

1950

# Joseph Judkins, Dan J. Miller, Frank Oborn and Adrian De Bloois v. Boyd N. Fronk : Brief of Appellant

Utah Supreme Court

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## Recommended Citation

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7500  
CASE NO. 7600

**FILED**  
NOV 10 1950

Clerk, Supreme Court, Utah

# In the Supreme Court of the State of Utah

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JOSEPH JUDKINS, DAN J. MILLER,  
FRANK OBORN, and ADRIAN DE BLOOIS,  
*Plaintiffs and Respondents,*

VS.

BOYD N. FRONK,  
*Defendant and Appellant*

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## Appellant's Brief

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and Appellant*

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*Defendant and Appellant*

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## STATEMENT OF FACTS

Appellant on June 6th and 7th, 1945, contracted to purchase real property on the Northeast corner of 20th Street and Harrison Boulevard in Ogden, Utah, (Tr. 28, 30, 90) for the purpose of erecting a gasoline service station thereon, (Tr. 30) subsequently receiving deed therefor and quieting title to a portion thereof. (Tr. 90) On June 7, 1945, he paid the fee and obtained from Ogden City a building permit to construct such service station. (Tr. 3, 31) At the time of issuance of such permit, the zoning ordinances of Ogden City in force and effect allowed use of real property in that area of which this property is a part, for such service station and store purposes. (Tr. 3, 4) The Building Code of Ogden City, in effect at the time of issuance of the permit to appellant, contained a provision that "Every permit issued by the Building Official under the provisions of this Code shall expire by limitation and become null and void, if the building or work authorized

by such permit is not commenced within 60 days from the date of such permit, or if the building or work authorized by such permit is suspended or abandoned at any time after the work is commenced for sixty days.” (Tr. 27) The building permit issued to appellant, had a provision, written on the face thereof, that “This permit is void if work is not commenced within sixty days, or if work is suspended for sixty days.” (Tr. 3, 31) The building Code also provides for a Board of Examiners and Appeals with power to interpret its provisions, with specific power to interpret it in cases where a “manifest injustice might be done”. (Tr. 3) However, Ogden City has never appointed such a Board of Examiners and Appeals as so provided for in the Building Code.

In reliance upon his building permit, the appellant immediately commenced work and expended money toward the erection of the service station. (Tr. 28) In August, 1945, he mortgaged his home for \$1,400.00 for funds for the station. (Tr. 42, 49, 67) Each month from and including June, 1945, to and including March, 1946, he performed work on the premises toward building the station. (Tr. 27 to 31, 39 to 68) Then, in the early months of 1946, he called on various lumber and supply houses for materials and was informed that he must have a Government priority number. (Tr. 51) He immediately made application for priorities to the Civilian Production Administration, both at its Ogden and Salt Lake City offices, which application was denied. (Tr. 52)

On August 12th, 1946, Ogden City passed an ordinance amending its zoning ordinances to make use of real property in the area in which appellant's said



premises were located for a store or service station, a non-conforming use. (Tr. 3) This ordinance was not retroactive. (Tr. 3, 4)

On July 25, 1947, the controls over building materials were terminated by the executive order of the President of the United States, (Tr. 67, 68) but shortage of such materials and great difficulty in obtaining them continued until to or after October, 1948. (Tr. 31 to 38 inc., 68 to 76). On October 13, 1948, appellant, believing that now he could get materials, applied to the Board of City Commissioners of Ogden City for a renewal of his building permit of June 7, 1945, (Tr. 6, 7, 56, 57) and after hearing had during which he explained his difficulties regarding building materials to the Board of City Commissioners, (Tr. 66) this Board on October 26, 1948, granted his application and renewed said building permit. (Tr. 7, 8, 56, 57) On November 23, 1948, respondents protested to the Board of City Commissioners and hearing on their protest was continued to November 30, 1948, (Tr. 7, 8) when respondents and their counsel were present and appellant and his counsel were present, and after such hearing the City Commission refused to rescind its action in renewing appellant's original building permit. (Tr. 7, 8)

That up to October 13, 1948, the appellant had expended on the land in question in relation to work in connection with construction of the station, an amount in excess of \$1,200.00, and since the 26th of October, 1948, the date of renewal of his permit, he caused further sums to be expended in excess of \$900.00. (Tr. 59)



Respondents brought this action seeking an injunction against appellant to restrain him from constructing the station and from a judgment in their favor, appellant appeals.

The trial of this case was had by the District Court on the 25th day of November, 1949, but the Findings of Fact and Conclusions of Law were not entered therein until the 23rd day of September, 1950.

## ARGUMENT

### POINT 1

BY RECEIVING A VALID BUILDING PERMIT FROM OGDEN CITY, PERFORMING WORK THEREUNDER, AND EXPENDING FUNDS IN RELIANCE THEREON, APPELLANT ACQUIRED A VESTED RIGHT TO CONSTRUCT A SERVICE STATION, AND COULD NOT BE AFFECTED BY A SUBSEQUENT ZONING ORDINANCE ENACTED BY OGDEN CITY.

There is no dispute of the fact that the appellant was issued a building permit on June 7, 1945, for the purpose of constructing a service station upon his land, and the findings of the Court so hold. It is not disputed that at the time of issuance of the appellant's permit, it was lawful under the Zoning Ordinances of Ogden City to erect a service station in the area in which appellant's land is situated. In reliance upon this permit, appellant performed a great deal of work and expended large sums of money prior to the time, in August, 1946, when Ogden City amended its Zoning Ordinance to prohibit such use in this area, the amended Ordinance not being retroactive.

It is the overwhelming weight of authority in the United States that one who thus receives a valid building permit, performs work and expends money in reliance thereon, acquires a vested right to complete the construction. The right is unaffected by subsequent amendments of Zoning Ordinances. 40 ALR at page 928 states the rule as follows:

“By the weight of authority a municipal building permit or license may not arbitrarily be revoked, particularly where, on the faith of it, the owner has incurred material expense.”  
There many cases are annotated which follow the weight of authority.

In an annotation commencing at page 500 and particularly at page 505 et. seq. of 138 ALR cases are cited and discussed, which hold that one who has obtained a building permit or license and has proceeded to act under it, has thereby acquired a vested right which is protected against disturbance by a subsequent amendment of the Zoning Ordinance. Among the cases cited in this annotation at page 506, is *New York State Investing Co. v. Brady*, 214 App. Div. 592, 212 NYS 605, where it was held by the New York Court that an amendment of the building zone resolution prohibiting the erection of a gasoline filling station in a certain location did not cut off the right of the owner or lessee of such premises to proceed under a permit for the construction of such a station where the permit was obtained and work had been commenced thereunder and a large amount of money expended in connection therewith prior to the adoption of the amendment.

Also, in the case of *Sandenburgh v. Michigamme Oil Co.* 249 Mich. 372, 228 NW 707 it was held that after property in a business zone had been purchased for the purpose of constructing a gasoline filling station thereon, a building permit obtained, and substantial work performed thereunder, the city was precluded from revoking the permit and later amending the zoning ordinance with reference solely to this property and was precluded from giving such amendment retroactive effect.

In another New York case set out in this annotation, *Pelham View Apartments, v. Switzer*, 130 Misc. 545, 224 NYS 56, it was held that one who had secured a building permit for an apartment house upon a site where apartment houses were allowed by the zoning ordinance then in effect, and in reliance upon such permit, purchased the lot, employed an architect, had the property surveyed, and excavated the cellar, could not be deprived of the vested right thus acquired by a subsequent revocation of the permit pursuant to an amendment of the zoning ordinance. The Court said:

“Where a permit to build a building has been acted upon, and where the owner has, as in this instance, proceeded to incur obligations and in good faith to proceed to erect the building, such rights are then vested property rights, protected by the Federal and State Constitutions . . . While it is unfortunate that the erection of this apartment house may be distasteful to people living in the neighborhood, and while perhaps it is unfortunate that their property should be thus affected, yet the protection of such rights must be legally done, and the public officials

representing the people cannot legally be permitted to change the zoning law, and cancel a permit previously issued under the original zoning act, where an innocent purchaser of real estate has in good faith acted upon such official action of the city, and has thereby acquired vested rights under his permit. This case must be distinguished from the many other cases where permits were not obtained in good faith, but merely in anticipation of an amendment to the zoning law. The facts in the present case indicate entire good faith upon the part of the purchaser, as is evidenced by the large sums of money that were paid by him on the strength of the presumed legality of his original permit. It would be nothing short of confiscation, and a complete disregard of constitutional rights, if a municipality could revoke a building permit issued under the conditions as presented in this case.”

Likewise in another case cited in the annotation, a California case which went to the Supreme Court of the United States, *Dobbins v. Los Angeles*, 195 US 223, 49 L ed 169, 25 S Ct. 18, where an amendment of a municipal ordinance prohibiting the erection or maintenance of gas works except within certain prescribed limits which excluded property previously included therein, after it had been purchased for the purpose of erecting gas works thereon and after such erection had been commenced under a permit from the Board of Fire Commissioners, was held to be an arbitrary interference with property rights protected by the Fourteenth Amendment to the Federal Constitution and not justified as an exercise of the police power.

In the case of Wikstrom v. City of Laramie, et al (Wyoming) 262 Pac. 22, it is stated:

“It may, however, not be out of place in passing, to state that, as a general rule, where a City Council, or the proper city officer, in absence of fraud grants a permit for the construction of a building, and the party acting in the faith thereof commences the erection of a building, he acquires something more than a mere license, something in the nature of a vested right, and the permit cannot then be revoked by the City.”

In the case of London vs. Robinson et al (Cal.) 271 Pac. 921, it was held that

a zoning ordinance enacted by a municipality applied only from the date on which it took effect.

In City of Lee Falls v. Fisk, 24 NYS 2d 460 (1941) HN 12, a prospective purchaser of real estate disclosed to City officials that he intended to purchase realty and erect a gas station thereon. He was informed there was no ordinance preventing the erection of such station. Thereafter he purchased the realty, receiving a mortgage loan to finance the erection of the station, entered into a lease, notified tenants in houses located on the realty to move therefrom and made an agreement with a wrecking company to raze the houses. The Court held that the purchaser of the realty acquired vested rights of which he was not divested by action of the common council of the city in thereafter enacting a zoning ordinance which would prevent the erection of such a station on the realty in question.

In the case of Trans-oceanic Oil Corporation vs. City of Santa Barbara (Cal. 1948) 194 Pac. 2d 148, it



was held that a holder of a building permit, who actually commences work upon a building and incurs liabilities for work and material, acquires a "vested property right" which he is entitled to have protected against arbitrary revocation of permit, and also holds that where a permit has been regularly issued and rights have vested thereunder, the adoption of a zoning ordinance prohibiting the permitted use of property does not ipso facto revoke the permit.

Atlas vs. Dick 81 NYS 2d 126 (1948) holds: One who has merely obtained a building permit is bound by any change in zoning ordinance made before he proceeds with construction of building thereunder, but where operations have been begun and contracts let under a permit valid when issued permittee thereby acquires vested rights which cannot be taken from him by subsequent modification of zoning ordinance.

## POINT II.

APPELLANT DID NOT LOSE HIS VESTED RIGHT TO CONSTRUCT A SERVICE STATION WHEN NATIONAL WAR EMERGENCY LEGISLATION PREVENTED HIM FROM OBTAINING PRIORITIES FOR BUILDING MATERIALS.

The evidence in this case and also the findings clearly show that the appellant exercised all possible effort to obtain building materials to proceed with the construction of the station. He went to the Anderson Lumber Company, Wheelwright Lumber Company, Burton Walker Lumber Company in Ogden, and also went to Ed White Electric and Ogden Electric Company to

obtain materials. (Tr. 51) Finding of the Court substantiates this evidence. Although necessity for obtaining priorities was terminated July 25, 1947, the evidence before the court shows that it was not possible to obtain many materials needed in the construction of the service station, such as electric wiring, steel, re-inforcing iron, cement, metal sashes. (Tr. 68, 69, 70 and 71)

George Ward, Manager of the Anderson Lumber Company testified that after July 25, 1947, the supply of cement was so short that even after July 25, 1947, and through 1948, only about one-tenth of the demand for cement could be supplied, and that cement, upon a few occasions, was shipped from California into this market to help supply part of the trade. (Tr. 70) As to steel re-inforcing bars and metal sashes, they were almost non-existent during 1947 and 1948. (Tr. 71)

Mr. Joseph Behling, representative of the Salt Lake Hardware Company, dealers in builders lines, builders hardware, tanks machine pipe fittings, plumbing fittings and electrical equipment and wiring, testified that all of these articles were very difficult to obtain in the years 1945, 1946 and 1947, and that some of them started to ease off in the middle of 1948, but critical shortages did continue even into the year 1949, such as pipe and other steel products and tank plate. (Tr. 32-33-34).

The testimony of Mr. Ward and Mr. Behling is uncontradicted. However, even were there no such testimony in this case, it is a matter of common knowledge of which the Court may take judicial notice that critical shortages in building materials continued through the year 1948. Under such conditions we submit that it cannot reasonably be said that the appellant did not use



due diligence because he did not apply for renewal of his permit until October 13, 1948. Very clearly it was not until then that an individual such as the appellant, could reasonably believe that he might then stand some chance of getting materials.

The findings prepared by the respondent in Paragraph 13 sets forth certain construction under permits issued by Ogden City, which was completed during the years 1945, 1946 and 1947. There is nothing in the record to show whether or not the builders had priorities issued by proper authority, but it must be presumed that they did have such priorities.

In Paragraph 14 of the findings is set forth certain construction which was completed during the years 1947 and 1948. Likewise in relation to at least some of these where the permit issued prior to July 25, 1947, it must be presumed that such building had priorities and as to the few remaining, it does not appear in the record how or where materials were obtained, so that these findings have little evidentiary weight as to the facts in this case.

The building permit issued by Ogden City to appellant created a contract under which appellant had a vested right to construct a service station. He was prevented from performing the time requirements in the permit because of the national war emergency and his inability to so comply is legally excused by reason of the paramount war emergency. The principal of law governing such situations is well and clearly enunciated in the case of *National Grain Yeast Corp. v. City of Crystal Lake*, 147 F 2d 711 (CCA 7th 1945), in which the Federal Circuit Court of Appeals says:

“Nor can the court, nor should the defendant, ignore the effect of the World War on efforts of parties to comply with contract obligations and requirements.

“The extent to which parties may justifiably expect relief in a court of equity upon a showing that the failure to perform was because of inability to secure priorities, etc., due to the War, presents a question upon which final judicial pronouncement has not been made.

“It is our belief that courts of equity will not close the door of relief to a party who has diligently and in good faith attempted to complete its contract, but who has been wholly or in part prevented from so doing because of the first demands and requirements of the Government in the prosecution of the War.”

Also in a recent case appealed to the Circuit Court of Appeals from the Federal District Court of Utah, *New York Life Insurance Company v. Durham*, 166 F2d 874, the Court states the following principal of law:

“Private rights, when affected by the incidence of War, are governed by determinations of political departments of government, and courts will usually condition private rights whether resting in contract or otherwise, in order to give full effect to the exigencies of War.”

### POINT III

BOARD OF CITY COMMISSIONERS OF OGDEN CITY HAD POWER TO RENEW APPELLANT'S BUILDING PERMIT.

Inasmuch as appellant did not lose his vested right to construct the service station by reason of his being

prevented from proceeding because of the war emergency, most certainly the Board of City Commissioners of Ogden City had power to grant renewal of his original permit. We assert that the provisions in the Building Code, which are incorporated in the building permit, providing against abandoning the work for a period of sixty (60) days, or a period of one year with respect to a new permit at half fee, are provisions designed to obtain reasonable diligence in prosecuting work under building permits and are analogous to statutes of limitation. Provisions of limitations statutes may be waived and we submit that for the very good cause of impossibility of performance due to war restrictions the Board of City Commissioners had the power to waive these time provisions and renew appellant's permit. When the holder of a building permit is prevented from pursuing the work within the time specified by the paramount requirement of government due to war, we do not believe that it was the intention of the City and its Building Code to make the permit an absolute nullity because of such excusable failure to meet a time limitation.

The City Commission, being an administrative body, has power to review the facts upon which appellant based his application for renewal of his permit, and when it determined that those facts justified waiver of the time limitations and renewal of the permit such determination became conclusive. The Courts will not review the findings of an administrative body in such matters unless there is arbitrary abuse of discretion. Clearly there was no abuse of discretion here. The City Commission held hearings at which both respondents

and appellant were present, together with their counsel, and it was only after a careful and fair consideration, upon hearings had, that the Board of City Commissioners determined that appellant should have a renewal of his building permit. There being no arbitrary action nor abuse of discretion by this administrative body, we submit that its determination is final and cannot be reviewed by the courts.

The law in this regard is succinctly stated by McQuillin on Municipal Corporations in Volume 1, Second Edition, Paragraph 390, Page 1068 as follows:

“Assuming that the municipal authorities have acted within the orbit of their lawful authority, no principle of law is better established than that courts will not sit in review of proceedings of municipal officers and departments, especially those involving legislative discretion, in the absence of bad faith, fraud, arbitrary action or abuse of power.”

This rule is so well established that it would be a work of supererogation to cite the voluminous number of cases supporting the rule. For other general statements of the rule, we refer the Court to 42 American Jurisprudence, Paragraph 209, Page 610, et. seq., and 43 American Jurisprudence, Paragraph 255, pages 72, 73. One of the many cases stating the rule is that of Henry Bennett et al vs. State Corporation Commission, 142 Pac. 2d 810, 150 ALR 1140, a Kansas case, which holds:

“In the absence of arbitrary or capricious action or abuse of discretion by executive or administrative officers, courts do not interfere

with the performance of their acts which are discretionary in character or involve the exercise of judgment.”

The Building Code of Ogden City in effect at the time appellant obtained his building permit, provided for a Board of Examiners and Appeals, which would have power to grant relief with respect to the requirements of building permits in cases where a manifest injustice would be done. No such Board has ever been appointed by Ogden City as is found in Finding 11 of the District Court. Had there been such a Board of Appeal, appellant might have gone before it and sought relief with respect to renewal of his building permit, because of the manifest injustice which would be done him should the impossible be required of his complying with the time provisions in the permit when prevented from doing so by the Government requirements for priorities. There being no such Board of Appeal, most assuredly the City Commission of Ogden City could exercise such power as might have been exercised by such subordinate Board had one been in existence. Thus the City Commission very clearly acted within its powers in granting appellant relief by renewing the original permit.

There was in existence a Board of Adjustment in Ogden City as provided by Section 15-8-95, Laws of Utah (1943), and respondents may argue that appellant should have applied to that Board. However, such Board of Adjustment has no power to determine matters pertaining to use of property under zoning ordinances, nor matters pertaining to renewal of building permits and, therefore, such Board of Adjustment



would have had no power to hear appellant nor grant him any relief had he gone before it. The law with respect to this is found in the case of Walton vs. Tracy Loan and Trust Company, 97 Utah 249, 92 Pac. 2d 724, where the limitations of power of such Boards of Adjustment were adjudicated by this Court.

#### POINT IV

APPELLANT DID NOT ABANDON THE INTENDED CONSTRUCTION OF THE SERVICE STATION.

There is no finding by the District Court that the appellant, Boyd N. Fronk, ever abandoned construction of the Service Station, nor does the evidence support a conclusion of law of abandonment.

#### POINT V

THE DISTRICT COURT ERRED IN GRANTING AN INJUNCTION IN THIS CASE.

Respectfully submitted

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