

CITY OF BLYTHEVILLE, W. J. CUPPLES, ET AL  
*v.* HAROLD THOMPSON, SR., ET AL

5-6166

491 S.W. 2d 769

Opinion delivered March 12, 1973

[Rehearing denied April 16, 1973]

1. ZONING—VALIDITY OF REGULATIONS—MATTERS AFFECTING.—Zoning ordinances are valid as against constitutional objection only by reason of the police power, and such ordinances must bear some definite relation to the health, safety, morals and general welfare of the inhabitants of that part of the city.
2. ZONING—VALIDITY OF REGULATIONS—REASONABLENESS.—A residential restriction is arbitrary and unreasonable where traffic conditions have substantially reduced the residential value of property in an area.
3. ZONING—VALIDITY OF REGULATIONS—CONSTITUTIONAL PROHIBITIONS.—A refusal to rezone property because other available property is already zoned for such purposes can create a monopoly contrary to Art. 2, § 19 of the Arkansas Constitution.
4. ZONING—VALIDITY OF REGULATIONS—DENIAL OF REZONING AS ARBITRARY.—Where property had become less desirable for residential purposes because of its proximity to a business district, adjacent property owners had the right to use it for business purposes and the trial court correctly held that zoning authority's refusal to rezone to commercial was arbitrary and unreasonable.

Appeal from Mississippi Chancery Court, Chickasawba District, *Gene Bradley*, Chancellor; affirmed.

*Bill E. Ross and Graham Sudbury*, for appellants.

*Elbert S. Johnson*, for appellees.

CONLEY BYRD, Justice. This zoning case arises out of an application by Harold Thompson, Sr., his sister Mrs. Rebecca Mitchell and Kenneth Storey to rezone a 74,400 square foot plot from R-2 Residential to B-3 Commercial for the purpose of constructing a supermarket. The application was denied by both the Planning Commission and the City Council. The trial court found that the property was adjacent to an established business district and concluded that the City was arbitrary and unreasonable in denying the rezoning. The City of Blytheville and a number of property owners as intervenors bring this appeal.

The property involved is located between Main Street (Highway 18) on the south, Walnut Street on the North, Walker Blvd. on the east, and Holland Street on the west. The area to be rezoned is shown in the shaded area of appellant's Exhibit "E" attached hereto as an appendix. The record shows that the downtown business district of Blytheville lies west of and adjacent to Holland Street and all that area is zoned commercial. All of the property fronting on Main Street and south of the subject property between Holland Street on the west and Walker Blvd. on the east is zoned and used as commercial property. Immediately east of Walker Blvd. on the south side of Main Street is a four family apartment building. North of Walnut Street the zoned commercial area extends east from Holland Street approximately 110 feet. Four lots east (each lot being approximately 60 feet) of the commercial area just described, appellee Mitchell owns the property north across Walnut Street from the property sought to be zoned. In the block where the subject property is located an alley between the lots fronting on Walnut and Main Streets extends from Holland to the subject property. Thompson proposes to leave a 175 ft. residential lot owned by him and occupied by his son as a buffer to the residential property to the

east. All of the lots fronting on Main and west of the proposed supermarket center have been commercial for several years. In 1971 the city zoned a lot (104 X 140) in the southwest corner of the proposed supermarket center for commercial use.

It is undisputed that most of the residences in the area are approximately fifteen years old. It is also undisputed that Interstate 55 was opened in 1966 and that since that time Main Street (Highway No. 18) has served as the main traffic artery between the downtown business section of Blytheville and the Interstate. Since that time there has been no further residential construction on Main Street. In fact there has been some commercial development on Main Street from the Interstate interchange back toward the area in question. East beyond the Interstate lies the Blytheville Industrial Park.

E. M. Terry, a qualified Real Estate Appraiser, pointed out that the Thompson residence, containing one bedroom and a half bath upstairs and ten rooms and two baths down stairs, is a large house containing a great deal of functional obsolescence, lacking in such things as central heat, central air-conditioning and a built-in kitchen. According to him the existing value of the 74,400 square feet under present zoning would be \$42,700 as opposed to a value of \$100,000 if the commercial use were permitted. The residential property to the west of the subject property on Walnut was described as 900 to 1,000 square feet residences ranging in value from \$9,500 to \$13,500. He pointed out that the commercial area on Main Street was in existence when those houses were built. Mr. Terry also pointed out that appellee Mitchell owned about 400 feet of the frontage on the north side of Walnut across from the subject site. That property contained four low cost rent houses ranging in value from \$3,000 to \$4,000. In addition to describing the service stations, drive-ins and bar taverns located on Main across from the block in which the subject property is located, he described the residential area to the east of Walker Blvd. as containing residences valued somewhere from \$18,000 to \$28,000. He pointed out that Mr. Tyrone, the owner of property at 717 Main, being east of the proposed supermarket, had an 18 X 20

ft. office on the side of his carport that he used as the business office of Acme Termite Company. He pointed out that since 1966, the daily traffic count between downtown Blytheville and the Interstate had increased from 5,000 to 6,000 vehicles per day to 10,200. Because of the location of the Blytheville Industrial Park and the build-up of the commercial area around the Interstate interchange, he expressed the opinion that the daily traffic count on Main Street would continue to increase. In concluding that the highest and best use of the subject property was for commercial purposes, he stated that in his opinion the construction of the supermarket would have a minimal effect on the residences in the area. In making this conclusion he pointed to the negative influences already created and his observation of other commercial encroachments in the City of Blytheville.

Thomas L. Hodges, a City Planning Consultant, testified to a comprehensive Development Plan recently adopted by the City in which the subject property was designated as residential. It was his opinion that commercial development should not be allowed to occur in that area except for a buffer type use. According to him a buffer type concept provides that there should be a gradual transition so that a minimum amount of nuisance and conflict would occur. He did not consider the residence occupied by Thompson Jr., the 175 foot lot adjacent to Walker Blvd., as a buffer. According to him the rezoning would have an adverse effect from noise, lights and increase in traffic and would be the first commercial development to intrude on Walnut, east of the established business area. It was his view that the entire area on three sides of this property was composed of substantial well kept residential property which should be preserved in the comprehensive zoning plan. He also stated that if the rezoning petition is granted, the City would have to make further modifications in the traffic pattern. On cross-examination after stating that the daily traffic count on Main Street was at least 10,000 vehicles and increasing, the following occurred:

"Q. In other words, we have a busy thoroughfare there?

A. Yes, sir.

Q. Would you say the homes in that area from Walker Blvd. along Main Street east are desirable residences for the rearing of children?

A. Yes, sir.

Q. You don't think the heavy traffic would affect them.

A. I am sure it might have some effect but they have back yards and that is where the children normally play.

Q. I believe you said, in your opinion, the building of this grocery store would not greatly increase the traffic?

A. I didn't say that. I said that other considerations were more important than what the increase was on Main Street and as a proportionate ratio of traffic on Main Street I would think that the increase would not be that substantial."

Richard Reid, an Attorney and Chairman of the City Planning Commission testified that the City Planning Commission unanimously recommended that this rezoning petition be denied. It was his feeling that it would adversely affect the adjoining residential property and particularly the property on Walnut Street that would be blocked off to itself and left stranded. Having it zoned from street to street and having parking and an open area clear through, it would be a traffic flow from Walnut to Main and increase traffic problems on both streets. The other reason he felt that it should not be rezoned was that this was not an expanding commercial area. There was property in the area not too far west which was vacant and needed to be developed. There was no need to expand the commercial area. On cross-examination Mr. Reid stated that the property west of the subject property on both sides of Main is commercial, but it has been frequently vacant, has got vacancies there now and there is property for sale in this area.

The "Tonks" are in the area. Commercial development normally moves from the downtown area if it is needed, but there is an area within the downtown area that is for sale and should be developed before any further development occurs. There was no need for expansion in this area at this time, it has a good use as a residential area, there is a substantial home on it and he did not feel that the commercial area needed to be extended.

Clarence E. Johnson, a certified public accountant, testified that there was no projection of commercial property on Walnut Street anywhere in that area and that if this rezoning is permitted the residences on Walnut, west of the subject property, would be penned in and isolated and the values thereof would decrease considerably. On cross-examination Mr. Johnson admitted that when he built his home at 713 Main, the first commercial property on the south side of Main was the Tastee Freeze (625 Main), and the next buildings were the "Tonks" and "Joint". On the north side was the old F. L. Wicker building and the concrete building Mr. Abbott owns. Going back west was the Jack Robinson's Gin and then Gilbert's Upholstery. The Gulf Station east of the Tastee Freeze and the Mini Mart have been built since he built his home in 1956.

Denny Wilson, a member of the City Council, testified that a supermarket of the caliber that the Storey Brothers have built in the city already would be a nuisance to that area. Furthermore it would create a traffic problem and would cause a devaluation of the property in the area. After pointing out that he was alderman for the ward where the property is located, he was asked if he saw any problems with the location of a big supermarket on the subject property. Mr. Wilson answered as follows:

"A. Yes, particularly to the traffic situation, due to the new extension of the one-way streets. Yes, sir, I do, there is a number of things I base that on because Highway 18 will eventually be divided in this area and one-way traffic is going to be going to Walnut Street, one-way traffic going west and one-

way traffic on Ash would be entering into State Highway 18 on the eastern flow, this already is a problem here for entering because of the heavy traffic and because of this man running a used car lot, Mr. Gilbert on this corner, we have had a lot of complaints about that—

Q. Is that also in an R-2 Zone?

A. Yes, Sir.

Q —Then in the winter time especially, this part of the highway is hard to get into because of the steep incline and if there is a little ice or something on there it also creates a great problem. Eventually, if this building is built here as has been proposed, this would throw all the western traffic and make North Walker Blvd. an expressway between Main Street and Walnut Street to handle the large trucks that will be setting out here about 27 feet in the the street, according to the proposal of building to be erected here. Generally those trucks, those trailer trucks are about 40 feet long, with a 15 foot dock so that will put 27 out in the street. We already have a problem on Walnut Street because of people coming in off of interstate, Main Street can't carry it so they turn on Walnut one block and then come through to town the best way they can. We have a moving and storage business over there that also parks trucks out in front for loading and unloading. It is an established business but it creates complaints and problems which we voice to them to try to get that cleared up, so all in all the whole picture all the way around causes traffic problems and it looks to me this new business would create a problem."

Thereafter the following occurred:

"THE COURT: I wasn't quite clear, this witness mentioned something about they planned to create one-way streets. I didn't quite follow that. Is Main Street going to be created into a one-way affair there?

WITNESS: No, sir, it will come in at the corner of Laclede, Ash will come into Main at the corner of Laclede which is about, oh, I guess, about 150 or 200 feet from the property we are talking about.

THE COURT: What about Walnut, is it going to be created into a one-way street?

WITNESS: Yes, sir, beginning at Laclede.

THE COURT: In other words, it won't come east to where this property is?

WITNESS: The starting of the one-way part that you are talking about?

THE COURT: Yes, sir.

WITNESS: No, sir, it will not."

Bob McHaney, a member of the City Council, testified that the homes in the 700 block on East Main were well kept—he would call them prestige homes. He, while recognizing the increase in traffic on Main Street, opposed the rezoning because it would be the first commercial development beyond Holland Street on Walnut and because it would increase the traffic flow and traffic problem. On cross-examination, he testified as follows:

"Q. Mr. McHaney, are you aware of the fact there is an established business district starting from this property all the way back to down town?

A. On Main Street, yes.

Q. To rezone all this property would be simply extending the present B-3 zone?

A. Yes, sir.

Q. Do you have any objections to grocery stores or supermarkets?

A. No I have no objection to grocery stores, I eat out of them, they furnish my food."



We have consistently recognized that zoning ordinances are valid as against constitutional objection, only by reason of the police power, *City of Little Rock v. Andres*, 237 Ark. 658, 375 S.W. 2d 370 (1964), and that such ordinances must bear some definite relation to the health, safety, morals and general welfare of the inhabitants of that part of the city, *City of Little Rock v. Sun Building & Developing Co.*, 199 Ark. 333, 134 S.W. 2d 583 (1939).

In a number of cases, we have recognized that a residential restriction is arbitrary and unreasonable where traffic conditions have substantially reduced the residential value of property in an area. See *City of Little Rock v. Andres*, *supra*, and *City of Little Rock v. Gardner*, 239 Ark. 54, 386 S.W. 2d 923 (1965).

In the *Sun Building & Developing Co.* case, *supra*, it was pointed out that a refusal to rezone property because other available property is already zoned for such purposes can create a monopoly contrary to Art. 2 § 19 of the Arkansas Constitution.

Finally in *Little Rock v. Pfeifer*, 169 Ark. 1027, 277 S.W. 883 (1925), in dealing with the refusal of a city to rezone property adjacent to an existing business district, we said:

"...There is substantial evidence tending to show that the value of some of the adjacent residence property will be depreciated on account of the lessening of usable value of the property for residence purposes, but we do not think that this affords justification for interfering with the gradual expansion of the business district, which has already been established. As the size of the business district grows, it ceases to be a residence district to that extent within the purview of the zoning ordinance, and any attempt on the part of the city council to restrict the growth of an established business district is arbitrary. When a business district has been rightly established, the rights of owners of property adjacent thereto cannot be restricted, so as to prevent them from using it as business property. It is the contention of the protestants that residence pro-

perty adjacent to a business district becomes, on that account, less desirable for residence use. Conceding this to be true, and it is undoubtedly true, in a sense, that property thus located is not as desirable as residence property, it demonstrates the right of owners of borderline property between residence and business district to use their property for either purpose. In other words, if it has become less desirable for residence property because of its proximity to the business district, they have the legal right, without interference, to use it for business purposes. . . ."

In the case at bar there is no doubt that the property in question is adjacent to existing business property and the trial court correctly held that the refusal to rezone was arbitrary.

Affirmed.

HARRIS, C.J., and FOGLEMAN, and JONES, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. In evaluating the question whether the chancellor's determination that the city council acted arbitrarily, we must start with the presumption that the city council did not abuse its discretion, but that it has acted with reason and in good faith for the benefit of the public. Following any other course produces an unthinkable and intolerable result—the substitution of the judgment and discretion of the courts for the collective judgment and discretion of the city council, the body in which the lawmaking branch of our government has seen fit to lodge the zoning power. *Wenderoth v. City of Fort Smith*, 251 Ark. 342, 472 S.W. 2d 74; *Little Rock Ry. & Electric Co. v. Dowell*, 101 Ark. 223, 142 S.W. 165, Ann. Cas. 1913D 1086.

The consideration given to this matter by the city authorities is itself indicative that they acted deliberately and reasonably, rather than arbitrarily or capriciously. First, the Blytheville City Planning Commission unanimously disapproved the rezoning and recommended that the application be rejected. Secondly, the city council re-

jected the application, both on original consideration and on reconsideration, by a vote of seven to three.

The commission did not reach its conclusion summarily. It heard arguments pro and con at a public hearing in December 1971, at which appellees' attorney was present, after considering the matter in November. It had in 1970 granted a rezoning of a part of the property involved on the petition of appellee Thompson. The rezoned property fronted only on Main Street and on other commercial property, and the property for which rezoning is now sought appeared to constitute a buffer on two sides between commercial and residential areas. The commission had the services and advice of the city's planning and land development consultant, Mr. Thomas L. Hodges of the Urban Planning and Development Corporation, who had served the city since 1967 and whose qualifications are such as to give weight to his opinions, and to cause appellees' attorney to remark that he was impressed with them. A new code had been developed with the assistance of this consultant, after numerous meetings of the planning commission and considerable thought and planning, and adopted by the city council on August 10, 1971.

The opinion of this expert supported the action of the planning commission and that of the city council. This expert had studied the proper zoning of this property when the earlier rezoning petition was granted, when the comprehensive development plan was prepared and when the pending request was made. The chairman of the planning commission was a Blytheville lawyer who had spent his entire life in that city and who had been familiar with the property all that time. He had been a member of the commission for eight years and its chairman for four. He had participated in two comprehensive planning studies of the city, one in 1964 and the other in 1971. He said that the commission did not always follow the recommendations of their professional adviser in zoning matters. He testified that before the hearing the members of the commission considered the matter for a month and went out and viewed the property involved. Chairman Reid was influenced in his action by the

feeling that adjoining residential property, particularly on Walnut Street, would be isolated; that the supermarket parking area would provide a traffic flow between Walnut and Main and increase traffic on both streets and that the supermarket would draw traffic on Walker Avenue into an intersection with Main Street and cause a traffic regulation problem; that the subject property was not in an expanding commercial area; and that there was no need for expansion of the commercial area.

Clarence E. Johnson, a member of the planning commission for seven years, was motivated by similar considerations and by the conclusion that traffic problems would result from the backing of trucks into the proposed supermarket loading dock, and that noise from unloading at night and early morning would be offensive.

The city council heard the matter at its December 1971 meeting and reconsidered it in January 1972. Proponents of the rezoning were heard. One of the members of the council, who lived in the general area and was an alderman from the ward in which it was located, had observed the property while driving past it five or six times daily. In voting against the rezoning, he considered the lack of commercial development west of the property, the probability that the store would be open all night and on Sundays, the traffic problem from the T intersection of Walker and East Main, the ingress and egress of vehicular traffic at points other than established intersections, and the probability that North Walker Street would be partially blocked at times by trucks serving the supermarket. At least one of the councilmen who voted against the application viewed the property twice between meetings, once in the company of the applicants' attorney. This alderman considered that, if rezoning were permitted, the property would be the site of the first commercial development on Walnut Street east of Holland.

These actions are certainly not indicative of any unreasoned exercise of judgment. Even one of the council members who voted for the application testified when called as a witness by appellees that he exercised his best judgment in the vote, and that the other aldermen did

too. He said that he did not think the other aldermen acted arbitrarily.

If there was substantial evidence to support the action of the Blytheville City Council, it did not act arbitrarily or capriciously, as that term has been defined in our zoning cases. To act arbitrarily means to act in a manner decisive but unreasoned, or arising from an unrestrained exercise of the will, caprice or personal preference, based on random or convenient selection or choice, rather than on reason or nature. Capricious means "not guided by steady judgment or purpose." *City of Little Rock v. Parker*, 241 Ark. 381, 407 S.W. 2d 921; *City of North Little Rock v. Habrle*, 239 Ark. 1007, 395 S.W. 2d 751. In effect, the application of the appropriate restraint on judicial action in these cases requires that the courts refuse to act unless no reasonable mind could reach the conclusion reached by the city council. See *City of Little Rock v. McKenzie*, 239 Ark. 9, 386 S.W. 2d 697. While it might seem to us in a review remote in time and distance from the property involved that a preponderance of the evidence supported the rezoning of the property, it is not the function of the courts to weigh the evidence. When they do, chancellors become one-man zoning boards and this court constitutes itself as a super-zoning board with statewide jurisdiction. I feel that the distinguished chancellor fell into error by weighing the evidence in this case and that the majority of this court has followed him down this wrong trail.

A review of the testimony reveals evidence tending to show that: the subject property is virtually surrounded by substantial residential property in an old established residential area, with the exception of property west of it on Main Street which is zoned commercial and which abuts the smaller tract earlier rezoned at the instance of the appellee Thompson; the value of the residences would be impaired; west of Walker on Main toward the central business district of Blytheville there are several businesses no longer in operation, several buildings are vacant, many are in need of rehabilitation, and there has been no new commercial development in this area since 1963 or 1964; the only significant commercial development east of the property is at least one-half mile away as one

approaches Interstate Highway 55; the last official traffic count on East Main was 10,200 vehicles per day and traffic is increasing; traffic in the area will be increased substantially by the operation of a supermarket on the property, and considerable new traffic drawn from southeast Blytheville for which Walker Boulevard furnishes the principal artery; the increase in traffic would present problems of regulation and make ingress and egress to and from the residences more difficult and hazardous, and the intersection at South Walker and Main, a T-type intersection, would be considerably complicated to the extent that the city would have to take measures to insure traffic safety and to modify the resulting traffic plan; the maneuvering and parking of large trailer trucks at the store's loading docks would impede traffic and sometimes partially obstruct the street; noise would be generated by traffic, opening and closing of automobile doors and by the large trailer trucks, which normally would make deliveries at the store in the early morning hours, and would be anticipated to experience difficulty in maneuvering into the loading docks; the noise factor would be intensified by echoes from a paved parking lot and by reason of the fact that truck motors are not turned off while unloading; it is advantageous to have substantial exterior lighting in a supermarket parking area; the supermarket would probably be open until 9:00 or 10:00 p.m. or later and on Sundays; substantial trash problems would develop in the area; there would be a health problem if garbage cans existed; vermin control is a problem around a supermarket; the property is not in an R-2 Zone as is all the surrounding residential property, but would be in a B-3 Zone (Highway Commercial); it is undesirable to have an R-2 Zone facing a B-3 business; the residences west of the property on Walnut would be "boxed" in between the supermarket and a freight terminal at Holland and Walnut; the comprehensive city plan contemplated the preservation of the residential area; the adjacent commercial area is not expanding, but is deteriorating; there is no need for expansion of the commercial area.

Even though the best and most remunerative use of appellees' property would require the rezoning, those

persons residing in the residential area who have relied upon residential zoning have rights at stake and are entitled to consideration, and the use of appellees' property may be restrained so as not to cause them injury. Benefit to a few individuals cannot be permitted to override the best interests of the residents of the overall area, and the line must be drawn at some point. Mere economic gain to the owner of a comparatively small area is not sufficient cause for rezoning. *Marling v. City of Little Rock*, 245 Ark. 876, 435 S.W. 2d 94; *Downs v. City of Little Rock*, 240 Ark. 623, 401 S.W. 2d 210; *Tate v. City of Malvern*, 246 Ark. 316, 438 S.W. 2d 52.

Appellees' own real estate expert admitted (just as the city planning consultant testified) that the area was not an expanding commercial area and had not been for the past ten years, and that the Thompson house would not be much of a buffer for the residential area on the east. One of the aldermen who voted for the application said that it was undesirable to have a business in a B-3 Zone across the street from an R-2 Zone. Mr. Thompson, Sr., admitted that some of the residential property would be "boxed in" by the rezoning.

I do not see how the city action can be called either arbitrary or capricious, even under the extreme standards of the amazingly renascent *Little Rock v. Pfeifer*, 169 Ark. 1027, 277 S.W. 883,<sup>1</sup> particularly in view of the admission of appellees' own expert. For this reason, I respectfully dissent.

I am authorized to state that the Chief Justice and Mr. Justice Jones join in this dissent.

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<sup>1</sup>Cf. Ark. Stat. Ann. § 19-2825, et seq. (Repl. 1968); *City of Little Rock v. Parker*, 241 Ark. 381, 407 S.W. 2d 921. See also, Gitelman, *Judicial Review of Zoning*, 23 Ark. L. Rev. 22.