

1980

# Davinci's, Inc. v. Utah Liquor Control Commission : Brief of Petitioner in Support of Petition

Utah Supreme Court

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CASES CITED

Celebrity Club, Inc. v. Utah Liquor Control Commission,  
    P.2d \_\_\_\_\_ (Utah 1979), (No. 16083)

Hunt Club, Inc. v. Moberly,  
    407 S.W.2d 148 (Ky. 1966)

State Beverage Department v. Brentwood Assembly of God Church,  
    149 So.2d 871 (Fla. 1963)

STATUTORY AUTHORITIES

Utah Code Annotated §32-1-36.15

## 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 family style restaurant which applied to Respondent for the issuance of a license for the establishment of a state liquor store on the premises of Petitioner at 2020 East 3300 South, Salt Lake City, Utah. Prior to Respondent's decision on Petitioner's application, Petitioner contacted compliance agents of Respondent regarding the question of whether the 600-foot proscription in §32-1-36.15, Utah Code Annotated (Supp. 1979) is applicable. Inquiry was made because

of the location of a public school, to-wit: Evergreen Junior High School. The entrance to the school is at 3401 South 2000 East, well beyond the proscription, but the school property extends into the interior portions of the block, thus prompting the inquiry.

Measurement was made from the nearest entrance of the school building to the front door location of the restaurant. The distance is 542.6 feet. The measurement crosses a five foot high fence, and a corner of the building. Other measurements were made to various locations on the school grounds. Those measurements are set forth in the Stipulation of Facts and on the attached Survey. Moreover, if the measurement is made in a straight line manner from the closest point of the school's playground to the restaurant, the line passes directly over the length of the building in which the restaurant and other offices and stores are located, as well as a seven foot high fence with barbed wire atop it.

Petitioner completed its formal application to Respondent and filed it with Respondent on the 4th day of April, 1980.

On the 28th day of March, 1978, the Utah Attorney General published an opinion determining the point of reference from which the measurement is to be made. It was determined that the measurement is to be made from the nearest outside wall of the building in which the state store is to be located. The restaurant is closer than 600 feet, when so measured in a straight

line, cross-fence manner, and is more than 600 feet when measured by the shortest route of circuitous travel required to walk from the school to the restaurant.

On the 11th day of April, 1980, 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, rules and regulations of the Utah Liquor Control Commission, and there were then and now are licenses available.

#### ARGUMENT

##### THE APPROPRIATE MANNER OF MEASUREMENT IS THE SHORTEST ROUTE OF ORDINARY PRACTICAL PEDESTRIAN TRAFFIC.

The statute here at issue, §32-1-36.15, Utah Code Annotated (1953), as amended, states, in relevant part, that:

No state store . . . shall be established  
within a radius of 600 feet of any public  
. . . school . . . .

Respondent has not properly defined the term "radius" and has therefore improperly denied Petitioner's application.

While the applicable statute here in question sets forth a 600-foot limitation, it offers little guidance as to the manner in which the measurement is to be made. There is considerable difference of opinion regarding the manner in which

a designated number of feet is to be measured, as is demonstrated by the numerous cases dealing with the problem, cited in 4 ALR3d 1250.

Even though it has been determined that the measurement is to begin and end at established points (not at issue here), the interpretation of the Utah statute is not complete; it must be further examined to include a determination whether the measurement is to be along the shortest practical route of actual pedestrian travel, or in a straight-line, cross-fence, crow-flies manner.

Measurement along the shortest route of ordinary pedestrian traffic has been the better reasoned approach. In Hunt Club, Inc. v. Moberly, 407 S.W.2d 148 (Ky. 1966), the licensed premises were found not to be within a statutory 200-foot proscription, although the rear portions of the licensed premises and the church were within 200 feet, as the crow flies. The statute there provided that the measurement was to be taken on the street on which the licensed premises were located, in a straight line from the nearest outside wall of the building on the licensed premises to the nearest outside wall of the church or school building. In construing the statute relative to the manner of measuring the distance from the church to the liquor store, the court there stated:

By reading the latter part of the statute relative to making the "measurement," it is apparent the Legislature means that the



measurement should be taken "on the street" where people travel, not as the crow flies.

See also, State Beverage Department v. Brentwood Assembly of God Church, 149 So.2d 871 (Fla. 1963) and cases annotated at 4 ALR3d 1250.

The Court has recently construed the term "radius" as used in §16-6-13.5, Utah Code Annotated (1953), as amended, which reads substantially the same as the statute here presented (except that it provides for nonprofit clubs rather than state stores in restaurants) in Celebrity Club, Inc. v. Utah Liquor Control Commission, \_\_\_\_\_ P.2d \_\_\_\_\_ (Utah 1979), (No. 16083). The Court there held that the Commission was estopped to deny a license to the club because a letter from the Commission indicated compliance with the 600-foot proscription and, in reliance thereon, the club expended more than \$200,000 to complete its facilities.

In addition to the estoppel issues, the Court discussed the interpretation of §16-6-13.5, Utah Code Annotated (1953), as amended, in connection with the issue (not here at dispute) of the point from which the measurement of 600 feet should extend and the location of the terminus of the licensed facility closest to the school. What was there stated by the Court is, however, important to the determination of the present issue on appeal.

The statutory phrase "within a radius of 600 feet of any public or private school" was construed by the Court in

that case, not in the literal, geometric sense, but in a sensible and practical sense, in order to avoid an absurd result. The same phrase of the present statute should similarly be given a practical construction with regard to the manner of measurement.

A purpose of the present statute is to protect school students from possible improper influences that may be present from a family restaurant that serves wine and other liquors with its dinner meals. (Id., Chief Justice Crockett concurring with comments.) If the measurement of the 600-foot proscription is made from the school and the area actually frequented by the school's students to the Petitioner's restaurant, according to the shortest practical and reasonable route required by the students to be walked, the 600-foot requirement and the purpose of the statute are fully satisfied. The buildings, fences, and other obstructions between the restaurant and the school effectively protect the students from any improper influences of the restaurant, and the measuring of the 600-foot proscription according to the shortest practical route of circuitous travel, necessary for the students and others to walk from the school to the restaurant, satisfies the statutory requirement and protects the students by assuring a minimum reasonable distance between the restaurant and the school grounds and building.

CONCLUSION

Since the school students cannot be expected to cross fences, climb walls, and walk through or over buildings, the measurement from the school to Petitioner's restaurant should be made along the shortest, practical route of circuitous travel. To do so would result in a sensible and practical, and easily administered, construction of the present statute and would fulfill the purpose of the statute and the intent of the Legislature by avoiding a harsh or unreasonable result. Respondent should be ordered to review the application of Petitioner according to such manner of measurement, and to grant to Petitioner its license as prayed.

DATED this 11th day of July, 1980.

Respectfully submitted,

OEHLER & LOWE, P.C.  
Attorneys for Petitioner

By: Keith F. Oehler  
KEITH F. OEHLER

CERTIFICATE

I HEREBY CERTIFY that I delivered two (2) copies of the foregoing to the Utah Attorney General, State Capitol Building, Salt Lake City, Utah, on the 11th day of July, 1980.

Keith F. Oehler