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NO. 23770

IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF COLORADO**

FILED IN THE  
COURT  
COLORADO

THE CITY OF BOULDER, )  
COLORADO, a Colorado )  
municipal corporation, )

Plaintiff in Error, )

vs. )

WAYNE D. PHIPPS; LYAL )  
E. QUINBY and GLADYS )  
L. QUINBY, )

Defendants in Error.)

Error to the  
District Court  
of the  
County of Boulder,  
State of Colorado

HONORABLE  
WILLIAM E. BUCK  
Judge

BRIEF OF PLAINTIFF IN ERROR

WALTER L. WAGENHALS  
City Attorney  
Attorney for Plaintiff in  
Error  
Municipal Building  
Boulder, Colorado  
442-2020, Ext. 311

November, 1968

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UNDER THE EVIDENCE THE PROPERTY OWNERS FAILED TO PROVE BEYOND A REASONABLE DOUBT, AS REQUIRED BY LAW, THAT THE T-TRANSITIONAL ZONING AFFIXED TO THEIR PROPERTY BY THE BOULDER CITY COUNCIL UPON ANNEXATION WAS UNREASONABLE AND ARBITRARY AND THAT THE RESTRICTIONS IMPOSED BY SUCH ZONE PRECLUDED THE USE OF THEIR PROPERTY FOR ANY PURPOSE FOR WHICH IT WAS REASONABLY ADAPTED . . . . . 18

THIS BURDEN UPON THE PROPERTY OWNERS WAS NOT DISCHARGED REGARDLESS OF THE STANDARD THAT IS APPLIED:

A. The zoning affixed to a property in an annexation under The Municipal Annexation Act of 1965 is judged by its "reasonableness" and not by the more limited criteria followed in rezonings. . . . . 22

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THE CITY OF BOULDER,	)	
COLORADO, a Colorado	)	Error to the
municipal corporation,	)	District Court
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Plaintiff in Error,	)	County of Boulder,
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	)	
vs.	)	
	)	
	)	
WAYNE D. PHIPPS; LYAL	)	
E. QUINBY and GLADYS	)	HONORABLE
L. QUINBY,	)	WILLIAM E. BUCK
	)	Judge
Defendants in Error.)	)	

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE

I. PLEADINGS

The action in the Boulder County District Court was commenced on December 29, 1967, when Wayne D. Phipps, Lyal E. Quinby and Gladys L. Quinby, hereinafter referred to as "plaintiffs" or "property owners" filed their complaint for a declaratory judgment.

The defendant below, the City of Boulder, will be referred to as "City" or "Boulder". Trial was had to the court on the basis of the complaint as amended on May 29, 1968.

The amended complaint attacked the T-Transitional zoning affixed by Boulder to real property (hereinafter referred to as "subject property") owned by plaintiffs. Boulder had annexed the subject property as part of an "enclave" under The Municipal Annexation Act of 1965 and the T-Transitional zoning was affixed at the time of the annexation. The subject property had been zoned in the County of Boulder as B-Business. The prayer was for a declaratory judgment holding void the T-Transitional zoning of the Boulder annexation ordinance concerning the subject property (f. 39).

The amended complaint in its material details alleged as follows:

1. Plaintiffs owned certain real property, part purchased in 1963 and the balance in 1965 (ff. 28-30), the property all was zoned B-Business in the County at the time of purchase and property owners relied upon the said zoning, the purchase price reflected the said zoning and decisions concerning the property since purchase had been made in reliance upon that zoning (ff. 30-31);

2. That the subject property was annexed November 7, 1967, by the City under Ordinance No. 3266 and rezoned from the

County of Boulder B-Business to City T-Transitional, which zone was substantially more restrictive on property use (ff. 31-34) and such zone was not justified in that (ff. 34-37):

(a) The County zoning was not wrong;

(b) Any material change in the character of the neighborhood subsequent to the County zoning in fact supported the B-Business classification and therefore the T-Transitional affixed by the City was improper;

3. That in effect the City had arbitrarily, capriciously and illegally "spot zoned" the property T-Transitional (ff. 37-38).

Boulder admitted the annexation of the subject property by Ordinance No. 3266 and the T-Transitional zoning affixed by the terms of that ordinance. All other allegations were denied, some specifically and others because of lack of knowledge and information sufficient to form a belief regarding the truth thereof (ff. 23-25).

## II. EVIDENCE

The trial consisted of testimony from Mr. William Lamont and Mr. Wayne Phipps along with the introduction into evidence of a number of written exhibits. Plaintiffs' Exhibit "A" (received at f. 93) is an aerial

photograph of the subject property and the surrounding area with all zoning classifications as affixed under the City's zoning map. Exhibit "A" was frequently referred to and the evidence cannot be made clear nor complete without making frequent and easy reference to it. As a consequence, Appendix I, included at the end of this brief, has been prepared which is a diagram representing the information contained on the aerial photograph, Exhibit "A". Boundaries are shown for different areas with those areas numbered 1 through 11 with the zoning classifications as follows: T-Transitional; B-Business; MR-1 and MR-3 - Multi-Family Residential; SR-3 - Single-Family Residential; and UNIVERSITY or UNIV. meaning University of Colorado upon which there is no City zoning classification (f. 136). Street names have been included. The darkened area (Area 1) is that real property (approximately 10 acres - per plaintiffs' Exhibit "F" received at f. 167) annexed and zoned T-Transitional under Ordinance No. 3266, the unhatched part being the subject property.

Mr. William Lamont, Planning Director of the City of Boulder (f. 101) testified that he was to report to the City Council on the areas eligible for annexation to the City under The Municipal Annexation Act of 1965 (f. 225). He determined that the subject property, and approximately the east one-half of Areas 10 and 11 (per Appendix I) along with certain right-of-way was so eligible (ff. 226-228). He was then

directed by the City Council to actively pursue the annexation of those areas eligible (f. 225).

The City Council first considered the annexation and zoning of the subject property at its meeting August 8, 1967 (defendant's Exhibit 4 received at f. 299). At that time it had before it a memorandum from the City Planning Staff furnishing the basic data concerning the annexation with the recommendation that the property be zoned T-Transitional as well a memorandum from the City Planning Board recommending that the subject property be annexed and zoned T-Transitional (plaintiffs' Exhibit "F" received at f. 167). The City Council referred the matter back to the Planning Staff to see if the annexation and zoning of the subject property should have been acted upon in conjunction with the annexation and zoning of the east one-half of Areas 10 and 11 (f. 166, ff. 261-262).

The Planning Staff responded with a memorandum (plaintiffs' Exhibit "G" received at f. 167) which the City Council had before it when it again considered the annexation and zoning of the subject property on September 19, 1967 (defendant's Exhibit 3 received at f. 299). This memorandum discussed the question posed by the City Council and compared the area northeast of the 28th Street and Baseline interchange (the subject property, Area 1 on Appendix I) with the area southwest of the 28th Street and Baseline

interchange (the east one-half of Areas 10 and 11 on Appendix I) based upon the following criteria:

1. Existing zoning on the property in the county;
2. Existing development on the property;
3. Existing zoning on abutting properties;
4. Existing use of abutting properties;
5. Traffic circulation in the area;
6. Orientation of the property;
7. Potential uses on and around the property.

It was pointed out that the properties north of the subject property with but one exception were zoned T-Transitional. A great majority of the properties in the surrounding area had been developed with conforming uses. The property fronting upon Baseline immediately east of the subject property all the way to 30th Street was zoned T-Transitional and had existing upon it an older home located at the corner of 30th and Baseline. The Toll Road and interchange on the west provided a physical and visual barrier from the properties west of 28th Street. The property orientation was to the 28th Street

frontage road rather than Baseline. The pattern of T-Transitional zoning and uses were clearly established along the frontage road indicating T-Transitional for the subject property.

The recommendation for T-Transitional by Mr. Lamont to the City Council was based on the following factors:

1. A definite character of transitional uses along 28th Street north of the subject property (ff. 237-238);

2. The orientation of the subject property was to the north and the zoning and use of the properties to the north should control (ff. 235-238);

3. The orientation to 28th Street derived from the thick strand of trees on the eastern border of the subject property along with Skunk Creek which forms both a physical and visible barrier to Baseline Road (f. 240);

4. The T-Transitional zoning on the property immediately to the east (f. 238);

5. The circulation problems in the area (f. 238);

6. The entire enclave had not been developed to give it the character of a business area which would have been his recommendation had it been so developed (ff. 245-246);

7. And the 28th Street overpass and Baseline widening with median strips had totally separated the subject property from Areas 10 and 11 and any similarity in treatment (ff. 247-248).

He was of the opinion that these factors established a firm pattern indicating T-Transitional zoning and that other developments in the vicinity had not changed nor affected this (ff. 282-291). Mr. Lamont testified that the function of the T-Transitional is to recognize uses that can be compatible with multi-family uses such as offices or clinics yet not have the general character you would find in most business uses. It is a transition or passover type of district requiring the same type of environment generally as a residential area and bridges the gap between straight business and straight residential uses (ff. 233-235).

Defendant's Exhibit 3 reflects that prior to the first reading of the ordinance on September 19, 1967, a motion was made to amend the draft Ordinance No. 3266 to provide for B-Business zoning rather than T-Transitional. This motion was defeated. Ordinance No. 3266 was then adopted on first reading. Ordinance No. 3266 was passed on second reading on November 7, 1967, and the subject property was annexed and zoned T-Transitional thereunder (defendant's Exhibit 2 received at f. 299 and plaintiffs' Exhibit "C" received at f. 93).

Mr. Lamont stated (ff. 109-111) that he was aware of the zoning on other properties in the general neighborhood, when the respective zoning classifications were affixed, the nature of the public improvements that had been constructed or made, as well as the development in the general neighborhood of buildings and facilities and the existing character of the area. His testimony concerned the above considerations from 1960 when the subject property had been zoned B-Business in the County and the discussion concerning the subject property and the surrounding properties ties directly to Appendix I (Appendix I is used because the testimony from Mr. Lamont on these aspects made reference to Exhibit "A"):

1. Area 1 - This is the area annexed and zoned T-Transitional under Ordinance No. 3266 and the subject property is represented by the unhatched area; this property had been zoned by the County of Boulder as B-Business (f. 108) and the Planning Board of the City had made no objection to that zoning classification upon inquiry made by the County (ff. 130-132). Subsequent to 1960 a Texaco station had been erected on the easterly portion facing upon Baseline Road while the area was in the County zoned B-Business (ff. 153-154); on the eastern part of the property north of the Texaco station an office building, of which Mr. Phipps, one of the plaintiffs, was part owner (ff. 212-213) was being constructed at the time of the trial and this construction conformed to the City

T-Transitional zoning. The City of Boulder 1957 Guide for Growth (plaintiffs' Exhibit "B" received at f. 94) showed the subject property as well as the balance of the property contained in Area 1 as T-Transitional.

2. Area 2 - Property fronting on the 28th Street frontage road and lying directly north of the subject property - this is property referred to in the testimony as part of the Leach-Tracy property which had been annexed by the City in 1961 (f. 184) and zoned MR-3 (f. 144). It had later been rezoned T-Transitional and a Holiday Inn Motel had been constructed upon it in accordance with the T-Transitional zoning (f. 150 and ff. 281-282). The Guide for Growth showed this as T-Transitional.

3. Area 5 - Lying east of the subject property. This property is referred to in the testimony as part of the Leach-Tracy property which had been annexed by the City in 1961 (f. 184) and zoned MR-3 (f. 144). It was rezoned T-Transitional in 1964 (ff. 144-145). A request for rezoning from T-Transitional to B-Business made in 1966 had been denied (f. 189). The Guide for Growth showed this as MR-3.

4. Area 6 - Lying east of the subject property with its north line being the north line of Area 2 extended; this again is property referred to in the testimony as part of the Leach-Tracy property which had been

annexed by the City in 1961 (f. 184) and zoned MR-3 (f. 144). Two apartment complexes had been constructed since 1960 in conformance with the MR-3 zoning (f. 153). The Guide for Growth showed this as MR-3.

5. Area 3 - fronting on the 28th Street frontage road and Aurora and lying north of Area 2 - this is referred to in the testimony as the Reneau tract and was zoned B-Business in 1961 or 1963 (f. 137) and the rezoning request made by the City Administration from that classification to T-Transitional had been denied in 1965 by the City Council due to lack of information (ff. 142-143). No construction has occurred thereon since 1960 although a house converted to a real estate office exists on the site (f. 243). The Guide for Growth showed this as T-Transitional.

6. Area 4 - fronting on Aurora Avenue and 28th Street frontage road - this area is zoned T-Transitional with construction since 1960 of the following: The Green Shield Office Building, a church and the Golden Manor apartment complex for the elderly (f. 150). The Guide for Growth showed this a T-Transitional.

7. Area 7 - across Baseline Road south of the subject property - except for a motel located in the western portion thereof, this entire area was in the County in 1960 (ff. 183-185) and upon annexation in 1961 was zoned T-Transitional; in 1963 it was rezoned

to B-Business and construction has included three gas stations, a McDonald's restaurant and a 7-11 grocery outlet (ff. 154-155). The Guide for Growth showed this as T-Transitional.

8. In 1960 Baseline Road was a two-lane county road and it intersected at-grade with 28th Street (f. 244-245). In 1963, the 28th Street overpass was constructed which carried traffic over Baseline Road. Sometime after 1960 Baseline Road had been widened from two lanes to six lanes from Broadway all the way east to 30th Street and median strips had been put in place (ff. 155-156).

9. Area 8 - this was in the county in 1960 and student dormitories have been constructed since that date (f. 154). The area had been annexed to the City in 1961 (ff. 183-185). The property belongs to the University of Colorado and has no zoning classification.

10. Area 9 - across the 28th Street frontage road and 28th Street west of the subject property is part of the University of Colorado campus and has no zoning classification (f. 136).

11. East one-half of Areas 10 and 11 - this was annexed by the City of Boulder subsequent to the annexation of the subject property. The entire area was zoned B-Business in the county. Upon annexation by the City, the part of Area 10 annexed was zoned

B-Business and at the time of the zoning had located upon it a Taco House, two gas stations and a liquor store (ff. 230-231). The part of Area 11 annexed was zoned MR-3 except for a small portion zoned B which recognized the existing 7-11 grocery outlet.

Mr. Wayne Phipps, one of the plaintiffs, testified that he along with the two plaintiffs, Lyal E. Quinby and Gladys L. Quinby, presently owned the property and that part of it had been acquired in 1963 and the balance in 1965 (ff. 194-196). He testified that at the time the property was purchased that the B-Business zoning was a consideration and represented more value and affected his decision to purchase the property (ff. 199-200). He also stated that efforts to develop and sell the property all revolved around the B-Business zoning in response to a question relative to his reliance on the zoning classification (ff. 200-201). Defendant's Exhibits 2, 3 and 4 reflect that Mr. Phipps appeared personally or through counsel before the City Council at the various times the subject property was before that body for consideration and expressed his reliance on the B-Business zoning at the time of the purchase of the property and his objection to the T-Transitional zoning.

However, at one meeting of the City Council in response to a question Mr. Phipps stated that he did not know what type of development would go on the property (defendant's Exhibit 4 at the middle of page 322).

Further, on cross-examination at the trial, Mr. Phipps stated that the land had not been developed and had no improvements upon it (ff. 219-220). He further testified that there had been some negotiations with a national fraternity organization for the location of an office building on at least part of the property (ff. 216-218). He also said there had been other inquiries relative to a motel use (f. 222). On redirect examination Mr. Phipps stated that other inquiries had been made for drive-in type restaurants for hamburger stands or something of that nature but these proposals had been rejected because the property owners did not consider it good planning and it would not put the land to its best use (ff. 222-223).

Mr. Lamont testified that the zoning classifications of Boulder B-Business zoning and County B-Business zoning were comparable (ff. 115-117) and that Boulder T-Transitional permitted uses of a less intensive nature than those of the general retail type of district, either Boulder B-Business or County B-Business (ff. 117-118). Mr. Lamont stated that there were some area and bulk provisions which would be more liberal under the City T-Transitional compared to the City B-Business but the T-Transitional would be more restrictive as to the intensity of the use of the property (ff. 125-126). Mr. Phipps stated that he agreed with Mr. Lamont's testimony to the effect that the County and City B-Business zones were comparable but that the T-Transitional of the City was not

comparable to the County B-Business (ff. 202-204). This testimony is supported by both the City and County zoning codes (plaintiffs' Exhibits "E" and "D", respectively, received at f. 120).

### III. FINDINGS

The trial court, prior to ordering the attorney for the plaintiffs to draft the decree, had the following comments:

The factual situation here is not very much in dispute. The effect of the factual situation is probably the big dispute.

There is no dispute that in 1960, '61, this property, the subject property, was zoned by the County as Business, with a "B" classification.

There is one item there that is of particular importance, the way I view it. That is, at the time the County requested the City to indicate the City's stand on the County's zoning of this property. At that time, the City's overall planning map was in existence, plaintiffs' Exhibit "B", that had been adopted by the City, and with that in mind, Exhibit "B", the Planning Guide, the City said it had no objection to this being zoned "B", business.

That, the way I infer it, is a consent to the County zoning this "B",

considering that the City had this Planning Guide of 1957, in which all this area was included.

Now, that was zoned by the County as "B". What has happened since that time to change it from a "B" to a lower or more restrictive zone?

The big change has been the personality of the person planning and recommending the zoning, who didn't agree with the City's stand in consenting to a "B" classification here, but thinks that it should be something less than a "B", business.

That is the big change, as I see it.

The changes that the City attempts to show as necessary to make this a "T" classification are more theoretical than real...

The written findings and declaratory judgment as drafted by the attorney for the plaintiffs and adopted by the trial court are contained at ff. 43-52 and the following contains the essence included therein:

The Court finds that since the zoning of the above described real property of the plaintiffs as a "B-Business" by the County of Boulder in 1960, no changes have taken place in the character of the neighborhood which would

justify a change in the zoning classification of the plaintiffs' real property from a business classification to a transitional classification. On the contrary, the Court finds that changes have occurred in the general neighborhood of the plaintiffs' property which are consistent with the property of the plaintiffs being and remaining classified as a business zone, said changes consisting in part of the zoning of certain properties in the general neighborhood of plaintiffs' property to "Business"; the changing of the zoning of certain properties in the general neighborhood from residential to transitional; and the construction of business buildings in the immediate neighborhood of plaintiffs' property.

The Court finds and concludes that the evidence clearly sustains the allegations set forth in plaintiffs' amended complaint and that the relief requested by the plaintiffs in their amended complaint should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that City of Boulder Ordinance No. 3266 is, to the extent that the same affixes a T-Transitional zoning district classification to the above described property of the plaintiffs, is (sic) unlawful and of no force and effect;... (ff. 50-52).

## SUMMARY OF THE ARGUMENT

UNDER THE EVIDENCE THE PROPERTY OWNERS FAILED TO PROVE BEYOND A REASONABLE DOUBT, AS REQUIRED BY LAW, THAT THE T-TRANSITIONAL ZONING AFFIXED TO THEIR PROPERTY BY THE BOULDER CITY COUNCIL UPON ANNEXATION WAS UNREASONABLE AND ARBITRARY AND THAT THE RESTRICTIONS IMPOSED BY SUCH ZONE PRECLUDED THE USE OF THEIR PROPERTY FOR ANY PURPOSE FOR WHICH IT WAS REASONABLY ADAPTED. THIS BURDEN UPON THE PROPERTY OWNERS WAS NOT DISCHARGED REGARDLESS OF THE STANDARD THAT IS APPLIED:

A. THE ZONING AFFIXED TO A PROPERTY IN AN ANNEXATION UNDER THE MUNICIPAL ANNEXATION ACT OF 1965 IS JUDGED BY ITS "REASONABLENESS" AND NOT BY THE MORE LIMITED CRITERIA FOLLOWED IN REZONINGS; OR

B. EVEN IF THE TRADITIONAL RULES OF "ORIGINAL ERROR" OR "CHANGE IN CIRCUMSTANCES" APPLY, THE EVIDENCE SUPPORTS THE DECISION OF THE CITY COUNCIL.

## ARGUMENT

Under the evidence the property owners failed to prove beyond a reasonable doubt, as required by law, that the T-Transitional zoning affixed to their property by the Boulder City Council upon annexation was unreasonable and arbitrary and that the restrictions imposed by such zone precluded the use of their property for any purpose for which it was reasonably adapted.

The plaintiffs in their complaint alleged that the City Council of the City of Boulder had, upon annexation of their property under the "enclave" provisions of The Municipal Annexation Act of 1965, improperly zoned the property T-Transitional rather than B-Business, the zoning which existed on the property when it had been in the County of Boulder. The property owners alleged that they made the purchase of the property based upon the B-Business zoning and that any changes in the area supported that particular B-Business classification. They said that the T-Transitional of the City was substantially more restrictive on property use than the B-Business of the County of Boulder. There was no allegation in the complaint to the effect that the ordinance was confiscatory or that the T-Transitional zoning of the City deprived the plaintiffs of the reasonable use of their land.

The City of Boulder shall rely upon the Colorado case of Baum v. City and County of Denver, 147 Colo. 104, 363 P.2d 688 (1961) and subsequent decisions which have gone to support the propositions set forth in the cited decision. In Baum, the property owners had an entire city block of unimproved land in Denver which was zoned for single-family dwellings. They brought suit which attacked the validity of the zoning ordinance. They asserted that the nature and character of South Sheridan Boulevard in the area of their property had changed from a

quiet rural street to a principal commercial thoroughfare with a heavy flow of traffic. Further, they alleged that other properties in the general vicinity of the block which they owned were zoned and used for business and that changes in the nature and character of the area had made it undesirable, unfeasible and unrealistic to construct single-family residences or any other use which would comply with the zoning classification. They claimed that the zoning amounted to a "taking" of their property. The Colorado Supreme Court in the opinion discussed the evidence presented in detail and held that a zoning ordinance, like every other legislative enactment is presumed to be valid and one contesting it must prove its invalidity beyond a reasonable doubt. The Court said this burden had not been met and the case was dismissed. The Colorado Supreme Court stated:

...this Court does not sit as a super-zoning commission. Our laws have wisely committed to the people of a community themselves the determination of their municipal destiny, the degree to which the industrial may have precedence over the residential, and the areas carved out of each to be devoted to commercial pursuits. With the wisdom or lack of wisdom of the determination we are not concerned. The people of the community, through their appropriate legislative body, and not the

courts, govern its growth and its life. Let us state the proposition as clearly as may be: It is not our function to approve the ordinance before us as to wisdom or desirability. For alleged abuses involving such factors the remedy is the ballot box, not the courts. We do not substitute our judgment for that of the legislative body charged with the duty and responsibility in the premises... (at 122)

The Baum decision dictates that one attacking the validity of a zoning ordinance must allege and prove that the zoning affixed by the legislative body prohibits the reasonable use of the property and in effect amounts to a confiscation or taking of the property. As stated above, the property owners in their complaint made no allegation to the effect that they were being deprived of their property but rather stated that the City's T-Transitional was substantially more restrictive on property use than the County B-Business. As far as the evidence was concerned, there was no testimony from the plaintiffs that the subject property as a matter of fact was not reasonably adapted to T-Transitional uses or could not be used for T-Transitional uses. The evidence from the plaintiffs was generally to the effect only that the subject property was more valuable for B-Business than for T-Transitional.

The evidence showed that at the time of annexation the subject property had not been developed and had no improvements upon it. Mr. Phipps stated to the City Council that he did not know what type of development would go on the property. There had been some negotiations for the location of an office building on part of the property and this type of use is permitted under the T-Transitional zone. Other inquiries had been made relative to a motel use on the property, again a use which is permitted in a T-Transitional district. Further, Mr. Phipps was a part owner of another tract within the annexed area which at the time of the trial was in the process of having an office building constructed upon it. This again is a use permitted in a T-Transitional district. There was no testimony or any suggestion whatsoever that the property could not be used under the T-Transitional zoning. As a matter of fact, the evidence from the plaintiffs convincingly showed that the property could well be used and developed under the T-Transitional zone.

This burden upon the property owners was not discharged regardless of the standard that is applied:

A. The zoning affixed to a property in an annexation under The Municipal Annexation Act of 1965 is judged by its "reasonableness" and not by the more limited criteria followed in rezonings.

Even though the property owners neither alleged nor proved that the T-Transitional zoning by the City amounted to a "taking", the plaintiffs failed to establish beyond a reasonable doubt that the decision of the City Council was improper and incorrect. A review of the record reflects that the judgment which the City Council made is supported by the evidence.

The zoning of this property was an original zoning, not a rezoning, and the City Council is not bound by the traditional rules of "original error" or "change in circumstances". The property owned by the plaintiffs was annexed under the "enclave" provision of The Municipal Annexation Act of 1965, C.R.S. 139-21-5(1) (1963, as amended in 1965) which provides that when any unincorporated area is entirely contained within the boundaries of a municipality for a period of not less than three years that such area may be annexed by the municipality even against the wishes of the property owner. The annexing municipality must zone under its zoning ordinance and map the annexed property within ninety days of the annexation (C.R.S. 139-21-14(2) (1963, as amended in 1965)). The municipality may refuse to issue any building or occupancy permits for any portion or all of the newly annexed area during the period the property is unzoned (C.R.S. 139-21-14(3) (1963, as amended in 1965)). The initial purpose set forth in C.R.S. 139-21-2(1)(b) (1963, as amended in 1965) reads as follows:

To encourage natural and well-ordered development of municipalities of the state.

The City of Boulder cites the case of Farley v. DeMuth, 399 S.W.2d (Ky. 1965) which sets forth a rule of law which seems to be in consonance with the intention as set forth and expressed by the legislature in The Municipal Annexation Act of 1965. In the Farley case a property owner had 28 acres of land lying in the county upon which the county zoning was "residential". The property was annexed and 8 1/2 acres was zoned "commercial" while the balance was zoned "single-family residential". Some surrounding property owners contested the "commercial" zoning. The court pointed out that there were no other shopping areas in the vicinity and that commercial zoning of the 8 1/2 acres would be of benefit to the whole community. The court announced the rule that when an area is annexed the property is treated as though it were unzoned. This rule was limited by the Kentucky Supreme Court to the extent that the zoning affixed by the new governmental body having jurisdiction had to have a reasonable and justifiable basis and that an arbitrary classification or "spot zoning" would be unacceptable.

The Municipal Annexation Act of 1965 states that the zoning is to be affixed by the annexing municipality. There is no statement in the Act relative to the property having to receive a zoning classification

similar to that which obtained prior to the annexation. Also, the property owner may be denied use of his property for up to ninety days which indicates that it comes into the annexing municipality as though it were unzoned.

Even though property was in fact completely within the limits of a municipality for a number of years, until The Municipal Annexation Act of 1965 there was no way in which the municipality could control its development. The rule of the Baum case requiring that a zoning classification be "reasonable" would be consistent with the purposes of the Act and it also protects the property owner. The zoning affixed could not be arbitrary and could not deny the property owner the right to put his property to reasonable use. If the annexing municipality is bound to follow the zoning which previously obtained, then the territory, which has been in fact part of the municipality and which is now included within the municipality by reason of an annexation under The Municipal Annexation Act of 1965, is in effect still controlled by another governmental agency. A holding of this nature would seem to emasculate the provisions and objectives of The Municipal Annexation Act of 1965 (C.R.S. 139-21-2 (1963, as amended in 1965)). One of the main purposes of the Act seems to have been to permit the municipality to have jurisdiction on all laws, including zoning, on those properties which in fact are a part of that municipality.

Under the test of "reasonableness", does the evidence support the T-Transitional zoning affixed by the City Council? The subject property, part of a parcel of ten (10) acres which was annexed, had no development in existence upon it at the time of its annexation. The property is bounded on its east by a strand of trees and a creek. This separates the property from Baseline Road and gives the property its orientation toward the 28th Street frontage road. Properties directly to the north and directly to the east are zoned T-Transitional. Most of the property north of the subject property abutting the 28th Street frontage road is zoned T-Transitional and the uses or development on the property conform to that zoning classification. There is development in the general vicinity under B-Business zoning. However, one business area across Baseline Road is separated from the subject property by a six-lane road with median strips. The roadway would seem to be a reasonable boundary or dividing line between the two. The other business area south and west of the subject property near 27th Street and Baseline Road is completely separated from the subject property by that same six-lane roadway as well as the physical and visual barrier of the 28th Street overpass. Traffic and circulation problems in the area were also considered. A business zone, allowing development of a more intense nature, would compound these problems. Also, just to the north and east of the subject property two apartment complexes were in existence and the T-Transitional is the type of

district proper to bridge the gap between B-Business and a residential area. Based upon all of these considerations, the City Council affixed the T-Transitional zoning. This was a reasonable decision and the T-Transitional zoning cannot be proved by the plaintiff to have been invalid especially where the burden is "beyond a reasonable doubt".

This burden upon the property owners was not discharged regardless of the standard that is applied:

B. Even if the traditional rules of "original error" or "change in circumstances" apply, the evidence supports the decision of the City Council.

The City of Boulder would point out the following "changes" since the property was originally zoned B-Business by the County:

1. In 1960, the subject property as well as a large surrounding area were in the County, mainly undeveloped;

2. In 1960 the County zoned the subject property B-Business;

3. The large surrounding area was annexed and became a part of the City of Boulder;

4. The property lying just to the east of the subject property had been rezoned by

the City from MR-3 to T-Transitional in 1964;

5. The property lying just to the north of the subject property had been rezoned by the City from MR-3 to T-Transitional and a Holiday Inn Motel had been constructed upon it in accordance with that T-Transitional classification;

6. The property lying to the north and east of the subject property was zoned MR-3 and had two apartments constructed upon it;

7. Baseline Road and 28th Street had been changed from an at-grade crossing by the construction of the 28th Street overpass;

8. Baseline Road changed from a two-lane county road to a six-lane facility with median strips, but traffic and circulation problems still existed in the area;

9. Both the B-Business zoning and construction of B-Business uses were on properties on the south side of Baseline Road;

10. The subject property became eligible for annexation under the Municipal Annexation Act of 1965 and it would have to be put under the City of Boulder zoning ordinance and map within ninety days from the date of its annexation; there was no development in existence upon it; the City of Boulder's Guide for Growth showed the area to be

annexed as T-Transitional; and the orientation of the property due to the trees and creek on its eastern boundary was to the 28th Street frontage road and this made its zoning depend upon those properties lying to the north rather than to the area across Baseline Road to the south.

11. The purpose of a T-Transitional district is to bridge the gap between straight business and residential areas;

12. Mr. Phipps, one of the owners of the subject property, appeared before the City Council at the time it considered the annexation and zoning. He stated that he did not know what type of development would go on the property, made some other comments relative to his reliance on the B-Business zoning classification at the time of purchasing the property but made no statement whatsoever that the T-Transitional being considered by the City Council would deny him the reasonable use of his property;

A motion to change the zoning in the ordinance from T-Transitional to B-Business was defeated by the City Council. An ordinance was adopted by the City Council which annexed the subject property and, based upon the facts as above outlined, zoned it T-Transitional. The property owners could not establish beyond a reasonable doubt that the zoning in the ordinance was arbitrary or unreasonable based upon all the changes and zoning considerations involved or that the

legislative judgment made in any way deprived them of the reasonable use of their property.

In the face of this, the trial court did not impose the proper burden upon the property owners and substituted its judgment for that of the legislative body on what the facts indicated and what zoning decision should have been made. This is clearly indicated in the comments from the trial court made at the conclusion of the case:

Now, that was zoned by the county as "B". What has happened since that time to change it from a "B" to a lower or more restrictive zone?

The big change has been the personality of the person planning and recommending the zoning, who did not agree with the City's stand in consenting to a "B" classification here, but thinks that it should be something less than a "B", Business.

That is the big change, as I see it.

The changes that the City attempts to show as necessary to make this a "T" classification are more theoretical than real...

This was the same error which has been made by other trial courts. They substituted their judgments for those of legislative bodies and those trial courts were reversed

by the Colorado Supreme Court in Board of County Commissioners of the County of Jefferson v. Shaffer, 149 Colo. 18, 367 P.2d 751 (1961); City and County of Denver v. American Oil Company, 150 Colo. 341, 374 P.2d 357 (1962); City of Littleton v. Quelland, 153 Colo. 515, 387 P.2d 29 (1963); and Huneke v. Glaspy, 155 Colo. 593, 396 P.2d 453 (1964).

### CONCLUSION

The City of Boulder contends that the City Council, based upon all the considerations involved, made a reasonable legislative judgment and that the property owners have been unable to establish beyond a reasonable doubt that the City Council's decision was unreasonable or arbitrary or in any way denied them the reasonable use of their property. The trial court substituted its judgment for that of the legislative body. The City of Boulder prays that the decision of the trial court be reversed, that the complaint be dismissed and for the recovery of its costs.

Respectfully submitted,

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## APPENDIX

