the case of Walton v. Tracy Loan & Trust Company et al., 97 U. 249, 92 P. 2d 724, the court after

referring to various state zoning statutes, made the following observation at page 726:

> "Independent of the statutory provisions referred to above, no one would doubt that the exercise of the zoning power is definitely a legislative function and activity."

In the case of Jackson v. Denver Producing and Refining Company et al., 96 F. 2d 457, Tenth Circuit (Oklahoma 1958), the court held that the chief executive of the city had a duty to cause an ordinance extending the limits of an oil and gas district within the city to be submitted to the electors at the next general municipal election after date on which petition for referendum was filed. The court further indicated that the ordinance was suspended by the filing of the petition for referendum and remains in abeyance until a vote is had thereon.

In the case of State ex rel. Hunzicker v. Pulliam, 168 Okla. 632, 37 P. 2d 417, the court held that a zoning ordinance extending the limits of an oil and gas district within the city is legislative, and not merely administrative, and subject to referendum. The court went on to say that the mere fact that the ordinance will be of great benefit is not an urgent reason for its going into effect immediately as an emergency measure. The defendant contended that the ordinance was administrative in character and the court brushed the argument aside as without merit.

In the trial court, respondents relied heavily on the following cases:

A. Kelley v. John, 162 Neb. 319, 75 N.W. 2d 713.

B. Minneapolis-Honeywell Regulator Company v.

Carl Nadasdy (Minn. 1956), 76 N.W. 2d 670.

In the Kelley v. John case, the Nebraska court holds that a zoning ordinance reclassifying property from residential to business is an administrative act and not subject to referendum. The court indicates that the ordinance passing the comprehensive zoning plan is a legislative act and this is the ordinance that should be subject to referendum. The fallacy in this reasoning is that the comprehensive zoning ordinance may divide the city into districts which are agreeable to the people of the city. It is only when subsequent action is taken by the city council re-zoning certain areas that the remedy of referendum is desired by the people. The people then have a decision to either abide by the discretionary acts of the city council or to sumbit said acts to a vote of the people by way of referendum proceedings. As stated in the Dwyer v. City Council of Berkeley case, supra, at page 936 of the opinion, "a zoning ordinance as amended becomes in effect a different ordinance."

The further contention of the Nebraska court in the Kelley v. John case is that if a reclassifying zoning ordinance is to be subject to referendum proceedings, the master plan of the city becomes a nullity. This conclusion is questionable since the master plan is merely changed or the effective date delayed pending the vote of the people.

In connection with the Minneapolis-Honeywell Regulator Company v. Carl Nadasdy case, supra, the Minnesota court held that the referendum provisions of the state statute apply only to comprehensive zoning,

ordinances and not to their amendments. However, this was not a court-made rule since the court indicates at page 676 of the opinion that the controlling state statute permits the electors to vote only on the question of the "... approval or disapproval of the proposition of permitting the governing body to zone the municipality." The holding in this case is based squarely on a Minnesota statute which has no counterpart in the State of Utah.

It is interesting to note that after the Kelley v. John case was handed down by the Nebraska court, the same was cited in the Ohio case of Hilltop Realty, Inc. v. City of South Euclid, 164 N.E. 2d 180, wherein the Ohio court held that a reclassification of property from single family use to multi-family use classification amended the comprehensive zoning ordinance and was subject to referendum. Plaintiffs argued that the ordinance was an administrative act, and, therefore, not subject to referendum and cited the Kelly v. John case. The Ohio court responded to this argument at page 181 of the opinion as follows:

> "We have read this case. We are neither persuaded by its reasoning nor convinced that the applicable laws of Nebraska and Ohio are analogous, as claimed by the plaintiffs."

The only other case citing the Kelly v John case was the Alabama case of Ball v. Jones (1961) 132 So. 2d 120, which cited the Kelly v. John case in the dissenting opinion. In the main opinion, the court said, at page 123 thereof:

> "This court in Marshall v. City of Mobile, 250 Ala. 646, 35 So. 2d 553, recognized the well known

rule that municipal authorities act in a legislati capacity in the enactment of zoning ordinance Also, the amendment to a comprehensive zonir ordiance or a rezoning of a certain area, as w done in the instant case, becomes a part of t existing comrehensive ordinance and, a fortio is a legislative act."

It should be further pointed out that if responden prevail, appellant and others like her will be without remedy to review the discretionary acts of the ci council in zoning cases of this type. A hearing befo the Board of Adjustment, as suggested in the Kell v. John case, would be of little value for the followi reasons:

A. Appellant is not residing in the area rezon and would have no standing for a variance.

B. A variance ,if possible, would not be the appro ate remedy since the issue is whether the area should rezoned.

C. The Board of Adjustment has no authority control the discretionary acts of the city council.

Appellant has no cause of action in the courts the state where the discretionary acts of the c council are not confiscatory, discriminatory or arbitra as held in the case of Dowse v. Salt Lake City Corp ation, 123 U. 107, 255 P. 2d 723.

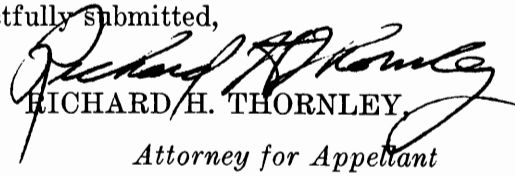
Since appellant has neither standing before

Board of Adjustment or the courts of the state, the only remedy left is that of referendum proceedings and if respondents prevail in this cause, appellant and others like her are without a remedy to review the discretionary acts of the city council in zoning cases.

CONCLUSION

Appellant maintains that a zoning ordinance reclassifying property from residential to commercial is a legislative act and the proper subject of referendum proceedings.

Respectfully submitted,



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