

1964

William E. Naylor et al v. Salt Lake City Corp : Brief of Appellants

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Naylor v. Salt Lake City*, No. 10114 (Utah Supreme Court, 1964).

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In the Supreme Court of the State of Utah

WILLIAM E. NAYLOR, WILLIAM
COSSEY, JAMES L. NEVILLE, and
BLAE E. HANSEN,

Plaintiffs and Appellants,

vs.

SALT LAKE CITY CORPORATION, a municipal corporation, J.
BRACKEN LEE, HERBERT F.
SMART, GEORGE B. CATMULL,
CONRAD HARRISON, JOE L.
CHRISTENSEN, RAY ROLFSON,
and ALDER-WALLACE, INC., a
Utah corporation,

Defendants and Respondents.

Case No.
10114

APPELLANTS' BRIEF

Appeal From The Judgment Of The
District Court for Salt Lake County
Honorable A. H. Ellett, Judge

APR 29 1965

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STATEMENT OF THE KIND OF CASE

This is an action for declaratory judgment and injunctive relief challenging the validity of an ordinance enacted by Salt Lake City Corporation.

DISPOSITION IN LOWER COURT

The lower court granted defendants' motion for summary judgment of dismissal at the pretrial conference.

RELIEF SOUGHT ON APPEAL

Plaintiffs, William Cossey and Blae E. Hansen, seek reversal of the summary judgment of dismissal and a trial on the merits of the action.

STATEMENT OF FACTS

On the 1st day of October, 1963, the Board of Commissioners of Salt Lake City passed an ordinance changing the zoning classification of approximately one-half of a city block from a Residential R-6 classification to a Business B-3 classification. This suit was instituted on October 30, 1963, for judgment declaring the ordinance invalid and in excess of the City's power and authority and for decree enjoining and restraining the defendants from granting building permits for the erection of improvements not authorized in a Residential R-6 zone.

Plaintiffs are taxpayers and property owners in the area affected by the zoning ordinance. The complaint alleges that on or about September 1, 1927, the defendant City enacted a zoning ordinance and adopted a use district map in pursuance of a comprehensive plan for zoning of Salt Lake City and that the Board of Commissioners of the defendant City has appointed a qualified Planning Commission to process, study and advise with respect to all matters relating to the comprehensive plan. It further avers, inter alia, that on or about May 28, 1963, Alder-Wallace, Inc. filed with the Planning Commission its petition for amendment of the use district map by changing certain premises located in a Residential R-6 use district to a Commercial C-3 classifi-

cation; that in accordance with the provisions of the statute the Planning Commission made a careful study of the petition and the change thereby proposed with respect to the comprehensive plan; that the Planning Commission after said study recommended that the application be denied for the reasons that: (R. 3-4)

“... the said proposed change was not consistent with, but contrary to the comprehensive zoning plan; that the proposed change bore no reasonable relationship to the character of the area and district to be affected thereby; that there was no need or reason shown for additional business or commercial zoning; that the proposed change would constitute ‘spot’ zoning and that the application was for other sound reasons inconsistent with the general purpose and plan of the then existing zoning ordinance.”

Plaintiffs’ complaint next alleges the adoption of the ordinance changing the subject premises from an R-6 classification to a B-3 classification and avers that the ordinance is invalid for the following reasons: (R 4-5)

“IX. The ordinance attempting to rezone the said tract of land, thereby creating a small Business B-3 district in a Residential R-6 district, and all things done or attempted in pursuance thereof are unlawful and in excess of the City’s power and authority and null and void and in violation of the express terms of Title 10, Chapter 9, Utah Code Annotated 1953, in the following particulars:

(a) Said attempted zoning of said tract of land in the residential district of Salt Lake City is not in accordance, but contrary to the comprehensive zoning plan authorized by statute and adopted by the City.

(b) Said attempted rezoning of said tract of land does not tend to promote either the health, safety or general welfare of Salt Lake City, nor does the same tend to lessen congestion in the streets or to secure safety from fire, panic or other dangers, or to promote any of the other purposes for which zoning of cities is by statute permitted, but on the contrary, such attempted zoning tends to the detriment of the purposes for which zoning is permitted.

(c) Said attempted rezoning does not give reasonable or any consideration to the character of the district or the use of lands therein, nor does it encourage or tend to encourage the most appropriate use of lands throughout the City as specified and required by the statutes, but on the contrary, said attempted rezoning tends to and does promiscuously intermingle business property with residential property, contrary to and in disregard of the letter, purpose and spirit of the statutes and the zoning plan authorized and adopted for Salt Lake City.

(d) No notice of a proposed change of the use district map from Residential R-6 classification to Business B-3 classification as required by Title 10, Chapter 9, Section 5, U.C.A. 1953, was given prior to the enactment of the ordinance."

The defendants filed answers admitting most of the material allegations of the complaint but denying the allegations of the aforesaid Paragraph IX and praying for dismissal of the complaint (R. 10, 11, 12, 13). Counsel for Alder-Wallace, Inc. thereafter filed his affidavit wherein he recites the enactment of the ordinance and

states that "the question involved in the instant litigation is wholly a matter of law" (R. 17-19). Counsel's affidavit also identifies the use district map of Salt Lake City, which is attached thereto as an exhibit. Defense counsel also filed the affidavit of Vernon Jorgensen, which recites that Mr. Jorgensen has advised the mayor of Salt Lake City with respect to what notice has customarily been required preceding the enactment of zoning ordinances (R. 21). With the issues thus framed, and based upon the pleadings and the aforesaid affidavits, the defendants moved the Court for summary judgment of dismissal (R. 15).

On February 5, 1964, defendants' motion for summary judgment came on regularly for hearing before the Honorable Aldon J. Anderson. The motion was argued by counsel and at the conclusion of the hearing the same was denied. Judge Anderson made and entered his written order denying said motion (R. 23).

On the same day that the motion for summary judgment was denied, defense counsel filed a notice of readiness for trial. Within one day after the service of the notice of readiness, plaintiffs' counsel filed a written objection to the same (R. 25). Notwithstanding said objection the case was given a preferential pretrial setting by the Honorable A. H. Ellett.

On March 11, 1964, the case came on for pretrial before Judge Ellett. After a preliminary discussion the Court directed plaintiffs' counsel to enlarge upon the allegations of the complaint by stating further the grounds upon which it was contended that the City had

acted arbitrarily. Plaintiffs' counsel made the following statement: (R. 28-34)

“ MR. MACFARLANE: I will state that specifically the action that was taken here that the plaintiffs deem to be arbitrary is alleged in the complaint and particularly paragraph 9 of the complaint; and we rely, of course, now upon every one of the allegations of the complaint and will state more specifically—

THE COURT: Yes.

MR. MACFARLANE: —at this time in support of the allegations of the complaint but not by way of limitation that the commission was arbitrary and capricious and acted without regard to a general or comprehensive plan in that in the immediate vicinity, that is, between South Temple and Ninth East Street and Second East—I mean South Temple and Ninth South Street and Second East and Seventh East there are $41\frac{1}{2}$ acres of Business B-3 zoning, 27 per cent of which is not being used for business purposes; $55\frac{1}{2}$ acres of Commercial C-1 zoning, 39 per cent of which or 40 per cent of which is not used for business purposes; 243.3 acres of Commercial C-3 zoning, 25 per cent or $32\frac{1}{2}$ per cent of which is not used for business purposes, indicating that there is considerable land in the general area already zoned for business or commercial use which is not so used; and that the evidence would further show that there are substandard and deteriorated business and commercial buildings in the B-3, C-1, and C-3 areas which should be replaced by new buildings; that the action of the commission in jumping a block of property zoned R-6 and R-7 and establishing a C-3 zone entirely or B-3 zone entirely surrounded by commercial—I mean residential property was completely with-

out regard to any general or comprehensive plan and, on the contrary, has the necessary effect of establishing instability in the adjoining residential properties; that the boundaries established for the new zone are not only unrelated to any comprehensive or general plan but are not logical boundaries and are based entirely upon the application of Alder-Wallace, which in turn is based upon the availability of land and not its suitability for use within the meaning of the zoning laws; that criteria which have been followed and are still a part of the general plan of the city were ignored in creating the new district in that it is not contiguous to any existing commercial area and nonetheless is within close proximity to other commercial areas, is established on Seventh East, which is a main artery of traffic for which the policy of the commission, both planning commission and city commission, has been and still is to prevent access, new access and particularly business access on said freeway, and the further criteria that there shall be no zone change made except upon the showing of need or change of conditions in the area; that as a matter of law the showing, attempted showing made on behalf of the application, did not show either a change of conditions or need which would warrant the action that was taken, there being no economic studies or any other evidence produced before the commission; that the uses allowed in the B-3 district are incompatible with the future development of the lands surrounding the spot which was zoned here, which lands are zoned R-6.

Now, in substance, Your Honor, that is our position with reference to the action that was taken by the commission.

THE COURT: Let me ask you one other thing. Will your proof show whether or not any

of those acreages of land zoned to B-3 was available for sale and not already used by some other use that couldn't be readily changed?

MR. MACFARLANE: Yes, we think it will. Now, I personally did not participate in the study, and I don't know which of these lands would be available and at what prices.

THE COURT: Well, I imagine your Utah Power & Light in a whole block, would be ten acres of that, and I am sure nothing would change that.

MR. MACFARLANE: That is probably true.

THE COURT: I wonder if it is true in the rest of this acreage.

MR. MACFARLANE: I don't think so.

THE COURT: What is the use that he proposes to put this to?

MR. McCONKIE: The problem is they have to get a big area in one place.

THE COURT: Now, you have on Second South two shopping areas east of Fifth East or Fourth, one between Fourth and Fifth and one between Second and Third; Albertson's and Grand Central are on Second South further west half between there and town, don't you?

MR. MACFARLANE: I don't know.

MR. McCONKIE: Yes.

MR. CRELLIN: Is it Albertson?

MR. McCONKIE: Albertson on Second South and Fourth East and Grand Central on Second South and Fifth East.

THE COURT: And do you have any—how far north do you have to go from Second South before you come to such a similar shopping center?

MR. McCONKIE: Just a moment, Your Honor.

THE COURT: Let Mr. Macfarlane—he is telling me what his proof will show. I wonder what his proof will show about that.

MR. MACFARLANE: My proof will show that there is property zoned for commercial and business use within the area as shown by the use district map which is a part of the file here.

THE COURT: Let's mark it.

MR. MACFARLANE: Whether it is actually used for that I don't know, but I'm not—

MR. McCONKIE: This is my copy. We have one in the file if you want to mark the one in the file.

MR. CRELLIN: Might as well use this, Judge. They are exactly the same.

THE COURT: I will use this one.

MR. CRELLIN: Except you have to pull it out of the file.

THE COURT: That's all right. Can it be agreed that pretrial Exhibit 1, which I am now marking, is a—and, by the way, that is a photostatic copy attached to an affidavit signed by Vernon Jorgensen. May it be agreed that that is a photostatic copy of a use map of Salt Lake City?

MR. MACFARLANE: Yes.

MR. CRELLIN: Yes.

THE COURT: Do you gentlemen so agree?

MR. CRELLIN: That's right.

MR. McCONKIE: Yes.

THE COURT: Can it further be agreed that the general plan of Salt Lake City is to be ascertained from this use map together with the Revised Ordinances of Salt Lake City now in force and effect, 1955?

MR. MACFARLANE: No.

MR. CRELLIN: That is our position.

MR. McCONKIE: Yes, but if that is the case, you are bound to give—

THE COURT: Wait a minute. What then, Mr. Macfarlane, do you claim the—where will I look for the general plan if I don't look to the ordinances?

MR. MACFARLANE: I think you may only look for the general plan in the testimony of planning commission members and city commission members, not only in the past for what the plan has been, but in the present for what, of course, they may—what the present plan is.

THE COURT: As for—

MR. MACFARLANE: My position is that the use district map is simply evidence or the effect, presumably the effect, of some plan which concededly may be amended from time to time; but whenever any ordinance is enacted amending or changing the use district map, it must be in accordance with some general over-all or comprehensive plan or purpose affecting an area beyond that immediately affected by the application.

THE COURT: Wouldn't you agree that the ordinances of Salt Lake City would be some evidence of what the plan was, what the general plan is?

MR. MACFARLANE: Well, certainly that's some evidence of what the city has done in pursuance of the plan, that is correct.

THE COURT: All right; but then you also claim that the general plan lies within the memory and knowledge of certain people, is not written down anywhere?

MR. MACFARLANE: Well, that is correct. I don't think that you can look at the use district map and say, 'Here is the plan. Now, where do we go from here?' I think that there has to be something independent of the use district map and the ordinance in order to guide the commission in its actions in amending the plan, and the statute itself says that there must be a general or comprehensive plan, and I deem that to be something in addition to the ordinance and the use district map.

MR. CRELLIN: Then every ordinance that Salt Lake City has ever passed would be in jeopardy under that theory, Your Honor, because every ordinance that's ever been passed since the antiquity could be challenged on the basis that we then go to the memory of people at that time as to what the basis of plan was."

During the course of the pretrial plaintiffs moved the court to amend the complaint by adding to Paragraph IX an additional allegation "that the ordinance is invalid and of no force and effect for the reason that the applicant, Alder-Wallace, Inc., as a mere optionee having no legal or equitable interest in the real estate

did not have standing to invoke the zoning power of the city" (R. 34). Though defense counsel made no objection to the timeliness of this motion, the motion was denied by Judge Ellett upon the ground that as a matter of law an optionee does have sufficient standing to invoke the zoning ordinance (R. 38).

The court thereupon directed the dismissal of plaintiffs' complaint with prejudice and subsequently entered judgment of dismissal (R. 27, 38). This appeal followed.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN CONCLUDING AS A MATTER OF LAW FROM THE PLEADINGS AND PRE-TRIAL STATEMENT THAT THE CITY HAD ACTED WITHIN ITS AUTHORITY IN ADOPTING THE ZONING ORDINANCE.

If, under the pleadings and pretrial statement, there is any material issue of fact, or any material issue of law which cannot properly be resolved without factual background not before the Court, then the dismissal must be set aside and the cause remanded for trial. The substance of the allegations attacking the zoning action are that: (R. 5-6, 28-30)

1. *The zoning action is not in accordance with a comprehensive plan.* Change of the use classification from residential to business is not based upon any general or comprehensive plan related to benefit of the district, area or community as a whole but instead is based solely upon considerations pertinent to the property rezoned and the owners of such property.

2. *The zoning action is not in furtherance of the police power.* The ordinance is not designed to and does not accomplish any of the objectives of the police power (i.e. health, safety, general welfare, street congestion, security from fire, panic, etc.).

3. *The zoning action is contrary to the stated purpose of the zoning laws.* The ordinance gives no consideration to other properties in the residential district where the change has been made and does not encourage appropriate use and orderly development of land in the district, area or community, but on the contrary arbitrarily intermingles business property with residential property to the detriment of other property owners and the community as a whole.

4. *The amendment of the existing zoning map is not supported by a showing of changed conditions.* The zoning act changes or amends the existing plan (presumably fair, rational and comprehensive) in the absence of any showing of change of conditions or change of circumstances which would warrant interruption of the stability of said plan.

In reviewing a summary judgment of dismissal an established principle of appellate review is that the reviewing court will accept as true the allegations of the plaintiffs' complaint and pretrial statement even though the same are in material respects denied by the defendants. Unless there is a stipulation or admission or some uncontroverted evidence which would justify the trial judge in concluding as a matter of law that the allegations attacking the ordinance are not true, then said allegations must be accepted as fact for the purpose of this appeal. In determining the merit of appellants'

argument this Court must resolve the following questions:

- A. Are the allegations attacking the ordinance sufficient in law to state a claim of invalidity, and, if so,
- B. Does the record below justify a judicial determination as a matter of law that the allegations attacking the ordinance are not true?

Proper resolution of these issues requires a review of the law applicable to the case at bar.

Salt Lake City is empowered by statute to “regulate and restrict . . . the location and use of buildings, structures and land for trade, industry, residence or other purposes” and for that purpose to “divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of [the statute]” (10-9-1, 2, U.C.A., 1953). The power of the City to enact zoning ordinances in accordance with the intent and purpose of the statute and within the limitations of the statute is not questioned in this case.

The City, however, does not have the unlimited, undefined and unrestricted power to legislate the use of property. Statutory limitations are specifically imposed by Section 10-9-3, U.C.A., 1953:

“10-9-3. Regulations to be in accordance with comprehensive plan.—Such regulations shall be made in accordance with a comprehensive plan designed to lessen congestion in the streets, to secure safety from fire, panic and other dangers, to promote health and the general welfare, to provide adequate light and air, to prevent the overcrowding of land, to avoid undue concentration

of population, to facilitate adequate provision for transportation, water, sewage, schools, parks and other public requirements. *Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the city.*" (Emphasis added)

The decision of this Court in *Marshall v. Salt Lake City*, 105 Utah 111, 141 P.2d 704, fixes some guidelines and standards by which the validity of municipal zoning action is to be determined.

Plaintiff in the *Marshall* case attacked an ordinance amending the zoning map on the ground that Salt Lake City did not have the authority as a part of a general zoning plan to create small general utility zones within residential districts. The case was tried to the District Court of Salt Lake County. Upon trial of the cause, including extensive evidence pertaining to the character of the areas involved, land uses, existing zoning and background of the zoning ordinance as it affected the area in question, the trial court concluded that the amendment to the map was unreasonable, unlawful, discriminatory and void. On appeal the decision of the trial court was reversed upon specific determination *from the evidence* in the cause that the amendment of the map was in accordance with a general zoning plan to set within reasonable walking distance of homes in the residential areas, daily family conveniences such as groceries, gasoline, etc. In this regard, the Supreme Court concluded from the evidence that there was "a definite and com-

prehensive plan” and that the zoning action here was a part of such plan and was therefore valid. The purpose and limitations of the zoning authority were expressed as follows: (105 Utah 111, 119-125)

“. . . As shown by the above quotes from the statute, the city is authorized to regulate and restrict ‘the *location and use* of buildings, structures and land for trade, industry, residence and other purposes’ and to accomplish this ‘may divide the municipality into *Districts* of such number, shape and area as may be deemed best suited to carry out the purposes of this Article.’ (Italics ours) This is done under the police power and by the statute must be done in accordance with a comprehensive plan, designed, inter alia, to lessen congestion in the street, promote the general welfare, facilitate transportation, and other public requirements. It shall be done with reasonable consideration of the character of the district, its suitability for particular uses ‘and with a view to conserving * * * and encouraging the most appropriate use of land.’ Sec. 15-8-91, *supra*. That the statute contemplates a division and regulation by *districts*, instead of regulation by single lots or small groups of lots, is evident. The regulation of the use of property by lots or by very small areas is not zoning and does violence to the purpose and provisions of the statute. It would not, and could not, accomplish the purpose of the law as set forth in the statute quoted *supra*. . . .

* * *

“City zoning is authorized only as an exercise of the police power of the state. It must therefore have for its purposes and objectives matters which come within the province of the police power. When exercised by a city, it is of necessity confined by the limitations fixed in the

grant by the state, and to accomplishment of the purposes for which the state authorized the city to zone. Those purposes, which control and must be subserved by any zoning, are set forth in Section 15-8-91, U.C.A. 1943, quoted *supra*. The elements required of a zoning plan are: It must be comprehensive; it must be designed to protect the health, safety, and morals of the inhabitants; to promote the general welfare; avoid overcrowding and congestion in traffic and population; facilitate transportation and other public service; and meet the ordinary or common requirements of happy convenient and comfortable living by the inhabitants of the districts, and the city as a whole. . . .

* * *

"The basic purpose of zoning is to 'bring about an orderly development of cities, to establish districts into which business, commerce, and industry shall not intrude, and to fix certain territory for different grades of industrial concerns. * * * The exercise [of this power] must have a substantial relation to the public good within the spheres held proper.' White's Appeal, 287 Pa. 259, 134 A. 409, 412, 53 A.L.R. 1215. 'It is a fundamental theory of the zoning scheme that it shall be for the general good, to secure reasonable neighborhood uniformity, and to exclude structures and occupations which clash therewith.' . . .

* * *

"Zoning is done for the benefit of the city as a whole, and the limitations imposed on respective districts must be done with a view to the benefit of the district as a whole, and not from consideration of particular tracts. . . .

* * *

"The tests of validity in such cases are: Does the ordinance bear a reasonable relation to the public health, morals, safety or general wel-

fare; have the districts been created according to a fair and rational plan?" "

We now turn to a discussion of the merits of plaintiffs' argument in light of the principles laid down in the *Marshall* case.

THE COMPLAINT STATES A CLAIM FOR INVALIDITY OF THE ORDINANCE

As heretofore noted, the complaint charges that the zoning action is not in accordance with a "comprehensive plan"; not supported by a showing of changed circumstances; not in furtherance of the police power, and contrary to the purpose and spirit of the zoning laws. Any one of these allegations, if supported by evidence at the trial of the cause, would justify the relief sought.

Comprehensive Plan

Statutory enabling legislation requires that municipal zoning be "in accordance with a comprehensive plan" (10-9-3, U.C.A., 1953). In this respect, the Utah statutes are similar to legislation adopted by legislatures of over 40 other states. The decision in the *Marshall* case, in referring to zoning action, states:

"This [zoning by districts] is done under the police power and by the statute *must be done in accordance with a comprehensive plan . . .*

* * *

". . . The elements required of a zoning plan are: *It must be comprehensive; . . .* (Emphasis added)

There is some confusion in the cases as to the meaning of the term "comprehensive plan." Authorities

generally agree that the terms "master plan" and "comprehensive plan" are not synonymous. The former is defined by one authority on the subject as "a long-term general plan for the physical development of the community which embodies information, judgments and objectives collected and formulated by experts to serve as both a guide and predictive force" (Haar, "In Accordance With A Comprehensive Plan," *infra*). Existence of a master plan is not essential to the validity of zoning measures (See, *e.g.*, *Gayland v. Salt Lake County*, 11 Utah 2d 307, 358 P.2d 633).

The "comprehensive plan," which is essential to the validity of any zoning measure, has been defined as "a general plan to control and direct the use and development of property in a municipality or a large part thereof by dividing it into districts according to the present and potential uses of the property." *Clark v. Town Council of Town of West Hartford*, 145 Conn. 476, 144 A.2d 327. Confusion in the cases as to what the standard "comprehensive plan" means is pointed out in an article on the subject written by Charles M. Haar, Assistant Professor of Law, Harvard Law School: ("In Accordance With A Comprehensive Plan," 68 Harv. L. Rev., 1154, 1167)

"An element apparently common to all the cases dealing with this problem is consideration of whether the zoning action under attack conforms to some sort of general plan—that is, whether it may be defended as logically related to something broader than and beyond itself. This general plan, or comprehensive plan, with which the amendment must conform, is many things to many courts. It may be the basic zoning ordinance

itself, or the generalized ‘policy’ of the local legislative or planning authorities in respect to their city’s development—or it may be nothing more than a general feeling of fairness and rationality. *Its identity is not fixed with any precision, and no one can point with confidence to any particular set of factors, or any document, and say that there is the general plan to which the zoning enabling act demands fidelity.*” (Emphasis added)

A requirement common to all of the cases is that the zoning ordinance must be comprehensive in that it is motivated by “benefit of the district as a whole and not a consideration of particular tracts” and may be logically related to something broader than the property itself. (See *Marshall v. Salt Lake City*, *supra*.)

All of the authorities recognize that a change or amendment of an existing zoning plan must be made in conformity to the enabling statute to the same extent as an original zoning ordinance. The “comprehensive” standard is thus applicable to changes and amendments of the map. In analyzing this standard as it relates to *amendments*, the Court should initially determine whether “comprehensive plan” is synonymous with the zoning map and ordinance or whether it requires consideration of matters extrinsic to the ordinance itself. In this regard, the case of *Hochberg v. Borough of Freehold*, 40 N.J.Super. 276, 123 A.2d 46, is of assistance. Plaintiffs in the *Hochberg* case sought to set aside an amendment to the zoning ordinance. In applying the “comprehensive” standard, the court said: (123 A.2d 46, 51)

“But what does the term ‘comprehensive plan’ signify? It hardly seems to have reference just to

the plan embodied in the zoning ordinance itself, because then the zoning scheme would be frozen and beyond amendment. The zoning law looks toward a stable [citing authorities] but not a static or unchangeable community [citing authorities].

“The term ‘comprehensive plan’ therefore signifies something other than the pre-existing zone plan. Moreover, it has significance, even though, as in the case of the Borough of Freehold, there is no formal master plan. . . .

“Some slight clue to the significance of the term is perhaps to be found in the following explanatory note to Section 3 of the Standard State Zoning Enabling Act (recommended by U. S. Dept. of Com., Hoover, Secy. of Com., 1926) from which N.J.S.A. 40:55-32 was largely taken:

‘This will prevent haphazard or piecemeal zoning. No zoning should be done without such a comprehensive study.’

“A comprehensive plan, like the process known as municipal planning, should take account of the variant interests affecting the physical layout of the community, accommodating them to the interest of the community as a social unit [citing authorities].

“So far as the present case goes, we may say then that a comprehensive plan involves at least this—a comprehensive outlook on the community welfare as a whole, both at present and in the foreseeable future [citing authorities]. Other factors may be covered by the term, which require consideration under other circumstances, but they need not be dealt with here. . . .”

As pointed out in the *Hochberg* case, if the existing ordinance is the “comprehensive plan” referred to in the

statute, then any change of this ordinance is *ipso facto* contrary to and *not* in accordance with the plan. Such an interpretation would render the plan beyond amendment.

A competent planner cannot rationally determine by looking alone to a paper plan that the next amendment for the overall good should be either in this direction or that direction. Many matters extrinsic to the map must be considered. The Utah Supreme Court in *Gayland v. Salt Lake County*, 11 Utah 2d 307, 358 P.2d 633, recognized the necessity of considering matters extrinsic to the map or ordinance in enacting zoning legislation. Referring to the duty of the zoning authority, this Court said: (11 Utah 2d 307, 310, 311)

“It has the responsibility of advising itself of all pertinent facts as a basis for determining what is in the public interest in that regard.”

which must include such facts “bearing on the question of proper zoning” as:

“. . . location of businesses, schools, roads and traffic conditions, growth in population and housing the capacity of utilities, the existing classification of surrounding property, and the effect that the proposed reclassification may have on these things and upon the general orderly development of the county.”

This Court further said:

“In performing their duty it is both their privilege *and obligation* to take into consideration their own knowledge of such matters and also to gather available pertinent information from all

possible sources and give consideration to it in making their determination.” (Emphasis added)

Any fair, logical and rational amendment to an existing plan must take into account such matters extrinsic to the ordinance itself as existing land uses, nature, condition and value of existing buildings, traffic conditions, property values, land vacancies, trends in land development, population changes, public need, established policies employed in similar applications, and numerous other considerations. None of these factors is disclosed by inspection or study of the zoning map. An amendment of the ordinance which does not take into account these factors extrinsic of the ordinance and map certainly cannot fulfill the objective of “community welfare as a whole both at present and in the foreseeable future” as required and contemplated by the “comprehensive” standard.

The City Commission in this case heard and presumably considered evidence extrinsic of the ordinance and map. Plaintiffs contend that the action of the Commission in amending the ordinance was not in accordance with, but contrary to the “comprehensive” standard, and specifically that the zoning action was based solely upon considerations pertinent to the property rezoned and the owners of such property. The trial court in this cause has determined as a matter of law, without benefit of evidence as to any of the extrinsic factors bearing upon proper planning and zoning, that the zoning action was reasonable. Plaintiffs contend that this determination is clearly erroneous.

Kuehne v. Town of East Hartford, 136 Conn. 452, 72 A.2d 474, illustrates judicial application of the “comprehensive” standard. The facts are similar to those involved in the case at bar. The zoning authority of the Town of East Hartford rezoned property in a residential zone for business use. The applicant intended to erect facilities for six or eight stores in the nature of retail stores and small business establishments calculated to serve the needs of residents in the vicinity. A small area already zoned for business was located relatively close. Fifty-one of the residents of the area filed their petition in support of the change. An appeal from the zoning action was taken to the Connecticut trial court. Extensive evidence was taken and the action of the zoning authority was affirmed. On appeal the Connecticut Supreme Court reversed, holding: (72 A.2d 474, 478, 479)

“A limitation upon the powers of zoning authorities . . . is that the regulations they adopt must be made ‘in accordance with a comprehensive plan.’ . . .

“In the case before us it is obvious that the council looked no further than the benefit which might accrue to Langlois and those who resided in the vicinity of his property, and that they gave no consideration to the larger question as to the effect the change would have upon the general plan of zoning in the community.”

* * *

“The action of the town council in this case was not in furtherance of any general plan of zoning in the community and cannot be sustained.”

See also *Appley v. Township Committee*, 128 N.J.L. 195, 24 A.2d 805, and cases collected at 51 A.L.R.2d 263. It is significant that the determination made in these cases and in the *Marshall* case was predicated upon evidence of all underlying circumstances which is in sharp contrast to the summary review of the map made by the trial court in this cause.

Should this Court conclude that the term "comprehensive plan," when applied as a test of the validity of a zoning amendment, is in fact synonymous with the existing zoning ordinance and that the word "comprehensive" does not contemplate consideration of factors other than the map itself, then plaintiffs earnestly contend that the zoning action here was patently inconsistent with the plan (map). The change is in direct violation of the "basic purpose" of zoning as stated in the *Marshall* case in that it arbitrarily creates a business district in the heart of a long established residential area. Assuming need for additional business properties (which need was not shown in this case) then logic and reason suggest enlargement or extension of existing business or commercial areas. From the plan itself it can be seen that there is no rational basis for jumping into the center of a residential area when business districts which could have been enlarged or extended are located in the same general area. Such action is in direct conflict with the "reasonable neighborhood uniformity" and "orderly development" contemplated by this Court in the *Marshall* case. The boundaries of the new business district are likewise indefensible. Such boundaries are based solely upon the availability of land and not on any rational

basis of harmonious, reasonable and appropriate land use on a general scheme.

It appears that the trial court in this cause either concluded that a zoning change need not comply with the “comprehensive” standard or he looked at the zoning map without benefit of extrinsic evidence and concluded as a matter of law that the City had complied with this standard. Either conclusion is reversible error.

Police Power - Zoning Purposes

Cities do not have authority to limit or restrict the use of private property except in furtherance of the police power. The *Marshall* decision recognizes that zoning is “done under the police power” and “must have for its purposes and objectives matters which come within the province of the police power.” The statute enumerates those purposes for which zoning is intended (i.e. to lessen congestion in the streets, prevent overcrowding of land, avoid undue concentration of population, etc.). This Court in the *Marshall* case concludes that the “basic purpose” of zoning is to:

“. . . ‘bring about an orderly development of cities, *to establish districts into which business, commerce and industry shall not intrude*, and to fix certain territory for different grades of industrial concerns. . . . It is a fundamental theory of the zoning scheme that it shall be for the general good, to secure reasonable neighborhood uniformity, and to exclude structures and occupations which clash therewith.’ . . .” (Emphasis added)

With established business districts in the near vicinity, intrusion of a small new business district into the heart

of a long-established residential area is at once suspect of special interest legislation and lack of planning.

Plaintiffs contend that the ordinance involved in this action was not passed to accomplish any of the purposes enumerated in the enabling statute and is not a legitimate exercise of the police power. The complaint charges that the ordinance gives no consideration to the purposes and objects of zoning legislation. This allegation is one which may be tested only by evidence.

Zoning action based solely upon considerations pertinent to one tract of land or one group of individuals cannot be "designed" in furtherance of the public welfare. For example, rezoning of a part of a residential area so that commercial interests will erect new buildings may serve an immediate problem in the tract rezoned. But, what happens to the rest of the residential district surrounding the newly created commercial zone?

Due consideration to the effect of the zoning action here would have disclosed that the action taken will create instability in the surrounding residential zone which will deter and possibly prevent redevelopment of the debilitated area for residential use. Thus, while an aesthetic and delinquency problem for a few may have been aided, a greater slum and delinquency problem is created for many. (Evidence in this cause would show, among other things, that the general plan of Salt Lake City has been to restrict the east line of the general business area to 5th East Street except for small neighborhood business areas provided by the original ordi-

nance of 1927. In some instances the boundaries of the outlying business districts have been readjusted. The new business zone on 7th East Street creates a high degree of uncertainty as to the probable future classification and use of the residential property now located between the new zone and the commercial properties to the west.)

Plaintiffs' evidence would show that Salt Lake City already has too much business and commercial zoning by all standards. Business interests in land use are not always parallel and consistent with the public interest in proper community planning, however. In this case the business interests which the defendant Alder-Wallace represents desired a large tract of land for commercial use at the lowest possible cost. It is obviously much less expensive to acquire such a tract in a residential area than it is to obtain property in an area already zoned for commercial use. The next step is to ask City authorities to rezone the residence property which has been optioned so that it can lawfully be used for commercial purposes. Such a proposal naturally has the support of many property owners whose profitable sale of their property is contingent upon the rezoning. Likewise, such a proposal is highly offensive to the conscience of the City planning staff. (The report of the Planning Commission in this case demonstrated intensive study of the application and careful thinking on its merit from a planning standpoint.) It is not difficult to establish a case for the proposition that business zoning will benefit these property owners and the valuation of the

property they seek to sell. Such a case is, nevertheless, a poor (and in fact an unlawful) basis for zoning action.

The zoning action taken by the Commission in this case not only fails to consider public welfare in terms of zoning legislation, but is antagonistic with public good in these areas. The trial court's review of the zoning map did not give fair judicial consideration to the problems of public welfare which are presented by the enactment of this ordinance. Evidence would establish the plaintiffs' position that the action here was not designed to fulfill any public purpose. Plaintiffs should be permitted to prove that the amendment to the map was in this case at the instance of private persons and for their benefit and not in the public interest.

Change of Conditions

In the case at bar, Salt Lake City, after due study and public hearing, adopted a comprehensive and general zoning ordinance in 1927. The subject premises and lands surrounding them have been zoned for residential use since original enactment of the ordinance. History of zoning in the municipality will show that there have been no significant changes in commercial zoning except in terms of readjustment of the boundaries of existing commercial districts. The action here taken does not fall within the category of readjustment of boundaries, for it is not contiguous with any existing commercial district. Instead, it constitutes the creation of an entirely new commercial district. It is a substantial departure from the existing map or plan.

Presumably the plan existing at the time of the amendment, which plan classified the property as residential, was a fair, rational and comprehensive plan. Such a presumption was given recognition by the court in *Northwest Merchants Terminal Inc. v. O'Rourke*, 191 Md. 721, 60 A.2d 743, where the court said:

“There is a presumption that zones are well planned and arranged and are to be more or less permanent *subject to change only to meet genuine change in conditions.*” (Emphasis added)

In *Page v. City of Portland*, 178 Ore. 632, 165 P.2d 280, the Oregon Supreme Court, in striking down an amendatory ordinance, said:

“Police power must be exercised to promote the general welfare of the people at large, and not for the interests of any private group [citing authorities]. *Amendments to zoning ordinances should be made with caution and only when changing conditions clearly require amendment. Otherwise, the very purpose of zoning will be destroyed.*” (Emphasis added)

To the same effect is *Wilcox, et al. v. City of Pittsburgh*, 121 F.2d 835 (C.C.A. 3rd, 1941), where the trial court had dismissed on motion a complaint attacking an amendatory ordinance. The dismissal order was reversed by the circuit court in an opinion which read in part as follows:

“In the juristic sense we think the council have been fully put upon their proof. The general principle is conceded. Changes in the plan, like the enactment of the original ordinance, are an

exercise of police power. . . . *As conditions are the basis and justification for zoning, clearly a change in the former is essential to a change in the latter.*” (Emphasis added)

The general rule requiring “change of conditions” as a basis for amendment of a zoning ordinance is stated in 101 C.J.S. 837 and the cases are collected in footnotes in the same volume and in the pocket parts.

The plaintiff has alleged and proposes to prove that there has been no change of conditions or change of circumstances since the enactment of the original ordinance which warrants or justifies the amendment to the plan. The trial court has brushed aside this allegation by his summary dismissal order. We do not believe that opposing counsel can find any legal basis for the action of the trial judge in this regard.

THE RECORD DOES NOT JUSTIFY A DETERMINATION THAT THE ALLEGATIONS OF THE COMPLAINT ARE NOT TRUE

The allegations of the plaintiffs’ complaint and the denials of the defendants’ answers set the case at issue. The affidavit of Vernon Jorgensen does not relate in any way to the factual background or merits of the zoning action (R. 21). The affidavit of Oscar W. McConkie, Jr. is a memorandum which simply sets forth the defendants’ summary of plaintiffs’ allegations; states that said allegations give rise to law questions only, and further states that “the Utah Supreme Court has settled the law in these questioned particulars” (R. 17-19).

There is no factual matter in Mr. McConkie's affidavit which would permit the trial court to conclude as a matter of law that the plaintiffs' allegations are not true. Likewise, there is nothing in the statement of plaintiff's counsel made at the time of pretrial which would warrant such a conclusion (R. 28-39).

In our review of the cases we have found no state or federal decision which disposes of issues such as are raised here without the taking of evidence. Cases tried in this and other jurisdictions have been decided only after introduction of evidence pertaining to the factual background and basis of the zoning action.

CONCLUSION

Plaintiffs respectfully submit that the complaint and pretrial statement state a claim upon which relief can be granted and that there is no basis in the record for a determination as a matter of law that the allegations are not true. For this reason it is earnestly contended that the cause should be reversed and remanded for trial.

Respectfully submitted,

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