1955

H. C. Hardgraves v. Harry L. Young et al : Brief of Appellant

Utah Supreme Court

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Case No. 8275

IN THE SUPREME COURT
of the
STATE OF UTAH

H. C. HARGRAVES, Building Inspector for SALT LAKE CITY, a municipal corporation,

Plaintiff,

— vs. —

HARRY L. YOUNG, KENNETH L. ANDERSON, and WILLIAM WALKENHORST,

Defendants.

APPELLANT'S BRIEF

CHRISTENSEN, HOLMGREN & CHRISTOFFERSEN,

Attorneys for Appellant

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STATEMENT OF FACTS

This appeal is from an order of the Third District Court sustaining a motion of the defendants for summary judgment. The action raises a question as to the interpretation and validity of certain zoning ordinances of Salt Lake City.

The defendants in this action are all residents of Salt Lake City, Salt Lake County, State of Utah. Each of the three defendants, at a different location in Salt Lake

City, has constructed and maintains what is commonly known as a fixed patio cover or carport without being issued a permit by the proper authorities of Salt Lake City. The defendants applied to the Board of Adjustment of Salt Lake City for a variance in the zoning ordinances to permit them to maintain the fixed patio covers or carports. Defendants also proposed an ordinance, the effect of which was to amend the zoning ordinances to permit the type of structures involved herein. The Commission failed and refused to adopt the proposed ordinance and the Board of Adjustment, under date of May 24, 1954, denied the request of defendants for a variance.

Under date of July 13, 1954, the Board of Commissioners of Salt Lake City ordered steps taken to effect the removal of the fixed patio covers or carports. Defendants advised the City Commission that they intended to retain the structures and asked that steps be taken immediately to obtain a ruling from the courts as to the application and validity of the zoning ordinances as they relate to these structures. Thereafter, under date of August 23, 1954, a complaint was filed on behalf of the City praying for an order of the court directing these defendants to remove the fixed patio covers or carports from their present locations within 30 days.

At the argument of this matter before the Third Judicial District Court, counsel for defendants advised the court that William Walkenhorst, one of the defend-

ants named herein, had purchased additional property adjoining his premises so that under the City's view of the case, such defendant would not now be in violation of the city zoning ordinances and by stipulation of counsel for plaintiff and defendants the action was dismissed as to William Walkenhorst. After argument, but without taking testimony, as requested by counsel for plaintiff, the Third Judicial District Court under date of September 20, 1954, granted the motion of defendants for summary judgment. This appeal is taken to this court from that ruling.

ARGUMENT

A. THIS IS NOT A PROPER CASE FOR SUMMARY JUDGMENT BECAUSE

(1) Fails to conform to the requirements of Rule 56 (b).

(2) Fails to conform to the requirements of Rule 56 (c).

B. DEFENDANTS SHOULD HAVE PURSUED REMEDY PROVIDED BY 10-9-15, UTAH CODE ANNOTATED 1953.

C. THE ZONING REGULATIONS IN QUESTION.

(1) Exclude the type of structures involved in this action.

(2) Are a proper exercise of the police power.

A. THIS IS NOT A PROPER CASE FOR SUMMARY JUDGMENT BECAUSE

(1) Fails to conform to the requirements of Rule 56 (b).

Rule 56 (b) provides:

> "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

As we can see from the wording of the section, summary judgment is limited to situations where the action is brought against a party against whom a "claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought." It hardly seems to require argument or citation of authority to show that the defending parties in this case do not fall within any of the classifications set out in the rule. Obviously, a counterclaim or cross-claim is not being asserted against defendants. Likewise, too, a declaratory judgment is not being sought. We have been unable to find any case which has held that the word "claim" in the rule, which is the only remaining portion of the rule which defendants could come under, has been held to include the type of action brought by plaintiffs in the District Court.

A. THIS IS NOT A PROPER CASE FOR SUMMARY JUDGMENT BECAUSE

(2) Fails to conform to the requirements of Rule 56 (c).

Rule 56 (c) provides:

> "The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

As will be noted the rule provides that summary judgment should not be granted if there is an issue as to any material fact. In the immediate case the issue might well resolve itself as to whether or not there is any reasonable relationship between the prohibiting of such structures in side yards and the public health, safety, morals or general welfare of the inhabitants of Salt Lake City. Now who is going to provide information that will help us to decide this point. All of us can sit in our respective offices and form our own conclusions in this matter based upon limited, or no experience with the subject matter. It seems apparent that persons who have made a very thorough and an analytical study of the relationship between density in population, fire hazards, the health of the population, the efficient movement of traffic, and other matters directly affecting our every day health and welfare would be the appropriate parties to advise us on this subject. Certainly, experts from the

Fire Department, the Health Department, Traffic Department, Zoning Department, and perhaps others, who have studied the effect of the zoning ordinances on the health and welfare of the population should be brought into the picture to show the results of their studies. Otherwise, we are left up to our own individual opinions without the benefit of information showing why particular zoning ordinances were adopted and why perhaps a side yard of 6 feet was required rather than a side yard of 4 or 8 feet. To most of us, with little reflection on the subject, we would fail to see why a zoning ordinance should provide for a maximum of 12 story buildings rather than 10 or 14 story buildings and it might be hard for us to see why the zoning ordinance would prohibit two families of two each in one dwelling but would not prohibit one family of ten members in the same dwelling. Likewise, it might not be readily apparent to us why one lawn umbrella would be permissible whereas a fixed or structural carport or patio cover would be prohibited. The answers to these questions are found in comprehensive studies which have been made in numerous cities showing the relationship between cause and effect in such matters and showing also the tendencies which have been found to develop if apparently innocuous steps are permitted to be taken in the first place.

As was stated by this court in the case of *State ex rel. Civello v. New Orleans,* 154 La. 271, 97 So. 440, 22 A.L.R. 260, which dealt with zoning ordinances:

> "It is not necessary, for the validity of the ordinances in question, that *we* should deem the ordinances justified by considerations of public health, safety, comfort, or the general welfare. It is sufficient that the *municipal council* could reasonably have had such considerations in mind. If such considerations could have justified the ordinances, we must assume that they did justify them." (Italics added.)

How can we know what considerations might have influenced the adoption of zoning plans without further information on the subject?

The case of *People v. Leighton,* 44 N.Y.S. 2d 779, deals with the very question of the necessity for evidence in such cases. In the Leighton case defendant was convicted of violating city zoning ordinance. At the trial defendant attempted to introduce evidence in the matter to prove that the ordinance, in its application to defendant's premises, was an improper exercise of the police power. Such evidence was excluded by the trial court and testimony was limited to the question as to whether ordinance had been validly adopted and whether defendant had constructed two family house.

The court in deciding that the proffered testimony should have been admitted stated. "The burden of proof to show the unreasonableness of a municipal ordinance rests upon the person asserting it. However, the defendant here was unable to meet such burden by the reason of the exclusion of any and all evidence offered on the

subject. This court, therefore, has no evidence before it upon which it can pass in determining the validity of the ordinance in its application to defendant's premises. Whether the defendant on a new trial can meet the burden of establishing the unreasonableness of the ordinance remains to be seen. She is at least entitled to present her proof on the subject."

B. DEFENDANTS SHOULD HAVE PURSUED REMEDY PROVIDED BY 10-9-15, UTAH CODE ANNOTATED 1953.

Section 10-9-15, Utah Code Annotated 1953, provides:

> "JUDICIAL REVIEW OF BOARD'S DECISION-TIME LIMITATION. — The city or any person aggrieved by any decision of the board of adjustment may have and maintain a plenary action for relief therefrom in any court of competent jurisdiction; provided, petition for such relief is presented to the court within thirty days after the filing of such decision in the office of the board."

Thus it seems apparent that defendants after their bout with the board of adjustment should have sought assistance from any court of competent jurisdiction. Under an amendment which was made to 10-9-15 in 1949 such application would have to be made to the court within 30 days after the filing of the decision of the board of adjustment.

We think the Utah case of *Provo City v. Claudin,* 63 Pac. 2d 570 is very pertinent to this point. In that case the City of Provo sought an injunction against defendants to restrain them from operating a funeral home in violation of city ordinance. In the case it appeared that defendant, C. O. Claudin, made an application to establish a funeral home, upon the premises in question, to the board of adjustment in and for Provo City and that thereafter said Board denied the request of defendant Claudin. As to this point the court stated:

> "Doubtless the Claudins would not have been interested in protesting the classification at the time of the public hearings unless at that time they desired to establish a mortuary in the district. But if later, when they were desirous of so doing and they conceived that the ordinance is in itself unfair in the manner specified, to wit, that the Class "B" District really includes territory which was at the time of the passage of the ordinance commercial in character or since has become so, they should have called the attention of the city commission or zoning commission, whichever body is the one to whom an applicant should first apply, to the matter and obtained a ruling from such body, and then from that ruling, if adverse, have taken an appeal to the courts. Certainly the incorrect procedure is to remodel the structure for a purpose prohibited in the zone by the ordinance and then, as a defense to an injunction suit, hit the city with the plea of an unfair ordinance."

If defendants in the immediate case, or in any other case, may fail to obtain a permit to build and thereafter

disregard the decision of the Board of Adjustment there is no purpose in 10-9-15. This section merely becomes surplusage and of no consequence.

C. THE ZONING REGULATIONS IN QUESTION.

(1) Excludes the type of structures involved in this action.

The zoning regulations which apply to this problem state; Section 6725 of the Revised Ordinances of Salt Lake City, 1944:

> "In all Residential 'A', 'A-3', 'B-2', districts, for every building erected there shall be a side yard along each lot line. The least dimension of any such side yard shall be 35 per cent of the building height, but in no case less than eight (8) feet for Residential 'A' and A-3', * * *"

Section 6727, Revised Ordinances of Salt Lake City, 1944:

> "(a) The area of a side or rear yard shall be open and unobstructed, except for the ordinary projections of window sills, belt courses, cornices and other ornamental features to the extent of not more than four (4) inches except that where the building is not more than two (2) stories in height the cornice or eaves may project not more than two (2) feet into such yard * * *"
>
> "(b) An open iron fire escape may project not more than four (4) feet into a side or rear yard."

Thus, in reading the two sections quoted, it seems apparent that a side yard of at least 8 feet is required in this district and, further, that such side yard shall be "open and unobstructed," with exceptions noted therein which do not concern us in this case. It would appear that the words "open and unobstructed" particularly when understood in connection with zoning ordinances and building codes not only in Utah, but throughout the country, mean just that. In the very section with which we are dealing, we note that exceptions are made for the eaves, chimney, etc., and in other sections of the code there are numerous references to fences, shrubbery and other obstructions of all kinds and descriptions. Therefore, we reach the conclusion that if there were to be exceptions, in addition to those set out in Section 6727, the ordinances would have made provisions for the same. Section 426 of the Uniform Building Code, which has been adopted by Salt Lake City, defines a yard to be "an open, unoccupied space, other than a court, unobstructed from the ground to the sky except where specifically provided by this code on a lot on which the building is situated."

Section 404 of the same code defines a court to be "an open unoccupied space bounded on two or more sides by the walls of a building." Thus, by definition contained in the Uniform Building Code we are forced to the conclusion that a yard is an open unoccupied space unobstructed from the ground to the sky on the lot on which the building is situated. Therefore, the only conclusion

we can reach is that the ordinance, in talking of an open and unobstructed side yard, means that it shall be open, unobstructed and unoccupied except for enumerated exceptions in the ordinances. Any other construction of the ordinance would leave it up to the whim, desire and caprice of each property owner to decide just what little bit of obstruction they should put up without being in violation of the ordinance. We respectfully suggest the only exceptions are included in the ordinances and if a variance is not given, the property owner is not to go beyond these exceptions. The only remedy is to obtain a variance, if it is justified. A variance was requested in this case and after thorough consideration denied.

C. THE ZONING REGULATIONS IN QUESTION.

(2) Are a proper exercise of the police power.

Comprehensive zoning laws and ordinances have repeatedly been upheld since the landmark case of *Euclid v. Amber Realty Co.*, 272 U.S. 365. That case and substantially all of the cases since that time on the question have stood squarely for the proposition that comprehensive zoning laws and ordinances prescribing, among other things, the height of buildings to be erected and the extent of the area to be left open for light and air and in aid of fire protection, etc., are, in their general scope, valid under the Federal Constitution.

The Supreme Court of the United States while rendering its decision in the case of *Gorieb v. Fox*, 71 L. ed. 605, went on to say:

> "It is hard to see any controlling difference between regulations which require the lot owner to leave open areas at the sides and rear of his house and limit the extent of his use of the space above his lot and a regulation which requires him to set his building a reasonable distance back from the street. Each interferes in the same way, if not to the same extent, with the owner's general right of dominion over his property. All rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems in modern city life. Euclid v. Amber Realty Co., supra, p. 386. State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable."

The State Legislature of Utah granted considerable authority to cities to promulgate and adopt zoning regulations. 10-9-1, Utah Code Annotated, 1953, provides:

> "For the purpose of promoting health, safety, morals and the general welfare of the community the legislative body of cities and towns is empowered to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population and the location and use of buildings, structures and land for trade, industry, residence or other purposes."

10-9-2, Utah Code Annotated, 1953, provides:

> "For any or all of said purposes the legislative body 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, and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings or structures, or the use of land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulation in one district may differ from those in other districts."

10-9-3, Utah Code Annotated, 1953, provides:

> "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."

All of these sections show a legislative intent to give the city plenary power in regard to zoning.

10-9-17, Utah Code Annotated, 1953, provides:

> "Whenever the regulations made under authority of this article require a greater width or size of yards, courts or other open spaces, or require a lower height of buildings or less number of stories, or require greater percentage of lot to be left unoccupied, or impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this article shall govern. Wherever the provisions of any other statute or local ordinance or regulation require a greater width or size of yards, courts or other open spaces, or require a lower height of building or a less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required by the regulations made under authority of this article, the provisions of such statute, or local ordinance or regulation shall govern."

This section likewise indicates a legislative intent to leave a maximum of open and unoccupied space. This section specifically states that if there is any statute or local ordinance which imposes less restrictive standards that are imposed by the regulations made pursuant to the authority of this article, the regulations shall govern. This validity to obtain even in the face of a contradictory statute enacted by the Legislature of the State of Utah.

In the case of *Potts v. Board of Adjustment* (N.J.) 1945, 43 A. 2d 850, plaintiff challenged action of Board of Adjustment in denying his application for leave to

convert his single family dwelling into a two family apartment house within the present structure and framework of the dwelling. The ordinance restricted the area in question and did not permit two family dwellings. The houses were rather close together in the area and there were very limited side yards. Plaintiff alleged that Board action was arbitrary, unreasonable and discriminatory; contrary to the intent and purpose of the zoning act, and that the Board had previously granted permission for two family dwellings in same district.

The court upheld decision of Board and stated:

> "The inquiry is whether the board has conformed to the legislative formula; and when there has been a valid and reasonable exercise of the delegated power, there is no occasion for judicial interference. The legislative authority has confided the determination of the question of variances and special exceptions to the specialized judgment of the zoning board; and this court may intervene only when the general regulation or the action taken by the subordinate agency is arbitrary, capricious or unreasonable. It may not substitute its judgment for that of the zoning board."

Boardman v. Davis, et al., (City of Marshalltown, Intervenor), 3 N.W. 2d 608:

> "The Municipal Zoning Law, Chapter 324, Code of 1939, empowers cities and towns to adopt comprehensive zoning ordinances. The constitutionality of such statutes and ordinances enacted thereunder have been generally sustained, as a

valid exercise of the police power, in the interest of public peace, order, morals, health, safety, comfort, convenience and the general welfare.

"The authorities recognize that a zoning ordinance, which rests upon the police power of the state may, and often does, lay an uncompensated burden upon some property owners. However, such requirements do not constitute an easement upon the property. Nor do they deprive the owner of his property as in the case of an appropriation by eminent domain for some specific public use. They are merely a restraint upon the owner's use of the property for the protection of the general well-being or in other words to prevent harm to the public. In determining the validity of the police regulation the prime consideration must be the general purpose and relationship of the ordinance and not the hardship of an individual case.

"In general, the authorities above cited enunciate the doctrine that set-back provisions of an ordinance will not be held invalid unless they clearly appear to be arbitrary and unreasonable. Although there are some contrary holdings this is the doctrine of the majority of the more recent cases. It appears to be sound and to be consistent with the position taken by this court in Anderson v. Jester, supra, and in Des Moines v. Manhattan Oil Co., 193 Iowa 1096, 183 N.W. 832, 188 N.W. 921, 23 A.L.R. 1322."

Oliva v. City of Garfield, 62 A. 2d 677:

"One attacking a zoning ordinance as unreasonable in its application is met with the presumption that it is reasonable and must bear the burden of establishing the contrary. Repp v. Shahadi, Sup. 1944, 132 N.J.L. 24, 38 A. 2d 284; Yoemans

> v. Hillsborough Tp. Sup. Ct. 1947, 135 N.J.L. 599, 54 A. 2d 202; Crow v. Town of Westfield, supra. We find from the record before us that the plaintiff has not met this burden and that the amendatory ordinance does not violate the constitutional guaranties upon which she relies."

There have been a number of Utah cases recently on the subject of zoning including the Phi Kappa case and the Dowse case.

> *Phi Kappa Iota Fraterity v. Salt Lake City,* 212 P. 2d 177.

In this case the zoning authority of Salt Lake City was challenged in regard to the zoning limitation placed on dormitories, fraternities or sorority houses. The court points out that 10-9-1, and following, Utah Code Annotated, 1953, grant the governing body of the city the discretionary power to district and zone cities for various purposes that are to the public interest and the exercise of that power will not be interfered with unless the discretion is abused. The court goes on to say:

> "There are, of course, various solutions for zoning problems such as this; and opinions may differ as to which is the more efficacious. But it is not for the court to weigh the respective merits of these solutions. That is the duty that lies upon the shoulders of the governing body which is by statute authorized to district and zone cities. The selection of one method of solving the problem in preference to another is entirely within the discretion of the commission; and does not, in and

> of itself, evidence an abuse of discretion. If changes have developed which indicate that a dispersal of fraternities and sororities will better solve the problem, that is a matter for submission to the commission; and not one for the courts." *Dowse v. Salt Lake City Corp.*, 255 P. 2d 723:

Plaintiff alleged that his land was unsuitable for residential property; that it was located in a potential industrial or commercial zone; that the zoning ordinance, as applied to his property, serves no beneficial use and in no manner promotes the health, safety, morals or general welfare of the community; that the value of his property would be greatly enhanced if it could be used for industrial purposes; and that under these circumstances the zoning ordinance is so oppressive as to be confiscatory and unlawful. The court sustained the city's motion to dismiss the complaint on the ground it failed to state a cause of action. The court went on to say:

> "In this jurisdiction the discretionary power to district and zone cities for various purposes incident to the public interest is granted to the governing body of the city by statute, section 10-9-1, 2, 3, U.C.A. 1953. Palpably the exercise of the zoning power is a legislative function and activity. Walton v. Tracy Loan & Trust Co., 97 Utah 249, 92 P. 2d 724, 726. The wisdom of the plan, the necessity, the number, nature and boundaries of the district are matters which lie in the discretion of the City authorities, and only if their action is confiscatory, discriminatory or arbitrary may the court set aside their action. Marshall v. Salt Lake City, 105 Utah 111, 141 P. 2d 704, 149 A.L.R. 282. The fact that plaintiff's

> one-half lot might be more profitably used for commercial than for residential purposes, or indeed, the fact that it has become unsuited for residential purposes does not show discrimination or reveal arbitrary action."

In *West Bros. Brick Co. v. Alexandria,* 169 Va. 271, 192 S.E. 881, the court said:

> "Zoning ordinances, in the main, deal not with present conditions, but with conditions to come. They are not designed to Haussmanize a city, but to guide its future growth. Necessarily any plans of that nature must be in some degree arbitrary. It is seldom that there is any definite reason for holding that a lot on one side of a line should be devoted to one purpose and that just across it to another. The adaptability of certain territorial sections of cities to certain uses fade into each other. One end of a field may be, beyond preadventure, suited to industrial developments, the other to private homes. Intervening there must be a twilight zone. If the legislature cannot be relied upon to say where lines must run, who can be vested with that discretion? Demonstrative accuracy is an impossibility."

This case sums up the practical aspects of any zoning regulation.

We, of course, should note that we are not concerned with just one or even two buildings which are the subject of this action. If only these two buildings were involved it would be relatively inconsequential. However, the effect of the decision of the District Court is to permit carports and patios, not only of the type involved in this

action, but of every other kind, type and description, to spring up on every lot in Salt Lake City. Furthermore, such construction is not limited to one side but they might appear on either side, on both sides, on the front or on the back. If they may have a plastic roof presumably they could have a cement or a shingled roof. Thus, we see that in reaching a conclusion in the immediate case we must bear in mind not so much the affect of these structures but the likely affect of all the structures which will immediately spring up all over the city if the decision of the District Court is sustained. It is my recollection that counsel for the defendants at the argument of the case before the District Court suggested that there are already hundreds of these structures springing up and his concern with the ordinance was largely prompted by a desire on the part of a number of firms to immediately construct hundreds more.

We might draw some analogy between the present restriction in the ordinance and a restrictive ordinance regulating or eliminating dogs under the city's police power. In any given case it might readily be possible for the defendant to come in and show that his dog was well cared for and well behaved. He might easily establish that the children in the neighborhood enjoyed playing with the dog and as a result of its existence it contributed to, rather than detracted from, the general health, safety and welfare in the vicinity. It would seem, however, that if the ordinance had, as its over-all purpose and effect, the control of not one dog but thousands

throughout the city and that the net effect of the over-all control was beneficial with respect to the health, safety, welfare and general well-being of all the citizens, the ordinance would be sustained under the police power. In the immediate case it might be noted, also, that defendants have made no showing as the cases seem to require in order to overcome the presumption of validity.

The need for vision of the future in the government of cities does not lessen with the years. To the extent the cities become more crowded, even greater vision and planning are needed. Certainly a minor restraint in beneficial enjoyment should be approved in the general public interest when a wide spread disregard of a minor restraint would result in a major building infiltration of side and back yard space throughout the city.

We respectfully submit the decision of the District Court should be reversed.

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