1972

The Rogue v. The Utah Liquor Control Commission of the State of Utah And Sharp M. Larsen, F. Gerald Irvine, And Norma Giles Thomas, : Respondent's Brief

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AUTHORITIES CITED

Statutes:

UTAH CODE ANNOTATED (1953 as amended)

Other:

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

THE ROGUE, a non- profit Corporation,

Petitioner and Appellant,

vs.

THE UTAH LIQUOR CONTROL COMMISSION OF THE STATE OF UTAH AND SHARP M. LARSEN, F. GERALD IRVINE, AND NORMA GILES THOMAS, Constituting the members of said Commission,

Respondents.

Case No. 12721

BRIEF OF RESPONDENTS

STATEMENT OF NATURE OF CASE

This is an action in mandamus to compel the Liquor Control Commission of Utah to issue Appellant's liquor license upon a finding that Appellant complies with certain provisions of the liquor laws of the State of Utah.

DISPOSITION OF CASE IN LOWER COURT

The District Court denied Appellant's Writ of Mandamus and dismissed the case with prejudice.

NATURE OF RELIEF SOUGHT ON APPEAL

Respondents seek to have this Court hold that the District Court was without jurisdiction to make any decision on the merits. In the alternative the Respondents seek to have the decision of the District Court affirmed.

STATEMENT OF FACTS

Respondents basically agree with the facts as stated in Appellant's brief.

ARGUMENT

POINT I

THE DISTRICT COURT LACKED JURISDICTION OVER THE SUBJECT MATTER OF THIS SUIT.

The Third Judicial District Court reviewed the decision of the Liquor Control Commission and affirmed the action of the Commission. It was apparently never brought to the attention of the court that it lacked jurisdiction over this subject.

Subject matter jurisdiction cannot be waived, *Hardy v. Meadows*, 71 Utah 255, 264 p. 968 (1928), nor conferred by estoppel, *State v. Telford,* 93 Utah 228, 72 P. 2d 626, 628 (1937). It is permissable to raise this for the first time on appeal. *Davidson v. Munsey,* 27 Utah 87, 74 Pac. 431 (1903).

Section 32-1-32.6 Utah Code Ann. (Supp. 1971) provides for judicial review of action by the Liquor Control Commission. The pertinent part of that section provides:

> No court of this state (except the Supreme Court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission, . . . or to enjoin, restrain, or interfere with the commission in the performance of its official duties; provided, that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.

Therefore, the District Court had no jurisdiction to entertain any review or petition for writ of mandamus involving a decision of the Liquor Control Commission. Any attempt to excercise jurisdiction in such a case, or any decision or action taken, is void. This should be decisive of all other possible issues in this case.

POINT II

THE COMMISSION DID NOT VIOLATE ANY VALID ZONING ORDINANCE WHEN IT REFUSED TO ISSUE A LICENSE TO APPELLANT ON THE BASIS OF "NEIGHBORHOOD INCOMPATIBILITY."

The implication in appellant's brief is that the Commission violated a "valid zoning ordinance" of Salt Lake County in violation of Section 32-1-6(b). That implication is totally incorrect.

First, the decision by the County Commission to allow appellant to operate a private locker club and establish a state liquor store was not a valid zoning ordinance. The law is clear

that to create a valid zoning ordinance the statutory procedure must be strictly followed; otherwise any decision, even one purporting to be a zoning ordinance, is not a valid zoning ordinance. *Manning v. Reilly*, 2 Ariz. App. 310, 408 P. 2d 414 (1965); *Committee for Neighborhood Preservation v. Graham,* 14 Ariz. App. 457, 484 P. 2d 226 (1971); *Alabama Alcoholic Beverage Control Bd. v. City of Birmingham,* 253 Ala. 402, 44 So. 2d 593, (1950); *State ex rel. Spiros v. Payne,* 131 Conn. 647, 41 A. 2d 908 (1945). The statutory procedure for enacting County zoning ordinances is found in title 17 chapter 27 of the Utah Code. None of those procedures were followed, nor were they intended to be followed. The County Commission's decision was merely to grant a conditional use permit, thereby granting its consent as a local authority in compliance with Sections 16-6-13.1(6) and 16-6-13.5, thus allowing the Liquor Control Commission to procede.

Furthermore, the holding in *In re Salt Lake County v. Liquor Control Commission,* 11 Utah 2d 235, 337 p. 2d 488 (1960) and the meaning of Section 32-1-6(b) do not, by any stretch of the imagination, require the Liquor Control Commission to establish a State Store everywhere the County Commission says one is permissable. Section 32-1-6(b) gives the Liquor Commission power to decide:

> . . . the number and locations of the stores and package agencies to be established in the State; provided that a State Store or package agency shall not be located in violation of any valid zoning ordinance of any city, town or county of this State.

And subsection (l) gives the commission:

> . . . exclusive power to grant and issue all licenses and permits authorized by this act.

That means, for example, that a State Store may not be located in an area zoned exclusively for residential use. It gives the local authorities a veto power only; not an affirmative power to tell the commission where a State Store shall be located.

POINT III

THE COMMISSION DID NOT ENGAGE IN ZONING WHEN IT REFUSED TO ISSUE A LICENSE TO APPELLANT ON THE BASIS OF "NEIGHBORHOOD INCOMPATIBILITY."

County zoning is a specific act arising out of decisions made in strict compliance with Title 17 chapter 27 of the Utah Code Annotated. It refers to the legislative division of an area into districts having to do with structural design or general use to which buildings in a general district may be put. See Black's Law Dictionary, Rev'd 4th Ed., 1968. Such a definition in no way implies that every time a Board or Commission looks at the nature and character of a neighborhood it is therefore looking at "purely a zoning issue" (Appellant's brief, page 7).

The Liquor Control Commission is specifically required to look at such considerations in Section 32-1-36.15, which provides in part:

> In establishing any state store or package agency, the commission shall give consideration to the following: (a) The locality within which the proposed state or package agency is to be operated;

. . . .

(d) The extent of present or anticipated tourist traffic within the area of the proposed state store or package agency;
(e) The population in the area to be served by the proposed state store or package agency;
(f) The geographical location of such state store or package agency . . . .(Not to be near school, church, etc.)
(g) Such other facts or circumstances which may be considered material.

Furthermore, this section is not applicable to only public State stores as appellant suggests. By its terms it applies to "any" state store, and in the last paragraph of the section, referring to the permissable number of state stores, stores on private club premises are specifically mentioned and exempted from these particular considerations.

This provision, along with the Liquor Control Act, was passed in 1969, Laws of Utah 1969, ch. 83 by the same legislature that passed the provisions for licensing private clubs, Sections 16-6-13 et seq., Laws of Utah 1969, ch. 37. All related statutory provisions must of course be harmonized where possible, cf.*Glenn v. Farrell,* 5 Utah 2d 439, 304 P.2d 380 (1956), and these various provisions are easily read together to complement one another as the Legislature intended. The provisions of Section 32-1-36.15 clearly apply to any and all state stores, including those on the premises of private clubs.

In examining the neighborhood the Liquor Control Commission was not engaging in "zoning" but merely following the mandate of the legislature.

POINT IV

THE COMMISSION DID NOT EXCEED ITS AUTHORITY IN REFUSING TO ISSUE A LICENSE TO APPELLANT ON THE BASIS OF "NEIGHBORHOOD INCOMPATIBILITY."

In addition to the clear authorization to consider the neighborhood given to the Commission in Section 32-1-36.15, supra, Point III, the Liquor Commission is vested with broad discretion in finding facts pertinent to determining whether or not to issue a license.

It is not mandatory that the Commission issue any particular license to a particular applicant. Section 16-6-13.5 provides only that the Commission "shall have authority to issue a license to a social club", not that it "shall issue" such license. After providing for some of the requirements to be satisfied before a locker club may be licensed and contain a state store, Section 16-6-13.1 states that "if a state store is so established, liquor or wine may not be stored or sold in any other place than as designated . . . ." Such provisions clearly indicate that the issuance of a license is not merely a ministerial act occuring automatically on the occurance of certain events.

The Commission has broad discretion to:

> ". . . conduct hearings to inquire into any matter either of them deems proper concerning the provisions of this act (Liquor Control Act of 1969), and regulations adopted thereunder, and title 16 chapter 6, insofar as the same pertains to social clubs . . . licensed thereunder, or to the right to store or consume liquor on their premises . . . ." Section 32-1-32.1.

And the commission may require the applicant for a liquor license under title 16 chapter 6 to provide "any other information the commission may require." Section 16-6-13.6.

It is clear by the terms of title 16 chapter 6 that the issuance of licenses thereunder is to be "subject to the provisions of . . . the Utah Liquor Control Act of 1969 and regulations promulgated thereunder." Section 16-6-13.5 cf. Section 16-6-13.1(4) and (5).

Therefore, by the very terms of the statutes, as well as a reasonable interpretation of the entire legislative purpose evidenced in sections 32-1-1 et seq. and 16-6-13 et seq. the character of a neighborhood and its compatibility with a liquor licensee is a proper inquiry for the commission to make in coming to a decision. The commission is given broad authority to inquire into such matters.

It is true, as appellant states, that such broad authority may not be exercised in an arbitrary or capricious manner, but no such showing is made here. On the contrary the record indicates a full consideration by the commission of one of the factors the legislature obviously considered significant in granting liquor licenses of any kind, the nature of the neighborhood. On substantial evidence the commission made the factual determination that the residents were strongly opposed to the issuance of the liquor license, and therefore denied the application. In doing so the commission satisfied its statutory obligation.

CONCLUSION

The District Court had no jurisdiction to review any decision of the Liquor Control Commission and therefore any ruling on the merits by that court is void, whether correct or incorrect. Therefore it is respectfully submitted that this Court rule accordingly. In the alternative, it is submitted that the decision of the District Court in holding that the Liquor Control Commission acted properly and within its authority in denying appellant's application for a liquor license is a correct interpretation of the applicable statutes, and should be affirmed.

Respectfully Submitted,

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