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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. SORENSON and RAY J. UNDERWOOD, as members of the Board of Adjustment on zoning of Salt Lake City,
Defendants and Appellants.

Case No. 10167

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BRIEF OF RESPONDENTS

Appeal from the District Court of Salt Lake County, Utah
Honorable A. H. Ellett, Judge

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Section 51-12-3, 4 and 5, Revised Ordinances of Salt Lake City, Utah, 1955 9

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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. SORENSON and RAY J. UNDERWOOD, as members of the Board of Adjustment on zoning of Salt Lake City,
Defendants and Appellants.

Case No. 10167

BRIEF OF RESPONDENTS

STATEMENT OF THE KIND OF CASE

Respondents brought an action against the Board of Adjustment on zoning of Salt Lake City praying that the District Court for Salt Lake County enjoin the Board from requiring the respondents to remove

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the carport on their premises. Prior to the bringing of this action, the aforementioned Board had refused to grant a variance to the respondents stating that the carport was attached to the dwelling in violation of the zoning ordinance, the ordinance in question being Section 51-13-3, Revised Ordinances of Salt Lake City, Utah, 1955. Respondent were given 30 days to remove the carport (R15, 16, 18 to 19). The carport was then severed from the dwelling and this action brought.

DISPOSITION IN THE LOWER COURT

Appellants and respondents filed motions for summary judgment with the trial court. The trial court found the issues in favor of respondents and issued an order restraining the appellants from requiring respondents to remove, alter or in any way further disturb the carport located on respondent's property (R33). From the court's order appellants appeal.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the lower court's judgment and order enjoining the appellants from further action to require the removal of the carport.

STATEMENT OF FACTS

In April of 1962, respondents purchased the home in question (R1 & 12). On June 12, 1962, they were

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notified by letter that their carport, being attached to the dwelling house was in violation of the zoning ordinance, Section 51-13-3, Revised Ordinances of Salt Lake City, Utah 1955. On October 26, 1962, the respondents appealed to the Board of Adjustment for a hearing requesting a variance be granted so that the carport could remain as it existed at that time. A hearing was held before the Board. A copy of the minutes and order denying the variance were forwarded to the respondents (R14, 15 & 16). Thereafter, respondents caused the carport roof to be detached from the dwelling to make it conform with the ordinance. Nevertheless, they were given thirty days in which to remove the carport or suffer further legal action (R18, 19 & 22).

This action was then filed in the district court for Salt Lake County praying that the court enjoin the Board from further action. Motions for summary judgment were filed by all parties. The trial court, after hearing both motions granted judgment in favor of respondents and enjoined the Board from further action against the respondents in its effort to require the removal of the carport (R33). From the trial court's order, the Board appeals.

It should be noted that the evidence presented at the hearing of the Board and made a part of this record by the appellants shows that the carport in question was constructed by a prior owner (R15). It was constructed during the year of 1948 (R1 & 2). Since that time, it is conceded by the respondents that the carport

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did not fully conform with the then existing zoning ordinance in that it was attached to the roof of the dwelling. The nonconformity was corrected by the respondents by detaching the roof from the dwelling at the suggestion of the trial court (R22). The record further shows that the respondents' predecessor in title had been notified by the zoning board that the carport was in violation as early as August 25, 1961 (R15).

The trial court found that the carport was in fact now detached from the dwelling and therefore was not in violation of the ordinance in question (R33).

POINTS URGED FOR AFFIRMANCE

POINT I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS.

POINT II. RESPONDENTS ARE NOT NOW IN VIOLATION OF A CITY ORDINANCE PASSED SUBSEQUENT TO THE ERECTION OF THE CARPORT.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS.

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Respondents have detached the carport from the dwelling (R33). The trial court found that the two structures had been separated and now conform to the requirements of the ordinance in existence at the time the carport was erected (R33). Appellants cite Section 51-4-5, Subsections 9 and 10 of the Revised Ordinances of Salt Lake City, 1955, and set forth that said subsections were enacted on September 6, 1961, thirteen years after the carport was constructed and thereby allege that respondents are now in violation of these subsections (Appellant's Brief P. 7). It is respectfully submitted that the carport had been erected long before the subsections were enacted and have a prior existing use that was not affected by the passage of the new subsections. The new subsections have no bearing on the issues in this case. The record also clearly shows that respondents were not charged with violating the new subsections. Respondents' action was brought solely upon the ruling made by the appellants as it concerns Section 51-13-3 of said ordinances (Appellants' Brief P 4, §1 & 33).

Appellants concede that the respondents' predecessor had been told to remove the carport prior to the enactment of the new subsections (R15, Appellants' Brief P. 7). As early as August 25, 1961, at least a week prior to the passage of the new subsections 9 and 10 referred to by appellants, the carport was in dispute (R15). Self-serving affidavits containing legal conclusions were filed by the appellants setting forth that although the roof of the carport had been detached

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from the roof of the dwelling, that the same was done merely as a sham and in the opinion of the affiant did not make the carport conform to the ordinance (R25). It should be understandable that respondents would make every reasonable effort to conform to the requirements of the zoning ordinance at the least possible expense. Testimony taken at the hearing before the Zoning Board and made a part of the record in this case indicates that it would cost the respondents at least $2,100.00 to remove the carport and existing structures pursuant to the Board's order (R15). If only a small portion of a building is in violation of a zoning ordinance it should not be necessary for the owner thereof to remove the entire structure. He may alter the building to conform to the ordinance. This was done by the respondents and the trial court so found (R30).

POINT II

RESPONDENTS ARE NOT NOW IN VIOLATION OF A CITY ORDINANCE PASSED SUBSEQUENT TO THE ERECTION OF THE CARPORT.

In appellants' brief, they seek to include in this record other ordinances of Salt Lake City concerning zoning which were not at issue before the Zoning Commission or before the trial court and therefore should not be considered by this court (Appellants' brief P. 4, 5 & 7. In spite of this fact, by their own brief and record it is clearly shown that the subsections of the

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ordinance cited by appellants was passed long after the carport was erected and therefore have no bearing on the issues of this case. At page 5 of appellants' brief they set forth the side, front and rear yard regulations found in Section 51-12-3, 4 and 5 of the Revised Ordinances of Salt Lake City, Utah, 1955. It should be noted that the regulations set forth the minimum requirements for *main buildings* and do not apply to garages unless attached to and made part of the main building. Respondents were not aware of a zoning violation when the home was purchased. Appellants admit that warnings were given prior to the passage of subsections 9 and 10 of Section 51-4-5 which the appellants now try to invoke (R15).

The Board is attempting to apply an ordinance concerning rear and side yard requirements that was passed approximately thirteen years after the carport was erected (Appellants' Brief P. 7). This question was considered in the case of United Cerebral Palsy Association vs. Zoning Board of Adjustment, et al, 382 Pa. 67, 114 Atlantic 2nd 331, 52 ALR 2nd 1093. In considering this problem, the Supreme Court of Pennsylvania held:

> "Be that as it may, plaintiff points out that the garage and the greenhouse were constructed long before the zoning ordinance was enacted, would therefore constitute a legal nonconforming use as to rear yard requirements, and accordingly are protected by a provision of the ordinance to the effect that any building or the use of any building existing at the time of the passage of the

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> ordinance that does not conform in use, height, location, size or bulk with the regulations of the district in which it is located, shall be considered a nonconforming building or use, and may continue such use in its present location."

If appellants were permitted to apply the new subsections of the ordinance to prior existing structures, every home and business establishment in the City of Salt Lake would be in danger of zoning violation at the whim of the Zoning Board in changing zoning requirements after the business or dwelling had been constructed by ordering the owners to comply with every new ordinance passed. It is respectfully submitted that the Board cannot pass new subsections to ordinances changing or adding to the zoning requirements and then require the property owners in the particular area to conform to the new requirements long after their dwellings or other structures have been erected.

The trial court's finding that respondents have detached their carport from their dwelling in compliance with the prior ordinance should not be disturbed and its restraining order made permanent.

CONCLUSION

Respondents, being innocent purchasers of the property in question and after having taken steps to make their carport conform to the zoning requirements that existed at the time the carport was built should not now be required to expend a large sum of money

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in removing the carport which would detract from the value of their home. Appellants should not be permitted to enforce the subsections of an ordinance that were passed long after the carport was built and require new side yard conformity that was not in existence at the time the structure was erected. Clearly the respondents' carport conformed to the requirements of zoning at the time it was erected other than the fact that it was attached to the dwelling. This violation has since been eliminated and the zoning board should be restrained from further action against the respondents.

Justice dictates that the judgment and order of the lower court should be affirmed with cost to respondents.

Respectfully submitted,

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