

1961

# James G. Morrison v. Joseph F. Horne : Brief of Appellant

Utah Supreme Court

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Grover A. Giles; Gerald E. Nielson; Attorneys for Appellant;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

JAMES G. MORRISON,

*Respondent,*

—vs.—

JOSEPH F. HORNE, Director of  
Zoning and Building of Salt Lake  
County,

*Appellant.*

FILED

1931-1931

Clerk, Supreme Court, Utah

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BRIEF OF APPELLANT

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IN THE SUPREME COURT  
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JAMES G. MORRISON,

*Respondent,*

—vs.—

JOSEPH F. HORNE, Director of  
Zoning and Building of Salt Lake  
County,

*Appellant.*

Case No. 9394

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BRIEF OF APPELLANT

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NATURE OF THE CASE

This is an appeal from the Order of the District Court of the Third Judicial District granting a Writ of Mandamus directing the Director of the Zoning and Building Inspection Department of Salt Lake County to issue a building permit to James G. Morrison to allow him to build a service station on the Northwest corner of Seventh East and Forty-fifth South Streets in Salt Lake County contrary to the existing

zoning ordinances applicable to that address. The question presented is as to the meaning of, and the validity of Salt Lake County ordinances Title 8, Chapter 4, as amended, effective June 15, 1957.

## STATEMENT OF FACTS

The facts in this case are not in serious conflict and may be briefly summarized as follows:

Petitioner-Respondent has an interest in property located on the Northwest corner of the intersection of Forty-fifth South and Seventh East Streets in Salt Lake County, Utah. which property was first zoned effective date December 6, 1953 and has ever since been zoned R3-A, which designation is for residential use only and precludes any commercial use. A structure suitable for a general store was upon the premises at the time said Ordinance became effective, which structure remained on the premises until it burned sometime in 1960; that from sometime in excess of one year prior to the effective date of the Ordinance until the present, the premises have been vacant and unused.

The evidence further showed that Salt Lake County has assessed the property in question based upon its valuation as commercial property for the period 1955 through the year 1960.

Upon the foregoing facts, the Court issued its order granting the Writ of Mandamus requested by Petitioner-Respondent and Salt Lake County has appealed therefrom.

Because of the nature of the proceeding there are no Findings of Fact or Conclusions of Law from which Appellant can determine the basis of the District Court for its holding that the Writ of Mandamus should be issued. For this reason Appellant is obliged to anticipate in its brief all possible justification for said holding with the result that its brief may be somewhat longer than necessary and may cover areas not in serious dispute. On the other hand it should be noted that some guidance is given by Petitioner-Respondent's trial brief filed herein.

## STATEMENT OF POINTS

### POINT I.

A NON-CONFORMING USE BEING AN EXCEPTION TO THE ZONING ORDINANCE, THE BURDEN IS UPON THE PARTY ASSERTING THE RIGHT TO SAID USE TO PROVE ITS EXISTENCE. THERE IS NO WHERE IN THE RECORD OF THESE PROCEEDINGS, EVIDENCE OF A NON-CONFORMING USE EXISTING AT THE TIME THE ZONING ORDINANCE CAME INTO EXISTENCE.

### POINT II.

IF THE COURT FINDS THAT AT THE TIME OF THE EFFECTIVE DATE OF THE ZONING ORDINANCE PETITIONER'S PREDECESSORS HAD ACQUIRED THE RIGHT TO USE THEIR PROPERTY NOT IN CONFORMANCE WITH THE ZONING ORDINANCE, SUCH RIGHT CEASED TO EXIST PURSUANT TO THE PROVISIONS OF SALT LAKE COUNTY ORDINANCE TITLE 8, CHAPTER 4, SECTION 6, AS AMENDED, EFFECTIVE JUNE 15, 1957, BECAUSE THE PROPERTY IN QUESTION WAS NOT OCCUPIED BY A NONCONFORMING USE FOR A CONTINUOUS PERIOD

OF ONE YEAR. IN ADDITION SAID RIGHT HAS BEEN ABANDONED BY PETITIONER-RESPONDENT AND/OR HIS PREDECESSORS.

### POINT III.

SALT LAKE COUNTY IS NOT ESTOPPED, BY HAVING ASSESSED THE PROPERTY IN QUESTION UPON A COMMERCIAL VALUATION, FROM NOW DENYING THAT IT CAN BE USED COMMERCIALY FOR TWO REASONS.

1. IT IS NOT BOUND BY THE ERRONEOUS MINISTERIAL ACTS OF AN EMPLOYEE OF THE SALT LAKE COUNTY ASSESSOR'S OFFICE.

2. PETITIONER-RESPONDENT CANNOT BE SAID TO HAVE REASONABLY RELIED ON SAID ASSESSMENT IN VIEW OF THE NOTICE OF THE APPLICABLE ZONING, OF THE PROPERTY IN QUESTION, FURNISHED BY THE ZONING ORDINANCE ITSELF.

### POINT IV.

EVEN IF PETITIONER-RESPONDENT HAS ACQUIRED A RIGHT TO USE HIS PREMISES NOT IN CONFORMANCE WITH THE APPLICABLE ZONING ORDINANCE, THAT NON-CONFORMING RIGHT IS ONLY TO USE THE PREMISES AS A GENERAL STORE AND NOT AS A RETAIL GASOLINE STATION AS REQUESTED IN HIS APPLICATION FOR A BUILDING PERMIT.

## ARGUMENT

### POINT I.

A NON-CONFORMING USE BEING AN EXCEPTION TO THE ZONING ORDINANCE, THE BURDEN IS UPON THE PARTY ASSERTING THE RIGHT TO SAID USE TO PROVE ITS EXISTENCE. THERE IS NO WHERE IN THE RECORD OF THESE PROCEEDINGS, EVIDENCE OF A NON-CONFORMING USE EXISTING AT THE TIME THE ZONING ORDINANCE CAME INTO EXISTENCE.



American Jurisprudence broadly outlines the general rule describing the party having the burden of proof at 20 Am. Jur. 138, Evidence Section 135, as follows:

“The fundamental principle is that the burden of proof in any cause rests upon the party who, as determined by the pleadings or the nature of the case, asserts the affirmative of an issue and remains there until the termination of the action.”

This rule has been applied to a case involving proof of a non-conforming use in case of *Kansas City v. Wilhoit*, 237 SW 2d 919, Metzenbaum in his work quotes from that case at the top of page 1240 as follows:

“In prosecution for violation of a zoning ordinance, where provision that a nonconforming use existing at the time of the passage of the ordinance might be continued, was not part of the enacting clause of the zoning ordinance nor the part of the description of the offense involved and its provisions appeared in a separate section of the ordinance, the *defendant* had the *burden of proving* the nonconforming use of her property and a continuation of such use until the dates of the alleged violations.”

“In prosecution for violation of zoning ordinance on ground that defendant was using a private residence for boarding or lodging more than four persons, evidence did not establish the defense of a nonconforming use of the residence *existing lawfully at the time of the passage* of the zoning ordinance.”

This reasoning is further supported by a discussion in ALR 2d entitled “Zoning-Resuming Nonconforming Use”

at 18 ALR 2d page 728 Section 2, Subparagraph 3, beginning at the bottom of the first column of page 728, as follows:

“Turning now to the effect which a discontinuance of a nonconforming use has on the owner’s right to resume such use, it appears to be well settled that the right of a property owner to continue a nonconforming use will be lost through the abandonment of such use before or after the adoption of the zoning ordinance and that compliance must thereafter be had with its regulations. On the other hand, actions not amounting in law to abandonment do not produce this effect, and, therefore, a temporary cessation of a nonconforming use or the temporary vacancy of buildings used for a nonconforming use does not in itself operate as an abandonment of the nonconforming use, *where the circumstances, conditions, and statements of the owner are consistent with or evidence of an intention not to abandon the nonconforming use.*” (Emphasis added)

See also, 101 CJS 940 beginning at Section 184 on Zoning as follows:

“The rule permitting a landowner to continue a nonconforming use of property in a certain area applies only to a lawful nonconforming use which existed at the time of promulgation of the zoning ordinance or regulation. Normally the critical date is that on which the regulation prohibiting the use becomes effective rather than the date of its passage—”

Petitioner has asserted in his petition at paragraph 2 thereof that:

“That Petitioner and his predecessor in interest have a non-conforming commercial use in the above described property and have had such use since 1941. And said property has been valued and taxed as commercial property by Salt Lake County for the year 1960 and for several years last past.”

It appears then that the burden is upon Petitioner-Respondent to show that he is entitled to a non-conforming use in the instant case for otherwise he is clearly in violation of the applicable zoning ordinance.

The evidence in this case relevant to the use of the premises at the time of the effective date of the ordinance is as follows:

The effective date of the applicable ordinance was December 6, 1953 according to the uncontested testimony of the zoning inspector (R. 16 line 11)

Three witnesses testified concerning the use of the property in question both before and after that date. Mrs. Ursenbach testified that she returned to her near-by residence in October 1952, and that the property in question was vacant and unused, (R-15 Line 3) that the last time she knew of the property being used was in the spring of 1947 (R15 Line 24).

Mr. Morrison's testimony on this subject is as follows: He testified that he had been observing the property in question for the past four or five years and that it had not been used during that time (R-18 Line 21). He testified that he couldn't say definitely when the store

discontinued its operation (R-26 Line 4) and further down that same page, testified that he has learned that it discontinued its operation around 1953 or 1955, and still later on that same page that he knew the business was there in 1950.

Mr. Miller testified that he lived in the area and that the store operated until 1951 or 1952 and that it had been vacant since that time (R-29 Line 16 and 28).

Where, as here, the building in question was not being used at the time of the effective date of this zoning ordinance, it would appear that there not being any use of the property, there could not be a non-conforming use. The best that can be said in support of a non-conforming use is that if it can be shown that there was an intention to continue the last use or at the very least an intention not to abandon the prior use, then a non-conforming use may be found.

There being no evidence anywhere in the record concerning the intention of the owner of the premises to continue his former use of the property at the time of the effective date of the zoning ordinance, it is submitted that Petitioner-Respondent has not sustained his burden to show the existence of a nonconforming use of the property in question.

## POINT II.

IF THE COURT FINDS THAT AT THE TIME OF THE EFFECTIVE DATE OF THE ZONING ORDINANCE PETITIONER'S PREDECESSORS HAD ACQUIRED THE RIGHT TO USE THEIR PROPERTY NOT IN CONFORMANCE WITH

THE ZONING ORDINANCE, SUCH RIGHT CEASED TO EXIST PURSUANT TO THE PROVISIONS OF SALT LAKE COUNTY ORDINANCE TITLE 8, CHAPTER 4, SECTION 6, AS AMENDED, EFFECTIVE JUNE 15, 1957, BECAUSE THE PROPERTY IN QUESTION WAS NOT OCCUPIED BY A NONCONFORMING USE FOR A CONTINUOUS PERIOD OF ONE YEAR. IN ADDITION SAID RIGHT HAS BEEN ABANDONED BY PETITIONER-RESPONDENT AND/OR HIS PREDECESSORS.

Salt Lake County Ordinance Title 8, Chapter 4, Section 6, as amended, effective June 15, 1957, provides as follows:

“A building or structure or portion thereof occupied by a nonconforming use, which is, or hereafter becomes, vacant and remains unoccupied by a nonconforming use for a continuous period of one (1) year, except for dwellings, shall not thereafter be occupied except by a use which conforms to the use regulations of the zone in which it is located.”

It is submitted that said language is unambiguous and when applied to the facts in the instant case, the only possible result is a finding that the land in question may not be occupied except by use which conforms to the use regulations of the zone in which it is located.

As yet Petitioner-Respondent has not, either in his argument or trial brief, satisfactorily answered or countered the provisions of this ordinance, nor has he indicated that it is for any reason invalid. The only suggestion yet received concerning how this ordinance can be avoided in this case is Petitioner's argument that said ordinance duplicates the provisions of Salt Lake County Ordinance

Title 8, Chapter 4, Section 11, as amended, effective June 15, 1957 which provides as follows:

“The nonconforming use of land, existing at the time this Title became effective, may be continued, provided that no such nonconforming use of land shall in any way be expanded or extended either on the same or adjoining property, and provided that if such nonconforming use of land, or any portion thereof, is abandoned or changed for a period of one (1) year or more, any future use of such land shall be in conformity with the provisions of this Title.”

And that the provisions of this latter ordinance to the effect that if the use in question is abandoned then any future use should be in conformity with the zoning ordinance somehow proscribes the operation of the former ordinance.

In response to this argument Appellant points out that a fair reading of both provisions indicates that a right to use land not in conformance with the zoning ordinance may be lost not only by dis-use for a period of one year, but additionally by abandonment and additionally by a change of use for a period of one year.

Although it has not been suggested that the provisions of Salt Lake County Ordinance Chapter 8, Title 4, Section 6, are invalid, because we do not know on what factual or legal basis the case was decided in the lower Court we feel constrained to support the proposition that they are valid. To this end, the Court is invited to see a three page discussion in Metzenbaum, Volume 2,

pages 1248 through 1950 wherein Metzenbaum cites as the applicable rule in capital letters the holding of the case of *Franner Realty Corp. v. Lebouf*, 109 NYS 2d 525 as follows:

“AN ORDINANCE SETTING TWELVE MONTHS OF “DISCONTINUANCE” OF A NONCONFORMING USE, AS A BAR TO RESUMPTION OF SUCH USE, HELD REASONABLE AND ENFORCEABLE, EVEN THOUGH THERE BE NO EVIDENCE OF INTENDED ABANDONMENT OF SUCH NONCONFORMING USE.”

This same case is again quoted at the middle of page 1249 in Metzenbaum as follows:

“This leaves one remaining query: Is the ordinance, in so far as it attempts to abolish a nonconforming use after non-user for one year, valid and constitutional?”

“In this connection it must be borne in mind that the policy of the law is the *gradual elimination of non-conforming uses* and, accordingly, ordinances should not be given an interpretation which would permit an indefinite continuation of the non-conforming use. McQuillin on Municipal Corporations, 3rd Edition, Vol. 8, Section 25.189 and cases cited.”

“The courts have gone far beyond holding that mere nonuse for a specified period of time may terminate the nonconforming use. In *Standard Oil Co. v. City of Tallahassee*, 5 Cir, 1950, 183 F2d 410, 412, certiorari denied (1950) in 340 US 892, 71 S Ct. 208.”

“It seems well established by the decisions, that ordinances such as the one at bar are valid



and *constitutional*. The only question that might arise in each case is the *reasonableness* of the period of time set forth in the ordinance. The court is satisfied that the period of a year in the ordinance herein is a *reasonable* one. The actual period of *nonuse* herein has been five years since the end of the war and eight years altogether."

As to whether Petitioner-Respondent abandoned his right to use his property not in conformance with the zoning ordinance (if he ever acquired it), please refer to our argument that it was lost by abandonment prior to the effective date of the ordinance under Point I above, and the argument with respect to burden of proof also in Point I above, and add the additional ingredient of approximately seven years of nonuse from December 1953 to the fall of 1960 to establish the fact of abandonment on the part of the Petitioner-Respondent and his predecessors.

### POINT III.

SALT LAKE COUNTY IS NOT ESTOPPED, BY HAVING ASSESSED THE PROPERTY IN QUESTION UPON A COMMERCIAL VALUATION, FROM NOW DENYING THAT IT CAN BE USED COMMERCIALY FOR TWO REASONS.

1. IT IS NOT BOUND BY THE ERRONEOUS MINISTERIAL ACTS OF AN EMPLOYEE OF THE SALT LAKE COUNTY ASSESSOR'S OFFICE.

2. PETITIONER-RESPONDENT CANNOT BE SAID TO HAVE REASONABLY RELIED ON SAID ASSESSMENT IN VIEW OF THE NOTICE OF THE APPLICABLE ZONING, OF THE PROPERTY IN QUESTION, FURNISHED BY THE ZONING ORDINANCE ITSELF.



In support of its argument that Salt Lake County is not estopped to deny a building permit to Petitioner because of erroneous assessments by an employee of the Assessor's office, see an annotation at 119 ALR 1509, an Annotation at 1 ALR 2nd 338 Section 7, and Metzenbaum's discussion beginning at page 162 Volume 1 of his three volume work.

Because the law seems to be reasonably clear in favor of municipal bodies in this area, we offer only two representatives quotes from these discussions. At 1 ALR 2d 351 2nd Column, the authors of ALR say:

“Ordinarily a municipality is not estopped by a mistake, unauthorized act, laches, dereliction, or wrongful conduct on the part of a public official, and no estoppel can grow out of dealings with municipal public officers of limited authority where such authority has been exceeded.”

And at page 352, bottom of first column, they add as follows:

“So, as the collection of duly levied taxes for governmental purposes is a governmental function, the collection officer cannot by mistake or misinformation work an estoppel against the municipality.”

And at 119 ALR, 1512 at the very top of the first column:

“Most of the cases are to the effect that a municipality is not precluded from enforcing a zoning or fire limit regulation by the fact that one or more of its officers or servants has exceeded his authority by issuing a permit contravening the terms of such regulation; and this not-

withstanding that the holder of the permit has proceeded thereunder to his detriment before the municipality seeks to enforce the regulation against him.”

Even if the doctrine of estoppel was applicable in this case, it cannot be said that the Petitioner-Respondent *reasonably* relied on the assessment to his detriment in view of the zoning ordinance itself, which gave him constructive notice that the property in question was not zoned commercially. In that regard see 101 CJS 700, Zoning Section 14, which section begins as follows:

“Every property owner in a city is charged with notice of the zoning ordinances; and even a nonresident who deals with property within the limits of an unincorporated city is charged with knowledge of the zoning ordinance of the city regulating the use of such property. So, a purchaser of land is presumed to possess knowledge of the restrictions in a zoning ordinance applicable thereto;”

#### POINT IV.

EVEN IF PETITIONER-RESPONDENT HAS ACQUIRED A RIGHT TO USE HIS PREMISES NOT IN CONFORMANCE WITH THE APPLICABLE ZONING ORDINANCE, THAT NON-CONFORMING RIGHT IS ONLY TO USE THE PREMISES AS A GENERAL STORE AND NOT AS A RETAIL GASOLINE STATION AS REQUESTED IN HIS APPLICATION FOR A BUILDING PERMIT.

Salt Lake County Ordinance Chapter 8, Title 4, Section 9 as amended, effective June 15, 1957, provides:

“The nonconforming use of a building or structure may not be changed except to a con-

forming use; but where such change is made, the use shall not thereafter be changed back to a nonconforming use."

As in the case of Salt Lake County Ordinance 8-4-6, the language of this ordinance is clear and unambiguous. We have then only to determine if it is, for any reason, invalid.

On this matter see 58 Am. Jur., 1031, Zoning Section 166 as follows:

"Whether and under what conditions and to what extent one nonconforming use may be changed to another depends upon a number of factors, including the terms of the governing statute or ordinance and the view of the courts or of the zoning authorities as to what constitutes a "change" and as to whether the circumstances of a particular case are such as to demand a relaxation of the strict letter of the law. Ordinarily, the exemption granted by a zoning law to the owner of land devoted to an existing nonconforming use is held not to confer the right to change from one nonconforming use to a new and different one; the substitution of one nonconforming use for another is prohibited. The validity of a zoning law so provided or so interpreted has been upheld as a proper exercise of the police power, and the contentions rejected that the regulation or restriction had no real or substantial relation to the public health, safety, morals, or general welfare, was unreasonable, arbitrary, or confiscatory, and operated to take property without due process of law, or for a public use without compensation."

See also 18 ALR 2d, 739 Section 10, which begins:

“The substitution of one nonconforming use for another constitutes such a discontinuance of the original nonconforming use as to amount to its abandonment. Whether or not the substituted nonconforming use may be continued depends on the specific provisions of the zoning regulation involved.”

and which otherwise supports the statement taken from American Jurisprudence quoted above.

## SUMMARY

Appellant contends that each of its points, I, II and IV are sufficient standing alone to warrant a reversal of the ruling of the district court. If we may be permitted some liberty with the language we can state our position as follows:

First: That there is no nonconforming use. Second: If there was one, it has been lost by nonuse. Third: If it hasn't been lost it cannot be changed to a service station. Our Point III, of course, has application to our right to assert Points I and II.

We ask that the ruling of the district court be reversed and further that if the court agrees with Appellant that it can be reversed on the grounds urged in our point II, that the courts' ruling be based on that

point to the end that Salt Lake County will have a standard capable of reasonably accurate measurement to apply in its future efforts to enforce its zoning ordinances.

Respectfully submitted,

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