1979

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

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 RESPONDENT

Response to Petition for Extraordinary Relief from Decision of Utah Liquor Control Commission.

ROBERT B. HANSEN
Utah Attorney General

JOHN S. McALLISTER
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

ROBERT J. STANSFIELD
44 Exchange Place
Salt Lake City, Utah 84111

Attorney for Petitioner

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Attorneys for Respondent

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44 Exchange Place
Salt Lake City, Utah 84111

Attorney for Petitioner

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NATURE OF THE CASE

The Utah Liquor Control Commission denied petitioner's application for a private club license and state store. Petitioner's prior request for extraordinary relief for the Supreme Court to determine that the club legally satisfies the 600 foot prohibition and to order the Utah Liquor Control Commission to license a store on the club premises was denied on February 28, 1979, by this court.

This matter again comes before the Supreme Court for a rehearing of the Petition for Extraordinary Relief.

RELIEF SOUGHT BY RESPONDENT

Respondent, Utah Liquor Control Commission, respectfully requests this court to deny the Petition for Extraordinary Relief and sustain the action of the Commission.

STATEMENT OF FACTS

The record in this matter reveals that petitioner Celebrity Club, applied to the Utah Liquor Control Commission for a license for a private club to store, serve and consume alcoholic beverages and requested the Commission to establish a state store for the sale of liquor. References are made to pages of the Utah Liquor Control Commission Record by "(R.1)".

The Utah Liquor Control Commission staff held public hearings and otherwise received information pertinent to the application including two surveys showing the distances between a nearby school (Salt Lake Junior Academy) and the proposed club. For the convenience of the Court the two surveys are reproduced in substance and are attached to this brief and designated "Attachment A" for the Celebrity's Clubs survey, and "Attachment B" for the survey submitted by the resident opponents to the Club. The record indicates that at the public hearings of July 21 and September 5, 1978, residents of the area

vigorously protested the application and seriously questioned the Club's compliance with the 600 foot distance prohibition (R. 24, 25, 32, 46 and 47).

In addition to the public hearings, the record contains various communications regarding the application: protests from R.R. Gallagher, a resident of the area (R. 38), Thure R. Martinsen, Principal of the Academy (R. 40) and Earl S. Maeser, attorney and resident of the area (R. 41).

Regarding the 600 foot prohibition in particular, the record contains correspondence from the Commission staff to George Sorenson (R. 26) and an apparent response from Mr. Sorenson's legal counsel (R. 39) and a letter from the director of the Utah Liquor Control Commission liquor agency regarding compliance requirements (r. 36).

The application was brought before the five member Commission on September 15, 1978, at which time the Commission itself heard from representatives of the Club, from opponents representing the school and residential area and from the director of the Utah Liquor Control Commission liquor agency who recommended denial (R. 16 and 17).

After a "lengthy discussion" of the application the Commission voted unanimously to accept the director's recommendation and thereupon denied the club's application (R. 17).

ARGUMENT

POINT I

THE PREMISES OF THE PROPOSED PRIVATE CLUB IS WITHIN THE 600 FOOT PROSCRIPTION AND THEREFORE PETITIONER IS NOT ENTITLED TO EITHER A CLUB LICENSE OR A STATE STORE.

Petitioner's application to obtain a license and to establish a state store is governed primarily by the law of the Private Club Act, Article I, Title 16, Utah Code Annotated. More specifically, the law sets forth the Commission's authority as follows:

> Subject to the provisions of this chapter and the Utah Liquor Control Act and regulations promulgated thereunder, the commission is authorized to issue a license to a social club, recreational, athletic, or kindred association, incorporated under the provisions of this chapter, which maintains or intends to maintain premises upon which liquor is or will be stored, consumed or sold as hereinafter provided,
>
> * * *
>
> but no original license shall be issued to any social club, recreational, athletic or kindred association where it is located within a radius of 600 feet of any public or private school, church, library, public playground or park unless the commission finds after full investigation that the premises is located within a city of the third class or a town [Whereupon a variance may be considered] Section 16-6-13.5 Utah Code Annotated.

It is readily apparent from the law that the Commission's license authority is for a premises upon which

the applicant proposes to store, consume or serve liquor. In addition to the license if the club desires to sell liquor it must apply for establishment of a state store on the premises and must meet various additional requirements, only one of which is to have a valid license. Section 16-6-13.1 (5) and (6), Utah Code Annotated.

While petitioner attempts to make much of the opinion issued by the Attorney General (dated November 15, 1976), he overlooks the fact that the questions, discussions, and conclusions of the opinion are essentially directed at state stores and package agencies established under authority of section 32-1-36.15 of the Liquor Control Act. Respondent submits that the opinion is worthwhile regarding Title 32, but it is not intended to be an adequate or definitive treatment of law regarding the licensed premises of private clubs under Article I of Title 16. The opinion is not particularly relevant to our case and when petitioner relies on the opinion out of context for the basis of his argument he apparently misses the point of the opinion.

The gist of the matter in the instant case is that the Commission's license authority is for the premises of a private club, and where the premises is within 600 feet of a school as it is in our case then the Commission has

no authority to license the premises. Thus, the denial of the license was correct under the law and should be sustained.

A. THE POINT OF MEASUREMENT FROM THE SCHOOL IS THE BOUNDARY OF SCHOOL PROPERTY NEAREST TO THE PROPOSED CLUB.

Petitioner contends in his Argument 1, that the playground is the point of measurement from the school. To the contrary, the point of measurement should be the edge or boundary of school property at the point on the boundary nearest the club. The statute is very specific about a "radius of 600 feet". The use of a specific distance implies a specific point from which to measure. Respondent submits that the better, more definite and most reasonable point is the boundary of school property. In this case, it is clear that the school owns the property and has the right to use the property and in fact used the particular area for school instruction and training purposes. (R. 17)

Common sense compels a reference to a school, church, library or park to include adjacent property devoted to school, church, library or park purposes. Additionally, a point on the property boundary can be determined by a survey with reasonable accuracy, where a point on a "playground area" may be more difficult

to ascertain and open to argument. Other statutes with a general reference to property used for school, church or other purposes are interpreted to mean all of the adjacent property devoted to that particular purpose, not merely a building or playground, but a definite and described area of land. For example, the property tax exemptions are applied on the basis of use, purpose and ownership. Section 59-3-1 Utah Code Annotated.

In this case even if measurement is made from the playground as petitioner has "acquiesced", the premises of the club still lies within the prohibited 600 feet. Nevertheless, respondent submits that the boundary of school property nearest the club controls and not the playground area.

B. THE POINT OF MEASUREMENT FROM THE CLUB IS THE NEAREST BOUNDARY OF THE PREMISES PROPOSED TO BE LICENSED.

Petitioner contends in his Argument 2, that the 600 foot radius should be measured from the state store inside the club. To the contrary, the statutes are reasonably clear that the distance should be measured from the boundary of the club premises for which a license is desired. The Utah Liquor Control Commission has authority to license a "premises upon which liquor is or will be stored, consumed or sold". Section 16-6-13.5

Utah Code Annotated. The definition of premises is incorporated from the Liquor Control Act by section 16-6-12.1 Utah Code Annotated as follows:

> "Premises" means any room, enclosure, building or structure where alcoholic beverages may be lawfully manufactured, stored, sold, or consumed as provided in this act. Section 32-1-3 Utah Code Annotated.

Thus it is clear that the Utah Liquor Control Commission has authority to license certain liquor related activities (to store, serve, consume liquor) within a certain area (the premises) unless that area is within 600 feet of a school, church, library, playground or park. Section 16-6-13.5 Utah Code Annotated. Where that premises lies within the 600 foot radius there is no authority to grant the license.

Subsequently, once the premises qualifies for a license and a license is issued, then a state store to sell liquor on the premises may be applied for and established at the discretion of the commission, provided that the applicant meets an additional set of special requirements.

> (5) Under the Utah Liquor Control Act of 1969, the regulation adopted thereunder and the provisions of this chapter, the Utah liquor control commission may establish a state store on premises of a social club, recreation, athletic or other kindred association.

> (6) Any social club, recreational, athletic or other kindred association seeking to have a state liquor store located on its premises, shall have a valid license issued by the Utah liquor control commission, file a written application with the commission in the form prescribed, accompanied by an application fee of $25, the written consent of local authority as defined in the Utah Liquor Control Act of 1969, and the regulations adopted thereunder, and that the proposed vendor can qualify for and obtain the bond specified in section 32-1-37 of the Utah Liquor Control Act of 1969. Every application shall contain a scaled floor plan of the social club, recreational, athletic, or other kindred association, including that part thereof in which applicant proposes that a state store be established and shall set forth any other information as the commission may direct. If a state store is so established, liquor or wine may not be stored or sold in any other place than as designated and approved by the commission. Section 16-6-13.1 (5)(6) Utah Code Annotated (Emphasis added)

Once the store is established on the premises, certain special restrictions apply which otherwise do not apply to the club in the absence of the store. Section 16-6-13.1 (8) Utah Code Annotated.

Thus, because a state store in a club can only be established on a licensed premises, and since it is the premises which must comply with the 600 foot prohibition, the distance from the school to the state store inside the club premises is not relevant. It is clear

then, that interpretations of the 600 foot distance under Section 32-1-36.15 Utah Code Annotated, while relevant to other types of state stores, do not particularly pertain to stores on club premises which are licensed under the rules of Article I of Title 16.

In this case, the club premises lies within the 600 foot proscription. In view of the circumstances, the controversy, the protests, the conflicting surveys, the commission certainly had cause to deny the license. Moreover, in light of the Commission's authority under the law, once the determination was made that the premises was within the 600 foot radius the commission did not have the authority to grant a license to a club within that radius. The decision was considered, was reasonable and was within the Commission's authority as prescribed by law and should be let stand by this court.

POINT II

THERE IS NO LEGAL REASON TO NOW ESTOPP THE COMMISSION FROM A PRIOR DECISION AFFECTING PETITIONER.

Petitioner asks this court to estopp the Commission from denying a license and to direct the commission to issue

a license for a state store. The argument is based on the theory that somehow the Commission acted in an arbitrary manner and beyond its authority in denying the license.

In fact and in law, the commission acted properly. The law with regard to liquor control is defined in precise terms. The commission itself is defined as:

> (a) The liquor control commission shall be comprised of five commissioners.
>
> * * *
>
> (c) three members of the commission shall constitute a quorum for the transaction of business. No more than three commissioners shall be of the same political party. Section 32-1-5(a),(c) Utah Code Annotated.

The powers and duties of the Commission are carefully enumerated in Section 32-1-6 Utah Code Annotated. Those duties are distinguished in detail from the duties of the Director and his staff in section 32-1-5.5 Utah Code Annotated. Nowhere does petitioner point to any inconsistent or unfair action of the Commission itself. In fact, the only action which the Commission took was to fulfill its legal obligation: hear both sides, consider the matter and make the decision. (R. 17)

Whether an applicant in fact has complied with the distance requirement is a matter of fact to be determined by the Commission. Once the determination is made and the Commission renders its decision, the order can be the subject of judicial review, but the determination of a matter of fact is not:

> Within thirty days of the date of the Commission's order in any proceeding in which a hearing shall have been held, any party to the proceeding deeming himself aggrieved by such order may petition the Supreme Court for the purpose of having the lawfulness of the order inquired into and determined.
>
> * * *
>
> No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order under review violates any right of the petitioner under the Constitution of the United States or the state of Utah. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review. Section 32-1-32.6 Utah Code Annotated. (Emphasis added)

The result here is that the decision of the Utah Liquor Control Commission should be upheld unless Petitioner can convice this court that the Commission's action was capricious or arbitrary or in excess of its

legal authority. The Rogue v. Utah Liquor Control Commission, 500 P2d 509 (1972). It is not a case for estoppel.

Specifically regarding liquor matters the following opinion of the Colorado Supreme Court is instructive.

> We have repeatedly held that the various licensing authorities have discretionary power in granting or denying licenses and their actions will not be disturbed on review unless arbitrary or capricious.
>
> * * *
>
> (2) We find nothing in this record to indicate that the action of the trustees in denying the license was arbitrary, capricious or unreasonable.
>
> No doubt there are those who think that to meet the needs of a neighborhood and the desires of the inhabitants for exhilarating beverages, there must be an outlet an every street corner; others may feel that a single outlet on the planet Mars would be sufficient. Between these two extremes there is a vast middle ground in which the licensing authority may in its sound discretion grant or deny a license without being properly or lawfully charged with arbitrary, capricious or unreasonable acts or conduct.
>
> From the record before us we conclude that the trustees were well within their discretionary powers in denying the license. Quedens v. J.S. Dillon and Sons Co., 360 P2d 984 (Colorado, 1961)

The Utah Liquor Control Commission has been given broad authority to examine private clubs and is not compelled to issue a license even if the 600 foot distance were not in question. If the commission finds

that the operation of the club is not consistent with the private club act the license can be denied. Section 16-6-13.6(5) Utah Code Annotated. Moreover, the commission makes the exclusive decision whether to establish a state store or to grant or refuse a liquor license in light of the purpose and policy of the law. Sections 32-1-6(b), (d) and (h) Utah Code Annotated. The exclusive power and discretion of the commission to issue a license and to establish a state store has been upheld by this court. The Rogue v. Utah Liquor Control Commission, Supra, at p. 511.

Thus, where the Commission considers that the club is not in keeping with the purpose and intent of the law, they have cause to refuse the application for a license and where they have reasons to believe that the club would be detrimental to the public interest they may even have a duty to reject the application. Olds v. Kirkpatrick, 191 P2nd 641 (Oregon, 1948). In light of the legal responsibility of the Commission, estoppel is not appropriate.

Petitioner's specific complaint centers around the staff letter of September 16, 1977 (R. 26). Petitioner argues that somehow the letter justifies the rather precipitant completion of the club at substantial expenditure. (Petitioner introduces the amount of $200,000.00 into his argument but there is not support for such figure in the record). Petitioner overlooks the last paragraph of the letter which clearly advises him that the final consideration

and decision are up to the Commission:

> The plot plan you submitted completes one of the requirements for your application to be considered. The Utah Liquor Control Commission will consider your application for a private locker club license only when all statutory and Commission requirements have been met. (R. 26)

Moreover, by his response of November 10, 1977, Petitioner shows that he (through counsel) understood that any distance approved by the prior letter was "tentative" and subject to further consideration and affirmation by the Commission (R. 39). If petitioner then elected to proceed without the necessary consideration and affirmation, he did so at his own risk. Even where "considerable money" has been spent for remodeling in anticipation of a license, the Commission's refusal to grant a license has been upheld by this court. The Mint v. Utah Liquor Control Commission, 586 P2d, 428 (1978).

Respondent submits that the commission should not now be estopped merely because of an expression of a staff member which petitioner has interpreted in his mind to authorize completion of his entire facility. The law is clear and petitioner is charged with following the law. If he spent money to complete the facility, he did so before presenting his proposal to be fully considered by the Commission.

From the "legion" of cases regarding the

theory of estoppel, respondent's search has not discovered nor has petitioner extracted any case where estoppel has been applied to restrict a commission charged with regulation of liquor. While estoppel sometimes may be appropriate in the usual course of business, it is generally not applicable in governmental control of the liquor industry. The Oregon Supreme Court has said:

> IS THE OLCC ESTOPPED TO DENY A LICENSE TO PALM GARDENS, INC.?
>
> Under appropriate circumstances, the state of Oregon may be estopped to assert a claim inconsistent with a previous position taken by it. The only Oregon cases applying the doctrine against the state, however, involve tax assessment or tax related situations.
>
> Assuming, however, that estoppel could be applied in this type of case, it should not be applied here. As noted in Willis v. Stager, 257 Or. 608, 619, 481, P.2d 78, 84 (1971):
>
> "...[I]t is well established that there can be no estoppel unless there was not only reliance, but a right of reliance, and that reliance is not justified where a party has knowledge to the contrary of the fact or representation allegedly relied upon ..." Palm Gardens v. O.L.C.C., 514 P2d 888, at p. 895 (Oregon, 1973)

Petitioner is held to know the law. He has no right to expect final approval from anyone but the commission authorized to give that approval. It is submitted that the facts of the record in light of reason and prudence do not justify the petitioner proceeding so far so fast,

and then attempting to bootstrap his way to compliance after the fact.

SUMMARY

Where liquor control and regulation are concerned, only the Utah Liquor Control Commission itself has broad power and duty to make the necessary determination regarding licenses and stores in light of the state law. The Commissions's decision in this case is well within its authority and is reasonable in light of the circumstances. Arguments both pro and con were presented for the record. Nowhere can respondent point to the Commission's action as being arbitrary, ill considered or beyond the bounds of its authority. The doctrine of estoppel has never been applied to override the discretion of a liquor regulatory commission and this case does not present the appropriate situation to apply that doctrine.

It is the club premises which is licensed, not the state store, and the Commission has no authority to license the premises when it lies within 600 feet of a school. In this case, by any measurement, the premises is within that 600 foot prohibition. The points of measurement are clearly the boundary of the premises proposed to be licensed and the boundary of the school property (not

the state store and not the playground).

Respondent respectfully requests that the petition for extraordinary relief be denied, and that the determination of the Utah Liquor Control Commission be upheld.

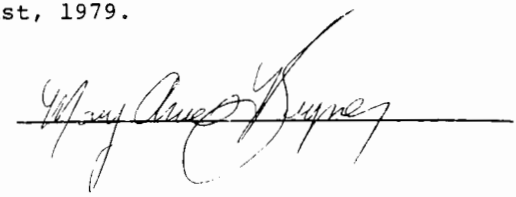
Respectfully submitted;

ROBERT B. HANSEN
Attorney General

JOHN S. McALLISTER
Assistant Attorney General

MAILING CERTIFICATE

I HEREBY CERTIFY that I mailed, postage prepaid, two (2) copies of the foregoing Respondent's Brief to Robert J. Stansfield, Attorney at Law and Counsel for Petitioner, 44 Exchange Place, Salt Lake City, Utah 84111, on this 30 day of August, 1979.



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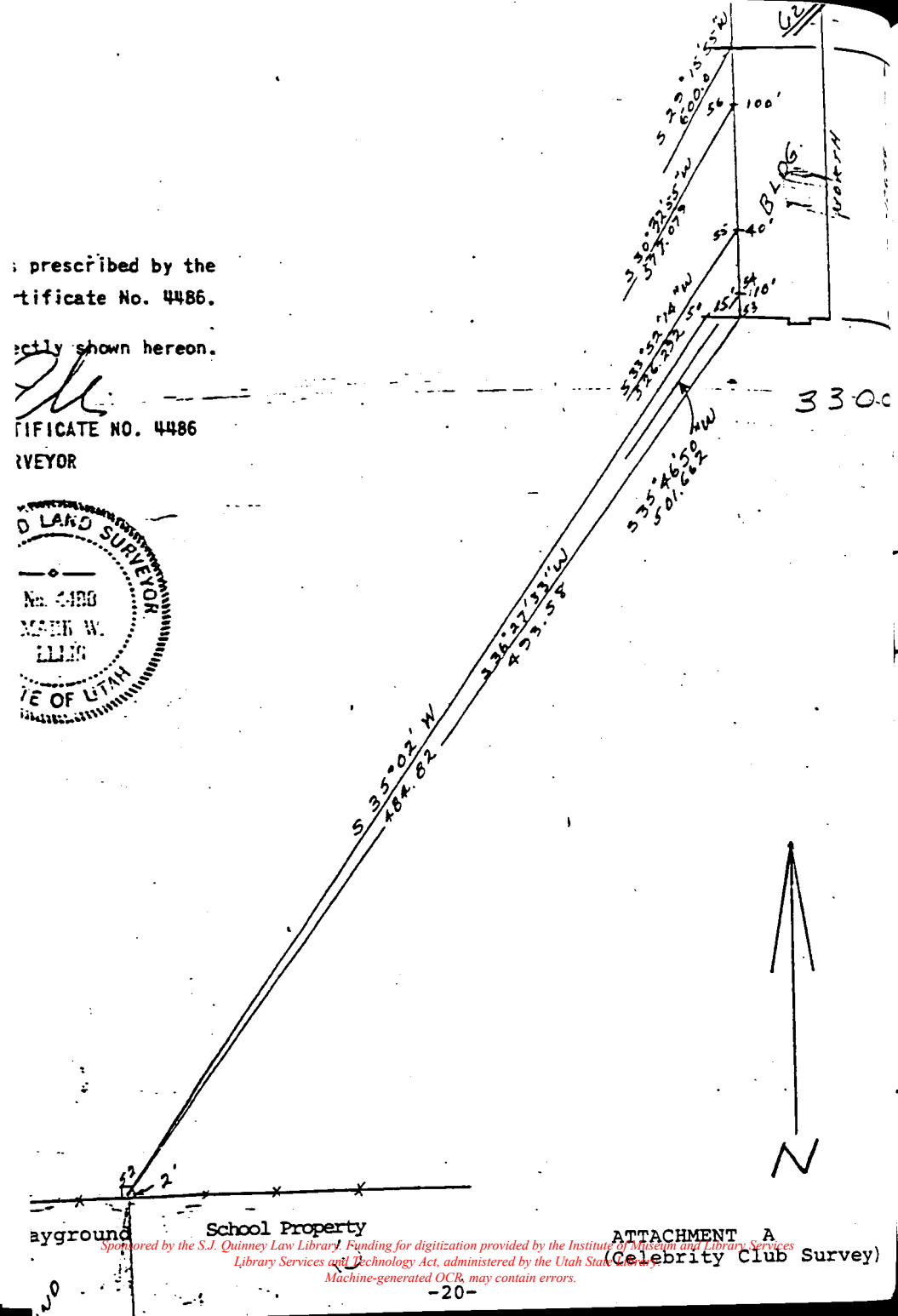
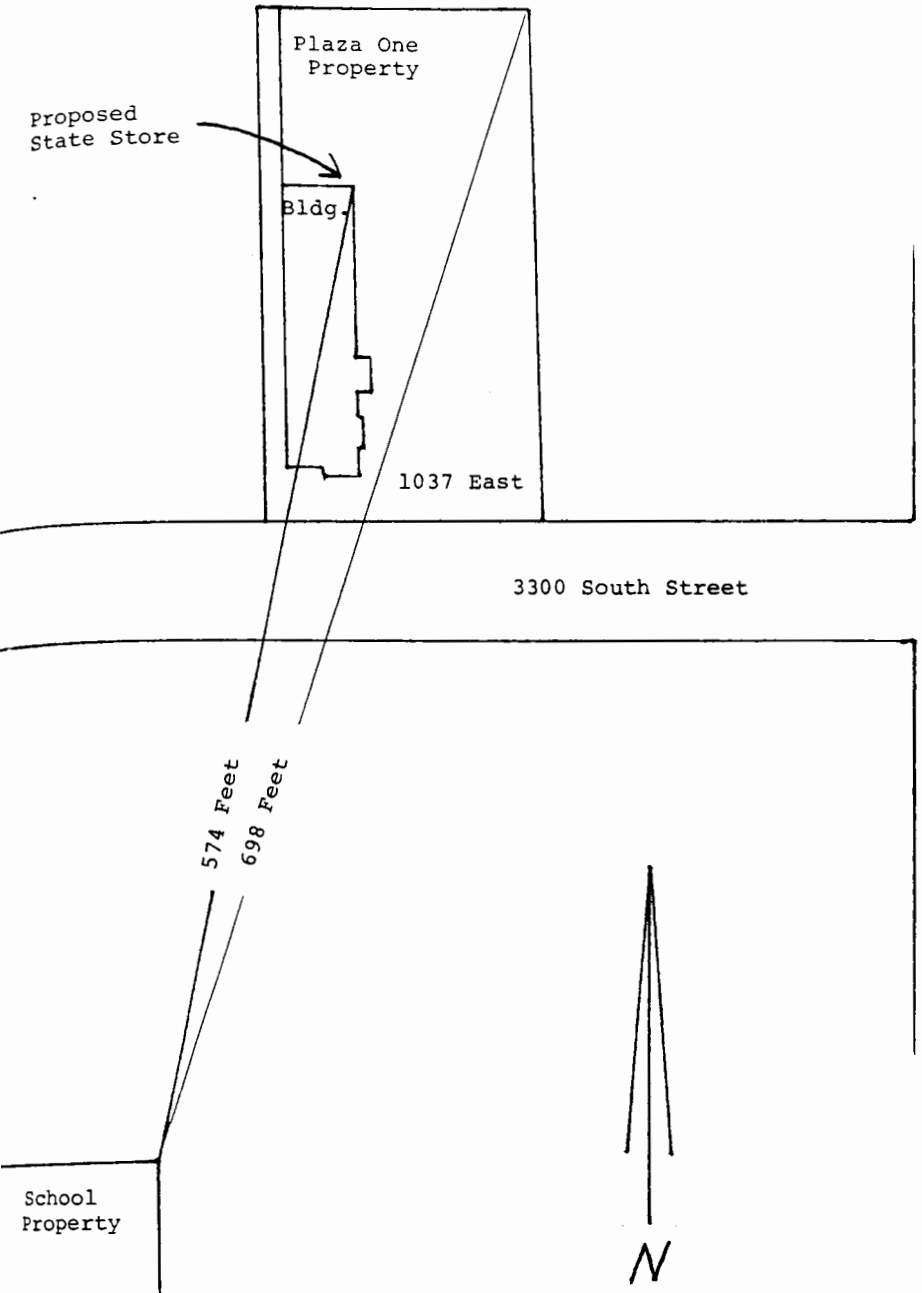


ATTACHMENT A
(Celebrity Club Survey)



ATTACHMENT B
(Resident's Survey)