

1961

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

Utah Supreme Court

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James E. Faust; Attorney for Respondent;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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JAMES G. MORRISON,

*Respondent,*

vs.

JOSEPH F. HORNE,

Director of Zoning and  
Building of Salt Lake City,

*Appellant,*

Civil No. 9394

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BRIEF OF RESPONDENT

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JAMES G. MORRISON,

*Respondent,*

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JOSEPH F. HORNE,  
Director of Zoning and  
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BRIEF OF RESPONDENT

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STATEMENT OF POINTS

POINT I.

RESPONDENT HAS A NONCONFORMING USE  
IN THE PROPERTY TO OPERATE A RETAIL GRO-  
CERY STORE AND SERVICE STATION.

POINT II.

RESPONDENT MAY CHANGE FROM ONE NON-  
CONFORMING USE TO ANOTHER NONCONFORMING  
USE WITHIN THE SAME CLASSIFICATION.

POINT III.

APPELLANT IS ESTOPPED TO DENY THAT  
RESPONDENT HAS A NONCONFORMING, COMMER-  
CIAL USE IN THE PROPERTY.

## POINT IV.

SECTION 8-4-6 OF THE SALT LAKE COUNTY ZONING ORDINANCES VIOLATES THE DUE PROCESS CLAUSE OF THE CONSTITUTIONS OF THE UNITED STATES AND OF THE STATE OF UTAH.

## SUPPLEMENTAL STATEMENT OF FACTS

Respondent feels that the statement of facts contained in the brief of appellants is not complete, therefore respectfully submits the following in addition.

Although the exact date that the building upon the property became vacant is not certain, there is no dispute in the fact that the building was used for a number of years as a general store, possibly as late as 1955. (R. 26) It is also not disputed that gasoline pump islands were constructed upon the premises for gasoline pumps which islands can be clearly seen in Exhibit P-3.

## ARGUMENT

### POINT I.

RESPONDENT HAS A NONCONFORMING USE IN THE PROPERTY TO OPERATE A RETAIL GROCERY STORE AND SERVICE STATION.

The Salt Lake County Zoning Ordinance itself protects the nonconforming use of the property. Section 8-4-11 of the Salt Lake County Zoning Ordinance states,

“The nonconforming use of land existing at the time this title became effective may be

continued, provided that no such nonconforming use 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.”

Since the building on the premises burned in September of 1960, it is respondent’s position that Section 8-4-6 of the Zoning Ordinance is not applicable. Respondent is not seeking to occupy said building but contends that he has the right to construct a nonconforming building under Section 8-4-5 of the ordinance which reads as follows:

“A nonconforming building or structure occupied by a nonconforming use which is damaged or *destroyed by fire*, flood, wind, earthquake or other calamity or act of God, or the public enemy may be restored and the occupancy or use of such building, structure or part thereof which existed at the time such damage or destruction may be continued or resumed, provided that such restoration is started within a period of one year (1) and is diligently prosecuted to completion.”

Section 8-4-6 of the ordinance reads 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 dwelling, should not thereafter be occupied



except by a use which conforms to the use regulations of the zone in which it is located.”

The words in the ordinance “remains unoccupied”, if applicable in the instant case, must mean an abandonment as set forth in 8-4-11 of the ordinance which connotates something more than circumstances over which the owner has no control which brings about a suspension of the use. Sections 8-4-6 and 8-4-11 of the ordinance must be construed together. The legal meaning of the word “Discontinue” was construed in the case of *State Ex. Rel. Schaetz vs. Manders*, 206 Wis. 121 238 NW 835 quoted in 114 ALR page 992,

“It was plainly the intent of the ordinance to permit the continuance of nonconforming uses. While we have found that no authority construing the legal meaning of the word “discontinue” we think that as used in this ordinance it means something more than a mere suspension. It was not the intention of the ordinance to destroy the right of an owner to continue the use of his premises by the mere fact that his tenants became insolvent.

We agree with the circuit court that ‘discontinue’ as it is used in the ordinance cannot mean a temporary nonoccupancy of the building or a temporary secession of the business. The word ‘discontinue’ as it is used in the ordinance is synonymous with ‘abandonment’. It connotates a voluntary, affirmative, completed act.

We think that the rights secured to the owner by the terms of the ordinance is not



lost by either accident or unpropitious circumstances over which he has no control, which brings about a mere suspension of the nonconforming use. It is a right extended to him and to be enjoyed by him until he voluntarily relinquishes it or abandons it.”

There is no proof that respondent or his predecessors in interest have abandoned or so changed the use of the land so as to terminate the nonconforming use of the land.

To effect an abandonment of the nonconforming use of land, it is necessary to show (1) intent, involving a voluntary change and actual relinquishment of right together with (2) some overt act carrying the implication that the owner does not claim or retain interest in the subject matter *Landay vs. McWilliams*, 173 Md. 460 196 A 293, 114 ALR 984.

In *Binghamton vs. Gartell*, 275 APP Div 457 90 NYS 2d 556 is stated that an abandonment within the meaning of the rule that the right of a property owner to continue a nonconforming use may be lost through abandonment of such use connotes a voluntary, affirmative, completed act and means something more than a mere suspension, a temporary non-occupancy of building or temporary ceasing of business activities. (Also cited 18 ALR 2d — Zoning — Resuming Nonconforming use 18 ALR 2d 725, pages 730-731).

Lapse of time is not, per se, decisive of whether a nonconforming use has been abandoned, it being merely one of the factors which may evidence such an intention. 18 ALR 2d page 725 at page 731.

The fact that respondent and his predecessors in interest in the property continue to pay commercial taxes as assessed on the property indicates that there was no intention to abandon the commercial nonconforming use on the property (Exhibit P-1).

In addition, the evidence showed that there was during periods of nonoccupancy *for rent* and *for sale* signs on the property. (R. 27) Periods of interruption of a nonconforming use due to the owner's inability to obtain a tenant or to sell the property does not amount to an abandonment. In *Haulenbeek vs. Allanhurst*, 1948 57 A 2d 52, 18 ALR 2d 747, it appeared that at the time the zoning ordinance was adopted and long before the building in question was operated as a hotel, and was used in this capacity at least two years after the issuance of the zoning ordinance under which the hotel constituted the nonconforming use.

“For the following eleven years the history of the building was quite varied due to the financial difficulties of the owner and his inability to obtain a tenant. Thus the building was empty for several years with interrupted various efforts to operate it for the purpose intended. For two years the building was occupied by the United States Army; and there-

after the owner attempted to operate it again as a hotel. Holding that there was no abandonment or discontinuance of a non-conforming use, so as to require a future use in compliance with the zoning ordinance, the court stated that the effort here had been to overcome the difficulties of an economic depression and wartime exigencies and that these acts could not be considered such a substantial change as to amount to an abandonment or discontinuance of the nonconforming use.”

18 ALR 2d 748 states:

“The fact that the nonconforming use was suspended because of financial difficulties of the owner may negative an intention on his part to abandon the nonconforming use.”

Temporary suspension of nonconforming use does not amount to an abandonment because of the seasonal character of the work, or the lack of work, because of reduced business activity, because of war or other enforced nonuse such as a destruction, otherwise than by voluntary act of the owner of the premises. 18 ALR 2d 740, 849-50-51-52-53-54.

Zoning ordinances will be construed where possible to protect nonconforming uses; that is to say, an ordinance enacted pursuant to a zoning law will be construed, if possible, as not effecting lawful buildings, property rights, business and uses. McQuillan Municipal Corporations 3rd Edit. Revised, Vol. 8, Section 25-184 page 475. Furthermore,

“Zoning ordinances, being in derogation

of common law property rights will be strictly construed and any ambiguity or uncertainty decided in favor of property owners.” *Kubby vs. Hammond*, 68 Arizona 17 198 Pac 2d 134 page 138; *City of Little Rock vs. Williams*, 177 SW 2d 924; *440 East 102nd St. Corp. vs. Murdock*, 285 NY 298 34 NE 2d 329.

We must assume that Judge A. H. Ellett, trial judge, made all necessary findings of fact essential to support his ruling.

“Where findings of fact have not been made the rule is that the judgment should be affirmed if there is any theory of the case on which such judgment can be sustained and any reasonable evidence in the record supporting such theory.” *Kubby vs. Hammond*, 68 Arizona 17 198 Pac. 2d 134 page 137. *Grizzle vs. Runbeck*, 244 Pac. 2d 1160 at page 1162.

It is submitted that in the instant case the tax assessments and tax roll showing this property to have been taxed as “Commercial-Industrial” as shown in P-1 is sufficient evidence alone to sustain the ruling of the trial court.

## POINT II.

RESPONDENT MAY CHANGE FROM ONE NON-CONFORMING USE TO ANOTHER NONCONFORMING USE WITHIN THE SAME CLASSIFICATION.

Appellant states in its brief that if respondent has a nonconforming use “that nonconforming right is only to use the premises as a general store.” Respondent contends that a nonconforming use for a retail grocery store may be changed to a retail service station.

Section 8-1-6 of the ordinance contains the definitions of words and terms used therein, “*Use*”, however, is nowhere defined.

The common law definition of the word “use” is found in 58 Am. Jur. page 1021.

“A nonconforming use within the meaning of zoning regulations has been defined as the use of the building or land that does not agree with the use district to which it is situated.”

It is and has been respondent’s position that Section 8-4-9 of the Zoning ordinance does not prohibit different activities within the same nonconforming use; that is, nonconforming use having a relation to classification. The nonconforming use classification of the property in question is considered by respondent to be “nonconforming C-1”. This is the lightest commercial classification. “Nonconforming C-1” permits both retail gasoline stations and a retail grocery store.

In the case of *Nyberg vs. Solmson*, 205 Md. 150 106 A 2d 483 46 ALR 2d, 1051, the owner of nonconforming property operated a new car agency and subsequently the same property was used for parking and storage of motor vehicles. Both were nonconforming uses, however, both were permissible in the first commercial use. The court held that it was permissible to change from the one nonconforming use to the other and stated that “a nonconform-

ing use may be changed to a use of the same or higher classification.” (See also the annotation “Right to Resume Nonconforming Use After Period of Non-use or of a Different Use From That In Effect At or Before the Time of Zoning.”)

114 ALR 991.

“It may be stated generally that a mere temporary discontinuance of a prior nonconforming use will not of itself show an abandonment thereof so as to preclude resumption of such use.”

### POINT III.

APPELLANT IS ESTOPPED TO DENY THAT RESPONDENT HAS A NONCONFORMING, COMMERCIAL USE IN THE PROPERTY.

Exhibit P-1 is the Salt Lake County Valuation Notice on the subject property showing it to be valued and assessed as “Commercial-Industrial”; and the same exhibit which is the assessment roll of Salt Lake County further shows that the subject property has been assessed as “Commercial-Industrial” for the past five (5) years.

The owner, Mr. Morrison, stated that before he bought the property he checked the valuation notices on the property and found it to be taxed as commercial property. He further stated that this commercial classification was one of the considerations which induced him to purchase the property. (R. 19). Trial court correctly observed (R. 19) “I am quite certain that a man buying property would

pay more for it if it is commercial and on a corner than he would if it was residential and on a corner.”

Anticipating respondent’s reliance upon estoppel appellant has in Point No. 3 of its brief herein, stated that since the zoning ordinance itself is constructive notice of the zoning classification and owner or prospective purchaser of a nonconforming property cannot rely upon the assessment rolls as indicia of a nonconforming right. It is submitted that if taxpayers cannot rely on the official assessment notices regarding use of property it would take a judicial determination of every nonconforming operation to determine its status.

The county can be estopped even in governmental capacity where justice and equity require (see pocket supplement 19 Am. Jur. Sec. 167 page 75), “and even in matters affecting its governmental power, it may be sometimes estopped if equity and justice demand it.”

*Farrell vs. Placer County*, 145 Pac. 2d page 570 page 57.

It is the essence of justice that there should not be two standards of conduct, one for the state and its political subdivisions and the other for its citizens. (See *Semar vs. Fiskin*, 210 Pac. 378 27 ALR 1208).

For Salt Lake County to assess and collect taxes on this property in the heavier tax bracket of “Com-



mercial-Indsutrial” and then refuse to permit the activity for which it is taxed is unconscionable.

#### POINT IV.

SECTION 8-4-6 OF THE SALT LAKE COUNTY ZONING ORDINANCES VIOLATES THE DUE PROCESS CLAUSE OF THE CONSTITUTIONS OF THE UNITED STATES AND OF THE STATE OF UTAH.

Section 8-4-6 of the ordinance reads 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.”

In the event Section 8-4-6 of the ordinance is construed so that “vacant and remains unoccupied” does not connote an abandonment; that is not requiring something affirmative on the owner’s part to show he voluntarily relinquishes his right, it is respondent’s contention that Section 8-4-6 standing alone is unconstitutional and violates the due process clause of the constitutions of the United States and of the State of Utah, and further is the taking of property without just compensation.

It is true that some courts have followed a rule which permits a zoning statute to do away with nonconforming uses after a statutory tolerance period and cite, for authority, the case relied upon

by appellant, *Standard Oil Company vs. City of Tallahassee*, 5 Cir. 1950 183 F 2d 410, 412. Most cases, however, are based on the police power to terminate an obnoxious use,

“Most of the cases that follow the latter rule do so on the grounds that the gradual abatement of use found detrimental to the health, morals, safety or general welfare is a proper exercise of the police power.”

Thompson on Real Property, 1957, replacements, Vol. 10A Pocket Supplement, Section 5358.

There has been no contention made by appellant at any time that respondent's use of the property for a retail grocery store and service station is a nuisance or obnoxious in any sense or that it would be detrimental in any way to health, morals, safety, or general welfare. In *Buchanan vs. Warley*, 245 US 63 38 cases S. Ct. 60, 18 68 L. Ed. 149, the Supreme Court of the United States asserted,

“Property is more than a mere thing which a person owns; it is elementary that it includes the right to acquire, *use*, and dispose of it. The Constitution protects these essential attributes of property.”

In *Betty vs. City of Sidney*, 79 Mont. 314 257 Pac. 1007, 1009 56 ALR 872, we find,

“The constitutional guarantee that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed or

its value may be annihilated; it is owned and kept for some useful purpose and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived. Hence any law which destroys it or its value or takes away any of its essential attributes deprives the owner of his property.”

In *Chicago B & Q Railway Company vs. State of Illinois*, 200 US 561 26 S. Ct. 341 350 50 L. Ed. 596 we find the following:

“The constitutional requirements of due process of law which embraces compensation for private property taken for public use applies in every case of the exertion of governmental power. If, in the execution of any power, no matter what it is, the government, Federal or State, finds it necessary to take private property for public use it must obey the constitutional injunction to make or secure just compensation to the owner.”

In *City and County of Denver vs. Denver Buick, Inc.*, 347 Pac. 2d, 919 at page 931 there is found this significant quote,

“In ignoring or overlooking these basic tenets the law has been reduced to a state of contrarities, where ownership envisions *rights* in the law of property, but only privileges in the law of zoning and city planning.”

If the appellants interpretation of Section 8-4-6 of the ordinance is correct, it means that an owner

of a nonconforming use has no rights but only the privilege to continue it, so long as it remains a profitable venture, so long as it is not destroyed by an act of God, so long as there is no war or other circumstance which prevents him from operating. Property rights cannot be this fragile; the power of government cannot be this arbitrary.

“There is another answer to the question of what derives from ownership. It has been tested in the crucible of time, and by reason of its merit, constitutional provisions were conceived and cast in its mold. By it an owner has more than a conferable privilege to use his property; he has a legal right, subject to certain restraints to enjoy and use his property; his ownership and use springing therefrom are not privileges, but are rights which this government was instituted to protect.”

*City and County of Denver vs. Denver Buick, Inc.*, 347 Pac. 2d, 919 at page 931.

In *Spann vs. City of Dallas*, 235 SW 513, 515 1 9ALR 1387 it states,

“If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right.”

*City and County of Denver vs. Denver Buick, Inc.*, 347 P 2d 919, Page 932,

“Unless the further use of property imperils the safety, health, comfort or general welfare of the community it appears that a denial of such use would be invalid. And a zoning restriction must have a reasonable and substantial relation to the safety, health, mor-

als or general welfare; the connection may not be tenuous, vague or remote.”

### CONCLUSION

Appellant having the burden to prove an abandonment of the nonconforming use cannot by mere lapse of time sustain the burden required to show an abandonment of nonconforming use. Under the universal rule that all presumptions are in support of the judgment; and where, as here, findings of fact have not been made, the rule is that judgment should be affirmed, if there is any reasonable evidence to support it.

In the event this court decides contrary to the ruling of the trial court with respect to the operation of a retail gasoline station, respondent respectfully requests that the court declare that respondent has a nonconforming use in the property for the operation of a retail grocery store.

Respectfully submitted,

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Salt Lake City, Utah

Received a copy of the foregoing Brief of Respondent this ..... day of .....,  
A.D., 1961.

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Attorney for Appellant