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Robert H. Crist and Jack L. Williams, dba Oak Hill School v. Mapleton City, a Body Corporate and Politic of the State of Utah, and Paul Cherrington : Brief of Appellant

In The Supreme Court of The State of Utah

ROBERT H. CHRIST and JACK L. WILLIAMS, d/b/a OAK HILL SCHOOL

Plaintiffs and Respondents,

-vs-

MAPLETON CITY, a body corporate and politic of the State of Utah, and PAUL CHERRINGTON,

Defendants and Appellants.

Case No. 12,558

BRIEF OF APPELLANTS

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STATEMENT OF NATURE OF THE CASE

This is an action by the Respondents on a Petition, first, against MAPLETON CITY, and then, on amended Petition, against PAUL CHERRINGTON, the Mapleton City Building Inspector and Zoning Administrator, for a Writ of Mandamus to compel the Appellants to issue a building permit for alteration of a "single-family" dwelling as a purported school for boys, and upon the counterclaim of the

Appellant, MAPLETON CITY, for an injunction against the Respondents enjoining and restraining them from converting, reconstructing, altering, occupying, and using a "single-family" dwelling in Mapleton City as a "multi-family" residence, dormitory, rooming house, boarding house, foster-family care home, detention facility or pretended school.

DISPOSITION IN LOWER COURT

The District Court, on June 10, 1971, after a brief and summary hearing on an Order to Show Cause why the Writ should not issue, signed Findings of Fact and Judgment and Writ of Mandamus ordering the Building Inspector and Zoning Administrator of Mapleton City to issue and deliver to the Respondents the building permit applied for. No action was taken by the Court on the Appellants' counterclaim for an injunction.

RELIEF SOUGHT ON APPEAL

Appellants seek to have the judgment of the trial court reversed and the Writ of Mandamus quashed. Appellants further seek an order, pursuant to Titles 10-9-16 and 10-9-30, Utah Code Annotated, 1953, requiring the lower court to issue an injunction and restraining order against the Respondents, ordering them to refrain from altering, building, or occupying

the structure in question without a building permit and Certificate of Zoning Compliance therefor, in accord with the demand of the counterclaim of the Appellants and the provisions of the zoning law.

STATEMENT OF FACTS

Because of the summary nature of the proceedings in this case, the transcript of the record is brief. The essential facts upon which the trial court predicated its decision to order the issuance of a Writ of Mandamus are these:

On December 23, 1970, a co-partnership doing business under the assumed name of "OAK HILL SCHOOL" (Respondents' Amended Answer to Request for Admissions Number 1) filed a written application with Mapleton City for a permit to remodel the Irwin Bailie "single-family" dwelling in the A-2 Zone of Mapleton City. The application (Appellants' Exhibit 2) described the contemplated use of the building, after remodeling, as a "private school for boys." The plans and specifications, however, prepared by or at the instance of the Respondents and submitted with and forming a part of the application, described and projected extensive alterations in the character of the existing "single-family" structure to create two offices, one T. V. lounge, one kitchen, one dining room, six bedrooms

and closets to accommodate twenty-six boys, six bathrooms, one room for staff quarters, two rooms for storage and laundry, one recreation room, one room for crafts, and one classroom. (Appellants' Exhibit 2; Respondents' Amended Answer to Request for Admissions Number 4; R-8).

On December 28, 1970, Respondents presented their application to the Zoning Administrator and Planning Commission of Mapleton City, and at the conclusion of a hearing thereon, the Respondents were informed that the Zoning Administrator and Planning Commission were going to recommend to the City Council that the permit not be granted. On January 4, 1971, Respondents appeared before the Mapleton City Council and requested approval of their application. The matter was taken under advisement and the City Council immediately thereafter sustained the action of the Zoning Administrator and Planning Commission in denying Respondents' application.

The Respondents then appealed the decision of the Zoning Administrator and Planning Commission to and applied for an interpretation of the Zoning Ordinance by the Mapleton City Board of Adjustment as provided by the Ordinance. (Chapter 4-3(a), 6, 7, 8 Mapleton City Zoning Ordinance) The

Board of Adjustment, on January 12, 1971, after a hearing thereon, sustained the action of the Zoning Administrator and Planning Commission in denying Respondents' application for the building permit and interpreted the Zoning Ordinance as not permitting a "multi-family" dwelling and dormitory-type facility in the A-2 Zone. (R-3)

It should be noted that notwithstanding the fact that Appellants denied Respondents' application for the building permit and that that action was affirmed by the Board of Adjustment on appeal, and that no permit has, in fact, ever issued to Respondents, either for the alteration of and construction in the Bailie home or for any use or occupancy thereof different from a "single-family" dwelling, the Respondents, in open defiance of the City, have, nevertheless, proceeded to alter the Bailie home in the manner specified in their application (R-11), and to solicit patrons therefor (R-9) and to occupy and operate the same (R-12).

It should also be noted that at the time the application for permit was filed and this action was commenced by the Respondents, they were a co-partnership doing business under the assumed name of "Oak Hill School" and had not filed an affidavit of

assumed and true name with the Office of the Secretary of State as required by the provisions of Title 42-2-5, Utah Code Annotated, 1953, as amended. (Respondents' Amended Answers to Request for Admissions Numbers 1 and 2)

It is important, also, to observe that there was in operation, prior to the enactment of the Zoning Ordinance, a similar facility known as the "Ettie Lee Home for Boys," which continues to function in the same A-2 Zone on a non-conforming use basis. This facility is contiguous to the Bailie property and located about one-fourth to one-half mile distant from the Bailie home. (Appellants' Fifth Affirmative Defense—Uncontroverted; R-15, 16)

The Respondents' Amended Petition was heard on an Ex-parte Order to Show Cause why a Writ of Mandamus should not issue, as part of a full calendar on a regular law and motion day, and it is clearly evident from the record that the court did not have the time and was not disposed to consider the case and all its ramifications in the depth which the merits of the case demanded. The court required that the matter be submitted on written briefs, without oral argument, and, further, required the ***Appellants*** to file the initial memorandum and to sustain the burden of showing why the permit should not issue to

the Respondents. (R-20, 22, 24, 25, 26, 27, 28)

The record is clear that the structural changes in the Bailie "single-family" dwelling contemplated by the Respondents' application were designed and intended to create a "multi-family," foster-family care home, dormitory-type facility for the housing of twenty-six (26) juvenile boys having drug, emotional, and other problems, and to provide for their full-time, day and night living, sleeping, and eating accommodations. (R-7, 8, 9)

The property on which the building permit is sought is located in Zone A-2 of the Zoning Ordinances of Mapleton City. (Appellants' Answer Number 16 to Respondents' Request for Admissions) The ordinance, in general terms, permits ***"one-family" dwellings and schools,*** public parks and playgrounds in the A-2 Zone. The ordinance further provides for and authorizes ***"multi-family" dwellings,*** nursing homes, ***foster-family care homes,*** and orphanages in ***Zone R-3, subject to the approval of the Board of Adjustment.*** (Respondents' Exhibit 1)

The facts will be further alluded to in Appellants' argument.

STATEMENT OF POINTS

I

THE COURT ERRED IN GRANTING THE WRIT OF MANDAMUS COMPELLING THE APPELLANTS TO ISSUE THE BUILDING PERMIT.

II

THE COURT ERRED IN REQUIRING THE APPELLANTS TO SUSTAIN THE BURDEN OF PROOF ON THE ISSUE OF WHETHER OR NOT THE PERMIT SHOULD BE GRANTED.

III

THE COURT ERRED IN REFUSING TO CONSIDER AND GRANT APPELLANTS' APPLICATION FOR AN INJUNCTION AND RESTRAINING ORDER AGAINST THE RESPONDENTS.

ARGUMENT

POINT I

THE COURT ERRED IN GRANTING THE WRIT OF MANDAMUS COMPELLING THE APPELLANTS TO ISSUE THE BUILDING PERMIT.

The critical question to be decided on this appeal is whether or not, under the circumstances of this case, Mapleton City and its officers and boards, charged with the administration of its zoning ordinances, can be properly compelled, in a summary proceeding, by the peremptory Writ of Mandamus, to

issue a building permit for what is denominated in the application of the Respondents as a "private school for boys," but which, in fact, according to the plans and other information and data submitted with and as a part of the application (Appellants' Exhibit 2), calls for the remodeling, construction, and conversion of a "single-family" dwelling into a "multi-family," multi-person dwelling, foster-family care home, or residential detention facility, with only incidental use contemplated as a school, and which is so interpreted by the various officers and boards charged with the administration of the zoning law. Section 1-2 of the ordinance defines the purposes of the same as: "to promote the health, safety, morals, convenience, order, prosperity, and general welfare of the present and future inhabitants of the City of Mapleton, Utah." Section 1-4 of the ordinance provides:

> "It is the intent of the City Council of Mapleton City, Utah, that the regulations and restrictions as set forth in this ordinance shall be so interpreted and construed as to further the objectives and purposes of this ordinance."

(a) THE OFFICE AND PURPOSE OF MANDAMUS IS TO COMPEL LAWFUL ACTION, BUT NOT TO DICTATE OR CONTROL THE CITY OR BOARDS' DECISION.

A public officer is in duty bound to exercise the judgment or discretion which is reposed in him by law. If he fails or refuses to do so, ***and does not act*** upon the subject or pass upon the question on which said judgment or discretion is to be exercised, then the Writ of Mandamus may be used to enforce obedience to the law. In other words, when, in matters involving discretion, the Respondent ***refuses to act at all,*** mandamus may issue to move him to action and to exercise his discretion in the matter. (SMYTH vs. BUTTERS, 38 Utah 151, 112 Pac. 809) The applicant for the writ, in such case, merely asks that the officer or board make a decision ***one way or the other.*** He does not seek to use the writ to compel or control the decision in any particular way, for, this cannot be done. (52 Am. Jur. 2nd 398 Section 77)

> "Although, as has been seen, mandamus may be resorted to for the purpose of compelling the exercise of official discretion, the use of the writ will not ordinarily be extended so as to ***interfere with the manner in which the discretion is exercised or to influence or coerce a particular determination.*** (Citing McCARTEN vs. SANDERSON, 111 Montana 407, 409 Pac. 2nd 1108, 132 ALR 1229) It has been reiterated that in the absence of a capricious or arbitrary act, ***mandamus will not issue to con-***

trol the exercise of official discretion or to alter or review action taken in the proper exercise of such discretion or judgment. (Citing SMYTH vs. BUTTERS, 38 Utah 151, 112 Pac. 809)

"Thus, mandamus will not lie to control the discretion of the court or judicial officer, or to compel its exercise in a particular manner, except in those rare instances when under the facts it can be legally exercised in but one way, ***nor is it a proper remedy to control acts of governmental bodies when acting within the scope of their legal powers.*** (52 Am. Jur. 2nd 298, et. seq., citing GOODMAN vs. MEADE, 162 Pa. supra 587, 60 A. 2nd 577) Mandamus is not an instrument for the instruction of public officers as to the manner in which they shall discharge duties which call for the exercise of discretion, as distinguished from the performance of ministerial duties." (Citing WOLFE vs. YOUNG, Texas Civil Appeals 277 S. W. 2nd 744)

"Mandamus is used to stimulate action pursuant to some legal duty, and ***is not to cause the Respondents to undo action already taken, or to correct or review such action, however erroneous it may have been.***" (STATE ex rel. ROBINSON vs. HUTCHESON, 180 Ten-

nessee 46, 171 S. W. 2nd, 282, 186 ALR 850)

"Mandamus is not a substitute for, and cannot be resorted to in civil proceedings to serve the purpose of certiorari, appeal, or writ of error, and this is true even though there is no mode of review given by or available under the law . . ." (52 Am. Jur. 2nd 337, Section 9)

"When there is no other adequate remedy, mandamus will issue to enforce performance of plain and imperative duties of administerial character imposed by law upon administrative bodies. ***The writ will not issue to control judgment or discretion.*** Unless there has been a 'clear abuse of discretion,' or the action of the agency was ***arbitrary, capricious,*** or prompted by wrongful motives, where judgment or discretion is reposed in an administrative agency and has, by that agency, been exercised, courts are ***powerless*** to use the writ of mandamus to compel a different conclusion." (U. S. ex rel. CHICAGO G. W. R. COMPANY vs. INTERSTATE COMMERCE COMMISSION, 294 U. S. 50)

The foregoing principles of law prevail in the State of Utah. In the case of TUTTLE vs. BOARD OF EDUCATION OF SALT LAKE CITY, 77 Utah 270, 285; 294 Pac. 294, this court said that mandate does not lie unless the relator or petitioner shows a clear legal right to performance of the act demanded

and a plain duty of the officer, board or tribunal to perform it ***as demanded,*** and where the duty to perform the act is ***doubtful,*** or where a discretion is imposed or involved in the performance of it, mandate ordinarily will not compel the performance of it in a particular way.

> "Writ of mandamus may be used to compel an inferior tribunal to act on a matter within its jurisdiction, but not to control its discretion while acting, ***nor to reverse*** its judgment when made." (HATHAWAY vs. McCONKIE, 85 Utah 21, 38 Pac. 2nd 300)

> "Mandamus will not lie to compel a board or officer having quasi-judicial function, to reverse or review judgment arrived at in discharging function, but will issue to such board or officer only if it or he ***refuses to exercise function.***" (CIVIC FEDERATION OF SALT LAKE CITY vs. SALT LAKE COUNTY, 22 U 6; 61 Pac. 222)

> "Action of public officer in situation calling for exercise of discretion is not reviewable by mandamus unless such officer has been guilty of ***clear and willful disregard of duty,*** or acts with ***caprice or partiality.***" (STATE ex rel. BISHOP vs. MOREHOUSE, 38 Utah 234; 112 Pac. 169)

(b) THE ZONING ADMINISTRATOR, THE

PLANNING COMMISSION, AND THE BOARD OF ADJUSTMENT ARE EMPOWERED TO AND CHARGED WITH THE RESPONSIBILITY OF INTERPRETING AND APPLYING THE ZONING LAW, AND IN THAT BEHALF, ARE EMPOWERED AND REQUIRED TO EXERCISE LAWFUL JUDGMENT AND DISCRETION IN THE ISSUANCE OF BUILDING PERMITS.

Under Section 4-3 of the Zoning Ordinance, it is provided:

> "The Board of Adjustment shall have the following powers and duties:
>
> a. ***Interpret ordinance and map.***
>
> The Board of Adjustment shall hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, or refusal made in the enforcement of this ordinance. The Board of Adjustment shall also interpret the zone map and boundaries thereof in case of dispute or disagreement."

Section 5-3(4) of the Ordinance further provides that:

> "Where other uncertainty exists, the Board of Adjustment shall interpret the map."

In distinguishing between ministerial duties and duties involving judgment or discretion, the general

rule is that in matters involving the interpretation of a statute, the officer or board acts with judgment and discretion.

> "A duty or act is ministerial in the sense here intended ***when there is no room for the exercise of discretion,*** official or otherwise, the performance being required by direct and positive command of the law . . . ***But a duty is regarded as involving the character of judgment or discretion, and cannot be controlled by mandamus, where it is not thus plainly prescribed or depends upon a statute or statutes, the construction or application of which is not free from doubt*** . . . Where the duty is not plainly prescribed, but is to be gathered by doubtful inference from a statute or statutes of uncertain meaning, it is to be regarded as involving the character of judgment or discretion which may not be controlled by mandamus, even though the court may deem the conclusion reached to be erroneous . . . " (52 Am. Jur. 2nd 402, Sections 80, 81 and 82)

The issuance of licenses or permits by boards and officers charged with that responsibility is a discretionary function.

> "Boards and officers charged with the duty or power of issuing licenses and permits usually exercise ***a discretionary function*** in the matter. ***Their determination involves a judg-***

ment as to the right and fitness of the applicant and generally calls for examining evidence and passing upon questions of fact. Where such is the case, ***courts may compel them to exercise their judgment or discretion, but will not attempt to control their discretion or compel them by mandamus to decide in a particular way. If in the proper exercise of their power they refuse a license or permit, the writ will not issue to revise or review their decision.***" (Anno: 20 ALR 1482; 29 ALR 41, 42, 53 ALR 49; 153; 72 ALR 1339; 124 ALR 247, 249)

The foregoing rule which accords to officers and boards a status of judgment and discretion in the exercise of their powers in issuing permits and interpreting ordinances is adhered to by the courts of this state.

In NAYLOR vs. SALT LAKE CITY CORPORATION, 17 Utah 2nd 300, 410 Pac. 2nd 764, this court said:

"The (zoning) commission, being charged with the duty of carrying out these numerous and varied objectives, must necessarily be allowed a wide latitude of discretion as to the manner in which they can best be obtained. In conformity with well-established rules relating to the powers of administrative bodies, it is to be assumed that they have some spe-

cialized knowledge of the conditions and the needs upon which the discharge of their duties depends. Because the law imposes this duty primarily upon the (zoning) commission, and because of its presumed expertise in fulfilling that responsibility, ***the court will not invade the province of the commission and substitute its judgment therefor;*** nor will it interfere with the prerogatives of the commission unless it is shown to be so clearly in error that there is no reasonable basis whatsoever to justify it and its action must therefore be regarded as ***capricious and arbitrary.***" (See also GAYLORD vs. SALT LAKE COUNTY, 11 Utah 2nd 307; 358 Pac. 2nd 633)

The meaning of the terms "arbitrary and capricious" in connection with municipal zoning was succinctly set forth by the court in JEHOVAH'S WITNESSES vs. MULLEN, 214 Oregon 281; 330 Pac. 2nd 5, as follows:

"The terms 'arbitrary and capricious action' when used in connection with determining the validity of action of municipal zoning authorities means willful and unreasoning action, without consideration and in disregard of facts and circumstances of the case, ***and where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though***

it may be believed that an erroneous conclusion has been reached."

No matter whether the court may consider the decision of the zoning administrator, the planning commission, and the board of adjustment to refuse to issue a building permit to the Respondents upon the basis of their application, including the plans and other information and data forming a part thereof, as wise or improper, the action taken is within the scope of the powers and the judgment and discretion vested in this officer and these boards in interpreting and applying the zoning law and the court ***cannot*** properly un-do what has been done or dictate a different course of action by the mandamus writ. Certainly there is no basis for any claim that the action taken was arbitrary or capricious within the definition of those terms herein set out and generally applied.

> "It is primarily the duty of the city to make the classifications. If the classification is reasonably doubtful, the judgment of the court will not be substituted for the judgment of the city." (MARSHALL vs. SALT LAKE CITY, 105 U 111; 141 Pac. 2nd 704, 709; 142 ALR 282)

(c) THE RESPONDENTS HAVE NO CLEAR AND ABSOLUTE RIGHT TO A BUILDING PERMIT AND THERE IS NO CLEAR OR ABSOLUTE DUTY ON THE PART OF THE APPELLANTS

TO ISSUE THE SAME UNDER THE CIRCUMSTANCES OF THIS CASE.

The mere fact that the Respondents have applied for a building permit to remodel a "single-family" dwelling ostensibly as a "school" is not controlling and does not create an absolute right to a permit when, as in this case, the accompanying plans and other information and data submitted to the city clearly demonstrate that the proposed structural changes are designed and intended to create a "multi-family," "multi-person" facility in the nature of a foster-family care home designed to provide living accommodations for more than a single family. It is the character of the facility which controls rather than the name which is appended to it in the application.

> "The ***name*** by which an institution is designated or called is not of controlling importance in determining whether or not it is a permissible use under a zoning ordinance; the question is to be determined by the activities or character of the business or service carried on, and ***not*** by the name." (CRAIN vs. LOUISVILLE, 1944, 298 Ky. 421; 182 S. W. 2nd 787; 64 ALR 2nd 1168)
>
> "The law must not only ***authorize*** the act sought to be enforced, but ***must require*** it to be done . . . Doubtful rights cannot be protected by mandamus, and it follows, as a corol-

lary, that the writ generally will not issue to enforce doubtful duties . . . (52 Am. Jur, 2nd 395, Section 73)

Neither is it necessary for the Appellants to wait until the facility is occupied before determining that the use of the facility is in violation of the application ,where the application itself and the plans submitted show, on their face, a design and intent to convert a "single-family" dwelling into a "multi-family," "multi-person" dwelling irrespective of any other or additional use contemplated. The provision in the ordinance for a certificate of compliance is primarily addressed to that situation in which an unlawful use of a facility is made where no building permit may even be involved or required. Here, the conversion of a "single-family" dwelling into a "multi-person," multi-family dwelling, for school purposes or otherwise, is violative of the use restrictions and spirit and purpose of the A-2 Zone.

> "A city may lawfully require that an individual shall obtain a permit for the construction ***or*** use of a building." (YUBA CITY vs. CHERNIAVSKY, 117 Ca 568; 4 Pac. 2nd 299)

Section 8-2 of the Mapleton City Ordinances provides that:

> "No building or structure shall be constructed, reconstructed, altered, or moved, ***nor shall the use of any land be changed*** except after the issuance of a permit for the

same by the zoning administrator or other authorized officer."

Section 8-3 of the Ordinances further provides that:

> " . . . Permits shall not be granted for the construction or alteration of any building or structure or for the moving of a building or structure onto a lot or for the change in use of any land, building, or structure, if such construction, alteration, moving, or change in use would be a violation of ***any*** of the provisions of this ordinance, nor shall any sewer service line, water service line, or electric utilities be installed to serve such premises if such use would be in violation of this ordinance."

It is obvious that there is no obligation or duty on the part of the City to defer its refusal to issue a building permit under the circumstances nor to refrain from taking any action against the Respondents until after the facility is remodeled and occupied. The City, would, in fact, be remiss in its duty to its citizens and inhabitants if it were to defer such enforcement and permit outlays of cash and effort by the applicant when the intent of the applicant is already known and expressed and the plans clearly show that the facility is designed to create a "multi-family," multi-person dwelling for day and night living in a "single-family" dwelling zone, irrespective of any other or additional uses to which the

property may be put, and when, as here, the applicants have proceeded without written permit to remodel and occupy the structure, and have at no time applied for or received a certificate of zoning compliance as required by Section 8-7 of the Zoning Ordinance. The requirement of a certificate of compliance with the ordinance as a condition precedent to use and occupancy of a property or facility is an additional and not a substituted requirement under the ordinances. The Writ of Mandamus, in any event, should issue only if it will resolve the entire problem.

> " . . . The writ is not an appropriate remedy unless it will settle the ***entire*** controversy." (LAKELAND JOINT SCHOOL DISTRICT vs. SCHOOL DISTRICT, 414 Pac. 451; 200 A. 2nd 748; 52 Am. Jur. 2nd 360, Section 36)
>
> "Mandamus is never granted in a doubtful case." (SNYDER vs. EMERSON, 19 Utah 319, 57 Pac. 300)
>
> "In mandamus proceeding, the legal right to require a person or court to proceed and the legal duty to do so must be ***free from doubt.***" (HOFFMAN vs. LEWIS, 31 Utah 179, 87 Pac. 167)
>
> "To warrant the court in granting a writ of mandamus against a public officer, such state of facts must be presented as to show that the relator has ***clear*** right to performance

of thing demanded, and that corresponding ***duty*** rests upon the officer to perform the particular thing." (STATE vs. MOREHOUSE, 38 Utah 234, 112 Pac. 169)

"Where public officers are sought to be coerced by will of mandate to do certain acts, the right of plaintiff to have act performed must be clear, and corresponding duty upon officer to do required act must be correspondingly clear." (WOODCOCK vs. BOARD OF EDUCATION OF SALT LAKE CITY, 55 Utah 458, 187 Pac. 181, 10 ALR 181)

"Owing to the summary and drastic character of the writ of mandamus, the law properly has erected around it many safeguards . . . In issuing the writ, regard should be had for the exigency which calls for the exercise of the court's discretion, and the interests of the public . . . and the promotion of substantial justice. The writ will ***not*** issue in doubtful cases, but only where there is a ***clear*** right in the plaintiff or relator to relief sought, a corresponding ***clear*** duty to be performed by the respondent, and no other specific and adequate mode of relief is available to the complaining party . . "(52 Am. Jur. 2nd 356, Section 31)

"Where, as to the facts, there exists ***any*** admissible doubt or ***where reasonable men***

might conscientiously differ with respect to discretion or the absence thereof, the courts have with practical unanimity declined to interfere by mandamus, and whenever an element of discretion enters into the duty to be performed, the functions of mandatory authority are short of their customary potency and become powerless to dictate terms to that discretion. The court is without power to substitute its discretion for that of a public officer or body or, where the act is discretionary, to direct that it be performed in a specific manner." (BOARD OF COUNTY COMMISSIONERS vs. PRICE, Okla. 385 Pac. 2nd 479; 52 Am. Jur. 2nd 399, Section 78)

". . . The court will not interfere by mandamus to compel the issuance of a building permit where the refusal of permit is not arbitrary and void, but involves the determination by the city officials upon facts as to which there is some admissible doubt or in respect of which reasonable men might conscientiously differ." (JACKSON vs. McPHERSON, 158 Miss. 152, 130 S. O. 287)

(d) IN INTERPRETING THE ZONING ORDINANCE, THE ORDINANCE MUST BE CONSIDERED AS A WHOLE AND PROPER EFFECT MUST BE GIVEN TO THE ENTIRE PURPOSE AND SPIRIT OF THE SAME.

"In determining the meaning of a city zoning ordinance and in construing the ordinance, the court does not isolate one part of the ordinance and ignore the plain import and meaning of the other parts, but gives force and effect to all of the provisions germain to the subject involved." (KILKOYNE vs. CITY OF COFFEYVILLE, 176 Kansas 159; 269 Pac. 2nd 418.)

"In determining the sense in which a particular word was used in a zoning ordinance, the court would consider the word in relation to the context of the ***entire*** ordinance." (CITY OF TULSA vs. MIZEL, Okla. 265 Pac. 2nd 496)

"The segregation in zoning ordinances of certain types of uses and businesses for certain areas is not a legislative sanction to carry on in such areas a business not expressly excluded therefrom, if there are reasons, apart from the zoning law, why the particular business may not be legally carried on in that area." (PRIMM vs. CITY OF RENO, 70 Nevada 7; 252 Pac. 2nd 835)

On this point, the Utah court has expressed itself as follows:

"The character of a zoning district, ***as a whole,*** must be kept in mind in determining

whether the health, safety, morals, or general welfare of the district and hence of the communty, would be promoted . . ." (DOWSE vs. SALT LAKE CITY, 123 Utah 107; 255 Pac. 2nd 723)

Ordinary day-time schools are manifestly compatible with "one-family" dwellings, public parks, and playgrounds, but the same cannot be said of a residential detention-type facility operated under the guise of a "school". As noted herein, Zone R-3 authorizes multi-family dwellings, nursing homes, ***foster-family care homes,*** and orphanages,***subject to the approval of the board of adjustment,*** which facilities are manifestly more akin to the facility proposed by the Respondents than is a "school" and it should also be observed that in the definition of terms set out in the ordinance (Section 3-1), those facilities which contemplate the housing of children for a limited purpose on a ***day-time only basis*** are differentiated from those facilities which provide for ***over-night lodging and living accommodations;*** and those uses which contemplate employing a facility for the over-night lodging and living accommodation of such children are restricted to the R-3 Zone which also authorizes "multi-family" and multi-person dwellings, and requires the approval of the Board of Adjustment. It is obvious from these distinctions that it was never contemplated that a school should include a facility primarily designed to provide ***living accommodations on a day and night basis*** with

only a limited school use. If school were the primary function of this facility, public schools are available and would be utilized. Obviously, the primary function of the facility is not "school" in the accepted sense of that term. To interpret the ordinance otherwise would be to say that because the State Industrial School contains the word "school" in its name, it could be established in any zone of any city designated generally as permitting a "school". By the same token, the fact that the State Prison conducts classes and grants certificates of graduation or diplomas to its inmates qualifies it as a "school" in the broadest definition, but it cannot seriously be contended that it would be proper or appropriate to establish a State Prison in any zone authorizing, generally, a use for "school" purposes.

The ***primary*** and ***paramount*** purpose of the facility must be determined, and if the use contemplated and for which the structural changes are designed are fundamentally to provide residential accommodations with only incidental use as a "school", the judgment of the zoning administrator, the planning commission, and the Board of Adjustment is the proper foundation for any decision relative thereto rather than the substituted judgment of the court.

In applying the rules of interpretation hereinabove set out in numerous decisions of the courts, it is clear that to allow a "foster-family care home," whether called a "school" or by whatever name it is

designated, to be established in a zone restricted to "single-family" dwellings, schools, parks, and playgrounds, would defeat the entire purpose and spirit of the zone. In fact, to permit this type of facility, designed for the care and treatment of disturbed and delinquent juvenile boys—some with "drug" problems—would have the practical effect of eliminating normal day-time "schools," parks, and playgrounds from the area altogether, because such facilities could not be established or utilized near facilities for juvenile delinquent boys—especially two such facilities—without inordinate risk and danger to the young people desiring to use the same.

In a case somewhat similar, decided by this court, and involving Provo City, this court interpreted the meaning of the term "semi-public building" just as, in this case, the zoning administrator, the planning commission, and the board of adjustment were required to interpret the meaning of the word "school" under the particular circumstances of this case. In PROVO CITY vs. CLAUDIN, 91 Utah 60, 63 Pac. 2nd 570, the court held that an ordinance prohibiting the use of a building in a residential district for other than certain specified purposes, which included "public and semi-public buildings" excluded a "funeral home" even though that facility had some of the attributes of a "semi-public" building.

In particular instances, the courts have distinguished between the meaning of certain terms as ap-

plied to various and particular fact situations:

In APPLICATION OF DEVEREAUX FOUNDATION (1945), 351 Pa. 478; 41 A2nd 744; appeal dismissed, 326 U. S. 686, the court held that an application by a school devoted to the education of mentally deficient, weak, and abnormal children, to erect a dormitory for boys of such school ***should have been denied,*** and no variance allowing such structure should have been granted, on the ground that such proposed structure did not fall within the terms of the zoning ordinance which provided that a building might be used for "educational or religious use, including a dormitory of an educational institution," since it was actually a "structure or other place for accommodating persons mentally deficient, weak, or abnormal," and that the granting of a variance to the ordinance would be contrary to the public interest because of its effect on the adjoining residential property owners.

Again, in YONKERS vs. HOROWITZ, 226 NYS 252, 22 APP. Div. 297, the court held that the operation of a home providing food, lodging and care and control of from 20 to 25 children aged 7 to 14 or 15 years, who had been placed there by their parents, was a violation of a zoning ordinance which permitted the operation of a "lodging or boarding house," as well as ***schools,*** libraries or public museums. (See 64 ALR 2nd 1170 and 134 ALR 1011.)

It should be noted that in the last case cited above,

the zone in question in fact authorized ***lodging or boarding houses*** as well as "schools" whereas in the case before this court, lodging or boarding houses are not permitted and over-night occupancy is restricted to "single-family" dwellings.

The cases are replete with instances where zoning administrators, planning commissions, and boards of adjustment have been called upon to interpret the meaning of particular terms as applied to particular fact situations and the judgment of these officers and boards has not been overturned by the courts through mandamus.

> "Mandamus is an extraordinary remedy which is available only in cases in which the usual forms of procedure are powerless to afford relief. Courts proceed with great caution in granting the writ . . . It is available only in rare cases, as a last resort for causes that are really extraordinary." (52 Am. Jur. 2nd 334, Section 5)

Under the Ordinances of Mapleton City as authorized by state law, the Board of Adjustment is empowered to interpret the ordinances and the meaning thereof and has proceeded to do so in this case and its judgment cannot properly be reversed by writ of mandamus issuing from the court.

The court, in its memorandum decision, has cited as authority for its position, the case of WILT-

WYCK SCHOOL FOR BOYS, INC. vs. HILL, et al. (182 NE 2nd 268, 11 NY 2nd 182) It is submitted that this case is not controlling or applicable, on its facts, to the fact situation now before this court. First of all WILTWYCK was a non-profit corporation and its certificate of incorporation was consented to by the Commissioner of Education of the State of New York and by the State Board of Social Welfare, pursuant to law. Its purposes, as set forth in its Certificate of Incorporation were: "to administer for dependent, neglected, abandoned, destitute, delinquent, and emotionally disturbed children, without discrimination as to race or color, a constructive program of moral and spiritual enlightenment, character development, correctional behavior problems, education and training for good citizenship; and as part of the foregoing program, to conduct a home for such children . . . " The patrons of the school were children from eight to twelve years of age all residents of New York City. Half of the school's budget was paid by New York City and half of that amount was reimbursed to the City by New York State. The Board of Education maintained on the school premises "Public Schoool No. 615, Manhattan." Teachers were paid by the New York Board of Education and the New York City curriculum was applied. Children attended classes from 9 o'clock to 3 o'clock p.m. with an hour for lunch and were referred to the school on a screening basis. By law, the school was not permitted to take "psychotic" children and

the school maintained a staff of 113 people, excluding the public school teachers. The court said:

> "There can be no doubt that the evidence showed that Wiltwyck, in conjunction with the Board of Education of the City of New York, was carrying on its work and function for the state."

The critical factor which differentiates this case from the case at bar, however, is that under the Yorktown Zoning Ordinance, governing the case, ***dormitories were expressly permitted*** as accessory buildings. In effect, therefore, the situation presented was that of a public school with daytime hours of instruction and a state supported dormitory in connection therewith, ***which dormitory was expressly permitted by the zoning law.*** To the contrary, the Oak Hill School at Mapleton in the case at bar, is not publicly sanctioned, supervised, sponsored, or financed. It is a private, profit venture. The school proposed is not a regular public school operated for students resident in Mapleton City, only, and the zone in question expressly limits day and night occupation to "single-family" dwellings and makes no provision for dormitories and foster-family care type facilities.

(e) THE ISSUANCE OF A BUILDING PERMIT FOR THE TYPE OF FACILITY CONTEMPLATED BY THE RESPONDENTS IS AGAINST THE PUBLIC INTEREST AND CONTRARY TO

LAW.

There is presently in operation in the same A-2 Zone in Mapleton City and less than one-half mile distant from the applicants' proposed facility, a foster-family care type home for delinquent boys known as the "Ettie Lee Home" which was established prior to the adoption of the zoning ordinance and which exists on a non-conforming use basis. The construction and operation of another home and quasi-detention facility for juvenile and delinquent boys in the immediate proximity of the subsisting "Ettie Lee Home," no matter under what name it is known, will cause and produce an undue concentration of delinquent and problem boys in a given area; enhance and enlarge the necessity for increased police surveillance, patrol, and protection, in a small community serviced by a single policeman and one part-time assistant; and augment the present and potential hazards to the general public and the lawful inhabitants of said area. All of these circumstances and conditions will tend toward breaches of the public peace and the issuance of a building permit for the facility sought by the Respondents will be and is manifestly against the public interest.

> "Mandamus is a writ designed to remedy a wrong, not to promote one; it is designed to compel performance of a duty which ought to be performed, not to direct an act which will work a public injury, or a private mischief, or

to compel a ***technical*** or literal compliance with the strict letter of the law ***in disregard of its spirit*** . . . The Court . , , may refuse to grant the writ if the consequence of its issuance will not promote substantial justice,***will result in more harm than good,*** . . . will tend to disorder and confusion, or will be attendant with manifest hardships and difficulties. If the evils following the issuance of the writ will outweigh those sought to be corrected, the court may refuse to grant it, even though the petitioner may show a clear legal right for which mandamus is an appropriate remedy." (RILEY vs. CARTER, 165 Okla. 262; 25 Pac. 2nd 666; 88 ALR 1018; 52 Am. Jur. 2nd 358, Section 33)

"It is an accepted doctrine that courts in the exercise of their discretionary powers to issue writs of mandamus ***will look to the public interests which may be concerned.*** Thus, even though the relator shows a clear legal right thereto, the court may properly refuse issuance of the writ if public injury or embarrassment may result therefrom, or if it will operate to the detriment rather than to the benefit of the general public, or if it will be likely to create disorder and confusion in public affairs. . . . " (52 Am. Jur. 2nd 359, Section 34)

(f) THE RESPONDENTS DO NOT APPLY TO THE COURT FOR EQUITABLE RELIEF IN THE

FORM OF MANDAMUS WITH CLEAN HANDS AND ARE, THEREFORE, BARRED FROM SUCH RELIEF.

The facts of this case show (1) that the Respondents have proceeded to remodel and convert a "single-family" dwelling in the A-2 Zone of Mapleton City to a multi-family," multi-person dwelling and foster-family care home without having first procured from the city a building permit therefor, and have, further, proceeded to occupy and use said converted facility without having procured a certificate of zoning compliance, both acts constituting a continuing misdemeanor under Sections 8-11 and 8-12 of the Mapleton City Zoning Ordinance; and (2) the Respondents have represented in their brochures (Appellants' Exhibit 3) that they are a fully accredited school, whereas, in truth and in fact, at the time of such representations and at the present time, the Respondents were not and are not qualified, licensed, and accredited as a school. Such action on the part of the Respondents is fraudulent and deceptive and the Respondents, having committed a continuing misdemeanor, do not invoke the jurisdiction of the court in this equitable proceeding with clean hands and their application should be denied. (Vol. 3, Rathkopf—Law of Zoning and Planning, Ch. 68, Sect. 7)

> " . . . Whether mandamus should be denied on equitable considerations should be determined from the facts of the particular case.

Ordinarily, if injury, damage, or prejudice results therefrom, the writ is ***not*** available to one who does not come into court with clean hands, is ignorant of the facts, and has not used reasonable diligence to inform himself thereof, or who refuses to do equity, or who has been guilty of ***fraud*** or bad faith with respect to the matter in controversy . . . " (52 Am. Jur 2nd 357, Section 32)

(g) THE RESPONDENTS HAVE A PLAIN, SPEEDY, AND ADEQUATE REMEDY AT LAW AND ARE NOT, THEREFORE, ENTITLED TO THE EQUITABLE WRIT OF MANDAMUS.

Chapter 4, Section 9, of the Mapleton City Ordinances pertaining to zoning provides:

> "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 that petition for such relief is presented to the court within 30 days after the filing of such decision in the office of the Board of Adjustment."

Webster and Black and the American Heritage Dictionary all define "plenary" as "full; absolute; complete in all aspects or essentials." Certainly, the term as thus defined does not refer to a summary proceeding. There can be no question that the petition

for a Writ of Mandamus is a summary procedure as distinguished from a plenary action and is unavailable to the Respondents. It should also be noted that the Respondents, before invoking the extraordinary and peremptory Writ of Mandamus in this proceeding, have neither alleged nor offered at the hearing on the petition, one iota of evidence to the effect that they have no plain and adequate remedy at law. This allegation and proof to sustain it are indispensible prerequisites to the issuance of the Writ under any circumstance, and the Writ cannot be made to serve the purpose of a writ of error, an appeal, or an order of certiorari. (Vol. 3, Rathkopf—Law of Zoning and Planning, Ch. 68, Sect. 4)

> "Mandamus is an extraordinary remedy which is available only in cases in which the usual forms of procedure are powerless to afford relief." (52 Am. Jur. 2nd 334, Section 5) (See also 52 Am. Jur. 2nd 337, Section 9; 52 Am. Jur. 2nd 356; Section 31; Rathkopf—Law of Zoning and Planning, Vol. 3, Ch. 68, Sect. 1(2).)

POINT II

THE COURT ERRED IN REQUIRING THE APPELLANTS TO SUSTAIN THE BURDEN OF PROOF ON THE ISSUE OF WHETHER OR NOT THE PERMIT SHOULD BE GRANTED:

Contrary to the oral expression of the trial court, it is respectfully submitted that although the burden

of going forward with the evidence may change from time to time in the progress of a case, when the Respondents applied for a writ of mandamus, the burden of proving their entitlement thereto rested upon them and all presumptions were and are against them in favor of the Appellants.

> "The rule that the burden of proof rests upon the party who asserts the affirmative of an issue applies in mandamus proceedings. Thus, the burden is upon the applicant to show that his right to the issuance of the writ is clear and indisputable and, except as to allegations that are admitted by the answer or otherwise, he must prove every fact that is the foundation of his proceeding. He must show an enforceable right; an imperative duty of the Respondent to perform; the authority, ability, and means of the Respondent; the lack of another plain, speedy and adequate remedy; the performance or compliance with necessary conditions precedent, including, where necessary, a demand for performance and refusal thereof; and, ***if the duty in question is discretionary, that there was an arbitrary exercise or abuse of discretion*** . . ." (52 Am. Jur. 2nd 786, Section 466)

The courts of this state have adopted the foregoing principles (See MORRISON vs. HORNE, 12 Utah 2nd 131; 363 Pac. 2nd 1113)

"Plaintiffs, in an action to review the action of county commissioners denying an application for permit to construct and operate mobile homes park, had burden of establishing their cause of action by preponderance of evidence, and it was incumbent upon them to show unreasonableness of such action. The court, in action to review county commissioners' denial of permit, may ***not*** substitute its judgment for that of the commissioners', and should ***not*** declare the action of the commissioners unreasonable unless clearly compelled to do so by the evidence in light of presumption that the commissioners acted reasonably." (CRETEN vs. BOARD OF COUNTY COMMISSIONERS OF WYANDOTTE COUNTY, 204 Kansas 782; 466 Pac. 2nd 263; COE vs. ALBUQUERQUE, 76 N. M. 77; 48 Pac. 2nd 545)

"Presumption of validity exists in favor of ***Board of Adjustment's*** determination and one who attacks such determination is met with the presumption and carries the burden of showing the decision to be against the weight of the evidence, unreasonable, erroneous, or illegal as a matter of law." (MUELLER vs. CITY OF PHOENIX, ex rel. PHOENIX BOARD OF ADJUSTMENT, 102 Arizona 575; 435 Pac. 2nd 472)

POINT III

THE COURT ERRED IN REFUSING TO CONSIDER AND TO GRANT APPELLANTS' APPLICATION FOR AN INJUNCTION AND RESTRAINING ORDER AGAINST THE RESPONDENTS:

Because the Respondents have proceeded to remodel and convert a "single-family" dwelling in the A-2 Zone of Mapleton City to a "multi-family," multi-person, foster-family care home or center and to occupy the same in violation of the applicable ordinances of Mapleton City and without having procured the necessary permits therefor, the trial court should have enjoined and restrained them from further remodeling or occupying the same, and their use and occupancy of the same should be abated pursuant to the provisions of Title 10-9-16 and 10-9-30, Utah Code Annotated, 1953. The Respondents should have been further enjoined from conducting any business or use in or about said premises as a dormitory, rooming house, boarding house, foster-family care home, or detention facility of any kind, nature, or description, or as a pretended school, and from otherwise perpetrating, committing, or permitting any illegal act, conduct, business, or use in or about said premises, all as demanded in the counterclaim of Mapleton City againt the Respondents. This action did not require the court to make any determination as to the purpose of the facility. On the contrary, to

grant the Appellants' application for an injunction against the Respondents, the court needed only to consider these basic facts:

(1) That the Respondents have proceeded to build or remodel a structure and

(2)) To occupy the same, without having first procured a building permit and certificate of compliance all in direct violation of Sections 8-2 and 8-7 of the Zoning Ordinances of Mapleton City, which require that the applicant for a building permit procure the same ***before*** constructing, altering, reconstructing, or moving any building or changing the use of any land and a certificate of compliance ***before*** using or occupying the same.

It is not necessary to deny that facilities of the type proposed by the Respondents may serve a useful purpose or be desirable. The fact is that the facility proposed is violative of the Zoning Ordinance of Mapleton City, and is appropriate only to the R-3 Zone. Whether or not there is presently land zoned in the R-3 classification is of no moment in view of the decision of this court in CHEVRON OIL COMPANY vs. BEAVER COMPANY, 22 Utah 2nd 143, 449 Pac. 2nd 989, where the court held that the fact that an ordinance provided for highway service zones, but that no land had been zoned for that use was ***not*** a fatal defect. The Respondents are free to take appropriate action to have land included in the R-3 Zone by established procedures.

CONCLUSION

On the basis of the facts and authority set out herein, Appellants respectfully submit that the judgment of the trial court should be reversed and the writ of mandamus quashed. Appellants further submit that the trial court should be ordered and required, pursuant to the Title 10-9-16 and 10-9-30, Utah Code Annotated, 1953, to issue an injunction and restraining order against the Respondents in accord with the demand of the counterclaim of the Appellants.

Respectfully submitted

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