

1950

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

Utah Supreme Court

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CASE NO. 7600

# In the Supreme Court of the State of Utah

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

VS.

BOYD N. FRONK,  
*Defendant and Appellant*

## Appellant's Reply Brief

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Case No. 7600

We are of the opinion that a Reply Brief may be helpful to the court in this case.

The case of National Lumber Products Company vs. Ponzio, N.J., 42 Atl. (2) 753, cited by respondents at page 12 of their Brief is not in point. This is a case in which the plaintiff installed a planing machine in a lumber yard which was already a non-conforming use. Therefore it is a case of increasing an already non-conforming use and not one where a use was authorized at the time of issuance of a permit and a subsequent ordinance enacted prohibiting the use. Also it appeared that plaintiff could have had lumber planed outside of his yard with very little delay so that his filling war contracts would not be materially affected.

Respondents at page 12 of their brief cite the case of Wilkins vs. San Bernardino et al Calif. (1946) 175 Pac. (2) 542. In that case the property owner deliberately violated the zoning ordinance by building a multiple dwelling and therefore the court denied relief in a declaratory judgment action. The court, however, at page 551 lays down a principle of law which supports the appellant's contention in the case at bar. There the court says:

“The fact that there is a housing shortage might justify the city, or perhaps even the court, under proper conditions, in temporarily suspending the operation of the zoning ordinance during an emergency, but it furnishes no justification for a judicial decision voiding the operation of the ordinance for all time to come or for plaintiffs action in violating the ordinance.”

Cases are cited in support of the proposition that the local body or in proper cases the court, may in time of war emergency suspend the operation of an ordinance. Among the cases cited is that of City of San Diego vs. Van Winkle, 158 Pac. (2) 774, (Calif.) 1945. This was an action by the City of San Diego to enjoin defendants from violating the City zoning ordinance. From that portion of the judgment which suspended during the war emergency the enforcement of the injunction which forever enjoined defendants from occupying or permitting any person to occupy the duplex dwelling on defendant's property, the City appealed and the District Court of Appeal of California affirmed such judgment so suspending that portion of the injunction. Defendants were the owners of real property located in LaJolla in the City of San

Diego. It was situated in a zone where only single family dwellings could be erected. In February of 1942, the defendants without intention to violate the ordinance, commenced the erection of a duplex dwelling house and subsequently completed it. The apartments were occupied by officers in the armed forces on active duty. It appeared and the court took judicial notice of the overcrowded conditions existing in the San Diego area and of the war emergency. It was argued by the plaintiff that its zoning ordinances are an exercise of police power and if they are not arbitrary, discriminatory nor oppressive the courts must enforce them and that the trial court had no jurisdiction to either refuse or to stay an injunction. The defendants admitted such rules generally but argued that the war emergency and the housing shortage permitted a court in exercising its equity jurisdiction to suspend the operation of the ordinance during the war emergency. This contention was upheld by the court in this case. The court further pointed out that the rent regulations, which were a part of the Emergency Price Control Act and hence a part of the emergency war legislation and regulations, would prevent eviction of the tenants and that the defendants could not obey both the state and federal regulations. The court held that regulations passed under constitutional authority suspend state or local laws or regulations in conflict with them and that this doctrine is not new. Many cases are cited by the court so holding. The court held the case squarely within the rule announced in the case of Realty Revenue Corporation vs. Wilson 182 Misc. 552, 50 N.Y.S. (2) 941, 942, which was a New York case in which the Realty Revenue Corporation owned an apartment house in the

City of New York which apartment house did not conform to the health and safety laws. The Commissioner of Housing and Buildings of the City of New York required the owner to cause the building to be vacated as unfit for human habitation and dangerous to life and health by reason of defects consisting of failure to provide a sprinkling system, an interior fire alarm system and self-closing fireproof doors. The owner brought the action to enjoin the Commissioner from enforcing the order. It developed that the War Production Board had refused to give a priority to the owner for materials necessary to make the required changes so the owner was unable to make the building safe and to conform with the requirements of the law. The Supreme Court of New York adopted certain portions of the opinion of the Trial Judge from which the following is quoted by the California Court at page 778 of 158 Pac. Rep. (2) as follows:

“Contrary to what perhaps may be a popular impression, the constitutionality of law depends, not upon abstract theory or philosophy but upon a very practical application of laws to facts, and a statute which is valid as to one set of facts may be invalid as to another, and one which is valid when enacted may become invalid by change in the conditions to which it is applied. Nashville, C. & St. L. Ry vs. Walters, 294 U. S. 405, 414, 415, 55 S. Ct. 486, 79 L. ed. 949; Municipal Gas Co. of City of Albany vs. Public Service Commission, 2 District, 225 N.Y. 89, 95, 96, 121 N.E. 772, 773, 774). Owners of multiple dwellings may be subjected to uncompensated obedience

to many regulations which are costly and burdensome to them but to enforce against them regulations which the Federal government says they shall not comply with would be an unreasonable and unconstitutional deprivation of their rights. State commands and Federal prohibitions cannot be allowed to become upper and nether millstones between which the rights of citizens are ground to bits . . . The Commissioner will not be stayed if walls, floors and ceilings are falling down or if unsanitary conditions make disease imminent. It thus may be that if inability to get materials continues for a long period, there may come a time when owners of such dwellings will have to submit to having them vacated. Upon the papers now presented it does not appear that that point has been reached in this case . . . The State's statutory standards stands upon the statute books capable of enforcement whenever and wherever the Federal prohibition does not interfere, but while the Federal prohibition continues, and in those cases to which it applies, the State's Statutory standard remains in suspended animation."

It was concluded by the New York court that as the apartment house was reasonably safe, the Commissioner of Housing and Building of the City of New York should be enjoined from enforcing the order to vacate the building "during the present emergency or until such time as the War Production Board releases the required materials." The California court in the San Diego case reached a conclusion that the trial court was not guilty of any breach of discretion in suspending the execution of the injunction during the present war



emergency and the existing housing shortage in San Diego and that he was fully justified in exercising his equitable powers in so doing.

Respondents in their brief say that appellant was a carpenter and knew there were shortages of materials and a priority was necessary in the years 1943, 1944, and 1945. It is true that appellant was a carpenter. However, we submit that there is no evidence in the record from which a conclusion can be drawn that appellant knew of the necessity for priorities at the time he obtained his city permit. On cross examination of the appellant by Mr. Adams (Tr. 65 and 66) the following questions and answers were given:

“Q. Calling your attention to the year of 1943 and 4 and 5, you are acquainted with the fact during those years that there was a priority on building materials?

A. I don't recall when the priorities started. There was some shortages and priority.

Q. Do you remember it being said in this hearing or agreed to that in 1942 the War Production Board was given authority to ration and control the use of building material. Do you remember that being agreed to here?

A. Yes, I guess so. I didn't remember reading it.

Q. Well, do you remember that during the time shortly before the issuance of this first permit that there was a priority on building materials?

A. No, I don't. I don't really know whether there was or not.

Q. Well, do you remember that there was a scarcity of materials during that time for construction work of all kinds?

A. There may have been. Of course I worked for the government and wasn't acquainted with trying to get them then.

Q. I think that's all the questions I have."

Consequently we cannot agree with the statement of counsel nor the finding of the court with respect to appellant's knowledge of priorities and shortages at the time he obtained his permit.

Respondents in their discussion of their point designated number A commencing at page 14 of their brief, contend that the City had no authority to issue a permit in exception to the ordinance. It is not contended by appellant that the City had the power to grant an exception to a zoning ordinance. What appellant affirms is that no question of exception to the ordinance is here involved. Appellant obtained his building permit when the ordinances of Ogden City permitted erection of a gasoline filling station on the site of his property. By relying upon that permit, doing work thereunder and expending large sums pursuant thereto, appellant obtained a vested right to complete his construction which vested right could not be affected by a subsequent amendment of the zoning ordinance. Because he was prevented from obtaining necessary materials because of Federal law and the War emergency, he did not lose his vested right because of inability to comply with the time provisions in the permit. Never having lost his vested right in his original permit and it not having become void by lapse of time for the reasons

above set forth and set forth in his brief, appellant's original permit remained in force and effect and consequently there was no necessity for issuing a new permit and no reason for attempting to grant any exception to the zoning ordinance enacted subsequent to the issuance of his permit, and consequently there is no question in this case of an exception to the zoning ordinance. It is clear from the evidence that appellant sought no exception to the zoning ordinance but that he asked the City Commission for a renewal of his original permit. Inasmuch as appellant does not contend that the City had any power to grant an exception to a zoning ordinance and that such question is not involved in this case, the numerous cases cited and discussed by respondents in their brief on this question have no application to the case at bar.

It is alleged by respondents in their complaint in paragraph seven thereof, that

“On October 13, 1948 the appellant appeared before the Board of Commissioners of Ogden City Corporation and requested a permit which he purchased three years ago be renewed, said permit being for the erection of a service station at 20th Street on Harrison Boulevard.”

This was the only application before the City Commission and was the application acted upon by the Commission. Respondents further allege in paragraph seven of their complaint

“That on October 21, 1948 the following communication was addressed to the Board of Commissioners by C. R. Kimball, said Engineer.

‘Subject; Application for building permit attached hereto. Application made by B. M. Fronk to construct a service station on the Northeast corner of Harrison Boulevard and 20th Street. Mr. Fronk recently appeared before the Commission asking that an old permit be renewed for this construction. The action taken by the Commission at that time approved the renewal of the permit, provided there were no protestants within a week. That period has elapsed and the application is being submitted for your approval.

Respectfully submitted

by C. R. Kimball’

That on October 26, 1948, the above communication was presented to the Board of City Commissioners and the same was moved by Mayor Peery, seconded by Thomas East and voted on by Mayor Peery, Thomas East and Ed. T. Saunders.”

These allegations in respondents’ complaint with respect to the application for renewal of the permit and the action taken by the City Commission are admitted by paragraph seven of appellant’s answer. Hence it is alleged and admitted in the pleadings that the application was for renewal of permit and the action of the Board of City Commissioners was to grant renewal of the original permit. Statements made by either the Mayor or the City Engineer as to an exception to the ordinance had no legal effect because both under the pleadings of the parties and as shown by the exhibits containing the communications to the City Commission, it is clear that the matter before the Commission was the matter of application for renewal and not

an application for the issuance of a new permit in exception to the zoning ordinance of August, 1946. These allegations in the complaint and admissions made by the appellant's answer are further substantiated by the direct testimony of the appellant. (Tr. 56)

“A. I figured I had to have a renewal of the permit to go ahead.

Q. And what did you do about it?

A. I went down and asked for a renewal of my permit.

Q. You went down where?

A. To the City Commission.

Q. And what did the City Commission do in relation to it?

A. They ruled I should.

A. I told the City Commission how I wanted to renew the permit to go ahead with the building because I had been unable to get materials before and had been shut off and wanted to go ahead.”

It may not have been necessary for the appellant to ask for renewal of his permit since his vested right had not been lost therein. However, if it were necessary to seek renewal under the circumstances, then the renewal by the Board of Commissioners was not in exception to the zoning ordinance of August 1946, but was a renewal of a validly existing permit issued prior to the ordinance of August, 1946, and at a time when it was permitted under the zoning ordinances to build a service station in the locality in question. Respondents



quote the case of *Walton vs. Tracy Loan & Trust Company* 97 Utah 249, 92 Pac. (2) 724, as an authority for the proposition that only the Board of Adjustment has authority to grant exceptions to zoning ordinances. The exceptions in that case held to be within the power of the Board of Adjustment to make, are minor exceptions such as variance of side lines and height of building. This court in the *Walton* case clearly held that the Board of Adjustment had no power whatever to grant major exceptions; and specifically held that a Board of Adjustment has no power to grant an exception allowing a change of use of property. The appellant did not seek here an exception to the zoning ordinance and if he had sought an exception, it would be pertaining to the use of his property and the Board of Adjustment in any event would have had no power to decide his matter.

Respondents on page four of their brief, call attention to the fact that the appellant obtained tanks and pipe of which there was a critical shortage. Appellant calls attention to the fact that the two tanks which he obtained for the storing of gasoline in connection with the service station were loaned to him by Wasatch Northern Oil Company who had them in their possession at that time. (Tr. 43, 51)

The respondents cite the case of *Peal vs. Gulf Red Cedar Co. of California*, 59 Pac. (2) 182, in which it is held that abandonment is made up of act and intent and the intent must be gathered from facts and circumstance in the case. The appellant contends that the testimony clearly shows that he never intended to abandon the building of the station after he started with its con-

struction. The facts also show that he purchased the ground for the purpose of erecting a service station thereon (Tr. 30) and that a short time after he had leveled the ground for the purpose of preparing to construct a station there, he installed, by burying in the ground, two large gasoline tanks which he has never removed and which now are still in place in the ground. These facts, together with all of his other acts in obtaining and seeking materials and applying for priorities, all clearly show that appellant never intended to abandon the construction of the service station.

The action taken herein by the Board of Commissioners of Ogden City in renewing appellant's permit should be sustained. It was an exercise of their proper powers after they had made a through investigation and after hearings and due deliberation.

Respectfully submitted,

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