

1960

# Salt Lake County et al v. Liquor Commission et al : Brief of Appellants

Utah Supreme Court

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Walter L. Budge; Gordon A. Madsen; Attorneys for Appellant;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

FILED

MAY 10 1960

SALT LAKE COUNTY, et al., <i>Respondents,</i>	Clerk, Supreme Court, Utah
—vs.—	Case
LIQUOR COMMISSION, et al., <i>Appellants.</i>	No. 9207

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BRIEF OF APPELLANTS

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SALT LAKE COUNTY, et al.,  
*Respondents,*  
 —vs.—  
 LIQUOR COMMISSION, et al.,  
*Appellants.*

# BRIEF OF APPELLANTS

The basis for the granting of such relief according to plaintiff's complaint was that such stores did not comply with the requirements of the county zoning ordinance,

as enacted and amended, and further that defendants had not complied with the provisions of Title 17-27-8, Utah Code Annotated 1953, as amended. Chapter 27 of Title 17 provides for a county planning commission and for the establishment of master plans and zoning ordinances to be enacted by counties. The chapter further provides a method of application for permission to construct or use buildings or structures in accordance with such master plans and zoning requirements.

The District Court, over the signature of Stewart M. Hanson, issued an Order to Show Cause, supported by affidavit, requiring the defendants to show cause why an injunction should not issue. A temporary restraining order was not permitted by the court.

On January 13, 1960 the defendants, Liquor Commission, the individual commissioners and defendants Drake made a motion to dismiss and hearing on the Order to Show Cause was continued without date until the motion to dismiss had been argued. The motion was argued January 25th before the Honorable Ray Van Cott, Jr., and was denied.

On February 7, 1960 the Liquor Commission and the individual commissioners petitioned this court to be granted an interlocutory appeal. On February 9th plaintiff filed answer to this petition, and on February 16th the court granted an appeal.

On April 26, 1960, upon stipulation of counsel, this action was dismissed as to the individual commissioners, Paul V. Kelly, Allan D. Johnson and J. W. Pace. Since

individual defendants, Drake and Anderson, did not choose to appeal or respond, the parties remaining before this court are the defendant-appellant, Utah Liquor Control Commission, and plaintiff-respondent, Salt Lake County.

## STATEMENT OF POINTS

### POINT I

THE UTAH LIQUOR CONTROL COMMISSION IS NOT SUBJECT TO ZONING REGULATIONS OF SALT LAKE COUNTY.

### POINT II

THE LIQUOR CONTROL COMMISSION IS SUBJECT TO SUIT ONLY UPON COMPLIANCE WITH THE PROCEDURE OUTLINED IN TITLE 32-1-28, UTAH CODE ANNOTATED 1953, REQUIRING THE WRITTEN CONSENT OF THE GOVERNOR BEFORE PROCEEDINGS MAY BE INSTITUTED.

### POINT III

THE LIQUOR CONTROL COMMISSION, APART FROM THE EXCEPTION NOTED IN POINT II, IS IMMUNE FROM LAWSUIT UNDER THE DOCTRINE OF SOVEREIGN IMMUNITY.

### POINT IV

THE STATUTE UPON WHICH SALT LAKE COUNTY RELIES PROVIDES BY ITS OWN TERMS THAT DISAPPROVAL BY THE COUNTY PLANNING COMMISSION MAY BE OVERRULED BY A MAJORITY VOTE OF THE PUBLIC AGENCY AUTHORIZING OR FINANCING SUCH BUILDING, IF SUCH PUBLIC AGENCY IS WITHOUT THE JURISDICTION OF THE COUNTY COMMISSIONERS; AND SUCH OVERRULING SHOULD BE IMPLIED FROM THE LIQUOR CONTROL COMMISSION'S CONDUCT IN OPENING AND OPERATING THE STORES IN QUESTION.



## POINT V

THE BUILDINGS IN QUESTION ARE NOT "PUBLIC BUILDINGS" AS DEFINED IN TITLE 17-27-8, UTAH CODE ANNOTATED 1953, AS AMENDED, UPON WHICH SALT LAKE COUNTY RELIES.

## POINT VI

THE LIQUOR CONTROL COMMISSION IS NOT WITHIN THE DEFINITION OF "ANY PERSON, FIRM OR CORPORATION" USED IN TITLE 17-27-23, UTAH CODE ANNOTATED 1953, UPON WHICH SALT LAKE COUNTY RELIES.

## ARGUMENT

### POINT I

THE UTAH LIQUOR CONTROL COMMISSION IS NOT SUBJECT TO ZONING REGULATIONS OF SALT LAKE COUNTY.

The question of regulation of state agencies by municipalities was first ruled upon by this court in the case of *Salt Lake City v. Board of Education of Salt Lake City*, 52 U. 540, 175 P. 654. In that case Salt Lake City attempted to require the Board of Education of Salt Lake City to comply with a municipal fire ordinance in connection with an addition to an elementary school being constructed by the school board. This court cited with approval the case of *Kentucky Inst. for Education of Blind v. City of Louisville*, 123 Ky. 767, 97 S.W. 402, 8 L.R.A. (NS) 533, in the following language:

"The principle is that the state, when creating municipal governments, does not cede to them any control of the state's property situated within them, nor over any property which the state has authorized another body or power to control."



The court went on to hold that the Constitution and the statutes of the state gave control of schools and school affairs to the respective boards of education and having so done, pre-empted from municipalities the exercise of control over school buildings.

of *North Summit School District*, 81 U. 51, 16 P.2d 900. and approved in the case of *Beard v. Board of Education* The Salt Lake City case has been cited subsequently

In Title 32-1-6, U.C.A. 1953, as amended, the Legislature granted to the Liquor Control Commission the power to:

“(a) Have the general control, management and supervision of all liquor stores and package agencies.

“(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.” (Emphasis added.)

Title 32-1-12, U.C.A. 1953, further provides:

“\* \* \* all property acquired, administered, possessed or received by the commission, shall be the property of the state, \* \* \*.”

The property in question is owned or possessed by the State of Utah and the Legislature has expressly vested the exclusive control of said property in the Liquor Control Commission. Accordingly, under the holding of the Salt Lake City case, neither the property nor the commission is subject to regulation on the part of Salt Lake County.

This holding is in accord with the overwhelming

weight of case law on the subject. See 61 A.L.R. 2d 970 and 171 A.L.R. 325; also see 31 A.L.R. 450. The cases cited in these annotations illustrate the generally accepted rule that governmental agencies are not subject to municipal zoning regulations when such agencies are performing "governmental" rather than "proprietary" functions.

In the case of *Utah Mfrs.' Ass'n. v. Stewart*, 82 U. 198, 23 P.2d 229, this court held that the Liquor Control Agency was clearly a governmental rather than a proprietary agency and that control of liquor traffic was a proper exercise of the police power of the state and not a monopolistic invasion into private enterprise. The opinion reads in part:

"That the prohibition or regulation of the manufacture, transportation, sale, and use of alcohol and other intoxicating liquors is an exercise of the police power of the state admits of no doubt."

Further:

"It is alleged a monopoly is created because no one except the manager designated by the Governor may sell alcohol within the state, and plaintiff and others similarly situated must purchase from him and no one else the alcohol required for manufacturing purposes. Ordinarily monopolies are regarded as obnoxious, and a state Legislature may not, under the guise of police power, create a monopoly in any trade or occupation or article innocuous in itself and the prosecution of or dealing in which is within the common right of all citizens on equal terms. 19 R.C.L. 14. There is, however, no common right on the part

of any person to sell intoxicating liquor, especially where the state has undertaken to control or prohibit the traffic as has been done in this state. *Trageser v. Gray*, 73 Md. 250, 20 A. 905, 9 L.R.A. 780, 25 Am. St. Rep. 587. The right to sell intoxicating liquor is not one of the privileges or immunities of citizens of the United States which the states are forbidden to abridge. *McClure v. Topf & Wright*, 112 Ark. 342, 166 S.W. 174. The rule is stated as follows in 19 R.C.L. 14 (Monopolies and Combinations): 'However partial it may seem, the state can create a monopoly of any business that is inherently dangerous to society and for that reason may lawfully be prohibited by it on the grounds of public policy, without violating any constitutional inhibition, because no person possesses an inherent right to engage in any employment, the pursuit of which is necessarily detrimental to the public.'

"And in 6 R.C.L. p. 408 (Constitutional Law), as follows: 'For the purposes of government exclusive rights and privileges are occasionally granted to particular individuals. When the public purpose of such grants is apparent the courts as a rule sustain them as in no wise denying to any the equal protection of the laws or violating prohibitions as to the granting to any one of special and exclusive rights or immunities. This principle has been applied to sustain the validity of exclusive privileges to remove garbage from cities, to *dispense intoxicating liquors*, to supply school books, to operate ferries and to exercise the power of eminent domain.' " (Emphasis added)

While it is to be observed that this Stewart case was decided during the days of prohibition and related to the control agency which preceded the present Liquor Control Commission, the control of that agency over alcohol

and intoxicating liquors was, if anything, more stringent and far-reaching than the control of the present commission. Accordingly, since the predecessor agency was held to be properly acting in a governmental capacity, and its functions were a proper exercise of the police power, the present commission's activities must be viewed as coming well within the rule laid down in the Stewart case. This interpretation is reinforced by the language of Title 32-1-2, U.C.A. 1953, illustrating the Legislature's intent in creating the present commission:

“This act shall be deemed an exercise of the police powers of the state for the protection of the public health, peace and morals; to prevent the recurrence of abuses associated with saloons; to eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of alcoholic beverages; and all provisions of this act shall be liberally construed for the attainment of these purposes.”

Since the Legislature has given exclusive control over intoxicating liquors and the dispensing of the same to the Liquor Control Commission, and since this court has held that such control is a legitimate exercise of the state's police power, to require the commission now to comply with county zoning ordinances would seriously encroach upon that exclusive control. Counties, by the simple expedient of zoning regulation, could prevent the commission from placing any dispensing agencies within their borders or, if not totally prohibiting, relegate the possible location of such stores to such inaccessible locations as to make their construction impracticable. Certainly such a ruling would be a direct negation of the

Legislature's edict above cited ordering a broad construction of the liquor control act to effectuate its purposes.

## POINT II

THE LIQUOR CONTROL COMMISSION IS SUBJECT TO SUIT ONLY UPON COMPLIANCE WITH THE PROCEDURE OUTLINED IN TITLE 32-1-28, UTAH CODE ANNOTATED 1953, REQUIRING THE WRITTEN CONSENT OF THE GOVERNOR BEFORE PROCEEDINGS MAY BE INSTITUTED.

The language of Title 32-1-28, U.C.A. 1953, provides as follows:

“The commission may *with the written consent of the governor* be sued and may institute or defend proceedings in any court of law or otherwise in the name of ‘Liquor Control Commission of Utah’ as fully and effectually to all intents and purposes and no such proceedings shall be taken against or in the names of the members of the commission, and no such proceedings shall abate by reason of any change in the membership of the commission by death, resignation or otherwise, but such proceedings may be continued as though such changes had not been made.”  
(Emphasis added.)

No permission from the governor in advance of suit has been alleged by plaintiff in this action.

The above cited provision has been referred to by this court in the case of *Riggins v. District Court of Salt Lake County*, 89 U. 183, 51 P. 2d 645, at page 661. Before the court in that case was the objection that the Liquor Control Commission could not sue without first obtaining the governor's permission. The commission in its own name had proceeded in a civil nuisance action

and the issue was raised by way of defense. The court answered the question in the following language:

“The point is made that under the provisions of section 30 the commission may not sue without the written consent of the Governor. That section is not open to that construction. The import of the language used in that section is that the commission may be sued with the written consent of the Governor, but that it may on its own account and in its own name institute a suit the same as if it were incorporated.”

The above language would indicate that only when the commission is sued is the governor's consent necessary—but it is necessary.

In the case of *State v. Lack*, 118 U. 128, 221 P.2d 852, which was a criminal prosecution for embezzlement against an agent of the Liquor Commission, the defendant claimed the criminal proceeding was invalid since the provisions of this section in question had not been met. The court there said:

“The contention of appellant is without merit. The quoted provision of the statute in question is a part of a chapter of the act which relates to its administration and to the powers and functions of the Liquor Control Commission. *It grants a limited and conditional waiver of the immunity of the state and its officials to civil suit.*” (Emphasis added.)

It would appear, therefore, that this court has recognized that the doctrine of sovereign immunity applies expressly to the Utah Liquor Control Commission, exempting it from suit *except* where this immunity is waived by



compliance with this procedural requirement of gaining the governor's consent. Appellant maintains that this element of consent is an essential part of plaintiff's pleading and in its absence, plaintiff has no standing in court.

### POINT III

THE LIQUOR CONTROL COMMISSION, APART FROM THE EXCEPTION NOTED IN POINT II, IS IMMUNE FROM LAWSUIT UNDER THE DOCTRINE OF SOVEREIGN IMMUNITY.

The question of immunity of state liquor agencies from lawsuit has been ruled upon in the federal courts and in seven state jurisdictions. Perhaps a typical holding is that of *State ex rel. Wilkinson v. Murphy*, 237 Ala. 332, 186 So. 487, 121 A.L.R. 283, where the court used the following language:

"It has been said in reference to legislation concerning intoxicating liquors, that the power of the state in this regard is an incident to society's right of self-protection. 'It is therefore essentially subject to the police power and has been so regarded for over a century.' 15 R.C.L. 254. Its regulation and control is held by all the authorities to be a governmental function based upon the duty of the government to protect the community from crime and the burdens of pauperism. So regarded, when the state itself takes over the traffic, it is as much in the exercise of a governmental function, through the police power, as when it works its convicts on farms purchased and in factories constructed by the state.

"As we read the argument, it is conceded that as to regulation, control or prohibition of the



liquor traffic, the state is in the exercise of its police power and of its governmental functions, but that when the state establishes its own liquor stores, there is a sudden shift from the police power, and the government is then engaged in a private enterprise. And this is urged, notwithstanding the universally recognized principle that it is the peculiar function of the lawmakers to ascertain and to determine the appropriate measures to be used in the exercise of this undoubted police power. No one has any inherent right to engage in the liquor traffic, and this argument leads to the illogical result that the state may license and delegate to another that which it cannot do itself. Sound reasoning, we submit, justifies no such conclusion.

“Police power is inherent in the government, and while it may be set aside by the Constitution, yet in order to find that it has been so set aside the Constitution must plainly so indicate. Relator therefor must rest upon section 93 of our Constitution to find such a result. And yet this section gives not the slightest indication of any such intention.

“It follows, therefore, that this police power over the liquor traffic is wholly uninfluenced and unaffected by any constitutional provision. The state as a consequence still possesses the power to its fullest extent and the authorities cited disclose that laws of this character have been uniformly upheld. Indeed, we find none to the contrary.”

The question is further annotated at 9 A.L.R. 2d 1284 and 121 A.L.R. 300.

The weight of authority of all the cases compiled in these annotations clearly indicates that state liquor

agencies are proper adjuncts of state government and as such, are immune from suit except in those states where the immunity has been expressly eliminated by constitutional or statutory provision. Such statutory or constitutional elimination has not occurred in the State of Utah with the exception of the statutory provision referred to in Point II of this brief concerning the governor's consent.

The status of the rule of sovereign immunity in Utah is commented upon at length in the dissenting opinion and Note 9 in the recent case of *Springville Banking Co. v. Burton*. ..... Utah ....., 349 P.2d 157, decided Feb. 1, 1960. Note 9 states, at page 168:

“\* \* \* And why has the Utah legislature enacted legislation permitting certain state agencies to be sued, such as the Road and Liquor Commissions, unless it has been assumed that the state enjoys sovereign immunity from suit in spite of Art. I, Sec. 22?”

As noted in Note 9, the overwhelming weight of authority supports the doctrine of sovereign immunity, as does the holding of the majority opinion.

With the reservation noted in Point II, appellant maintains that the doctrine of sovereign immunity applies in this fact situation and that the Liquor Control Commission, in operating the two stores in question, is immune from suit by Salt Lake County.

#### POINT IV

THE STATUTE UPON WHICH SALT LAKE COUNTY RELIES PROVIDES BY ITS OWN TERMS THAT DIS-

APPROVAL BY THE COUNTY PLANNING COMMISSION MAY BE OVERRULED BY A MAJORITY VOTE OF THE PUBLIC AGENCY AUTHORIZING OR FINANCING SUCH BUILDING, IF SUCH PUBLIC AGENCY IS WITHOUT THE JURISDICTION OF THE COUNTY COMMISSIONERS; AND SUCH OVERRULING SHOULD BE IMPLIED FROM THE LIQUOR CONTROL COMMISSION'S CONDUCT IN OPENING AND OPERATING THE STORES IN QUESTION.

Title 17-27-8, U.C.A. 1953, as amended, reads as follows:

“Whenever any board of county commissioners shall have adopted an official map of the county or any part thereof, then and thenceforth no public road, park or other public way, ground, or space, no public building or structure or no public utility, whether publicly or privately owned, which is not shown or described on the official map as part of the approved development within the county, shall be constructed or authorized in the unincorporated territory of the county until and unless the proposed location and extent thereof shall have been submitted to and approved by such county planning commission; provided, however, that in case of disapproval, the said planning commission shall communicate its reasons to the board of county commissioners of the county in which the public way, ground, space, building, structure, or utility is proposed to be located; and such board shall have the power to overrule such disapproval by a vote of not less than a majority of its entire membership, and upon such overruling said or other official in charge of proposed construction or authorization may proceed therewith; *provided further, however, that if the public way, ground, space, building, structure, or utility be one, the authorization or financing of which*

*does not, under the law governing the same, fall within the province of the board of county commissioners or other county official or board, then the submission to the county planning commission shall be made by the body or official having such jurisdiction, and the said planning commission's disapproval may be overruled by said body by a vote of not less than a majority of its entire membership or by said official. The acceptance, widening, removal, extension, relocation, narrowing, vacation, abandonment, change of use, acquisition of land for, or sale or lease of any road, park, or other public way, ground, place, property, or structure shall be subject to similar submission and approval, and the failure to approve may be similarly overruled. The failure of the commission to act within thirty days from and after the date of official submission to it shall be deemed approval, unless a longer period be granted by the submitting board, body, or official."* (Emphasis added)

While this statutory provision has never been construed by this court, appellant maintains that its language is clear and indicates that in this fact situation, since the Utah Liquor Control Commission is the agency financing the purchase of the 33rd South building and authorizing the lease of and in fact leasing the Kearns store, and since further the law governing the operation of these stores does not "fall within the province of the board of county commissioners or other county official or board," the Liquor Control Commission is free to overrule the County Planning Commission.

While the Liquor Control Commission has not affirmatively answered plaintiff's complaint and has not



affirmatively alleged such overruling vote of the majority of its members, appellant maintains such ministerial act can clearly be ~~implied~~<sup>INFERRED FROM</sup> by the commission's conduct in operating these stores.

So, assuming the statute upon which the plaintiff relies applies to appellant, which, as noted above, appellant does not concede, there has, in any event, been an implied compliance by appellant with the terms of that statute.

#### POINT V

THE BUILDINGS IN QUESTION ARE NOT "PUBLIC BUILDINGS" AS DEFINED IN TITLE 17-27-8, UTAH CODE ANNOTATED 1953, AS AMENDED, UPON WHICH SALT LAKE COUNTY RELIES.

In *Salt Lake City v. Board of Education of Salt Lake City*, 52 U. 540, 175 P. 654, this court ruled that state-owned buildings were not public buildings, under the terms of the ordinance relied upon by Salt Lake City, in the following language:

"\* \* \* If it be conceded, therefore, as it is and must be, that the state has not surrendered the control over its buildings to the cities, then it necessarily follows that the terms 'public buildings' and 'all buildings' used in the subdivisions of section 206, *supra* (city ordinance), which we have quoted, do not embrace all buildings within the cities. Moreover, if state buildings must be excluded, then public school buildings must likewise be excluded from those terms."

While it is true that the terms "public buildings" construed by the court appeared in a Salt Lake City

ordinance rather than in this statute relied upon by Salt Lake County, the ordinance and the statute have the common feature of being zoning regulations, and appellant maintains that the same construction should be given both.

## POINT VI

THE LIQUOR CONTROL COMMISSION IS NOT WITHIN THE DEFINITION OF "ANY PERSON, FIRM OR CORPORATION" USED IN TITLE 17-27-23, UTAH CODE ANNOTATED 1953, UPON WHICH SALT LAKE COUNTY RELIES.

The language of Title 17-27-23, U.C.A. 1953, which is the penal section of the zoning statute on which Salt Lake County relies provides in part:

"\* \* \* *Any person, firm or corporation violating any regulation in, or of any provision of, any zoning resolution, or any amendment of this act, shall be guilty of a misdemeanor.* \* \* \*" (Emphasis added)

In federal as well as state court, agencies of state or federal governments have been held to be without the definition of "person" or "corporation." A partial list of the cases so holding follows: *U. S. v. United Mines Workers of America*, 67 S. Ct. 677, 330 U. S. 258, 91 L.Ed. 884; *Hoyt v. Bd. of Civil Service Comm. of City of Los Angeles*, (Calif.), 132 P.2d 804; *City of St. Petersburg v. Carter*, (Fla.), 39 So.2d 804; *Att'y. General v. City of Woburn*, (Mass.), 79 N.E.2d 187; *Poynter v. Ottertail County*, (Minn.), 25 N.W.2d 708; *U. S. v. Board of Finance & Revenue*, (Pa.), 85 A.2d 156; *State v. Central Power & Light Co.*, (Tex.), 161 S.W.2d 766.

It is also to be noted that the above-quoted section specifies that any violation thereof is a misdemeanor, making the statute a criminal one. To subject the Liquor Control Commission, therefore, to the provisions of this statute would lead to the absurd result of holding a state agency guilty of committing a crime against the state.

## CONCLUSION

For all of the foregoing reasons, appellant maintains that the trial court erred in denying appellant's motion to dismiss. Appellant respectfully requests that this court reverse the District Court with instructions that this action be dismissed.

Respectfully submitted,

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