

1964

# Richard E. Swenson and Marilyn C. Swenson v. Salt Lake City et al : Brief of Defendants and Appellants

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD E. SWENSON and  
MARILYN C. SWENSON,  
*Plaintiffs and Respondents,*

vs.

SALT LAKE CITY, a Municipal  
Corporation of the State of Utah;  
EDWIN WHITNEY, VERNON  
F. JORGENSEN, HARRY A.  
HURLEY, WESLEY A. SOR-  
ENSON and RAY J. UNDER-  
WOOD, as members of the Board of  
Adjustment on zoning of Salt Lake  
City,  
*Defendants and Appellants.*

Case No.  
10167

## Brief of Defendants and Appellants

FILED

Appeal from the District Court of  
Salt Lake County, Utah

Honorable A. H. Ellett, Judge

AUG 7 - 1964

Clerk, Supreme Court, Utah

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## Brief of Defendants and Appellants

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### STATEMENT OF THE KIND OF CASE

This is an action to enjoin Salt Lake City and the members of its Board of Adjustment on zoning from enforcing the board's order requiring the plaintiffs to remove the carport within thirty (30) days after a hearing and decision thereon entered on November 19, 1962.

## DISPOSITION IN THE LOWER COURT

The plaintiff's motion, on appeal to the Third Judicial District Court, for a Summary Judgment was granted.

## NATURE OF RELIEF SOUGHT ON APPEAL

The defendants and appellants seek to have the Summary Judgment in favor of the plaintiffs reversed and the decision of the Salt Lake City Board of Adjustment on zoning affirmed.

## STATEMENT OF FACTS

Richard E. Swenson and Marilyn C. Swenson, the plaintiffs and respondents herein, are husband and wife. They own the property at 2675 South 18th East Street in Salt Lake City, Utah. (R. 1.) On June 12, 1962, the respondents were notified by letter from the Salt Lake City Board of Adjustment on zoning that the carport, garage and shed situated on the premises of the respondents, does not maintain required side and rear yardage and was in violation of Section 51-13-3 of the Zoning Ordinances of Salt Lake City. (R. 2.) That ordinance provides as follows:

“Sec. 51-13-3. Side yard, front yard, rear yard and height regulations. Same as for a Residential “R-1” District. (Revised Ordinances of Salt Lake City, Utah, 1955.)

The requirements for an R-1 Residential District are set forth in Section 51-12-1 to Section 51-12-6, inclusive, of the Revised Ordinances of Salt Lake City, Utah, 1955. However, the pertinent sections involved in this action are Sections 51-12-3, 51-12-4 and 51-12-5.

Section 51-12-3, provides as follows:

“Sec. 51-12-3. Side yard regulations. The minimum side yard for any main building shall be 35 per cent of the building height, but in no case less than eight (8) feet, and the total width of the two side yards for any one lot shall be 70 percent of the building height, but in no case less than twenty (20) feet.”

Section 51-12-4, provides as follows:

“Sec. 51-12-4. Front yard regulations. The minimum depth of the front yard for all main buildings shall be the average of the existing buildings within the same block frontage, except that a front yard need not be more than thirty (30) feet in depth. Where there are no existing buildings within the same block frontage, the minimum depth shall be twenty (20) feet.”

Section 51-12-5, provides as follows:

“Sec. 51-12-5. Rear yard regulations. The minimum depth of the rear yard for any main building shall be twenty-five (25) feet.”

(See pages between R 22 and R 23 proceedings before the Board of Adjustment, Salt Lake City, Utah, Findings and Order, Case No. 4572.)

The petition to grant the respondents a variance to allow them to maintain their carport in its present status and location was heard on October 29, 1962, before the said Board of Adjustment and the Board's decision entered on November 19, 1962; the respondents were so notified and given 30 days to correct the violation, (R 14); and also gave the respondents 30 days in which to remove the carport. (R 18 and R 19.) Thereafter on the 19th of December, 1963, the respondents filed their complaint in the Third Judicial District Court for Salt Lake County, praying that the appellants be restrained by order of court from enforcing said zoning ordinance and the order of the Board. The appellants moved for a dismissal of the action, (R 7) which was denied. (R 11.) The appellants then answered praying that the action of the respondents be dismissed and that the court make and enter its order affirming the order of the Board of Adjustment. No trial was ever held on the merits of the action.

The respondents and the appellants were given leave at a pretrial to file motions for summary judgments.

The motion of the respondents for a summary judgment was granted, evidently on the theory that the carport had been separated from the dwelling. (R 21 and R 22.) The fact is, that the respondents merely sawed through a board next to the outside dwelling wall and did not separate the carport from the dwelling. Neither building had been moved *at all* from their locations, (R.



26) and the buildings still remain in violation of Section 51-13-3 of the Revised Ordinances of Salt Lake City, Utah, 1955, as amended. (R 26.)

Section 51-4-5, subsections 9 and 10 of the Revised Ordinances of Salt Lake City, Utah, 1955, were enacted on September 6, 1961. If, as the respondent, Richard C. Swenson, states in his affidavit, that the carport was severed from his dwelling during the first week in May, 1964. (R 22), then the respondents are still in violation of the last above cited ordinance which provides as follows:

“Sec. 51-4-5. Side and rear yard exceptions.  
“ \* \* \*

“(9) Underground bomb or fallout shelters for emergency use only shall be allowed in a rear yard provided they are constructed at least four (4) feet from any property line and also provided that they conform to all requirements established by the civil defense agency for approved shelters.

“(10) A detached garage may be located in a side yard, provided said garage is at least fifteen (15) feet from a dwelling on an adjoining lot and at least ten (10) feet measured laterally from the dwelling to which it is accessory and at least sixty (60) feet back from the front property line. If the garage is placed in such a position, the area between the garage and the dwelling shall be open to the sky with no type of covering being allowed.”

The carport in this case is between the garage and dwelling house and is covered.

Mr. Richard E. Swenson, one of the respondents, admitted in his deposition that he had received notice that his carport was in violation of the city zoning ordinance, (deposition of Richard E. Swenson, page 4, lines 9 to 19, inclusive) ; and also stated that there was only two feet side yardage between the garage-carport and the neighbor's property line on the south. (Same deposition page 5, lines 2 to 30, inclusive, and page 6, lines 1 to 30, inclusive, and page 7, lines 1 to 5, inclusive.)

A. Dean Barney, Assistant Director of Zoning and Planning for Salt Lake City, Utah, (R 25) states in his affidavit that he aided Harry A. Hurley, a zoning enforcement officer of Salt Lake City, measure the side yardage between the shed, garage and carport on the premises and the adjoining property on the south "and we found that the distance measured from north to south of each mentioned structure to be one (1) foot and nine (9) inches." (R 25 and R 26.) In his deposition concerning this matter, Harry A. Hurley testified as follows:

"Q. And what does it show the distance between the property line on the south, the shed, the garage and the carport?"

"A. One foot and nine inches."

(Deposition of Harry A. Hurley, page 4, lines 19 to 21, inclusive. See also Exhibit No. 1 attached to the deposition.)

The respondents allege in paragraph 5 of their complaint, (R 2):

“That thereupon the plaintiffs prepared and filed an appeal to the Board of Adjustment and that a hearing was held on said appeal on October 26, 1962, and that upon said hearing the plaintiffs presented good and sufficient evidence to show special circumstances attached to the premises owned by plaintiffs which do not generally apply to other property in the zoning district, and further showed that because of said special circumstances, the plaintiffs would be deprived of privileges possessed by the owners of other properties in the same zoning district, and that the granting of the variance was essential to the enjoyment of property rights of plaintiffs.”

Mr. Hurley in answer to the following question answered the allegations of said paragraph 5 of the respondents' complaint as follows:

“Q. Let me ask you this, Mr. Hurley. Do you know of any special circumstances existing in regard to these premises belonging to the Swensons at 2675 South 18th East which are not enjoyed by them and which are enjoyed by their neighbors in the same zoning district?”

“A. No, I do not, sir.”

Deposition of Harry A. Hurley, page 5, lines 18 to 23, inclusive. See also the proceedings before the Board of Adjustment, Salt Lake City, Utah, Findings and Order, Report of the Commission, between pages R 22 and R 23, in which the said Board found the respondents

guilty of violation of the zoning ordinance (Sec. 51-13-3) without justification.

The above facts and evidence are uncontroverted.

## STATEMENT OF POINTS

### POINT I.

THE UNCONTROVERTED EVIDENCE SHOWS THAT THE RESPONDENTS ARE STILL IN VIOLATION OF THE CITY ZONING ORDINANCES, AND MERE FACT THAT A BOARD WAS SAWEED THROUGH BETWEEN THE DWELLING AND CARPORT DOES NOT CURE THE VIOLATION.

### POINT II.

THE ZONING ENFORCEMENT OFFICER AND THE BOARD OF ADJUSTMENT COULD NOT GRANT A VARIANCE TO THE PLAINTIFFS AND RESPONDENTS AND UNDER THE FACTS COULD ONLY COMPEL A COMPLIANCE WITH THE ORDINANCE.

## ARGUMENT

### POINT I.

THE UNCONTROVERTED EVIDENCE SHOWS THAT THE RESPONDENTS ARE

**STILL IN VIOLATION OF THE CITY ZONING ORDINANCES, AND MERE FACT THAT A BOARD WAS SAWED THROUGH BETWEEN THE DWELLING AND CARPORT DOES NOT CURE THE VIOLATION.**

In this case, the requirements of Section 51-13-3 of the Revised Ordinances of Salt Lake City, Utah, 1955, have not been met by the respondents as to side yard requirements. Moreover, the pretense of having allegedly severed the carport from the main living quarters, does not relieve the respondents from a duty to comply with the side yard requirements of the above mentioned ordinance, as the dwelling, patio, carport, garage and shed remain in exactly the same position and without any change in location whatsoever, as before the alleged severance. The violation of the ordinance is clear and positive, as Mr. Snider, the Zoning Enforcement Officer, so found, as did the Board of Adjustment on Zoning. See proceedings before the Board of Adjustment, Salt Lake City, Utah, Findings and Order, Report of the Commission, pages between R 22 and R 23.

This court found, contrary to the court below, in the case of H. C. Hargraves, Building Inspector for Salt Lake City, Plaintiff and Appellant, vs. Harry L. Young, Kenneth L. Anderson and William Walkenhorst, Defendants and Respondents, 3 Utah 2nd 175, 280 Pacific 2nd 974, as follows:

“ \* \* \*

“[1] It appears and we hold, contrary to the

trial court's conclusion, that the Sections quoted apply to a structure such as shown in the picture, whose projection obviously is far beyond the footage allowed by the ordinance.

"[2] As to the court's determination that there is no reasonable relationship between prohibiting such structure in prescribed sideyards and the public health, safety, morals or general welfare we cannot agree, since set-back requirements generally have been held valid under similar ordinances, and there appears to be no essential difference between elimination of structures in sideyards and the elimination of structures in frontal areas reserved in setback ordinances. Authorities generally accepting such a conclusion are in harmony with *Gorieb v. Fox*, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228, and we are impelled to follow them even though defendants will suffer in a situation where they acted in apparent good faith not realizing the import of the ordinances existing at the time they erected these structures.

" \* \* \*

## POINT II.

**THE ZONING ENFORCEMENT OFFICER AND THE BOARD OF ADJUSTMENT COULD NOT GRANT A VARIANCE TO THE PLAINTIFFS AND RESPONDENTS AND UNDER THE FACTS COULD ONLY COMPEL A COMPLIANCE WITH THE ORDINANCE.**

The appeal from the Zoning Enforcement Officer's decision to the Board of Adjustment and its decision

on appeal for review has resulted in confirming the such officer's decision. It was positively found that the side yardage was not sufficient to meet the requirements of the above cited ordinances and the mere fact that a board had been sawed through in an attempt to sever the carport from the main dwelling did not affect the side yardage *at all*, since the carport was not moved *at all* from its original position.

The Supreme Court of Utah has said in the case of Walton vs. Tracy Loan & Trust Co., et al. (Crookston et al, Interveners), 97 Utah 249, 92 Pacific 2nd 724, on page 729 of the Pacific Report, paragraph 7:

“[7] We hold therefore that the Board of Adjustment has no power to permit or authorize the use of property for, or the erection or construction of a building designed to be used for, any purpose or use not permitted within such district by the terms of the Zoning Ordinances of Salt Lake City; and the order of the Board of Adjustment and the judgment of the District Court are both made without authority of law.  
\* \* \*”

## CONCLUSION

It is, therefore, respectfully submitted that under the circumstances of this case, there was no valid reason in fact or law, warranting the lower court to grant the respondents a summary judgment sustaining their complaint and the appellants hereby respectfully further submit, that such judgment should be reversed

and decision and order of the Board of Adjustment for Salt Lake City on zoning affirmed.

Respectfully submitted,

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SALT LAKE CITY ATTORNEY

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Salt Lake City, Utah

Attorneys for Defendants and  
Appellants.

#### CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served the within Brief upon Plaintiffs and Respondents by mailing three (3) copies of the same to their attorney Wallace D. Hurd of Bayle, Hurd, Oman & Lauchnor, at 1105 Continental Bank Building, Salt Lake City 1, Utah, this .....<sup>7<sup>th</sup></sup> day of August, 1964.

A. M. Marsden