

1960

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

Utah Supreme Court

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Case No. 9207

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

SALT LAKE COUNTY, ET AL.,

Respondents,

—vs.—

UTAH LIQUOR CONTROL COM-
MISSION, ET AL.,

Appellants.

SEP 3 0 1960

Supreme Court, Utah

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF FACTS	1
STATEMENT OF POINTS.....	1
ARGUMENT	
POINT I.	
UTAH LIQUOR CONTROL COMMISSION IS SUB- JECT TO SUIT FOR VIOLATION OF SALT LAKE COUNTY ZONING REGULATIONS UNDER THE PROVISIONS OF TITLE 17-27-23, U.C.A., 1953, AS IT APPLIES TO VIOLATION OF THE PROVISIONS OF TITLE 17-27-8, U.C.A., 1953, AS AMENDED.....	2
POINT II.	
THE APPARENT CONFLICT BETWEEN THE PRO- VISIONS OF TITLE 32-1-28, AND TITLE 17-27-23, U.C.A., 1953, SHOULD BE RESOLVED IN FAVOR OF THE LATTER, IT BEING THE MOST RECENT EX- PRESSION OF THE LEGISLATURE.	7
POINT III.	
HAVING FAILED TO COMPLY WITH THE PROVI- SIONS OF TITLE 17-27-8, U.C.A., 1953, AS AMEND- ED, THE USE OF THE LAND AND BUILDINGS IN QUESTION BY THE LIQUOR CONTROL COMMIS- SION IS ENJOINABLE, AND THE TRIAL COURT RULING DENYING APPELLANT'S MOTION TO DISMISS RESPONDENT'S COMPLAINT HEREIN SHOULD BE AFFIRMED.	11
POINT IV.	
THE LIQUOR CONTROL COMMISSION ACTS IN A PROPRIETARY RATHER THAN A GOVERNMENT- AL CAPACITY, AND IS THEREFORE SUBJECT TO ZONING REGULATIONS.	12
CONCLUSION	14

TABLE OF CASES CITED

Alabama Alcoholic Beverage Control Bd. v. City of Birming- ham, 253 Ala. 402, 44 So. 2d 593.....	5
---	---

TABLE OF CONTENTS—(Continued)

	<i>Page</i>
Hudson Furniture Co. v. Greed Furniture & Carpet Co., 10 Utah 31, 36 Pac. 132.....	10
In Re Gannett, 11 Utah 283, 39 Pac. 496.....	10
Isom v. Rex Crude Oil Co., 140 Cal. 678, 74 Pac. 294.....	9
Sharp, et al., v. Police Jury of Parish of East Baton Rouge, 194 La. 220, 193 So. 594.....	6
Utah Mfrs'. Ass'n. v. Stewart, 82 Utah 198, 23 Pac. 2d 229.....	12

STATUTES CITED

Title 17-27-23, U.C.A., 1953 (Session Laws of Utah, 1941, Chapter 23, Section 23).....	2, 5, 6, 8, 10, 11
Title 17-27-8, U.C.A., 1953.....	2, 3, 5, 6, 11, 12, 13
Title 32-1-28, U.C.A., 1953, (Session Laws of Utah, 1935, Chapter 43, Section 30).....	7, 10, 11

TEXT AUTHORITIES

50 Corpus Juris 850.....	7
61 A.L.R. 2d 970.....	5, 13
61 A.L.R. 2d 987.....	5
9 A.L.R. 2d 1292.....	12
121 A.L.R. 300.....	12
Words & Phrases, Vol. 26A, "May—In Statutes, Authorizing Suits," page 428.....	9
Sutherland, Statutory Construction, Sections 138, 152, 160.....	10

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

The respondent agrees with the statement of facts as contained in appellant's brief.

STATEMENT OF POINTS

POINT I

UTAH LIQUOR CONTROL COMMISSION IS SUBJECT TO SUIT FOR VIOLATION OF SALT LAKE COUNTY ZONING REGULATIONS UNDER THE PROVISIONS OF TITLE 17-27-23, U.C.A., 1953, AS IT APPLIES TO VIOLATION OF THE PROVISIONS OF TITLE 17-27-8, U.C.A., 1953, AS AMENDED.

POINT II

THE APPARENT CONFLICT BETWEEN THE PROVISIONS OF TITLE 32-1-28 AND TITLE 17-27-23, U.C.A., 1953, SHOULD BE RESOLVED IN FAVOR OF THE LATTER, IT BEING THE MOST RECENT EXPRESSION OF THE LEGISLATURE.

POINT III

HAVING FAILED TO COMPLY WITH THE PROVISIONS OF TITLE 17-27-8, U.C.A., 1953, AS AMENDED, THE USE OF THE LAND AND BUILDINGS IN QUESTION BY THE LIQUOR CONTROL COMMISSION IS ENJOINABLE, AND THE TRIAL COURT RULING DENYING APPELLANT'S MOTION TO DISMISS RESPONDENT'S COMPLAINT HEREIN SHOULD BE AFFIRMED.

POINT IV

THE LIQUOR CONTROL COMMISSION ACTS IN A PROPRIETARY RATHER THAN A GOVERNMENTAL CAPACITY, AND IS THEREFORE SUBJECT TO ZONING REGULATIONS.

ARGUMENT

POINT I

UTAH LIQUOR CONTROL COMMISSION IS SUBJECT TO SUIT FOR VIOLATION OF SALT LAKE COUNTY ZONING REGULATIONS UNDER THE PROVISIONS OF TITLE 17-27-23, U.C.A., 1953, AS IT APPLIES TO VIOLATION OF THE PROVISIONS OF TITLE 17-27-8, U.C.A., 1953, AS AMENDED.

Title 17-27-23, U.C.A., 1953, provides as follows:

“It shall be unlawful to erect, construct, reconstruct, alter, maintain or use any building or structure or to use any land in violation of any regulation in, or any provision of, any zoning resolution, or any amendment thereof, enacted or

adopted by any board of county commissioners under the authority of the act. 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. *In case any building or structure is or is proposed to be erected, constructed, reconstructed, altered, maintained or used, or any land is or is proposed to be used, in violation of this act or of any regulation or provision of any resolution, or amendment thereof, enacted or adopted by any board of county commissioners under the authority granted by this act, such board, the district attorney of the county, or any owner of real estate within the district in which such building, structure or land is situated, may, in addition to other remedies provided by law, institute injunction, mandamus, abatement or any other appropriate action or actions, proceeding or proceedings to prevent, enjoin, abate or remove such unlawful erection, construction, reconstruction, alteration, maintenance or use.*" (Emphasis added.)

One of the provisions of the act to which the foregoing section of the statute applies is Title 17-27-8, U.C.A., 1953, as amended, referred to by appellant in his brief in Point III, and set out 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, 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 board 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.)

As pointed out by the appellant, this statutory provision has never been construed by this court. Further, an exhaustive search discloses no available record of the proceedings of the legislature from which its intention can be determined. We are left, then, to determine the intended application of this statute by a bare analysis of the words of the statute themselves. It is submitted that the phrase "body or official" in Title 17-27-8, U.C.A., 1953, as amended, must include state bodies, of which the Utah Liquor Control Commission is one. The provisions of Title 17-27-23 U.C.A., 1953, were obviously intended to provide remedies for the violation of all the preceding sections of that chapter including Title 17-27-8, U.C.A., 1953, as amended, and are therefore applicable to the Liquor Control Commission.

For authority to the effect that the legislature can, by specific statutory authorization, as here, make a state agency amenable to zoning regulations see 61 ALR 2d, 970, Sec. 8, at page 987, which discusses that point and begins with the following language:

"It has been recognized that a governmental project may be made subject to zoning regulations by the express authorization of the agency establishing it."

That annotation relies largely on the case of *Alabama Alcoholic Beverage Control Board v. City of Birmingham*, 253 Ala. 402, 44 So. 2d 593, wherein the City of Birmingham pursuant to a statute authorizing zoning of liquor stores by cities, threatened to enforce criminal sanctions against the managers of certain liquor stores

for the operation thereof in violation of local zoning ordinances. In that case the court found the zoning ordinance invalid for reasons not pertinent here, but said at page 598:

“While we recognize that the operation of the liquor store is a governmental function, this is no reason why the legislature cannot provide that the liquor store may be included within a zoning ordinance. A liquor store is a place where alcoholic beverages are placed on sale and sold to customers as in other stores, and for this reason from the standpoint of zoning could well be regarded as a business within the statute which authorizes a city to be divided into business, industrial and residential zones.”

We do not agree with appellant’s conclusion that the Liquor Control Commission is not within the definition of a person, firm, or corporation. It is pointed out, however, that while the misdemeanor provision of Title 17-27-23, U.C.A., 1953, apply to persons, firms and corporations, the other remedies in that same statute, including the remedy of injunctive relief as here requested, do not refer to persons, firms, or corporations.

Moreover, respondent submits that the buildings in question are “public buildings” for the purposes of Title 17-27-8, U.C.A., 1953, for the reason that they are used for public or quasi-public purposes, and as such are subject to Salt Lake County zoning regulations. Public buildings are defined in the case of *Sharp et al v. Police Jury of Parish of East Baton Rouge*, 194 La. 220, 193 So. 594, as follows:

“ ‘Public Building. In a narrow sense a “public building” is a building erected and owned by state, county or municipal authorities; a building owned or controlled and held by the public authorities for public use; a building belonging to, or used by, the public for the transaction of public or quasi-public business. As so defined the term “public building” includes a high school building, a hospital, a jail, a town calaboose, or a common schoolhouse.

“In a broader sense it is defined as a building, which, although privately owned, may be fairly deemed to promote a public purpose or to subserve a public use; a building where the public congregates in considerable numbers either for amusement or for other purposes.’ . . .” Citing 50 Corpus Juris, page 850 et seq.

Respondent submits that the building in question is used for the transaction of public business and also as a place open to the public wherein the public congregates.

POINT II

THE APPARENT CONFLICT BETWEEN THE PROVISIONS OF TITLE 32-1-28 AND TITLE 17-27-23, U.C.A., 1953, SHOULD BE RESOLVED IN FAVOR OF THE LATTER, IT BEING THE MOST RECENT EXPRESSION OF THE LEGISLATURE.

The Utah Legislature enacted the Liquor Control Act in 1935. (See Session Laws, 1935, Chapter 43.) The present Title 32-1-28, U.C.A., 1953, was included in the Liquor Control Act of 1935, as Section 30 of Chapter 43, Session Laws, 1935.

In 1941 the Utah legislature delegated to the various counties the power to zone. Title 17-27-23 U.C.A., 1953, was originally enacted as Session Laws, 1941, Chapter 23, Section 23.

Respondent submits that since Title 17-27-23, U.C.A., 1953, is the latest pronouncement by the Utah legislature, it should take precedence over Title 32-1-28, U.C.A., 1953, insofar as this action is concerned. Certainly the Utah legislature, in delegating the power to zone to the various counties in 1941, and providing for injunctive relief for violation of a county zoning ordinance and regulation, was aware of the fact that the Utah Liquor Control Commission operated and would in the future operate stores in the various counties. Were the legislature to exempt state agencies, including the Liquor Control Commission from the operation of Title 17-27-23, U.C.A., 1953, it could have expressly done so and provided for such exemption in the statute upon the premise that the Liquor Control Commission enjoys sovereign immunity. Respondent submits that its failure to do so however, must be considered as an indication that the legislature did not intend to exempt state agencies from the operation of Title 17-27-23, U.C.A., 1953; and further that the Liquor Commission is not free from suit under this statute on the basis that it enjoys sovereign immunity.

That the Liquor Control Commission does not enjoy freedom from suit under the concept of sovereign immunity has been expressly declared by the Legislature in Title 32-1-28, U.C.A., 1953. Appellant contends, on

pages ten and eleven of appellant's brief, that compliance with this statute is mandatory for standing to sue, and further that the statute is exclusive and provides the *only* means whereby the Liquor Control Commission is subject to suit. Yet a liberal reading of the statute does not carry with it such a restrictive meaning. Title 32-1-28, U.C.A., 1953, provides that, . . . "the tax commission *may* with the written consent of the governor be sued. . . ." If the legislature had intended to provide that this statute establish the sole and exclusive means of suit, words carrying that meaning would have been employed, such as the words "shall only," "upon condition that" or "must." However, words of this type are not to be found, and the Legislature has instead used the word "may" which, under the general rules of statutory construction, is held to be directory and not mandatory. (See Words and Phrases, Vol. 26A, "May—In Statutes, Authorizing Suits, page 428, citing *Isom v. Rex Crude Oil Co.*, 140 Cal. 678, 74 Pac. 294). To hold that the statute is exclusive would vest the Liquor Control Commission with the power to pick and choose the cases it would defend, if any, and would give it the status of having sovereign immunity, thereby rendering Title 32-1-28, U.C.A., 1953, meaningless and of no import. This result, respondent urges, was not intended by the Legislature.

Respondent submits that the two statutes in question are in direct conflict as to whether or not the appellant is subject to suit, and if so, in what manner. Respondent urges that the legislature in 1941 had knowledge of that

portion of the Liquor Control Act here in question, (Title 32-1-28, U.C.A., 1953) and as such could have exempted the appellant from the operation of Title 17-27-23, U.C.A., 1953. As was stated in the case of *Hudson Furniture Co. v. Freed Furniture & Carpet Co.*, 10 Utah 31, 36 Pac. 132, 133:

“It is clear that the two sections are repugnant to each other in this respect, and, as section 3918 is the latest expression of our legislature, it must prevail; and in so far as the two statutes are repugnant to each other, the former is repealed by the latter by implication. The fact that the former is not expressly repealed by the latter, and is our regular statute of frauds, as insisted by counsel for appellant, makes no difference. . . . Both statutes must be construed together, and given effect as far as possible, for both are presumed to have been enacted with deliberation, and with a knowledge of all existing laws on that subject.” Citing Sutherland Statutory Construction, Sections 152, 160, and cases.

Further, the Utah Supreme Court stated in the case of *In Re Gannett*, 11 Utah 283, 39 Pac. 496, 497:

“The repeal by implication results from an enactment the terms of which are in conflict with an earlier act, and the necessary operation of which cannot be harmonized with the necessary effect of the later law. In such case the last expression of the legislative will must prevail.” Citing Sutherland Statutory Construction, Section 138, and cases.

Although respondent does not contend that Title 32-1-28 U.C.A., 1953, is repealed by implication, respondent

does submit that the latest pronouncement of the Legislature controls for the purposes of this suit. As such, respondent need not comply with the provisions of Title 32-1-28 U.C.A., 1953, in order to maintain its action, but the appellant is subject to suit under Title 17-27-23, U.C.A., 1953.

POINT III

HAVING FAILED TO COMPLY WITH THE PROVISIONS OF TITLE 17-27-8, U.C.A., 1953, AS AMENDED, THE USE OF THE LAND AND BUILDINGS IN QUESTION BY THE LIQUOR CONTROL COMMISSION IS ENJOINABLE, AND THE TRIAL COURT RULING DENYING APPELLANT'S MOTION TO DISMISS RESPONDENT'S COMPLAINT HEREIN SHOULD BE AFFIRMED.

The Legislature in Title 17-27-8, U.C.A., 1953, as amended, has provided a clear procedure wherein the county planning commission and other political bodies, including the Liquor Control Commission, can express their intents and desires concerning land use to the end that said bodies can cooperate to serve the people whom they both represent, and has left the decision in the end to the body most concerned with the problem. Appellant has fully ignored this procedure. It has neither requested approval of its location of the planning commission nor has it, so far as this record shows, taken a vote of its membership to overrule the Salt Lake County Planning Commission. It now asks this court to say that because it has wholly ignored the planning commission and these statutory provisions, we should now infer a compliance with the provisions of Title 17-27-8, U.C.A., 1953, as amended, from this conduct. But this lack of recognition

is the very matter of which the county now complains. Had the same result obtained after compliance with the statute, the county would not and could not now complain. We now request this court to require specific compliance with that statute to the end that the County Planning Commission can at least advise appellant of its decision, and the appellant can then make its determination to comply with, or overrule, the Planning Commission. In this action it is not respondent's intent or desire to encroach upon or interfere with the sovereign power of the state of Utah. However, it is respondent's intent to require the Liquor Control Commission, as an agency and creature of the state, to comply with the laws of this state, to-wit: Title 17-27-8, U.C.A., 1953, as amended.

POINT IV

THE LIQUOR CONTROL COMMISSION ACTS IN A PROPRIETARY RATHER THAN A GOVERNMENTAL CAPACITY, AND IS THEREFORE SUBJECT TO ZONING REGULATIONS.

Respondent recognizes that the weight of authority favors the determination that the Liquor Control Commission acts in a governmental capacity. See 121 ALR 300 and 9 ALR 2d 1292. It is suggested however, that this determination has been made largely to support the constitutionality of the act as against the contention that it is a monopolistic invasion of private enterprise. The case of *Utah Mfrs.' Ass'n. v. Stewart*, 82 Utah 198, 23 Pac. 2d 229, is an example of this determination, as are many of the cases in the annotations cited above. On the other hand, the operation of the liquor commission

has many characteristics of a typical private business enterprise. It operates for a profit; it operates in general as a retail store serving the public at large. In this regard it should be noted that the expansion of its operation in question here represents not an effort to control or limit liquor consumption, but in fact encourages it. In this respect the commission has reacted much as a private entrepreneur desiring to increase its sales.

It is submitted now for your consideration that for purposes of amenability to zoning regulation, and possibly for purposes of tort liability, the operation of retail liquor stores by the Liquor Control Commission should be determined to be a proprietary function.

Under the view of respondent herein, this determination would not change the net result of this case, inasmuch as Title 17-27-8, U.C.A., 1953, would still apply. It should be noted, however, that if it is determined that in the operation of its retail liquor stores the Liquor Control Commission acts in a proprietary capacity, and at the same time that the provisions of Title 17-27-8, U.C.A., 1953, as amended, are not applicable as contended in part by appellant, then the result should be that the Liquor Control Commission would be barred from operating in conflict with county zoning ordinances according to the view that proprietary functions of political bodies are subject to zoning regulations. See 61 ALR 2d 970.

CONCLUSION

For all the foregoing reasons, respondent submits that the trial court did not commit error in denying appellant's motion to dismiss. Respondent respectfully requests that this court affirm the decision of the District Court and allow this matter to be tried on the merits.

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