1979

Celebrity Club, Inc. v. Utah Liquor Control Commission : Brief of Plaintiff

Utah Supreme Court

Robert B. Hansen; John S. McAllister; Attorneys for Respondent;
Robert J. Stansfield; Attorney for Petitioner;

IN THE SUPREME COURT OF THE STATE OF UTAH

CELEBRITY CLUB, INC., a Utah nonprofit corporation,

Petitioner,

v.

UTAH LIQUOR CONTROL COMMISSION,

Respondent.

Case No. 16083

BRIEF OF ~~PETITIONER~~ PLAINTIFF

Petition For Extraordinary Relief From Decision Of Utah Liquor Control Commission.

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STATEMENT OF THE NATURE OF THE CASE

Petitioner seeks relief from a decision of the Utah Liquor Control Commission denying Petitioner's application for a license to establish a state liquor store on the premises of Petitioner.

RELIEF SOUGHT BY PETITION

Petitioner seeks an Order from this Court directing Respondent to issue to Petitioner a license to establish a state liquor store on its premises.

STATEMENT OF FACTS

Petitioner is a nonprofit social club which applied to Respondent for the issuance of a license for the establishment of a state liquor store on the premises of Petitioner at 1037 East 3300 South, Salt Lake City, Utah. Prior to Respondent's decision on Petitioner's application and prior to

the construction of necessary improvements required by statute and by rules and regulations of Respondent (e.g., see §16-6-13(6), Utah Code Annotated requiring extensive kitchen and dining facilities), Petitioner contacted Compliance Agents of Respondent regarding the question of whether or not the 600 foot proscription in §16-6-13.5 and §32-1-36.15, Utah Code Annotated (Supp. 1977) is applicable. Inquiry was made because of the location of a private school. The entrance to the school is at 3370 South 900 East, well beyond the proscription, but the school property extends into the interior portions of the block, thus prompting the inquiry.

Agents of the Respondent made physical inspections of the area and advised Petitioner verbally that the proposed location of the state liquor store would have to be changed to exceed 600 feet. Petitioner changed the proposed location pursuant to the direction of the Compliance Agents.

Physical inspection again was made and Petitioners were advised verbally that the new location of the proposed state liquor store was not within 600 feet of the school and that a license could issue upon Petitioner satisfying numerous other conditions. Measurement was made from the nearest corner of the playground adjacent to the school building

to the location of the proposed state liquor store. The distance is 622 feet.

The points from which the measurement was made were in accordance with an opinion of the Utah Attorney General. See Exhibit 2 attached to the Stipulation of Facts submitted in this matter.

By letter dated the 16th day of September, 1977, Petitioner again was advised by an agent of Respondent whose job it was to determine if applicable requirements are satisfied that Petitioner's facility "satisfies the 600 foot requirement." See Exhibit 1.

Subsequent to the repeated verbal and written representations of Respondent, and in reliance thereon, Petitioner completed the club facility at a cost of nearly $200,000.00.

Petitioner completed its formal application to Respondent and filed it with Respondent on the 21st day of February, 1978.

On the 28th day of March, 1978, the Utah Attorney General published a new opinion changing the point of reference from which the measurement is to be made. Exhibit 4. Rather than measuring from the location of the proposed state liquor store as directed in the prior opinion, it was determined that the measurement is to be made from the nearest

outside wall of the building in which the club is located. Measuring in this manner, the club is not beyond 600 feet.

On the 15th day of September, 1978, Respondent denied Petitioner's application solely on the basis that the 600 foot requirement was not satisfied. Petitioner's application fully satisfied all other statutory requirements and all rules and regulations of the Utah Liquor Control Commission, and there were and now are licenses available.

A survey made in connection with some additional property owned by the school, but not used as a playground and not having a "school building" on it, was submitted. Exhibit 5. The property has a storage shed on it. The Club facility is not beyond 600 feet of the nearest point of said additional property.

ARGUMENT 1

IN MEASURING 600 FEET, THE POINT AT THE SCHOOL FROM WHICH THE MEASUREMENT SHOULD BE MADE IS THE NEAREST BOUNDARY OF THE PLAYGROUND TO THE CLUB FACILITY.

The Attorney General has issued two opinions relating to the applicable points of reference from which a measurement is to be made. With respect to the point of reference at the school, both opinions of the Attorney General are consistent in that they recognize the nearest boundary of the playground adjacent to the school as one of the two points

of reference.

The first opinion sought to interpret Utah Code Annotated §32-1-36.15 (Supp. 1977) which provides:

> "No state store or package agency shall be established within a radius of 600 feet of any public or private school, church, library, public playground or park. . ."

After discussing whether the term "school" relates only to the school building proper or to the school building and surrounding playgrounds, the opinion concluded:

> ". . .[T]he point of measurement to be used in the case of a school is the nearest wall of the school building if there is no playground, or the nearest point of the building or the boundary of the school playground where a school playground exists."

The second opinion quoted with approval the language of the first. While it may be argued that both opinions erroneously include playgrounds and that measurement should be made from the nearest point of the school building proper, it has been the consistent opinion of the Attorney General and Respondent and its Compliance Agents that the measurement should be made from the nearest boundary of the

playground.

Petitioner acquiesced in such an interpretation and submitted to Respondent a survey which measured from the nearest boundary of the playground.

With all parties having applied the same point of reference, and the use of such a point of reference being based upon reason, it is submitted that the proper point of reference at the school is the nearest boundary of the playground.

ARGUMENT II

THE APPLICABLE POINT OF REFERENCE WITH RESPECT TO THE CLUB FACILITY IS THE LOCATION OF THE PROPOSED STATE LIQUOR STORE RATHER THAN THE NEAREST WALL OF THE BUILDING IN WHICH THE CLUB FACILITY IS LOCATED

Unfortunately, while the applicable statutes clearly set forth a 600 foot limitation, they offer little guidance as to the points from which the measurement is to be made. That there is considerable difference of opinion regarding the manner in which a designated number of feet is to be measured is demonstrated in numerous cases dealing with the problem.

In attempting to delineate the manner in which the distance between two establishments is to be measured, the controlling statutes and the Courts which have construed those statutes have been less than consistent.

Measurement along the shortest route of ordinary traffic has been one approach. In State Beverage Department v. Brentwood Assembly of God Church, 149 So. 2d 871 (1963) the applicable statute specified such a measurement but the Court still was forced to define "the shortest route of ordinary pedestrian travel." See also Hunt Club, Inc. v. Moberly, 407 S.W. 2d 148 (Ky.) where the licensed premises were deemed not to be within the 200 foot proscription though the rear portions of the two buildings were within 200 feet.

A measurement in a straight line also has been considered the appropriate means of determining distance E.g. see Board of Trustees of Leland Stanford Junior University v. State Board of Equalization, 37 P.2d 84 (Cal. 1934).

Once it has been determined that the measurement is to be along a route of pedestrian traffic, or in a straight line, or according to some other formula, the interpretation of

a statute is not complete for it must be further expanded to include the points at which the measurement is to begin and e...

Again, inconsistency reigns. The Courts have adopte... measurements from front door to front door, curb to curb, bui... ing to building, property line to property line and various combinations of these terminal points. See 4 A.L.R. 3d 1250 and the cases cited therein for a treatment of the subject.

Against the backdrop of the lack of consistency in judicial interpretation and because of the failure of the Utah Legislature to definitively state the manner in which a measurement is to be made, the Utah Liquor Control Commission asked the Utah Attorney General for guidance.

By written opinion dated the 15th day of November, 1976 (see Exhibit 2 to the Stipulation of Facts), the Utah Attorney General determined that the proper measurement is a straight line between the nearest point on the boundary of the playground, if a playground exists, to the proposed site of the state liquor store.

The opinion is founded on reason and Petitioner submits it should be adopted by this Court.

At the conclusion of the opinion it is stated:

> "Legal basis for contrary interpretations does exist. For this reason if this opinion is not in keeping with the legislature's intent in enacting the above cited section ample opportunity will exist to clarify said intent in the upcoming legislative session." [Emphasis added]

The 1977 ligislative session did nothing to alter the interpretation of the Attorney General. Therefore, it is believed by Petitioner that the opinion reflects the intent of the legislature.

Both the Petitioner and the Utah Liquor Control Commission conducted themselves in accordance with the first opinion for a period well in excess of one year and during the entire period Petitioner was constructing the club facility.

The second opinion of the Attorney General was published more than a year and four months after the first opinion; it was no better reasoned than the first opinion; the Utah Legislature expressed nothing to indicate a change in its intent as expressed in the first opinion; and Petitioner expended nearly $200,000.00 in reliance on the first opinion. The second opinion of the Attorney General should be rejected as a standard for measurement.

ARGUMENT III

THE RESPONDENT SHOULD BE ESTOPPED TO DENY A LICENSE TO PETITIONER ON THE BASIS OF THE 600 FOOT PROSCRIPTION.

As has been set forth above, Petitioner contends that a proper interpretation of Utah Code Annotated §16-6-13.5 and 32-1-36.15 (Supp. 1977) results in Petitioner being beyond the

required 600 feet. If this Court were to adopt an interpretation which resulted in a measurement of less than 600 feet, it is the assertion of Petitioner that fundamental fairness dictates that Respondent be estopped to deny a license on the basis of the 600 foot limitation.

Petitioner recognizes that estoppel is to be applied to governmental entities with great care in that unrestrained exercise of the principle may hobble the entity's sovereign power. However, it is clear that the doctrine is applicable to governmental bodies when the underlying facts justify its application and where it is necessary to apply the doctrine to prevent an injustice. For authorities recognizing that estoppel can be invoked against governmental agencies see Surety Savings & Loan Association v. State Department of Transportation, Division of Highways, 195 N.W.2d 464 (Wis. 1972); Palm Gardens, Inc. v. Oregon Liquor Control Commission, 514 P.2d 888 (Or. 1973); Mountain States Advertising, Inc. v. Bureau of Revenue, 552 P.2d (N.M. 1976); Martinez v. Florida Department of Commerce, 358 So. 2d 115 (Fla. 1978); Finch v. Mathews, 443 P.2d 833 (Wash. 1968); People ex. rel. Mac Mullen v. Harrington, 188 N.W. 2d 214 (Mich. 1971); Hickey v. Illinois Central R. Co., 220 N.E. 2d 4 (Ill. 1966).

The cases recognizing that governmental agencies are subject to the doctrine of estoppel are legion, although some cases refused to apply the principle because the relevant facts did not support its application. E.g. see Walker Center Corporation v. State Tax Commission, 20 U.2d 346, 437 P.2d 888 (1968) where this Court refused to invoke estoppel because "the record does not indicate that the Commission misled the Plaintiff in any manner. . ." Cf. Palm Gardens, Inc. v. Oregon Liquor Control Commission, 514 P.2d 888 (Or. 1973) where reliance was not justified because the party had knowledge to the contrary of the fact or representation allegedly relied upon; Hickey v. Illinois Control R. Co., 220 N.E.2d 415 (Ill. 1966) where there was mere inaction by the state and not positive acts by officials which may have induced action.

This Court has spoken recently concerning the facts which would support estoppel against a governmental entity. Morgan v. Board of State Lands, 549 P.2d 695 (Utah 1976). In refusing to estop the Board because the Plaintiff had actual knowledge of certain relevant facts and because the Board had done nothing to delude or dissuade Plaintiff from properly following required procedure, this Court approved the following standard:

"Estoppel arises when a party (Defendant

> Board) by his acts, representations, or admissions, or by his silence when he ought to speak, intentionally or through culpable negligence, induces another (Plaintiffs) acting with reasonable prudence and diligence, relies and acts thereon so that he will suffer an injustice if the former (Land Board) is permitted to deny the existence of such facts."

Having circumscribed the factual requisites necessary for an application of estoppel, it is clear that the instant case is one which meets the most stringent of tests. If the facts of this case do not demand that the Respondent be estopped, Petitioner submits that the doctrine of estoppel may no longer be considered a viable legal principle in this jurisdiction.

Did Petitioner act reasonably and prudently? This is not a situation where the allegedly aggrieved party (the Petitioner) proceeded with its course of conduct and then asserted estoppel because of inaction on the part of the government. Rather, prior to expending $200,000.00, Petitioner approached Respondent for guidance. Respondent was the only entity Petitioner reasonably could go to for assistance. In fact, Respondent has the exlusive statutory authority to deal with the problem.

Respondent did not fail to act upon being presented with the question. Respondent proceeded to give specific dir-

ections with respect to the course of conduct Petitioner was to take. The directions did not come from clerks or others upon whose advice one could not reasonably rely. The directions came from personnel whose specific duties included making determinations of compliance with statutory requirements and with rules and regulations of Respondent. The repeated verbal and written assurances of compliance from Respondent were further supported by an opinion of the Attorney General. Without doubt, Respondent engaged in affirmative conduct which induced Petitioner to act and which Respondent full well knew would induce Petitioner to act. And surely Petitioner reasonably relied on the representations of the Respondent.

Once Respondent made a determination that Petitioner could proceed as directed by Respondent without being in violation of the 600 foot requirement, Respondent quietly observed Petitioner expend large sums on the facility in question. Then, after the facility was completed, and for no apparent reason, the interpretation of the 600 foot requirement was changed. The change came without any demonstrated change in legislative policy, and in spite of the first opinion of the Attorney General which had alerted Respondent to the fact that the 1977 Legislature could be approached to make appropriate changes if

the interpretation of the Attorney General was deemed to be incorrect.

It is submitted that an injustice was perpetrated and that the application of estoppel to Respondent is the necessary remedy - if the Court sanctions Respondent's second interpretation of the 600 foot limitation. To not estop Respondent from enforcing its second interpretation against Petitioner will promote a substantial injustice and will be tantamount to a judicial approval of abuse of administrative power.

Petitioner is not unmindful of the fact that the Utah Liquor Control Commission has been given broad powers to regulate alcoholic beverages in the State of Utah. Utah Code Annotated §32-1-6 (Supp. 1977). But in the exercise of those powers, Respondent must act reasonably and fairly and not arbitrarily as it did here. Once Respondent has exercised its powers by promulgating regulations and establishing rules of procedure, Respondent may not ignore those rules and regulations with impunity, particularly when to do so will inflict serious injury on citizens of this State.

The course of conduct pursued by the Utah Liquor Control Commission is not in keeping with fundamental notions of fair play and has denied to Petitioner due process of law un-

der Article I, §7 of the Utah Constitution and the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The applicable survey to be considered is the one under which both Petitioner and Respondent have operated from the beginning, i.e., the survey which uses as one measuring point the closest boundary of the playground.

The terminal points of the measurement should be (1) the closest boundary of the playground and (2) the location of the proposed state liquor store. Such a measurement results in Petitioner being in compliance with the 600 foot requirement.

If it is decided that the change in interpretation applies the proper standard of measurement, Respondent should be estopped to deny a license on the basis of the 600 foot requirement, for Respondent acted in a manner which factually supports estoppel and in a manner which did not meet standards of essential fairness, thus denying to Petitioner due process of law.

Respectfully submitted,

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