1966

Evan P. Jones v. Logan City Corporation : Appellant's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

EVAN P. JONES,
Plaintiff and Appellant

vs.

LOGAN CITY CORPORATION,
Defendant and Respondent

No. 10622

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This is an action by the Plaintiff to obtain an injunction enjoining Logan City Corporation from destroying Plaintiff's house pursuant to an order of Logan City's Board of Condemnation finding the house to be a menace to public safety.

DISPOSITION IN LOWER COURT

The case was tried to the Court and the Court entered a judgment for the defendant dismissing plaintiff's complaint and holding the Logan City Ordinance constitutional.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment and judgment in plaintiff's favor as a matter of law, or that failing, for

a modification of the judgment permitting plaintiff to appear before the Logan City Board of Condemnation and present evidence showing plaintiff's house is not a menace to public safety.

STATEMENT OF FACTS

A short time prior to June 2, 1965, the Chairman of the Logan City Condemnation Board investigated the property owned by the plaintiff. He said that he felt the conditions of the home on the property required a hearing by the Logan City Board of Condemnation. The house was constructed over sixty years ago and prior to the enactment of Logan City Ordinances No. 120 through No. 125. The house is located on a block where there are similar houses, constructed about the same time and of the same material which are also still being used. (Tr. 11-13)

The Chairman of the Board, the chief of the city fire department, and the other two members of the board, the city health officer and the building inspector, prepared and signed a notice that a hearing would be held on June 16, 1965 at the Logan City Commission Office, On June 2, 1965 a copy of this notice was mailed addressed to Evan P. Jones and Veda P. Jones at 188 West 5th North Street, Logan, Utah, and was sent by certified mail, return receipt requested. The Post Office returned the letter as unclaimed. (Tr. 17-19) At this time and for the past twelve years, the plaintiff, Evan P. Jones, has resided at Paris, Idaho. (Tr. 12) The Chairman of the Logan City Condemnation Board knew that Evan P. Jones resided at Paris, Idaho. (Tr. 27) On or about

June 2, 1965 a copy of the notice was also posted on the property in question located at 476 North 2nd West in Logan. The defendant introduced testimony from a 15 year old neighbor across the street who admitted that every day his mother had to look out her kitchen window at the house while she washed dishes and she thought it was very unsightly. (Tr. 31-32) This young neighbor said that sometime after school was out he saw the plaintiff take the notice off the house. Mr. Jones, testified that he hadn't been in Logan during that summer, that he had never received notice of the proceedings and that the only notice, oral or written, he had received was a letter dated October 15, 1965, advising him that since the time for appeal had expired, his house would be destroyed on October 25, 1965. (Tr. 12-14).

The Chairman of the Logan City Condemnation Board testified that a hearing was held on June 16, 1965, but neither Veda P. Jones nor the plaintiff, Evan P. Jones were present. Over the objection of the plaintiff a purported copy of the Board's findings that the building and structure located on the property constituted "a menace to public safety" and ordering it "demolished" within sixty days was introduced in evidence. The original record of such finding nor a certified copy of the same were not presented for admission and no explanation was made as to why they were not available.

An alleged copy of the original finding was served on Veda P. Jones, but even though the Chairman of the Logan City Board of Condemnation knew Evan P. Jones resided in Paris, Idaho, no copy of the finding was ever served on him or mailed to him at that address.

On or about October 20, 1965, the plaintiff received a letter advising him that his house would be destroyed on October 25, 1965 as the time for appeal had expired and on that day he commenced this action.

The Chairman of the Logan City Board of Condemnation admitted that there was no written standard from which it could be determined whether or not a building constituted a menace to public safety and he also admitted that his decision and those of the other members of the board was "subjective." (Tr. 27). On redirect examination the Chairman said that his decision was also partly based on his knowledge of some fire ordinance which was never introduced in evidence. (Tr. 28).

At the trial the defendant Logan City asked the Chairman of the Board of Condemnation to discuss the facts upon which he based his decision. This question was objected to by the plaintiff because the defendant had not alleged in its answer that the plaintiff's house was a "menace to public safety" nor that it was a "nuisance." Therefore it was plaintiff's construction of the pleadings that the defendant Logan City was proceeding on the theory that it was beyond the power of the Court to review the determination by the Logan City Board of Condemnation as its finding that the plaintiff's house constituted a "menace to public safety" was final except for review by the Board of Adjustment of Logan City. The Court apparently agreed with plaintiff's understanding as it sustained plaintiff's objection to the offered testimony. (Tr. 23-25).

The plaintiff alleged in his complaint that Logan City was proceeding under Ordinance Nos. 120 through Nos.

125 (Exhibits 1-6) which was admitted in Defendant's answer.

STATEMENT OF POINTS

POINT I: The District Court erred in holding that Logan City had authority to redelegate to a Board of Condemnation the power to legislate or adjudicate the conditions under which a house constitutes a "menace to public safety."

POINT II: The District Court erred in holding that the Logan City Board of Commissioners had established an adequate standard under which a City Board of Condemnation could determine when a house constituted a "menace to public safety."

Point III: The District Court erred in holding that Logan City had authority to demolish a residence in absence of an immediate threat to safety without affording the owner an opportunity to repair the same.

POINT IV: The District Court erred in not requiring Logan City to use good faith in giving notice to the owner of a house prior to determining that it should be demolished.

ARGUMENT

POINT I

LOGAN CITY HAD NO AUTHORITY TO REDELEGATE TO A BOARD A LEGISLATIVE OR JUDICIAL POWER TO DETERMINE WHAT CONSTITUTES A "MENACE TO PUBLIC SAFETY."

It seems to be well settled in this state that a city organized under the general law only has such powers as are given to it by the state legislature. That a municipal corporation in the exercise of all its duties including those most strictly local or internal, is but a department of the State. See Ogden City v. Bear Lake & River Water Works Inv. Co., 16 Utah 440, 52 P. 697, 41 L.R.A. 305; Salt Lake City v. Sutter, 61 Utah 533, 216 P. 234; Wadsworth v. Santaquin City, 83 Utah 321, 28 P2d 161; Walton v. Tracy Loan & Trust Co., 97 Utah 249, 92 P2d 724; Salt Lake City v. Revene, 101 Utah 504, 124, P2d 537; Ritholz v. City of Salt Lake, 3 Utah 2d 385, 284 P.2d 702. The Utah Supreme Court has said:

> "We are committed to the principle that cities have none of the elements of sovereignty . ." (Nasfell v. Ogden City, 122 Utah 344, 346, 249 P 2d 507).
> "A city organized and operating under general law may possess and exercise only the powers granted in express words (by an act of the legislature) and such as are necessarily or fairly implied in or incident to the powers expressly granted or those essential to the declared objects and purposes of the corporation and not merely convenient but indispensable." (Wadsworth v. Santaquin City, supra.)
>
> " . . any fair, reasonable, substantial doubt concerning the existence of the power is resolved by the courts against the corporation (city) and the power denied." (Salt Lake City v. Revene, supra.)

In enacting Ordinances Nos. 120 through 125 it appears that Logan City proceeded under the general grant of legislative power given to the board of commissioners in Section 10-6-79, Utah Code Annotated, 1953, and the

specific authority contained in Section 10-8-52, U. C. A. 1953:

> "They may define fire limits and prescribe limits within which no building shall be constructed except of brick, stone or other incombustible material, without permission, and may cause the destruction or removal of any building constructed or repaired in violation of any ordinance, and cause all buildings and enclosures which may be in a dangerous state to be put in a safe condition, or removed."

or in Section 10-8-60, U. C. A. 1953:

> "They may declare what shall be a nuisance, and abate the same, and impose fines upon persons who may create, continue or suffer nuisances to exist."

But none of the cited statutes give the Board of Commissioners the power to redelegate their legislative power to a Board of a city.

In Eureka City v. Wilson, 15 Utah 67, 48 P. 150, the city by ordinance defined the fire limits and provided that no buildings could be erected within such limits of combustible material. The Court said:

> "The erection of buildings with combustible materials may be prohibited by ordinance, and the granting of permission for the erection of such building may likewise, by ordinance, be regulated and restricted. Such was doubtless the intention of the legislature. The power thus conferred by the legislature upon the city council is, however, of a legislative character, and may not be delegated by the council to a committee. Such power being vested in the council, it must be exercised by it."

The city also added a provision that the "Committee on Buildings" may establish regulations and restrictions under which a combustible building could be erected. The court said:

> "By adding the proviso, however, the council has attempted to confer upon a committee, not only an absolute power, which would enable it to defeat the very object of the ordinance at its mere will and pleasure, but also a legislative power, which would enable it to perform a duty imposed upon the council itself by the statute, and that is to provide regulations and restrictions to control the granting of permission according to the provisions of the ordinance. This the council had no power to do. . . while a city council in this state may prohibit, by ordinance, the construction of buildings, within fire limits, or combustible material, still it cannot confer a power upon a committee, such as is attempted to be conferred by the proviso, which may be used as a means for unjust and arbitrary discrimination between citizens. If this proviso were valid, then, no matter what regulations and restrictions the committee might adopt, it would still be within its power to grant permission to one person to erect a wooden building, and refuse the privilege to another under the same circumstances. The statute vested in the council the exercise of powers of legislation respecting the establishing of fire limits and the construction of buildings therein. This demands a discretion in the council itself, and cannot be delegated.

In Logan City the Board of Commissioners have given the Board of Condemnation the discretionary power to determine when a building is in a dangerous state and to direct whether it shall be put in a safe condition or removed. In Ordinance No. 120:

"Said board of condemnation is hereby granted the power . . to find and determine whether any building or other structure constitutes a menace to public safety."

and in Ordinance No. 124:

"Every building found by the board of condemnation to constitute a menace to . . public safety, shall, if not destroyed . . within the time allowed by and in accordance with the finding of the board, shall be deemed, and every such building is hereby declared to be a public nuisance and every such nuisance may be abated summarily by the building inspector under the order and direction of the board of condemnation."

The Board of Condemnation can thus use its power as "a means for unjust and arbitrary discrimination between citizens" as it has done by proceeding against plaintiff's house even though there are others on the same block built of the same material at the same time. (Tr. 13).

Even where the legislature has authorized a city to establish a board the Court has said that the Board of Commissioners cannot delegate their legislative powers. In Walton v. Tracy Loan & Trust Co., supra. the Court said:

"It requires no citation of authority to establish that the Commission could not delegate to the Board or any other administrative officer its legislative powers or functions . .

"The powers of the Board (of adjustment) are the same as the powers of the Inspector and that in pass-

ing on appeals the Board may only do that which the inspector may have done in the first instance."

The difference between what the Board of Commissioners may do and what the Board of Condemnation can do is the difference between legislative or judicial powers and ministerial functions. As said in State Tax Commission v. Katsis, 90 Utah 406, 62 P2d 120:

> "Where judgment and discretion are required of municipal officers they cannot be delegated without express legislative authority." (Quoting from Jewell Belting Co. v. Village of Bertha, 91 Minn. 9, 97 N. W. 424, 425.)

The Court also defined a ministerial act:

> "The duty is ministerial, when the law, exacting its discharge, prescribes and defines the time, mode and occasion of its performance, with such certainty that nothing remains for judgment or discretion. (Citing Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65)
> "A Ministerial act may be defined to be one which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the acts being done. (Citing 2 Bouv, Law Dict., 416; 27 Cyc. 793)."

The Court found that the ascertainment by the auditor that there should be a penalty on the tax because of no negligence, intentional disregard, or fraud was a quasi judicial function which could not be delegated by the Commission.

Here the Chairman of the Logan City Board of Condemnation admitted that there was no written standard

from which plaintiff or any other person could determine whether or not his building was a menace to public safety. The chairman admitted that his decision and that of the other members of the board was "subjective," (Tr. 27) which is defined by Webster (New Collegiate Dictionary, 1958) as "exhibiting or affected by personal bias, emotional background, etc." In other words the sole decision is with the members of the Board to exercise their own judgment as to whether a building or house constitutes a "menace to public safety." The Logan City Board of Commissioners has completely delegated all its legislative and judicial power to make the decision. The ascertainment of whether a menace to public safety existed and whether it should be destroyed or repaired was a quasi judicial function if not legislative function. As stated in State Tax Commission of Utah v. Katsis, supra. "From the principles laid down above, this could not be delegated" to the Board of Condemnation.

POINT II

PRIVATE PROPERTY CANNOT BE DESTROYED AS BEING A NUISANCE BY A CITY'S BOARD OF CONDEMNATION IN ABSENCE OF A STANDARD TO CONTROL AND GUIDE THE BOARD.

The plaintiff alleged and the defendant admitted that in proceeding to demolish plaintiff's house the defendant was acting under Ordinances Nos. 120 through 125. No other ordinance which established a standard for the action of the Board of Condemnation was introduced in evidence. The Chairman of the Board of Condemnation

admitted that there was no written standard upon which his decisions and those of the members of the board were based. Their decision was "subjective." (Tr. 27).

In a concurring opinion in Revne v. Trade Commission, 113 Utah 155, 178, 192, P2d 563, Justice Latimer states the general rule:

> " . . the act is defective in that the lack of standards to control and guide the administrative agency, permits the agency to be unfettered and uncontrolled, and the sole judge of what may or may not be for the welfare of the people . and therefore, the powers delegated are too broad and sweeping. This renders the act unconstitutional."

At page 173 he also says:

> "It is impossible to find any definite standards in the act to guide the board, other than its discretion as to what is good and proper for the health and safety of the public."

The only standard the Logan City Board of Commissioners has given the Board of condemnation is whether the building is a "menace to public safety." This is a complete abdication of the Board of Commissioners power to determine whether a building is "in a dangerous state" which was delegated by the legislature in Section 10-8-52, supra. It also gives the Board of Condemnation the power to determine when a home is a "menace to public safety" and notwithstanding such determination the next day an identical home could be determined not to be a "menace to public safety" by the same Board as there is nothing in the ordinance that requires a uniform rule of action by the Board of Condemnation.

The general rule is stated in 37 Am. Jur. Municipal Corporations Section 160 at page 778:

> " . . it is established, that any municipal ordinance which vests an arbitrary discretion in public administrative officials with reference to the rights, property, or business of individuals, without prescribing a uniform rule of action, making the enjoyment of such rights depend upon arbitrary choice of the officers without reference to all persons of the class to which the ordinance is intended to be applicable, and without furnishing any definite standard for the control of the officers, is unconstitutional, void and beyond the powers of a municipality."

In People v. Sholem, 294 Ill. 204, 128 N. E. 377, an ordinance permitting destruction by officers of "any building, or other structure, which for want of proper repair, or by reason of age and dilapidated condition, or for any cause, is especially liable to fire, and which is so situated as to endanger other buildings or property, or so occupied that fire would endanger persons or property therein . " was held not to supply a sufficient standard to meet constitutional requirements.

In Lux v. Milwaukee Mechanics Ins. Co. 322 Mo. 342, 15 S. W. 2d 343, "any building, any structure or part thereof that is unsafe as to fire or for the purpose used, or has become unsafe from fire, decay, or other causes, . " was held to be an insufficient standard the Court saying that the council could have fixed a standard for the guidance of the administrative body.

In Gulf Ref. Co. v. Dallas (Texas) 10 S. W. 2d 151, "the nearness or proximity to existing dwelling houses"

or that "the health of adjacent inhabitants will be greatly menaced or in danger or would seriously offend the morals, good health, convenience, comfort, prosperity and general welfare of those residing in said district" was an insufficient standard and violated the Fourteenth Amendment of the United States Constitution because "The ordinance does not define the degree of hurt, injury or inconvenience to make the structure an undesirable one . . but vests in the building inspector the right to exercise his own personal views."

Not only does the Logan city ordinance vest in the Board of Condemnation the right to exercise their own personal views, but the Chairman of the Board of Condemnation admits that this is in fact what is done in reaching a decision. (Tr. 27).

In Bennington v. Hawks, 100 Vt. 37, 134 A. 638, 50 A.L.R. 983, the court said:

> "In order to make the increased fire hazard a basis for declaring a building a public nuisance, it must be shown that it unnecessarily and unreasonably increases that hazard . . Its hazardous character must be unmistakable and the dangers therefrom so imminent and extraordinary as to make an irreparable result probable rather than possible."

No such limitation is placed on the Logan City Board of Condemnation. Indeed as plaintiff understands the defendant's position and the decision of the lower Court, it is within the authority of the city to permit its officers to exhibit personal bias or emotional background in determining whether or not a building is a "menace to publice safety." In this case the city did not plead in its

answer that the plaintiff's home was in fact a "menace to public safety" and therefore the action of the city was lawful. As a result the plaintiff objected to any evidence being introduced on the subject. The plaintiff wanted the court to proceed on the issue that regardless of whether or not plaintiff's home is a "menace to public safety" does a Board of a City have the power to determine that fact and destroy plaintiff's home without any provision for review by the City Commission*, the courts without any delegation of legislative authority to cities to allow a Board to so determine and without any standard established by a city ordinance as to what conditions the board must find before it can determine that a building is a "menace to public safety." If the Board does not have to find that there is a structural weakness in the house which would make it unsafe to remain standing under the weight of the occupants and contents, or that the heating system does not keep the heat below the point of combustion of surrounding combustible materials or some other standard showing an actual danger to the public, then regardless of the Court's review and determination that plaintiff's building is not a nuisance, is not a "menace to public safety" in the Court's opinion, the Court would still be required to uphold the action of the Board which has already been shown to be arbitrary with regard to the plaintiff.

*It should be noted that the appeal provision in Ordinance No. 122 does not provide for appeal to the City Commissioners, but to the Board of Adjustment composed of City Judge, Chief of Police, and two other citizens and taxpayers appointed by the Mayor as provided in Ordinance No. 101 creating a Board of Adjustment and providing that one member of Zoning Commission shall serve on the Board.

It has been said in 39 Am. Jur. Nuisances, Section 190, page 467:

> "Usually in suits of this character the burden is on the defendant to prove a justification. So, in a suit to restrain city officials from destroying property as a nuisance, the burden is on the city of showing that it is in fact a nuisance, by competent evidence, the same as any other fact is established, and evidence is not admissible of a finding of public officials that it is a nuisance . "

The defendant Logan City, having failed to plead that plaintiff's home is in fact a nuisance and, therefore, not having been able to offer evidence in support thereof, should be held enjoined from having plaintiff's house demolished as being a nuisance. The finding of the Board as indicated above is not evidence that plaintiff's house is a nuisance and in view of the requirements of Section 78-25-16 as to evidence of the contents of a writing there is a question whether or not the finding should have been admitted in evidence, since the Board did not produce the original nor explain that it had been recorded and this was a copy thereof or afford the plaintiff any other means of determining whether or not the finding of the Board was as offered.

In fact the alleged findings by the Board is not a "finding" at all, but a mere conclusion of law based on no facts which appear in the alleged order of the Board of Condemnation. Without any knowledge of the facts upon which such conclusion was based, plaintiff is helpless to know what steps he should take to repair his house if it in fact has any defects which constitutes it a menace to public safety.

POINT III

THE AUTHORITY OF CITIES IN RELATION TO BUILDINGS IN A DANGEROUS STATE (NOT PRESENTING AN IMMEDIATE THREAT TO SAFETY SO AS TO REQUIRE IMMEDIATE DESTRUCTION) IS LIMITED TO DIRECTING REPAIR OR REMOVAL.

At the hearing on the temporary restraining order the Court indicated to the parties that they should try to settle the matter. Accordingly the plaintiff in good faith had his attorney write to Logan City offering to paint his house, put in new windows, and install a new furnace. If this was not sufficient the plaintiff requested advice as to what additional requirements the City would impose.

The City replied by showing the plaintiff's attorney a copy of a report of the building inspector which plaintiff felt and the Court seemed to agree was not a sufficient reply by Logan City. (Tr. 4-6). The plaintiff would still like to know what requirements the City has in order to preserve his house from destruction. But since the decision of the Board of Condemnation is that his house be destroyed it appears that Logan City has usurped the authority granted by Section 10-8-52, supra., in not giving plaintiff an opportunity to repair his house. It seems evident that his house does not impose such an immediate threat to public safety that it must immediately be destroyed since it has been standing without objection from anyone between June 16, 1965, the date of the original finding and October 15, 1965, the date of the letter from the Board of Condemnation.

The Utah Legislature has said (Section 10-8-52, supra.) that the city may cause all buildings and enclosures which may be in a dangerous state to be put in a safe condition, or removed. The plaintiff has not been given an opportunity to put his house in a safe condition and if the lower court is sustained his house will be destroyed without his ever having that opportunity. The plaintiff believed that the Court's comments indicated that if the ordinance was constitutional the plaintiff would be entitled to action by the Logan City Board of Commissioners. (Tr. 5).

It is respectfully submitted that if the Supreme Court finds against the Plaintiff on the other points, the limitations of power held by Municipal Corporations discussed under Point No. I above should permit the Court to provide that Logan City must re-open the hearing to permit evidence as to what must be done in order to put plaintiff's house in a safe condition and there must be a finding by the Board of Condemnation on this point.

POINT IV.

A PROPERTY OWNER IS ENTITLED TO THE EXERCISE OF GOOD FAITH BY THE CITY IN GIVING NOTICE OF A HEARING FOR DESTRUCTION OF PROPERTY.

If the Court finds against the Plaintiff on the above points it is respectfully submitted that Plaintiff should be entitled to have a hearing on whether or not his house is in fact a "menace to public safety." Ordinance No. 120 provides that the notice of the hearing should be mailed to the owner at his "last known address." The Chairman

of the Board of Condemnation admits that he knew that the plaintiff resides in Paris, Idaho. (Tr. 27). The plaintiff's uncontradicted testimony is that he has resided there for the past twelve years. (Tr. 12).

The lower Court found that the plaintiff had actual notice of the hearing on the basis of the testiminy of a neighbor boy, age 15 years, that he saw plaintiff take the notice off the house. The plaintiff does not question the right of the Court to believe the testimony of a 15 year old neighbor whose mother does not enjoy looking at her neighbor's house as opposed to plaintiff's testimony that he had not been in Logan during that summer. But the question is whether the rights of property owners should depend solely on the testimony of a boy.

Our rule with regard to service of summons requires it to be served by a person over the age of 21 years (Rule 4 (d) (1), Rules of Civil Procedure, U. C. A. 1953.) In Liebhart v. Lawrence, 40 Utah 243, 120 Pac. 215 the Utah Supreme Court requires an affidavit in good faith as to the last known residence where service could not be had personally on the defendant. In Perkins v. Spencer, 121 Utah 468, 243 P2d 446, the Supreme Court required strict compliance with the alternate to personal service. In that case the circumstances were very similar to the situation here. A copy of the decision of the Board was served on Mrs. Veda Jones who is separated from her husband and lives in Logan, but no copy was mailed to the Plaintiff who lives in Paris, Idaho so he had no chance to appeal the decision. In the Perkins case a copy of the notice was left with the wife, but no copy was mailed to the husband at his last known address.

It is respectfully submitted that if the Court finds that the City Commission can delegate such a wide discretion to its Board of Condemnation which permits it to destroy a property owner's home without being governed by any standard, and without affording the property owner an opportunity to repair the same, then the Court should also impose a high standard of fairness on the Board in its procedures. So that where the Chairman of the Board knows the plaintiff's address and does not mail a notice to him at that address, the Board should be required to re-open its proceedings for a determination as to whether or not the plaintiff can present evidence of the soundness of his home which will change the personal bias of the members of the Board and permit plaintiff to retain his house.

Respectfully submitted,

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