

1980

Davinci's, Inc. v. Utah Liquor Control Commission : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Robert B. Hansen; John S. McAllister; Attorneys for Respondent;

Keith F. Oehler; Oehler & Lowe; Attorneys for Petitioner;

Recommended Citation

Brief of Respondent, *Davinci's, Inc. v. Utah Liquor Control Comm.*, No. 17043 (Utah Supreme Court, 1980).

https://digitalcommons.law.byu.edu/uofu_sc2/2292

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

DAVINCI'S, INC., a Utah :
corporation, :
 :
Petitioner, :
 :
-v- : Case No. 17043
 :
UTAH LIQUOR CONTROL :
COMMISSION, :
 :
Respondent.

BRIEF OF RESPONDENT

Response to a Petition for Review of an
Order of the Utah Liquor Control Commission.

ROBERT B. HANSEN
Attorney General
State of Utah

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

Attorneys for Respondent

Keith F. Oehler
OEHLER & LOWE, P.C.
Suite 22 - Ivy Place
2020 East 3300 South
Salt Lake City, Utah 84109

Attorneys for Petitioner

FILED

AUG 8 1980

IN THE SUPREME COURT OF THE STATE OF UTAH

DAVINCI'S, INC., a Utah :
corporation, :
 :
Petitioner, :
 :
-v- : Case No. 17043
 :
UTAH LIQUOR CONTROL :
COMMISSION, :
 :
Respondent.

BRIEF OF RESPONDENT

Response to a Petition for Review of an
Order of the Utah Liquor Control Commission.

ROBERT B. HANSEN
Attorney General
State of Utah

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

Attorneys for Respondent

Keith F. Oehler
OEHLER & LOWE, P.C.
Suite 22 - Ivy Place
2020 East 3300 South
Salt Lake City, Utah 84109

Attorneys for Petitioner

TABLE OF CONTENTS

	<u>Page</u>
NATURE OF THE CASE -----	1
DISPOSITION BEFORE THE UTAH LIQUOR CONTROL COMMISSION -----	1
NATURE OF RELIEF SOUGHT -----	2
STATEMENT OF FACTS -----	2
ARGUMENT	
POINT I	
THE WORD "RADIUS" IN UTAH LAW CLEARLY CALLS FOR A MEASUREMENT ALONG A STRAIGHT LINE. -----	4
POINT II	
THE UTAH LIQUOR CONTROL COMMISSION HAS EXCLUSIVE DISCRETION UNDER THE LAW TO DETERMINE THE LOCATION OF OUTLETS FOR THE SALE OF LIQUOR.	9
CONCLUSION -----	11

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Celebrity Club Inc. v. Utah Liquor Control Commission, 602 P.2d 689, (1979).</u> -----	4,5
<u>Celebrity Club Inc. v. Utah Liquor Control Commission, 602 P.2d 689 at pp. 692 and 693.</u> -----	6
<u>Hunt Club, Inc. v. Moberly, 407 S.W.2d 148 (1966).</u> -----	8
<u>Rogue v. Utah Liquor Control Commission, 500 P.2d 509 (1972).</u> -----	10,11
 <u>Authorities</u>	
Utah Code Annotated, Section 16-6-13.5 -----	5
Utah Code Annotated, Section 32-1-3 -----	9
Utah Code Annotated, Section 32-1-6(b) -----	9
Utah Code Annotated, Section 32-1-36.15(2)(a) -----	4,10
4 A.L.R. 3d 1250, at p. 1253 -----	7

IN THE SUPREME COURT OF THE STATE OF UTAH

DAVINCI'S INC., a Utah corporation,	:	
	:	
Petitioner,	:	
	:	
-v-	:	Case No. 17043
	:	
UTAH LIQUOR CONTROL COMMISSION,	:	
	:	
Respondent.	:	

BRIEF OF RESPONDENT

NATURE OF THE CASE

Petitioner, a restaurant, asks this court to review action by the Utah Liquor Control Commission which denied petitioner's application to establish a state liquor store on petitioner's premises.

DISPOSITION BEFORE THE
UTAH LIQUOR CONTROL COMMISSION

The Utah Liquor Control Commission denied petitioner's application to establish a state liquor store on the premises of its restaurant.

NATURE OF RELIEF SOUGHT

Respondent, Utah Liquor Control Commission, requests this court to uphold the Commission's action of April 11, 1980, whereby petitioner's application to establish a state liquor store on its premises was denied.

STATEMENT OF FACTS

Respondent disagrees substantially with petitioner's characterization of the facts in this matter and therefore submits its own statement of the facts as to the pertinent matters at hand.

Davinci's Inc., hereinafter referred to as petitioner or restaurant, is a restaurant located in a small shopping center at 2020 East 3300 South in Salt Lake City, Utah.

Application was made by petitioner for establishment of a restaurant state liquor store to sell liquor at petitioner's place of business. In verifying the information furnished in the application it was found that the Evergreen Junior High School was situated adjacent to the shopping center on the south. Measurements were taken in a straight line from the school and the restaurant was found to be at a distance of 540 feet from the main school entrance, 525 feet from the nearest school building wall, 360 feet from

the school playground fence, and 330 feet from the school parking lot. (See affidavit of Joe R. Coccimiglio in respondent's supplemental designation of record.)

It was also discovered that the fence between the school and the shopping center was opened and rolled back for a distance of approximately 15 feet, providing direct access between the school property and the shopping center, generally along the straight line between the school main entrance and petitioner's main entrance.

On April 11, 1980, the Commission in a regular meeting considered the application, heard statements from counsel and a representative for the restaurant and then disapproved the restaurant's application for establishment of a state store. Petitioner challenges that disapproval on the sole basis that the Commission did not properly define the term "radius" as used in the 600 foot prohibition in the state law and therefore improperly denied petitioner's application.

The Utah Liquor Control Commission thus disapproved petitioner's application for establishment of a restaurant state liquor store, and petitioner now asks this court to direct the Commission to approve and establish a state store on the premises of its restaurant operation.

ARGUMENT

POINT I

THE WORD "RADIUS" IN UTAH LAW CLEARLY
CALLS FOR A MEASUREMENT ALONG A STRAIGHT
LINE.

Nowhere does petitioner contend that the refusal to establish a state liquor store was in any manner arbitrary or capricious or beyond the authority granted to the Liquor Commission under the law. The sole basis upon which petitioner's complaint of the Commission's refusal lies is that the Commission did not correctly define the word "radius" as used in the law:

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. . . . Section 32-1-36.15 (2) (a), Utah Code Annotated.

Thus, where the Commission applied the word "radius" in terms of a straight line measurement, petitioner contends that the interpretation should be in terms of ordinary pedestrian traffic or shortest walking distance. Such an interpretation of "radius" as the shortest practical route of circuitous travel is clearly incorrect and contrary to Utah law.

Petitioner cites the recent Utah case of Celebrity Club Inc. v. Utah Liquor Control Commission, 602 P.2d 1689 (1979) as authority for a "sensible and practical ... construction" of Section 32-1-36.15(2) (a), Utah Code Annotated. Petitioner

urges this court to be reasonable by avoiding a literal or geometric construction of the law.

But this court in the Celebrity Club Case, clarified in depth the meaning of the language of Section 16-6-13.5, Utah Code Annotated, regarding the protected area, the licensed area and the required distance in between the two. Even though that case dealt with Title 16 the following language clearly is dispositive of the issues at hand under Title 32:

A "radius is defined as a line segment extending from the center of a circle or sphere to the curve or surface.

* * *

In Sachs v. Legg, (1920) 219 Ill. App. 144 ..., the court said that a radius is a straight line from the center of a circle or sphere to its periphery or surface, and a periphery is the circumference of a circle, and that the word "within" was used as a preposition in the sense that the whole territory embraced within the limits of the three hundred feet should be included. [10 ALR.2d 588, ap. 607.]

* * *

In construing 16-6-13.5 another factor to be considered is that prior to 1977, this section proscribed the establishment of licensed premises "in the immediate proximity of any existing school . . ." The amendment, in effect, specified by measurement the meaning of "immediate proximity."

* * *

If the legislature so intended, it could have expressed the proscription by stating "where it is located within a straight line distance

of 600 feet from the boundary of any public or private school.
Celebrity Club Inc. v. Utah Liquor Control Commission, 602 P.2d 689 at pp. 692 and 693.

The point of the Celebrity Club case is that definition of the protected area and the licensed premises had to be clarified by the court but the definition of the distance and its measurement in a straight line were clarified by the legislature previously and do not need to be reclarified or redefined now.

Further, Petitioner urges that fences, buildings, and other obstructions are a practical, protective barrier which will force a circuitous route of travel. The argument fails in the face of the facts. As of the date of the latest inspection, the fence is down and the "shortest practical route" between the school and petitioner's restaurant is along the 540 foot measurement, door to door, or along the 330 foot line, property to property.

The point is, even if the fence can be repaired, petitioner cannot guarantee the effectiveness or longevity of any barrier. However, the fence, or in this case, the lack of a fence, proves the wisdom of the legislature's language of "... a radius of 600 feet ..." in a straight line measurement.

Regarding the sale of liquor generally, the law in the United States is:

In construing enactments prohibiting sale of intoxicants within a specified distance from certain establishments, most of the courts which have considered the problem have held that in the absence of any specific statutory provision governing the matter of measurement of distances, the distance is to be measured along the shortest straight line between the place where the liquor is to be sold and the other establishment. 4 A.L.R. 3d 1250, at p. 1253.

Cases to the contrary invariably result from specific statutory requirements such as the authority cited by petitioner in his brief.

Florida Statutes:

... no license ... shall be granted to a vendor ... whose place of business is within 2,500 feet of an established church or school (which distance shall be measured by following the shortest route of ordinary pedestrian travel along the public thoroughfare from the main entrance of said place of business to the main entrance of the church) Section 561.44(2) Florida Statutes, 1961, as cited in petitioner's brief at page 6.

Kansas Statutes:

[N]o license for the sale of alcoholic beverages at retail shall be issued for any premises that are located on the same street as, and within 200 feet of, a building used exclusively as a church or for classrooms of a school ... the measurement shall be taken in the street on which the licensed premises are located. Kansas Revised Statutes, 243.220, as cited in petitioner's brief on page 5.

In the foregoing case the court allowed the liquor license, but it is interesting to note the court's further comment:

It may or may not be ironical, but at the time of hearing before the Board, it had licensed approximately 17 other retail alcoholic beverage outlets on Main Street and Broadway all within 200 feet of the church property according to the measurement it used in the present case. Hunt Club, Inc. v. Moberly, 407 S.W.2d 148 (1966).

Thus, petitioner's authority advanced in support of its theory of circuitious travel arises only because of the unique statutes of Florida and Kansas upon which the courts based their opinions.

In conclusion of Point I, the Utah law is clear. The word "radius" in the Utah law means a straight line and when applied to a distance in a statute such as Utah's it indicates clearly a straight line distance which defines the extent of a circular area. In this case the law describes an area within which the Utah Liquor Control Commission has no authority or jurisdiction to allow a state liquor store.

POINT II

THE UTAH LIQUOR CONTROL COMMISSION HAS EXCLUSIVE DISCRETION UNDER THE LAW TO DETERMINE THE LOCATION OF OUTLETS FOR THE SALE OF LIQUOR.

Under the Utah Liquor Control Act the sale of liquor is legal only when made through official outlets designated as state stores on premises owned by the state or in the case of a restaurant, established on the restaurant premises by a lease. Section 32-1-3, Utah Code Annotated. Under the law the Commission is given exclusive authority to decide where a state store will be established:

... The Commission shall:

* * *

(b) Decide within the limits and under the conditions imposed by this act, the number and location of the stores and package agencies to be established in the state
Section 32-1-6(b), Utah Code Annotated.

The Supreme Court of the State of Utah has ruled before on the authority of the Commission regarding the establishment of state liquor stores. In a case where the Liquor Commission denied the application for establishment of a state store in a private club, this appellate court observed as follows:

The law does not require that whenever the county commission has given its approval insofar as the county is concerned it become mandatory upon the Liquor Commission to grant the application. It seems obvious that if this were the law, the Liquor Commission would be deprived of the authority conferred upon it by Section 32-1-6(b) to "decide ... the number and location of the stores and package agencies to be established in the state."

* * *

...the state statute, Section 32-1-6, Utah Code Annotated 1953, having given the Commission plenary power to decide the number and location of liquor stores took precedence over county zoning ordinances. Rogue v. Utah Liquor Control Commission, 500 p.2d 509 (1972).

Thus, under Utah law where the Commission has authority to establish stores it also has the discretion to not establish a store. That discretion must be allowed and observed under the law.

It is submitted that the Legislature clearly intended to limit the Commission's discretion and authority by its declaration that:

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 Section 32-1-36.15 (2) (a), Utah Code Annotated.

The point is that the Commission has no authority to establish a state store within a radius of 600 feet of a school. Even

if the authority existed, the Commission in its discretion has the power to not establish such a state store. In that event the petitioner might attack the refusal for being arbitrary or capricious, but the argument would not be well taken in view of the plenary authority of the Commission.

In summary of Point II, the Commission's discretion should stand unless petitioner can carry the burden of showing that the Commission's decision is arbitrary or capricious or is beyond the Commission's authority:

The burden was upon the plaintiff to show that the action of the Liquor Control Commission was beyond its authority or was capricious and arbitrary. Rogue v. Utah Liquor Control Commission, 500 P.2d 509, p. 511.

Petitioner in this matter has not even alleged that the action of the Commission is arbitrary or capricious or beyond its authority. Nevertheless, it would seem that the Commission's discretion and authority are limited in that ~~a~~ no state store shall be allowed within a straight line radius of 600 feet of a school.

CONCLUSION

"Radius," as used generally and in the Utah statute, is susceptible of no other meaning than a straight line intended

to define the extent of a circular area within which the Utah Liquor Control Commission has no authority to establish a state liquor store. Any authority to the contrary from other states turns on express language of particular statutes which clearly require the measurement in that state to be made according to circuitous pedestrian traffic.

Respondent submits that unless the action of the Commission can be shown in some way to be arbitrary or capricious or in some way beyond its authority, the action must stand. There has been no such showing in this case.

To the contrary it would seem that to allow a liquor store within the area of legal proscription would be arbitrary or capricious and an action which could seriously be challenged as clearly beyond the authority of the Commission.

Respondent therefore respectfully requests that this court uphold the action of the Commission of April 11, 1980, wherein the application for the establishment of a liquor store in petitioner's premises was denied.

DATED this 9th day of August, 1980.

RESPECTFULLY SUBMITTED,

ROBERT B. HANSEN
Attorney General

JOHN S. McALLISTER
Assistant Attorney General

MAILING CERTIFICATE

I do hereby certify that I mailed two copies of the foregoing Brief of Respondent, postage prepaid, to: Keith F. Oehler, OEHLER & LOWE, P.C., Suite 22 - Ivy Place, 2020 East 3300 South, Salt Lake City, Utah 84109, on this the 8th day of August, 1980.


