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Mesa Development Company, Inc. v. Sandy City Corporation : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MESA DEVELOPMENT COMPANY,)	
INC.,)	
)	
Plaintiff/Appellant,)	
)	
vs.)	Case No. 970029CA
)	
SANDY CITY CORPORATION,)	Priority 15
)	
Defendant/Appellee.)	

APPELLANT'S REPLY BRIEF

Appeal from a final judgment of the Third District Court,
Homer F. Wilkinson, District Judge, Presiding

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COURT OF APPEALS

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CONTROLLING STATUTE

U.C.A. § 10-2-414 provides in part that:

Before annexing unincorporated territory having more than five acres, a municipality shall, . . . adopt a policy declaration with regard to annexation.

* * *

Before adopting the policy declaration the governing body shall hold a public hearing thereon. At least 30 days prior to any hearing, notice of the time and place of such hearing and the location where the draft policy circulation is available for review shall be published in a newspaper of general circulation in the area proposed for expansion except that when there are 25 or fewer residents or property owners within the affected territory, mailed notice may be given to each affected resident or owner. . . .

**APPELLANT'S RESPONSE REGARDING
SANDY CITY'S "STATEMENT OF FACTS"**

Contrary to Sandy City's assertion at page 2 of its brief, Mesa's objection to the annexation proceedings is based upon Sandy City's total failure to provide notice, as mandated by U.C.A. § 10-2-414, of "where the draft policy declaration [for the annexation] is available for review" at least 30 days prior to the adoption of the policy declaration.

In response to the numbered paragraphs in the Statement of Facts, Mesa Development responds as follows:

1. Whether or not Mesa Corporation "resided" in the annexed area is an issue of law. Mesa acknowledges that it did not have its principal place of business within the annexed territory.

2. Sandy City's reliance upon the 1979 annexation policy declaration in paragraph 2 of its Statement of Facts is a tacit admission that no policy declaration was properly adopted (U.C.A. § 10-2-414) either prior to or at the time of the Coulter/LDS Church annexation that is challenged in this action.

6. Even though the Sandy Planning Commission initially recommended annexation in October (R.100), the annexation petition was subsequently lumped with

additional parcels and the total property annexed in the Coulter/LDS Church Annexation Ordinance was in 10.55 acres. (R.79-81).

7. Even though the November 16, 1993 notice, as described in the affidavit of the Sandy City employee (R.59, 60) makes reference to a proposed policy declaration, the proposed declaration itself has never been disclosed or revealed by Sandy City. In addition, there is no support in the record, and indeed no claim is made by Sandy City, that the notices sent to property owners made any reference to the proposed policy declaration. (R.60). The November 4, 1993 notice published in the *Greensheet* contained no reference to the draft policy declaration.

8. At the December 7, 1993 city council meeting, Mr. Shaw made reference to “the actual annexation policy declaration which we’re required by state law to file with the County Boundary Commission. . .”. (R.101). There is nothing to suggest that this was a draft policy declaration as required by statute. In fact, at least one copy of the final declaration is dated November 15, 1993 (R.32). There is also no indication in those transcribed proceedings that there had been any notice to the public of the availability of the proposed draft policy declaration as required by U.C.A. § 10-2-414.

10. While it is true that the property annexed included property from several different petitions, a single ordinance was passed accepting all of the 10.55 acres at one time. (R.79). The property annexed exceeded five acres.

12. Contrary to Sandy City's assertion, Mesa's objection was that the notice which was given did not provide at least 30 days notice of the location where the draft policy declaration was available for public review as required by law. The Complaint alleged that Mesa was the owner of real property within the affected area. (R.2).

SUMMARY OF ARGUMENTS

Because the annexation ordinance at issue exceeded five acres in area, Sandy City was obligated by U.C.A. § 10-2-414 to prepare a draft policy declaration, give published notice of its availability, and give notice of a hearing on the draft, all prior to adopting the annexation ordinance. Sandy did none of these things, and as a result the ordinance is invalid.

The disconnection statute does not apply to this case because the annexation ordinance was invalid. See Chevron USA, Inc. v. City of North Salt Lake, 711 P.2d 228 (Utah 1985).

Mesa has standing to challenge the ordinance because it is an affected property owner. Individual property owners can challenge annexation proceedings.

ARGUMENT

I. THE COULTER/LDS CHURCH ANNEXATION ORDINANCE IS INVALID.

The threshold issue on appeal is whether or not the annexation ordinance can stand in the face of the procedural deficiencies which exist.

A. The annexation was of sufficient size to require a policy declaration.

Sandy City argues (p. 12) that because Mesa's property was 3.89 acres in size, that U.C.A. § 10-2-414 does not apply to Mesa's parcel. It was undisputed, however, that the total property annexed by the ordinance contained 10.55 acres (Ordinance No. 93-60, R.79) .

The trial court found that "Sandy's notice of the annexation proceedings did not specify a place where policy declaration would be available for public inspection." (R.226) Sandy City has not attacked this finding.

The statute at issue, U.C.A. § 10-2-414 provides in relevant part that:

Before annexing unincorporated territory having more than five acres, a municipality shall, on its own initiative, on recommendation of its planning commission, or in response to an initiated petition by real property owners as provided by law. . . adopt a policy declaration with regard to annexation.

As discussed in the December 7, 1993 city council minutes, Sandy City determined to consolidate several petitions. (R.101) Having made the decision to annex a parcel in excess of five acres, Sandy City took upon itself the obligation to properly adopt a policy declaration with regard to the annexation. Without identifying any support from any case or statute, Sandy City argues that because Mesa's parcel was less than five acres, even though it was included in an annexation ordinance which included over ten acres, that Sandy was entitled to ignore the requirements of § 10-2-414 regarding the draft policy declaration.

There is nothing in U.C.A. § 10-2-414 to support the argument that the statutory requirement is to be applied as Sandy City beckons. Indeed, the statute mandates that the municipality “. . . shall adopt a policy declaration with regard to the annexation. . .” after notice of and after a hearing on the draft policy declaration.

In U.C.A. § 10-2-401, et seq. the legislature has mandated that before cities annex property in excess of five acres that they analyze, based upon a draft policy declaration, the impact the proposed action would have on a number of issues. The policy factors enumerated in the annexation statute, U.C.A. § 10-2-401, would be frustrated in virtually every annexation if Sandy City's interpretation of the statutory scheme were to be adopted. If Sandy City's position were to be adopted, a city could

routinely consolidate a number of separate petitions that may potentially include hundreds of acres without undertaking the legislatively mandated analysis. This analysis process, of which the draft policy declaration is an integral part, is a critical precursor of the right given to cities to expand their boundaries. Sandy City asks this Court to ignore both the legislative purpose and the clear instruction of U.C.A, § 10-2-414.

Sandy City attempts to place the blame for its own procedural deficiencies on Mesa's shoulders, arguing a chamber of horrors if the ordinance is struck down. The entire annexation process was within Sandy City's control. Sandy City has not even attempted to argue that it properly adopted a policy declaration for this 10.55 acre annexation. The trial court concluded that the annexation did not comply with the statute. (R.227) There was never any public notice that a draft of the proposed policy declaration was available for public review prior to any of the hearings as required by § 10-2-414. Indeed, none of the notices given by Sandy City in connection with the annexation even refer to a draft policy declaration, let alone identify . . . "The location where the draft policy declaration is available for review.". There is no

evidence that a draft policy declaration ever existed for the Coulter/LDC Church annexation.¹

Sandy City makes a half-hearted argument at page 11 of its brief that its 1980 annexation policy declaration somehow applies to the 1993 annexation ordinance. This argument finds absolutely no support in U.C.A. §10-2-414. The Utah Supreme Court has specifically rejected such a contention in Paulsen v. Hooper Water Improvement District, 656 P.2d 459 (Utah 1982) (revd. on other grounds Pike v. Vernal City, 711 P.2d 240 (Utah 1985)). In Paulsen, the Utah Supreme Court observed that:

U.C.A. § 10-2-416 contemplates the adoption by a municipality of a specific policy declaration for each new area in excess of five acres that is annexed.

In Paulsen, the Court went on to observe that:

In addition, § 10-2-414 also requires the adoption of a specific policy declaration because the factors listed in § 10-2-414(2) will necessarily vary for each new area sought to be annexed. Moreover, the last paragraph of § 10-2-414 sets forth an elaborate notice provision with regard to the

¹ See for example, paragraph 7, page 6 of Sandy City's Statement of Facts. No reference is made to the draft policy declaration having been circulated to the public or otherwise made available to the public. In that same regard, at page 5, Sandy City contends that a copy of the proposed declaration was mailed to potentially affected governmental agencies on November 16, 1993. (R.32) This is especially curious in light of the alleged existence of a signed policy declaration dated November 15, 1993. U.C.A. § 10-2-414 requires that the draft be available at least 30 days prior to any hearing on the draft.

adoption of a proposed policy declaration. To permit an municipality to adopt a single master policy declaration for all future annexations of areas in excess of five acres would render § 10-2-414(2) and the notice provisions in the last paragraph of § 10-2-414 a nullity.

The law in Utah is well established that a separate specific policy declaration must be adopted, after notice and hearing in connection with each annexation that exceeds five acres in size. The annexation ordinance here was of 10.55 acres. The statute was not complied with and the Coulter/LDS Church Annexation Ordinance, 93-60 is void.

II.

MESA IS NOT REQUIRED TO COMPLY WITH DISCONNECTION STANDARDS OR PROCEDURES.

Sandy City argues (at page 8) that Mesa must seek relief through the disconnection statute. If the annexation which is challenged by Mesa were a valid annexation, Mesa should be required to pursue disconnection of all or part of the property from Sandy City. No legal authority exists to support Sandy City's argument that disconnection is the only remedy available where the annexation ordinance is invalid.

In Chevron USA, Inc. v. City of North Salt Lake, 711 P.2d 228 (Utah 1985) the Utah Supreme Court specifically observed that disconnection is not the proper method to attack an invalid annexation.

Annexation and disconnection obviously serve different purposes, are effectuated by different statutory procedures, and are governed by different criteria. A property owner of annexed territory cannot forego the specified legal procedure for challenging an annexation and instead resort to disconnection procedures because those procedures might be more successful for attacking an annexation. (at 231).

The Court went on to observe that a failure to challenge the annexation could result in an endless circle of litigation. The Chevron case also reaffirms the significance of the requirement that municipalities give notice of and hold a public hearing on the policy declaration where the annexation exceeds five acres.

In short, Sandy City's argument that Mesa must pursue deannexation is specifically rejected in the Chevron, supra, case.

III.

MESA HAS STANDING.

A. Mesa is a resident within the meaning of the statute. In its opening brief, Mesa set forth (pages 13 through 16, inclusive) the reasons why Mesa should be considered a "resident" within the annexation statute. As pointed out in Mesa's opening brief, the term "resident" is not defined in the annexation statute.

Additional support for the proposition that the term "resident" as used in the annexation statute refers to the property owner is found in U.C.A. § 10-2-423. That

provision addresses the subject of “residents” paying property taxes. This reference to “residents” as taxpayers further supports Mesa’s argument that the annexation statute’s use of the term “resident” means the property owner.

The Chevron USA, Inc. case, supra, also speaks of the obligation of the “property owner of annexed territory” to challenge the annexation. While standing was not an issue in the Chevron case, the Utah Supreme Court’s reference to the “property owner” as being obligated to attack the annexation lends support to the interpretation that it is property owners who are involved in the annexation process. Sandy City’s argument would mean that the owner of vacant property could never challenge the annexation process, even though that owner may have been the petitioner, while on the other hand, a renter who merely happens to live in the annexed territory could challenge the annexation. This anomaly would not advance the annexation process.

Sandy City next argues that because Mesa had actual notice of the annexation proceedings that it lacks standing to attack the irregularity of the proceedings. This argument fails for a number of reasons. Initially, the Freeman, infra, decision does not support Sandy’s argument that Mesa lacks standing. In Freeman v. Centerville City, 600 P.2d 1003 (Utah 1979), the plaintiff contended that the annexation statute

itself was constitutionally defective because of a deficiency in notice requirements within the statute. The Court concluded that the statutory scheme was constitutional and that the notice provisions for in the statute did not render it constitutionally defective.

As the Supreme Court observed, there was no claim in Centerville City that the city had not complied with the statute. The issue here is not whether the statute was invalid, but whether Sandy complied with the statutory notice requirement. The trial court concluded that while Sandy did not comply with the notice requirements, that it “substantially” complied. (R.227) In West Bountiful City v. Woods Cross City, 737 P.2d 163 (Utah 1987), the Supreme Court of Utah rejected the argument Sandy City advances and the trial court accepted. In West Bountiful, Woods Cross was given only 19 days notice of a hearing on a proposed policy declaration. (The statute then required 20 days notice.) Woods Cross actually attended the hearing, and later objected to the annexation based upon the inadequacy of the notice. Even though Woods Cross had actual notice and actually attended the hearing, Justice Zimmerman concluded that the inadequate notice precluded a finding of substantial compliance with the annexation statute by West Bountiful and struck down the challenged

annexation ordinance. In this case, Mesa stands in the same position as Woods Cross in the West Bountiful case. Mesa has standing.

The Utah Supreme Court has made it clear that a city's failure to strictly comply with the notice requirements of the annexation statute renders the annexation void, even where the complaining party had actual notice and was present. Paulsen v. Hooper Water Improvement District, *supra*; Doty v. Town of Cedar Hills, 656 P.2d 993 (Utah 1982); West Bountiful City, *supra*. Had Sandy City given proper notice of the availability of the draft policy declaration and had hearings on it, or had the draft proposal even been available for inspection, others may have appeared to object to the annexation and to the draft policy declaration.

IV.

MESA'S CLAIM DOES NOT VIOLATE LEGISLATIVE POLICY.

Legislative policy regarding annexation is set forth in U.C.A. § 10-2-401. No where is it indicated in the statute that municipalities may ignore the notice requirements by failing to give notice of the availability of copies of the draft policy declaration and notice of hearings on the declaration for annexations in excess of five acres.

There is nothing within the current annexation statutes that require challenges to annexation proceedings to be brought by the attorney general as Sandy City suggests at pages 16 and 17 of its brief. In 1979, the Utah Legislature repealed the former annexation statutes. Sandy City has not offered this Court any authority under the current statutory scheme which supports its position that only the attorney general can pursue challenges to an annexation. The Kansas case, Babcock v. Kansas City, 419 P.2d 882 at 884 (Kansas 1966), relied upon by Sandy City was effectively overruled in Kansas by changes in legislation similar to those enacted in Utah in 1979. See City of Lenexa v. City of Olathe, 620 P.2d 1153 (Kansas 1980) (overruled on other grounds, 625 P.2d 423).

Sandy City's argument is also implicitly rejected in the vast number of post 1979 Utah cases challenging annexation that were private actions. See for example, Chevron v. City of North Salt Lake, *supra*; Sweetwater Properties v. Town of Alta, 638 P.2d 1189 (Utah 1981); Szatkowski v. Bountiful City, 906 P.2d 902 (Utah App. 1995). If no private right of action had existed, it seems likely that the Utah courts would have said so by now.

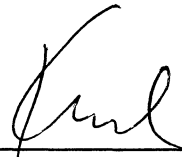
Sandy City, at various points in its brief, raises a chamber of horrors argument that Mesa's action would disenfranchise a number of unsuspecting residents. Mesa

was not the cause of the inadequate notice that dooms the ordinance. Mesa did not violate the annexation statute. If any fingers are to be pointed, they can be directed only at Sandy City. Sandy City has not suggested that it is incapable of attempting to defend its own actions. There are no statutory requirements that all of the property owners be included in this action. Certainly none have been identified by Sandy City.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the Coulter/LDS Church Annexation Ordinance, 93-60 should be declared invalid.

DATED this 19 day of May, 1997.




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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing were mailed, postage fully prepaid, on the 19 day of May, 1997, to the following:

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