

2008

Merril v. Park City : Brief of Appellant

Utah Court of Appeals

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THE UTAH COURT OF APPEALS

RALPH MERRILL d/b/a QUINN'S
JUNCTION PARTNERSHIP,

Appellant/Plaintiff,

vs.

PARK CITY, a body politic and political
subdivision of the State of Utah, and JOHN
DOES 1-50,

Appellees/Defendants.

Appeal No. 20080452-CA

BRIEF OF APPELLANT, RALPH MERRILL
d/b/a QUINN'S JUNCTION PARTNERSHIP

ON APPEAL FROM A FINAL JUDGMENT OF DISMISSAL OF THE THIRD
JUDICIAL DISTRICT COURT FOR SUMMIT COUNTY, CASE NO. 050500205,
HONORABLE BRUCE LUBECK, DISTRICT JUDGE

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JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction pursuant to Utah Code Ann. §§ 78A-4-103(2)(b) and (j) (2008).

STATEMENT OF THE ISSUES ON APPEAL

- I. DID THE DISTRICT COURT ERR IN RULING THAT THE FACTS AS ALLEGED BY PLAINTIFF COULD NOT SUPPORT A CLAIM THAT DEFENDANT'S DENIAL OF PLAINTIFF'S ANNEXATION PETITION WAS ARBITRARY, CAPRICIOUS, OR ILLEGAL?**
- II. DID THE DISTRICT COURT ERR IN RULING THAT THE FACTS AS ALLEGED BY PLAINTIFF COULD NOT SUPPORT A CLAIM FOR INVERSE CONDEMNATION?**

STANDARD OF REVIEW

A district court order granting a motion to dismiss is reviewed on appeal for correctness, giving no deference to the trial court's determination. Code v. Utah Dep't of Health, 2007 UT App 390, ¶ 3, 174 P.3d 1134. A trial court considering a motion to dismiss under Rule 12(b)(6) is required to accept the facts as pleaded as true. Russell v. Standard Corp., 898 P.2d 263, 264 (Utah 1995). Accordingly, the facts asserted herein are deemed admitted for the purposes of this appeal.

DETERMINATIVE STATUTES / ORDINANCES

Utah Code Annotated §10-9a-801(3). See Addendum 1.

STATEMENT OF CASE AND COURSE OF PROCEEDINGS

I. Nature of the Case

Plaintiff / Appellant Ralph Merrill, d/b/a Quinn's Junction Partnership ("QJP") filed this action to challenge the decision by Defendant / Appellee Park City ("Park

City”) to deny QJP’s annexation petition. QJP alleged that although the property at issue in this dispute (the “QJP Property”) lies in Summit County, outside the boundaries of Park City, that Park City has for at least the past fifteen (15) years exercised land use control over the QJP Property by virtue of certain agreements between Summit County and Park City. As set forth in greater detail below, Park City denied QJP’s annexation petition as part of an ongoing course of conduct, which has included several moratoria on development and impossible development requirements, designed to preclude all development on the property, and either maintain the property in its current undeveloped state or obtain the property for open space at an artificially depressed price. In addition, by exercising its annexation power to maintain the QJP Property as open space by preventing any economically viable use for the QJP Property, Park City inversely condemned the QJP Property.

II. Course of Proceedings and Order Dismissing Complaint

District Judge Lubeck dismissed QJP’s Revised Second Amended Complaint on April 22, 2008, ruling that the facts as alleged by QJP could not establish that Park City’s denial of QJP’s annexation petition was arbitrary, capricious, or illegal, and that QJP had failed to state a valid claim for inverse condemnation. See Order of April 22, 2008, Addendum 2. QJP appeals from that Order of dismissal.

STATEMENT OF FACTS

The following facts must be accepted as true and considered in the light most favorable to QJP.

Parties

1. Plaintiff, Ralph Merrill, d/b/a Quinn's Junction Partnership, ("QJP") has for the past eighteen (18) years been the owner of approximately thirty (30) acres of real property in the Snyderville Basin, Summit County, Utah (the "QJP" property). (R. 140, ¶ 1).

2. Defendant Park City ("Park City") is a body politic and a political subdivision of the State of Utah. (R. 140, ¶ 3).

The QJP Property

3. The QJP Property lies northeast of Park City and is contiguous to Park City's boundary on the north and contiguous to a parcel of property owned by Barnes Bank, which has been annexed into Park City. The QJP Property is physically located on the Southwest corner of the major intersection of U.S. Interstate 40 and State Road 248, commonly referred to as Quinn's Junction. (R. 141, ¶ 6; see also Exhibit 2).

General Allegations

4. QJP purchased the QJP Property in 1990 at commercial prices because at that time the QJP Property was the only property in Quinn's Junction designated as a hard commercial zone. (R. 141-142, ¶¶ 8, 11-12).

5. Extensive infrastructure for commercial development was placed at or near QJP Property, including the only sewer line along the southwest corridor of SR 248, within 400 feet of Quinn's intersection. (R. 141, ¶ 9).

6. QJP relied on the commercial zone, as well as representations by City and County officials, in purchasing the property at commercial prices in about 1990. (R. 141, ¶ 11).

7. QJP was assessed and paid a property tax based on the commercial zone for the QJP Property. (R. 142, ¶ 12).

8. On January 14, 1993, Summit County down-zoned the QJP Property from a commercial zone to a zone that allowed only 1 unit per 40 acres to be built no sooner than ten (10) years and as many as twenty (20) years into the future. (R. 142, ¶ 14).

9. On May 3, 1993, QJP filed an application with Summit County to amend the General Plan to reinstate the commercial use and eliminate the ten or twenty year delay so that QJP could obtain the rights to an economically viable use and immediate development. The application was denied. (R.142, ¶ 15).

10. At the time it denied QJP's May 3, 1993 application, Summit County had in place a land use plan giving land use control over the QJP Property to Park City because of interlocal agreements between the City and County and because the QJP Property was within Park City's annexation declaration zone. Summit County directed QJP to request all development approvals from Park City pursuant to the interlocal agreements between Park City and Summit County, which required Park City's approval for any development of the QJP Property. (R.142, ¶¶ 13, 15, 17).

11. QJP then proceeded to exhaust its administrative remedies against Summit County, eventually commencing litigation against Summit County, which is still pending, Merrill v. Summit County, Civil No. 950600004. QJP has simultaneously

pursued its vested rights and constitutional claims through administrative remedies provided by the City and County.¹ (R. 142, ¶ 16).

12. On September 28, 1993, Summit County and Park City formalized their pre-existing agreement to allow Park City to exercise de facto control over property beyond its borders by executing a formal interlocal planning agreement (the “Interlocal Agreement”), which is still being enforced today.² (R. 143, ¶ 18; see also Exhibit 5).

13. Under the terms of the Interlocal Agreement, Summit County “authorize[d] and formalize[d] Park City’s participation in land use planning, development approvals, and the provision of urban services in unincorporated portions of Summit County and/or in proximity to the City limits.” (Id.)

14. In addition, the Interlocal Agreement provided that any development at Quinn’s Junction, including the QJP Property, should be compatible with Park City’s standards and requirements, which are not part of Summit County’s land use code. (R. 143, ¶ 20).

15. The effect of the September 28, 1993 Interlocal Agreement, as well as other agreements between Park City and Summit County, was to force QJP to obtain

¹ QJP believes Summit County should also be a party to this action, however, when the action was instituted QJP was already engaged with the County in an action before the Property Rights Ombudsmen. This action was dismissed before the Ombudsmen action was concluded and Summit County could be made a party.

² Park City has also exercised control over the northeast side of Quinn’s Junction, consistently reaffirming to QJP and the public at that time that no development would occur there because of wetland issues, slope, and critical open space view areas, even though the northeast side of Quinn’s Junction was also not within Park City’s boundaries. (R. 145, ¶ 29; see also Exhibit 7).

annexation into Park City and development approval from Park City before it could obtain any economically viable use for the QJP Property. (R. 144, ¶ 22).

16. The ultimate effect of the Interlocal Agreement and other City/County agreements was to force QJP to comply with ambiguous, often conflicting, and vague development criteria of Park City, even though the QJP Property was not located in Park City. (R. 144, ¶ 23).

17. Even though the Interlocal Agreement expired by its terms, Park City is still exercising control of the QJP Property by requiring annexation and approval for any development. (R. 161, ¶ 89).

18. Over the next fifteen (15) years, QJP was not allowed to develop its property either in Summit County or Park City, although, as explained below, it continued to make diligent efforts to obtain development approval from both Park City and Summit County. (R. 144, ¶ 26). As part of its efforts, QJP sought and obtained a hearing in Summit County regarding its claim that it possessed a vested right in certain development permits on the QJP Property. (R. 145, ¶ 28).

19. In the vested rights hearing, Summit County, through its planning department, agreed to restore the previous commercial use to the QJP Property by designating the QJP Property 'commercial' in its general land use plan. On March 18, 1996, Park City also recognized the restored commercial zoning of the QJP Property,

designating the property as commercial on its draft land-use maps and General Plan.³ (R. 145, ¶ 28; see also Exhibit 6).

20. QJP was still not contiguous to Park City, however, so it could not apply for annexation at that time. (R. 145, ¶ 27).

21. In about March 1996, Summit County, which had agreed to restore a commercial use to the QJP Property by virtue of the vested rights hearing on August 29, 1995, refused to do so. (R. 147, ¶ 37).

22. On March 20, 1997, Park City altered its General Plan, designating the QJP Property as only a “possible commercial receiving zone” instead of a commercial zone. (R. 145, ¶¶ 30-31; see also Exhibit 8.)

³ The 1995 Park City General Plan shows the QJP Property as the only possible commercial use at Quinn's Junction. (R. 146, ¶ 32; see also Exhibit 9). The 1995 Park City General Plan contains the following language relative to the Southwest corner of Quinn's Junction which includes the thirty (30) acre QJP parcel:

It is expected that property owners will be able to achieve reasonable development potential from their land while meeting ... community objectives. (R. 146, ¶ 34; Exhibit 10, p. 31).

The 70-acre parcel [including the QJP 30-acres] is unique in character because of its highway access, visibility, relatively gentle topography, vegetation (agricultural use), relationship to other recreational attractions (specifically Jordanelle Reservoir), and relationship to the Silver Creek corridor. All of these features demand special focus. (R. 146, ¶ 34; Exhibit 11, p. 43).

[G]uidelines [should be established] for a mixed use, clustered, commercial development on the Southwest corner parcel. (R. 146, ¶ 34; Exhibit 12, p. 44).

23. The 1997 Park City General Plan, described above, contains the following language on page 38:

Maintain an open space corridor from the ridge tops along highway 40 to highway 248. Using the ridge tops as a boundary, maintain the same open space corridor along the North side of the Highway 248 to the Treasure Mountain Middle school. (R. 146, ¶ 35; Exhibit 13).

24. During QJP's discussions with Summit County at this time, it was made clear to QJP that Park City's approval was necessary before any development could occur. (R. 147, ¶ 38).

25. Despite the passage of both the County and City General Plans suggesting a possible commercial use for the QJP Property, both Park City and Summit County continued to obstruct QJP's efforts to obtain any development approval for the QJP Property, as described below. (R. 148, ¶ 44).

26. In furtherance of this strategy of obstruction, Park City and Summit County informed QJP that as a pre-condition to any development application or formal annexation petition, QJP would be required to organize all property owners in the Park City annexation declaration zone, and prepare a master plan and annexation petition for the area. (R. 148, ¶ 41).

27. From 1998 through May 3, 1999, QJP attempted to organize and formulate a master plan with the property owners at Quinn's Junction as required by Park City. (R. 148, ¶ 42; see also Exhibit 15).

28. Park City, however, continuously undermined QJP's attempts to organize property owners in annexation declaration zone by purchasing large tracts of property

from the very property owners QJP was directed to organize at Quinn's Junction. (R. 149, ¶ 47; see also Exhibit 17).

29. Prior to May 3, 1999, while QJP was attempting to organize property owners, QJP was advised by Park City that it would not annex or approve any development on the QJP Property until after the 2002 Utah Winter Olympics. (R. 148, ¶ 43).

30. Together with Summit County, Park City pursued a strategy of land use regulation which was intended to bankrupt QJP and other property owners or force QJP and others to sell their property to Park City as open space at a fraction of those properties' value by assuring they would never be annexed or allowed any economically viable use. (R. 148, ¶ 44).

31. Having delayed any development of the QJP Property until at least 2002, Park City on May 3, 1999 sent QJP its first inquiry regarding purchasing the QJP Property, by letter from Sally Elliot (Summit County Commissioner from 2005 to present) through a Park City citizen group known as "COSAC." (R. 149, ¶ 46; see also Exhibit 16).

32. After the 2002 Utah Winter Olympics, QJP again approached Park City and Summit County about annexing and obtaining approval to develop the QJP Property. QJP was informed, however, that the City and the County had commenced a new land use study of Quinn's Junction and that no development would be accepted or approved until the completion of the Study. (R. 149, ¶ 48). By letter to Park City, Summit County "made clear that both the County and City are legally prohibited from considering

development proposals in the study-area until the study is complete.” (R. 150, ¶ 49; see also Exhibit 18 (emphasis added)).

33. This prohibition on development was, in fact, an illegal moratorium prohibited under Utah law, including Utah Code Annotated 10-9a-504,⁴ imposing on QJP a temporary zoning ordinance (TZRO) without procedural due process.

34. As part of their land-use study, Park City and Summit County hired Steve Coyle, an outside land use expert from Oregon, to review its land use regulations. On September 11, 2003, the consultant sent a draft report to Park City and to Summit County. (R. 151, ¶ 53; see also Exhibit 20).

35. Mr. Coyle’s draft report found that Park City and Summit County land use regulations were vague, ambiguous, inequitable, and entirely subjective in their application, creating litigation by providing no clear objective criteria for development approvals. (R. 150, ¶ 52; see also Exhibit 19).

36. Mr. Coyle’s report found the land use code was a discretionary code that in practice:

- “[P]roduce[d] a high level of uncertainty about the successful outcome of a proposed development plan [due to the lack of] specific, measurable criteria for achieving an approval.”
- “[P]lace[d] virtually all of the responsibility on property owners ... to meet the code's discretionary criteria, [and provided] no clear plan approval pathway.”

⁴ Under Utah law a temporary land use regulation could not be longer than 6 months. U.C.A. § 10-9a-504 (2).

- Rendered “appropriate design . . . secondary to a process that relies on a subjective evaluation by the agency reviewers.”

(R. 151, ¶ 54; see also Exhibit 19, p. 2).

37. Mr. Coyle’s report found that Park City’s and Summit County’s discretionary land use policies had the effect of “1) creating a low density development on individual parcels that are neither resource efficient nor coherently planned in the larger context; 2) selling land as open space preserves, and; 3) litigation.” (R. 151, ¶ 55; see also Exhibit 19, p. 2).

38. Mr. Coyle’s report also found that “while the purchase of land in the area as open space may be a stated goal of both City and County officials, intentionally or unintentionally relying on a discretionary code system to effectively reduce property values may result in a less equitable means to achieve this end.” (R. 151, ¶ 56; see also Exhibit 19, p. 2).

39. Mr. Coyle’s report also criticized the political nature of the “discretionary zoning” system, which “vests substantial political control over the planning process [and] can provide leverage for the promotion of pro-growth, no-growth or other land use agendas by restricting or facilitating the location, quality, and quantity of development that is not tied to a specific plan.” (R. 151-152, ¶ 57; see also Exhibit 19, p. 2).

40. Moreover, Mr. Coyle’s report found that the political nature of the discretionary zoning system makes it difficult to achieve a “specific plan,” or Master Plan for an area, because it “works against public support, [and inequitably creates]

higher-zoned economic winners and base-zone losers as a result of the planning process, a further deterrent to broad support.” (R. 151-152, ¶ 57; see also Exhibit 19, pp. 2-3).

41. Mr. Coyle also found Quinn’s Junction to be an appropriate location for commercial development, including retail, commercial mixed use, industrial and residential.⁵ (R. 152, ¶¶ 58-60; see also Exhibit 19, pp. 4-5).

42. Rather than present this draft or submit a final report to the public, or have Mr. Coyle continue, Park City and Summit County terminated Mr. Coyle, buried the report from public view, and avoided the use of other outside consultants. (R. 152, ¶ 61).

43. Thereafter, Park City and Summit County prepared their own report titled *'Quinn's Junction Study' (Joint Planning Commission Development Principles)*, which it thereafter treated as its General Plan (the "QJ Study"). (R. 153; ¶ 63; see also Exhibit 21).

44. On October 21, 2004, Park City annexed a portion of its own property on the north and east side of Quinn's Junction, making the QJP Property contiguous to the Park City limits for the first time. (R. 154, ¶ 68). Before October 21, 2004, QJP could not file a petition to annex into Park City because the QJP Property was not contiguous to the City boundary. (R. 145, ¶ 27).

45. After the October 21, 2004 annexation of the Park City parcel, QJP jointly petitioned for annexation into Park City with Barnes Bank, the owner of a parcel adjacent to the QJP Property. (R. 154, ¶ 70).

⁵ There have been at least 3 major studies over the past 10 years which have consistently found a commercial demand at Quinn’s Junction and the QJP Property as the logical place for a commercial node. (R. 152, fn. 2).

46. QJP and Barnes Bank hired the same consultant and prepared a joint petition showing the same master planned development on the fifty-four (54) contiguous acres they own adjacent to the City boundary. (R. 154, ¶ 71; see also Exhibit 22).

47. For these services, QJP paid in excess of \$50,000, which included a non-refundable filing fee paid to Park City and a planning fee to the consultant. (R. 154, ¶ 72).

48. Because of expensive non-refundable filing fees, it has been the informal policy of Park City and prospective applicants to get preliminary approval from the agents and employees of the City prior to submission of an annexation petition. (R. 154, ¶ 73).

49. In accordance with that practice, QJP met with Park City and was told that an annexation petition from QJP would be favored. (R. 154, ¶ 74).

50. On May 14, 2004, Park City had unanimously approved a prior pre-annexation agreement with QJP which would have provided for substantial commercial development on the QJP Property. (R. 158, ¶ 86(f); see also Exhibit 36).

51. During meetings with Park City, however, QJP was advised that it should not file a joint petition with Barnes Bank because Park City was going to reject the annexation of the Barnes Bank property and QJP's petition would also be rejected if it filed a joint petition with Barnes. (R. 154-155, ¶ 74).

52. Park City also advised QJP that the reason it annexed only a small peninsula of its own land on the northeast border of the QJP Property on October 21, 2004 was to avoid annexing the Barnes Bank property. (R. 154-155, ¶¶ 68, 75).

53. QJP was further advised that if it filed a separate petition, Park City would accept the petition and annex the QJP Property into the City. (R. 155, ¶ 76).

54. QJP advised Barnes Bank of this fact and the parties agreed to separate their joint petition and file amended, separate petitions. (R. 155, ¶ 77).

55. Barnes Bank, a/k/a Park City Heights, then sent Park City a letter of protest. (R. 155, ¶ 78; see also Exhibit 24).

56. On or about January 24, 2005, QJP and Barnes Bank, a/k/a Park City Heights filed separate annexation petitions, which contained the same proposed per acre development and densities. (R. 155, ¶ 79; see also Exhibits 25-26).

57. On March 10, 2005, Park City held a brief hearing and considered both annexation petitions. (R. 155, ¶ 80; see also Exhibit 27).

58. On March 10, 2005, before the annexation hearing, the Park City staff submitted a **positive** recommendation regarding annexation of the QJP Property. (R. 156, ¶ 83(b); see also Exhibit 30).

59. During the March 10, 2005 hearing, however, Park City unanimously accepted the Barnes Bank petition and denied the QJP petition by a vote of three to two. (R. 155, ¶¶ 80-82).

60. The first reason for the denial stated in the hearing was the potential for “the creation of [an] island, or, at a minimum, a peninsula” due to certain adjacent land owned by the Osguthorpe family. (Exhibit 28, p. 7).

61. The alleged island or peninsula, however (the Osguthorpe parcel) arose because Park City deliberately annexed only a portion of a parcel it owned adjacent to

the QJP Property, and failed to include all contiguous city-owned property within that annexation as required by State law. (R. 157, ¶ 86(a)). Park City’s strategic annexation of its own property artificially created the technical issues of contiguity, peninsulas and islands.⁶ (R. 159, ¶ 86(k)).

62. In addition, the owner of the Osguthorpe parcel which allegedly created the peninsula caused a letter to be sent to Park City on March 8, 2005, informing Park City that he was “now willing to consider inclusion of the trust property in the proposed annexation” of the QJP Property and Barnes Bank property. (R. 158-159, ¶ 86(j); see also Exhibit 29).

63. Another reason stated in the hearing for the rejection of the QJP Petition was that the “proposed design” was incompatible with the “spirit” of the City’s General Plan (the “QJ Study” referenced above in Paragraph 43). (Exhibit 28, p. 8).

64. The annexation petition submitted by Barnes Bank and approved by Park City, however, was nearly identical to the annexation petition and development proposed by QJP, including the same per acre development and densities. (R. 155, 157, ¶¶ 79, 86(c); see also Exhibits 25-26).

65. There is no legitimate basis for Park City to differentiate the Barnes Bank property from the QJP Property based on a prior pre-annexation agreement, dated July 2,

⁶ In addition, the creation of so-called peninsulas through annexation does not generally prevent Park City annexations. For example, about eight months prior to the denial of QJP’s annexation petition, Park City annexed two separate properties in the Quinn’s Junction area that both created similar peninsulas. (R. 157, ¶¶ 86(a), (b)). Both properties are currently undergoing commercial development. (Id.)

1992, between Park City and Barnes' predecessor because by its terms, the Barnes Bank property was subject to the same current land use regulations as the QJP Property and the Barnes' petition included property owners that did not have pre-annexation agreements. (R. 158, ¶ 86(h)).

66. On March 13, 2005, three days after the annexation hearing, the Mayor of Park City called Ralph Merrill and again offered to buy the QJP Property to be used as open space. Merrill declined. (R. 156, ¶ 83(e)).

67. One day later, on March 14, 2005, Park City issued a formal notice of rejection of QJP's annexation petition, without giving any reason. (R. 156, ¶ 83(f); see also Exhibit 32). The formal notice also contained outright errors, including the statement that the vote against annexation was 5-0 when in reality it was 3-2. (See Exhibit 28, pp. 9-10; see also Exhibit 33).

68. On March 19, 2005, the Park City Mayor issued the following statement to the press:

There is land along Park City's S.R. 248 entry-way that could be purchased with revenues from another bond. At this point that's the place that's still open and probably faces the greatest threat from development.

(R. 156, ¶ 83(h); see also Exhibit 34).

69. Upon information and belief, the QJP Property is the land on the S.R. 248 entry-way that the mayor referred to in his comments to the press. (R. 156-157, ¶ 84).

70. Park City used subjective, vague, ambiguous, and unlawful criteria to reject QJP's petition including the QJ Study which the Court should declare void or illegal pursuant to Utah Code Annotated 10-9a-801(3). (R. 159, ¶ 86(m)).

71. Park City used land regulation to acquire QJP's property as open space without just compensation and due process. (R. 159, ¶ 86(n)).

72. Park City did not apply the law equally to QJP and other similarly situated properties as required by its own municipal ordinances and the Utah State Constitution. (R. 159, ¶ 86(o)).

73. Even though the QJP Property is not within Park City's boundaries, Park City has and is exercising land use control over the Property, and is refusing to allow any economically viable use of the Property to proceed. (R. 160, ¶ 88).

74. Park City's exercise of control over the QJP Property, together with its refusal to annex the QJP Property or approve any development thereon, has left QJP with no economically viable use for the property. (R. 161-162, ¶ 94).

75. In addition, Park City has deprived QJP of its reasonable investment-backed expectations for the QJP Property, based on the commercial land prices and taxes paid by QJP, as well as the various fees and other expenses it has incurred as a result of representations by and requirements of Park City. (R. 162, ¶ 95).

76. Park City's refusal to annex the QJP Property or allow any economically viable use does not substantially advance any legitimate public interest, nor is it reasonably related or narrowly tailored to any such interest. (R. 162, ¶ 96).

77. QJP has exhausted its administrative remedies, Park City has waived any such requirement, or it would be futile for QJP to take further action in this regard. (R. 162, ¶ 97).

SUMMARY OF THE ARGUMENT

This action is the result of Park City's efforts for the past fifteen (15) years to preclude development on the QJP Property and to maintain that property as open space for the benefit of Park City without payment of just compensation. The QJP Property lies in Summit County, outside the boundaries of Park City. Nonetheless, when QJP petitioned Summit County to reinstate a commercial zone on the QJP Property in 1993, after a downzoning from commercial to base density, QJP was informed that it could not obtain any development for the QJP Property without approval and annexation by Park City. That requirement arose from the QJP Property being located within Park City's annexation declaration zone and being covered by interlocal agreements between Summit County and Park City giving Park City control over the property.

For the last fifteen (15) years, up to and including the present time, Park City has imposed one obstacle after another to block QJP's efforts to obtain an economically viable use for the QJP Property. Because the QJP Property was not contiguous to Park City until October, 2004, QJP spent the years from 1993 through 2004 seeking development approval from both Summit County and Park City without annexation. Following a determination of vested rights by Summit County in 1995, and several changes to Park City's General Plan, in 1998 Summit County designated the QJP Property as a possible village center. As a precondition to obtaining approval for any

such development, however, QJP was required to organize the neighboring landowners and craft a Master Plan, along with obtaining the approval of Park City, for the Quinn's Junction area. QJP was thwarted in those efforts, however, first by Park City's strategic land purchases in the area, and then by Park City's 1999 decision not to approve any development before the 2002 Winter Olympics. Park City then made its first inquiry to QJP regarding purchasing the QJP Property for open space, after having depressed the price by consistently precluding any development for years before and into the foreseeable future.

The completion of the Winter Olympics brought only further delay for QJP, as Park City then blocked all development efforts pending the completion of a three-year land-use study at Quinn's Junction. When the outside expert retained by Park City and Summit County to conduct the study reached conclusions adverse to Park City's intentions, Park City fired the expert, disregarded his findings, and crafted its own report.

During the lengthy study moratorium, the QJP Property became contiguous to Park City's boundaries for the first time. QJP then dutifully obtained a pre-annexation agreement from Park City and filed its petition for annexation. Inexplicably, in spite of the pre-annexation agreement and representations by Park City that the QJP Petition would be favored, Park City denied QJP's petition. Park City's simultaneous approval of a nearly identical petition filed by an adjacent landowner revealed that Park City's stated reasons for the QJP denial, including the creation of a peninsula and incompatibility with Park City's land-use study, were pretextual and false. After the denial of QJP's

annexation petition, Park City made another offer to buy the QJP Property as open space at depressed prices, revealing the true purpose of its annexation decision.

A municipality's decision regarding an annexation petition is generally entitled to deference from the courts, unless the facts demonstrate that the decision was "arbitrary, capricious, or illegal," or tainted by an abuse of power or fraud. QJP has clearly made the factual allegations necessary to establish that Park City's decision is subject to the Court's review pursuant to the standards set forth by the Utah Appellate Courts. The facts show that Park City has abused its annexation power and its authority under the interlocal agreements with Summit County to obstruct any and all efforts by QJP to obtain an economically viable use for the QJP Property. As set forth in greater detail below, Park City has imposed one delay and obstruction after another for the purpose of stopping all development of the QJP Property to further its open space agenda. This case presents an "unjust" situation demanding judicial review.

Park City denied QJP's annexation petition for the purpose of precluding all development on the property, and either maintaining the property in its current undeveloped state or obtaining the property for open space at an artificially depressed price. The allegations of QJP's Revised Second Amended Complaint, when viewed under the standard applicable to a Rule 12(b)(6) motion to dismiss, state a valid claim that Park City's annexation decision, in the context of Park City's conduct for the past fifteen (15) years, was arbitrary, capricious, or illegal. In addition, the allegations regarding Park City's actions and intent to preclude any development by abusing its

annexation power and interlocal agreements with Summit County, if established at trial, state a valid claim for inverse condemnation of the QJP Property.

ARGUMENT

I. The Deference to be Afforded Park City’s Annexation Decision Does Not Prevent Judicial Review of Park City’s Arbitrary, Capricious, and Illegal Motives, Purposes, and Actions in this Case.

The Utah Supreme Court has stated that “[a] determination of city boundaries is a legislative function. . . [for which] courts are reluctant to interfere.” Child v. Spanish Fork, 538 P.2d 184, 186 (Utah 1975) (citing Bradshaw v. Beaver City, 493 P.2d 643 (Utah 1972)). However, the Supreme Court has also unequivocally affirmed the courts’ authority and duty to intervene where “the decisions or actions taken . . . are so wholly unreasonable and unjust that they must be deemed capricious and arbitrary in adversely affecting someone’s rights.” Child, 538 P.2d at 186; see also McQuillan Mun. Corp. §7.41 (2007) (“Since the change of municipal boundaries is regarded as a legislative question . . . [the municipality’s] decision is final as to the existence of the facts in the absence of abuse of power or fraud” (emphasis added); Utah Code Ann. § 10-9a-801(3) (2007) (court shall determine whether municipality’s land use decision is “arbitrary, capricious, and illegal.”).

In Creekside Associates, Inc. v. City of Wood Dale, 684 F. Supp. 201 (N.D. Ill. 1988), the U.S. District Court for the Northern District of Illinois confronted a similar claim to that of QJP in this case. In Creekside, the plaintiffs could not obtain development permits for their property without first being annexed into the defendant city. Id. at 203. Plaintiffs submitted a plan and annexation proposal to the City, which

was originally accepted by the Planning Commission before being summarily rejected by the City Council. Id. Plaintiffs “alleged that Wood Dale’s refusal to annex and appropriately zone the property” was arbitrary and capricious because it “bore no relationship to public policy and served no legitimate public interest.” Id. at 205. The defendant city moved to dismiss, but the court ruled that:

While plaintiffs’ burden of proving the absence of any legitimate justification for Wood Dale’s decision may be difficult, we cannot conclude on the face of the complaint that a trier of fact could not find that Wood Dale’s failure to annex and zone the parcel for development in compliance with the Wood Dale plan was arbitrary and capricious. On this basis alone, Plaintiffs have stated a cognizable claim.

Id.

The facts are more compelling in this case. QJP entered into a pre-annexation agreement with Park City on May 14, 2004, and the Park City Council on March 10, 2005 arbitrarily and capriciously reneged on that agreement and rejected QJP’s annexation petition. Moreover, as explained in more detail below, Park City rejected QJP’s annexation petition as just one action in an ongoing course of conduct carried out for the pre-determined purpose of precluding all development and either obtaining the QJP Property for open-space at an artificially depressed price, or maintaining the QJP Property in its current, undeveloped state. The pre-determined reasons for Park City’s conduct, including the denial of the annexation petition, as alleged by QJP and accepted as true for purposes of this appeal, serve no legitimate public interest.

II. Park City Is and Has Been Abusing its Annexation Power to Obtain Open Space Without Paying Just Compensation by Preventing All Development and Either Maintaining the Property in its Undeveloped State or Obtaining the Property at an Artificially Depressed Price.

QJP has made diligent efforts since the early 1990's to obtain approval for an economically viable use of the QJP Property. Park City and Summit County, however, have imposed one obstacle and delay after another to thwart those efforts. When QJP purchased the thirty (30) acres comprising the QJP Property at commercial prices in 1990, it was the only property designated as a hard zone commercial node in the area. (R. 141, ¶ 8). In 1993, the QJP Property was down-zoned to one (1) unit per forty (40) acres. (R. 142, ¶ 14). In response to the down-zoning, QJP filed an application with Summit County to reinstate the commercial zone. (R. 142, ¶ 15). The application was denied, and Summit County directed QJP to seek all future development approvals from Park City, because interlocal agreements between Park City and Summit County gave Park City control over development decisions on the QJP Property. (R. 142, ¶ 15).

In 1995, Summit County heard QJP's claim that it possessed a vested right in certain development permits on the QJP Property. (R. 145, ¶ 28). In the vested rights hearing, Summit County, through its planning department, agreed to restore the previous commercial use to the QJP Property, by designating the QJP Property 'commercial' in its general land use plan. On March 18, 1996, Park City also recognized the restored commercial zoning of the QJP Property, designating the property as commercial on its draft land-use maps and General Plan. In or about March 1996, however, Summit County refused to restore the commercial zone. (R. 147, ¶ 37). On March 20, 1997,

Park City also adopted a new General Plan designating the QJP Property as only a “possible commercial receiving zone.” (R. 145, ¶¶ 30-31; see also Exhibit 8).

QJP continued to seek a reinstatement of the commercial zone, and in 1998, Summit County placed a possible village center zone on the QJP Property. (R. 147, ¶ 39). As a precondition to any development application, however, Park City and Summit County directed QJP to organize all property owners within the Park City annexation declaration zone to prepare a master plan and annexation petition. (R. 148, ¶ 41). QJP accordingly worked diligently to do so from 1998 through May 1999, while Park City simultaneously sought to undermine those efforts through strategic land purchases from landowners that QJP had been directed to organize. (R. 149, ¶ 47). In or about May, 1999, Ralph Merrill was advised that Park City would not annex or approve any development until after the 2002 Winter Olympics. (R. 148, ¶¶ 42-43). Thus, in May 1999, having precluded development of the QJP Property for six years and having announced their intention to continue to delay any development for at least three more, Park City, through its citizen group COSAC, sent QJP a letter inquiring about a possible sale of the QJP Property to Park City as open space. (R. 149, ¶ 46). QJP declined the offer.

After the 2002 Winter Olympics, QJP approached Park City and Summit County again about annexing and developing the QJP Property, as both the City’s and County’s land use maps indicated at least a possible commercial zone for the property. (R. 149, ¶ 48). In response, Park City informed QJP that no development would take place until the completion of another land use study for Quinn’s Junction. (Id.) This study took

three (3) years to complete, in part because the first consultant hired by Park City and Summit County, Steve Coyle, made several determinations that were adverse to Park City's and Summit County's interests. (R. 150, 152, ¶¶ 50, 58).

Mr. Coyle concluded that: (a) Quinn's Junction was an acceptable location for commercial development, and (b) Park City's and Summit County's opaque and discretionary land-use regulations, either intentionally or unintentionally, enabled Park City to inequitably acquire property for open space at artificially depressed prices. (R. 151, ¶ 56; see also Exhibit 19, p. 2). Mr. Coyle stated as follows in his report:

While the purchase of land in the area as open space may be a stated goal of both City and County officials, intentionally or unintentionally relying on a discretionary code system to effectively reduce property values may result in a less equitable means to achieve this end.

(Id.) Following the issuance of this critical report, Mr. Coyle was promptly fired and the report buried. (R. 152, ¶ 61).

Park City and Summit County then prepared their own report, contradicting that of the independent expert, Mr. Coyle. (R. 153, ¶ 63). As the study dragged on, a property owner adjacent to the QJP Property declared bankruptcy due to the deadlock. (R. 150, ¶ 50). Park City purchased that property and has maintained it as open space to this day.

In October 2004, Park City annexed a portion of the adjacent property, making the QJP Property contiguous to Park City, and thus potentially annexable, for the first time. (R. 154, ¶ 68). Accordingly, with the previously insurmountable obstacle to development lifted, QJP and another adjacent property owner, Barnes Bank, filed a joint petition for annexation into Park City. (R. 154, ¶ 70). During a subsequent meeting with Park City,

however, QJP was advised to file its own separate annexation petition because QJP's petition was favored by Park City while Barnes Bank's petition was not. (R. 154-155, ¶ 74). Accordingly, QJP and Barnes Bank separated their petitions, but maintained the same joint commercial master plan including the same per acre development and densities. (R. 155, ¶ 79).

At the annexation hearing on March 10, 2005, contrary to its prior statements, Park City unanimously accepted Barnes Bank's petition and denied QJP's petition by a vote of three to two. (R. 155, ¶¶ 81-82). One day after issuing the formal denial of QJP's petition and once again precluding development for the foreseeable future, Park City again offered to purchase the QJP Property for open space at depressed prices. (R. 156, ¶ 83(e)). QJP again declined. The following day, the mayor of Park City issued a press release stating that land along Park City's S.R. 248 entry-way, like the QJP Property, should be purchased with open space funds because it "face[d] the greatest threat from development." (R. 156, ¶ 83(h); see also Exhibit 34).

According to these facts, Park City is exercising regulatory control over the QJP Property pursuant to its interlocal agreements with Summit County, and is exercising that control to preclude any economically viable use of the QJP Property. "A reviewing court may not inquire into the motives of municipal authorities or others with respect to annexation or detachment of municipal areas, unless the proceedings are tainted by malice, fraud, corruption, or gross abuse of discretion." McQuillan Mun. Corp. §7.41 (2007) (emphasis added). The facts in this case establish that Park City has grossly abused its discretion in refusing to annex or approve any use of the QJP Property for the

purpose of precluding any development and obtaining the property as open space either without payment of just compensation or at an extortionate price. It is difficult to imagine a more tainted proceeding.

The trial court erred, and disregarded the facts, when it ruled that “[a]t best, plaintiff has claimed a pattern of conduct that does not allow land owners to fully utilize their land.” (R. 238). That characterization ignores the 15-year history of Park City’s abuses, including repeated moratoria, false statements, and the culminating denial of the annexation petition, all of which have not just precluded QJP from “fully utiliz[ing]” its property but have precluded any use at all. The actions of Park City, as alleged, are “so wholly discordant to reason and justice that [they] must be deemed capricious and arbitrary and thus in violation of complainant’s rights.” Triangle Oil v. North Salt Lake Corp., 609 P.2d 1338, 1340 (Utah 1980). QJP’s Petition for Review of Park City’s conduct should not have been dismissed and the trial court’s decision must be reversed.

III. Park City’s Improper and Abusive Exercise Of Its Regulatory and Annexation Powers Resulted In An Inverse Condemnation of the QJP Property.

In its Revised Second Amended Complaint and Petition, QJP has properly asserted a claim for inverse condemnation. Article I, § 22 of the Utah Constitution provides that “[p]rivate property shall not be taken or damaged for public use without just compensation.” “This provision is broader in its language than the similar provision in the Fifth Amendment of the United States Constitution.” Bagford v. Ephraim City, 904 P.2d 1095, 1097 (Utah 1995). An inverse condemnation action requires “(1) property,

(2) a taking or damages, and (3) a public use.” Farmers New World Life Ins. Co. v. Bountiful City, 803 P.2d 1241, 1243-44 (Utah 1990). Accordingly:

[t]he takings analysis has two principal steps: First, the claimant must demonstrate some ‘protectible interest in property.’ If the claimant possesses a protectible property interest, the claimant must then show that the interest has been ‘taken or damaged’ by government action. A ‘taking’ is ‘any substantial interference with private property which destroys or materially lessens its value, or by which the owner’s right to its use and enjoyment is in any substantial degree abridged or destroyed.’

Strawberry Elec. Serv. Dist. v. Spanish Fork City, 918 P.2d 870, 877 (Utah 1996) (citations omitted).

A. QJP Has A Protectible Property Interest.

The trial court improperly ruled that “simply because plaintiff may have certain expectations about its property does not equate to a vested property interest affected by [Park City’s] annexation decision.” (R. 241). The expectations QJP has for its property, however, are simply the expectations commensurate with fee simple ownership of any real property – the expectation that the fee simple owner be allowed to put the property to some economically viable use. The facts demonstrate that Park City has not merely precluded QJP from “fully utilize[ing] their land,” as found by the trial court, it has effectively deprived QJP of any economically viable use through the abuse of its annexation power and interlocal agreements. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992) (payment of just compensation required where restriction denies all economically beneficial or productive use of the land); Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978) (regulation that causes diminution in value or interferes with reasonable investment-backed expectations may

constitute a taking requiring payment of just compensation); Arnell v. Salt Lake County Bd. of Adjustment, 2005 UT App 165, ¶ 17, 112 P.3d 1214 (analyzing takings claim through extent of regulatory restriction and interference with investment-backed expectations). Because annexation and Park City approval is a required precondition to any development on the QJP Property, QJP's expectations with respect to annexation are reasonable and protectible. Accordingly, QJP has established, for purposes of the motion to dismiss, that it has a protectible property interest for purpose of its inverse condemnation claim.

Moreover, QJP has a recognized property interest in the commercial rights in the QPJ property, as set forth in its Revised Second Amended Complaint as follows:

The County, through its planning department, agreed to restore the previous commercial use to the QJP Property by designating the QJP Property 'commercial' in its general land use plan. On March 18, 1996 the City also recognized the restored commercial zoning of the QJP Property, designating the property as commercial on its maps. Those actions were taken, in part, because, in a hearing on August 29, 1995, the Summit County Commission found QJP had vested commercial rights in the QJP Property and directed the County Planning Commission to restore a commercial hard zone to the QJP Property.

(R. 145, ¶ 128; see also Exhibit 6).

B. Park City's Refusal to Permit Development and to Annex the QJP Property Can and Does Constitute A Regulatory Taking or Inverse Condemnation.

The trial court erred when it found that "Park City's Council decision placed no [] restriction on plaintiff's use of his property." (R. 242). As alleged by QJP, Park City's acts, pursuant to its interlocal agreements with Summit County, not only restrict but preclude QJP's use of its property for any economically viable purpose.

Regulatory takings “occur when a governmental entity intrudes to limit the use of private property while not physically seizing it.” B.A.M. Development, L.L.C. v. Salt Lake County, 2005 UT 89, ¶ 33, 541 Utah Adv. Rep. 3. “[Z]oning regulations are a typical form of regulatory taking.” Id.

The Supreme Court has assigned no set formula to determine whether a regulatory taking is unconstitutional. Although there is no set formula, the Court has ‘examined the taking question by engaging in essentially ad hoc, factual inquiries that have identified several factors – such as economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action.’ Each regulatory taking stands on its own and must be examined individually to determine whether it ‘substantially advances legitimate state interests’ and ‘does not deny an owner economically viable use of his land.’

Id. (citations omitted) (emphasis added). “A regulatory taking transpires when some significant restriction is placed upon an owner’s use of his property for which ‘justice and fairness’ require that compensation be given.” View Condo Owners Assoc. v. MSICO, LLC, 2005 UT 91, ¶ 31, 127 P.3d 697 (citations omitted).

The analysis set forth in the Creekside case is again relevant and persuasive, and contradicts the trial court’s ruling that a decision not to annex property cannot restrict the use of that property. Creekside Associates, Inc., 684 F. Supp. at 201. In Creekside, the U.S. District Court concluded that “plaintiffs have also stated a cognizable claim by alleging that the City Council’s decision [not to annex] deprived them of all use of their property without compensation.” Id. at 205. “A municipality cannot without compensation deprive a property owner of all reasonable uses of the property even if such deprivation serves a legitimate public interest.” Id. (emphasis added). Thus, the refusal to annex and approve the development plan can serve as the underlying act supporting a

takings claim. “By alleging that the City Council’s decision rendered their property worthless, plaintiffs have stated a claim upon which relief may be granted and thereby survived [the] motion to dismiss.” Id.

This is precisely what QJP has alleged here – that in refusing to approve development and annex the QJP Property, when annexation and approval by Park City are requirements for development, Park City has deprived QJP of any economically viable use for the property. Lucas, 505 U.S. at 1025 (2002); Arnell, 2005 UT App 165 at ¶ 17. In addition, Park City has deprived QJP of its reasonable investment-backed expectations for the QJP Property, based on the commercial land prices and taxes paid by QJP, as well as the various fees and other expenses it has incurred as a result of representations by Park City officials. (R. 162, ¶ 95). Penn Central Transportation Co., 438 U.S. at 124; Arnell, 2005 UT App 165 at ¶ 17. Whether or not the preservation of open-space is a legitimate public interest, that interest cannot be legally pursued through deliberate actions depriving QJP of all economically feasible uses for its property without payment of just compensation.

Summit County has ceded to Park City the decision making authority over development of the QJP Property. Park City has, in turn, abusively exercised its regulatory and annexation power in a manner designed to preclude all economically viable uses for the QJP Property. Park City has done so because it desires to maintain the QJP Property as open space, either without payment of any just compensation or by payment of a price severely depressed by the fact that it will never allow the property to


be developed. The facts as alleged set forth a valid claim that Park City's actions constitute a regulatory taking or inverse condemnation.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's order dismissing this case.

DATED this 20th day of October, 2008.

Van Cott, Bagley, Cornwall & McCarthy

A handwritten signature in black ink, appearing to read 'CLT', is written over a horizontal line.

Scott M. Lilja

Chandler P. Thompson

*Attorneys for Plaintiff / Appellant Ralph Merrill d/b/a
Quinn's Junction Partnership*

CERTIFICATE OF SERVICE

I hereby certify that I caused two (2) true and correct copies of the within and foregoing **BRIEF OF APPELLANT**, to be hand-delivered, this 20th day of October, 2008, to the following:

Mark D. Harrington
Polly Samuels McLean
Park City Attorney
445 Marsac Avenue
Park City, UT 84060

A handwritten signature in black ink, appearing to read "MDH", is written over a horizontal line.

ADDENDUM 1

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Citation: **UCA 10-9a-801**

Utah Code Ann. § 10-9a-801

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*** This document reflects changes recieved through the 2008 Second Special Session ***
*** Annotations current through 2008 UT 64 (9/16/2008); 2008 UT APP 337 ***
*** (9/18/2008) and September 1, 2008 (Federal Cases) ***

TITLE 10. UTAH MUNICIPAL CODE
CHAPTER 9a. MUNICIPAL LAND USE, DEVELOPMENT, AND MANAGEMENT
PART 8. DISTRICT COURT REVIEW

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Utah Code Ann. § 10-9a-801 (2008)

§ 10-9a-801. No district court review until administrative remedies exhausted -- Time for filing -- Tolling of time -- Standards governing court review -- Record on review -- Staying of decision

(1) No person may challenge in district court a municipality's land use decision made under this chapter, or under a regulation made under authority of this chapter, until that person has exhausted the person's administrative remedies as provided in Part 7, Appeal Authority and Variances, if applicable.

(2) (a) Any person adversely affected by a final decision made in the exercise of or in violation of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local land use decision is final.

(b) (i) The time under Subsection (2)(a) to file a petition is tolled from the date a property owner files a request for arbitration of a constitutional taking issue with the property rights ombudsman under [Section 13-43-204](#) until 30 days after:

(A) the arbitrator issues a final award; or

(B) the property rights ombudsman issues a written statement under [Subsection 13-43-204\(3\)\(b\)](#) declining to arbitrate or to appoint an arbitrator.

(ii) A tolling under Subsection (2)(b)(i) operates only as to the specific constitutional taking issue that is the subject of the request for arbitration filed with the property rights

ombudsman by a property owner.

(iii) A request for arbitration filed with the property rights ombudsman after the time under Subsection (2)(a) to file a petition has expired does not affect the time to file a petition.

(3) (a) The courts shall:

(i) presume that a decision, ordinance, or regulation made under the authority of this chapter is valid; and

(ii) determine only whether or not the decision, ordinance, or regulation is arbitrary, capricious, or illegal.

(b) A decision, ordinance, or regulation involving the exercise of legislative discretion is valid if it is reasonably debatable that the decision, ordinance, or regulation promotes the purposes of this chapter and is not otherwise illegal.

(c) A final decision of a land use authority or an appeal authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal.

(d) A determination of illegality requires a determination that the decision, ordinance, or regulation violates a law, statute, or ordinance in effect at the time the decision was made or the ordinance or regulation adopted.

(4) The provisions of Subsection (2)(a) apply from the date on which the municipality takes final action on a land use application for any adversely affected third party, if the municipality conformed with the notice provisions of Part 2, Notice, or for any person who had actual notice of the pending decision.

(5) If the municipality has complied with Section 10-9a-205, a challenge to the enactment of a land use ordinance or general plan may not be filed with the district court more than 30 days after the enactment.

(6) The petition is barred unless it is filed within 30 days after the appeal authority's decision is final.

(7) (a) The land use authority or appeal authority, as the case may be, shall transmit to the reviewing court the record of its proceedings, including its minutes, findings, orders, and, if available, a true and correct transcript of its proceedings.

(b) If the proceeding was tape recorded, a transcript of that tape recording is a true and correct transcript for purposes of this Subsection (7).

(8) (a) (i) If there is a record, the district court's review is limited to the record provided by the land use authority or appeal authority, as the case may be.

(ii) The court may not accept or consider any evidence outside the record of the land use authority or appeal authority, as the case may be, unless that evidence was offered to the land use authority or appeal authority, respectively, and the court determines that it was improperly excluded.

(b) If there is no record, the court may call witnesses and take evidence.

(9) (a) The filing of a petition does not stay the decision of the land use authority or authority appeal authority, as the case may be.

(b) (i) Before filing a petition under this section or a request for mediation or arbitration of a constitutional taking issue under Section 13-43-204, the aggrieved party may petition the appeal authority to stay its decision.

(ii) Upon receipt of a petition to stay, the appeal authority may order its decision stayed pending district court review if the appeal authority finds it to be in the best interest of the municipality.

(iii) After a petition is filed under this section or a request for mediation or arbitration of a constitutional taking issue is filed under Section 13-43-204, the petitioner may seek an injunction staying the appeal authority's decision.

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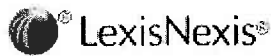
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ADDENDUM 2

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

RALPH MERRILL dba QUINN'S JUNCTION PARTNERSHIP, Plaintiff, v. PARK CITY, Defendant.	RULING and ORDER Case No. 050500205 Judge BRUCE C. LUBECK DATE: April 22, 2008
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The above matter came before the court for oral argument on April 18, 2008 on defendant's motion to dismiss.

The motion was filed February 15, 2008. Plaintiff opposed the motion March 6, 2008, and defendant replied in support March 13, 2008. Defendant filed a request to submit on March 13, 2008. Based thereon oral argument was scheduled but postponed at the request of the parties.

Plaintiff was present through Scott Lilja and defendant was present through Mark Harrington.

Oral argument was held and the court took the issues under advisement. Before the hearing the court carefully considered the memoranda and other materials submitted by the parties. Since taking the issues under advisement, the court has further considered the law and facts relating to the issues. Now being

fully advised, the court renders the following Ruling and Order.

DISCUSSION

"A rule 12(b)(6) motion to dismiss admits the facts alleged in the complaint but challenges the plaintiff's right to relief based on those facts." *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194 (Utah 1991). On a motion to dismiss the court accepts the material allegations in the complaint as true and interprets those facts and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *Moss v. Pete Suazo Utah Ath. Comm'n*, 2007 UT 99, ¶18. Granting a motion to dismiss "denies the nonmoving party of the right to litigate his claim on the merits, [and] the threshold for surviving such a motion is relatively low. *Anderson Dev. Co. v. Tobias*, 2005 UT 36, ¶49. "Only if it is clear that the claimant is not entitled to relief under any state of facts that could be proven to support the claim should a motion to dismiss be granted." *Buckner v. Kennard*, 2004 UT 78, ¶9.

Plaintiff sets forth many allegations in the revised "second amended petition for review; complaint for declaratory relief and damages and jury demand" in which it asks the court to review the Park City Denial of QJP Annexation Petition and makes claims for declaratory judgment, inverse condemnation and damages.

A. PETITION FOR REVIEW.

Plaintiff claims that the Council's land use decision, voted on March 10, 2005 and recorded in writing March 14, 2005, in a letter from Park City's Mayor, to reject plaintiff's annexation petition for Quinn's Junction Parcel (QJP), was arbitrary, capricious and illegal under UCA 10-9a-801(3). Defendants claim plaintiff has no cause of action under this statute, that the Council's decision is not a land use decision, nor a taking nor did it amount to inverse condemnation.

Plaintiff recites a litany of allegations, many of which concern decisions, agreements, and other matters that are not before the court in relation to plaintiff's petition for review, to show the history of defendant's arbitrary actions. The court focuses on those allegations pertinent to plaintiff's petition for review, which alleges the Park City Council's (the Council) decision was arbitrary and capricious.

It is well established:

[A] determination of city boundaries is a legislative function . . . as in all legislative matters, courts are reluctant to interfere therewith; and do so only when the decisions or actions taken are clearly outside the authority of the governing body, or are so wholly unreasonable and unjust that they must be deemed capricious and arbitrary in adversely affecting someone's rights.

Child v. Spanish Fork, 538 P.2d 184, 186 (Utah 1975) (citing *Bradshaw v. Beaver City*, 27 Utah 2d 135, 138 (Utah 1972)). The Utah Municipal Code states the powers delegated to a municipality

by statute "shall be liberally construed to permit the municipality to exercise the powers granted by this act except in cases clearly contrary to the intent of the law." UCA 10-1-103).

1. *The Council's Decision was a Land Use Decision.*

Defendant claims the Council's decision was not a land use decision and therefore that plaintiff has no case of action under UCA 10-9a-801(3). The basic position of defendant is that the decision by a municipality to NOT annex is not reviewable in court. Defendant cites *Chevron U.S.A. v. North Salt Lake*, 711 P.2d 228 (Utah 1985) to support this claim. However, in the citation they point to from this case, the Court acknowledges that the former annexation statute "contemplates that residents of an annexed area may challenge the annexation in court although the act does not specify a particular kind of judicial procedure for such a challenge." (at 231). This does not mean, as defendants urge, that a City Council's annexation decision is not a land use decision. *Bradshaw v Beaver City*, 2493 P.2d 643 (UT 1972) seems to indicate that the decision to annex, is a legislative function and the courts may review such decision, but with great reluctance to intrude into the prerogative of that legislative branch and the courts will interfere if the decision is so lacking in propriety and reason that it must be deemed capricious and arbitrary. Further, under MLUDMA, "any person

adversely affected by a final decision made in the exercise of or in violation of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local land use decision is final." UCA 10-9a-801(2)(a)). The Council's decision to reject an annexation petition was made, in this court's view, in the exercise of the provisions of The "Municipal Land Use, Development, and Management Act" (MLUDMA).

The decision to NOT annex seems to be reviewable in court under the legislative review provision, UCA 10-9a-801(3)(b). The court looks at a legislative land use decision to see if it is reasonably debatable. The court does not substitute its judgment for that of the legislative body. If the decision could promote the general welfare or even if it is reasonable debatable that it is in the interest of the general welfare, the decision is to be upheld.

2. *The Court Must Presume the Decision is Valid.*

In Utah, "annexation is a statutory procedure A city satisfies the statutory requirements through 'substantial compliance' with the statute. . . . the city [has] . . . broad discretion when making decisions which it concludes best fulfills its responsibility for determining municipal boundaries. *Szatkowski v. Bountiful City*, 906 P.2d 902, 904 (UT App

1995) (discussing a prior version of an annexation statute) (citations omitted). In reviewing a petition for rehearing, the court "shall presume that a decision, ordinance, or regulation made under the authority of this chapter is valid; and . . . determine only whether or not the decision, ordinance, or regulation is arbitrary, capricious, or illegal." (*Id.* at 10-9a-801(3)). The statute sets out certain factors to guide a court's decision. (See *Id.* at (3)(b)-(d)).

The court cannot conclude, even when presuming all of plaintiff's allegations to be true, that plaintiff could prevail in its assertion that the Council's March 2005 decision was illegal, capricious or arbitrary. At best, plaintiff has claimed a pattern of conduct that does not allow land owners to fully utilize their land. However, this does not equate to an illegal or arbitrary decision, and the court cannot see from the allegations and supporting evidence before it, how this decision could be viewed as such, as being not even reasonably debatable that it is in the general welfare. This is particularly so given the considerable deference owed to the Council's decision and the broad discretion the Council had to grant or deny plaintiff's petition. UCA 10-2-405(1)(a)(i)(A).

Plaintiff does not allege that the Council failed to adhere to statutory procedures in denying the petition, nor does plaintiff substantiate its claims that the Council's decision was

vague or ambiguous.

Plaintiff's complaint fails to demonstrate that the Council's action was "outside of its authority or is so wholly discordant to reason and justice that its action must be deemed capricious and arbitrary and thus in violation of the complainant's rights." *Triangle Oil v. North Salt Lake Corp.*, 609 P.2d 1338, 1340 (Utah 1980).

Plaintiff's complaint is dismissed, with prejudice, as to the first cause of action. The court has jurisdiction to entertain the petition but it fails to state a claim upon which relief can be granted.

B. DECLARATORY JUDGMENT, INVERSE CONDEMNATION AND DAMAGES

Plaintiff asks that the court grant declaratory judgment stating, "defendant has taken or damaged by inverse condemnation the QJP property without just compensation" and that the court award plaintiff fair market value for the QJP property. Defendant argues plaintiff does not have a property interest in the denial of an annexation petition to sustain a claim for inverse condemnation and the Council's decision had no affect on any such interest as plaintiff still owns the exact land it did prior to the Council's decision. Plaintiff responds that its protectible

property interest was in the use and development of its property.

The court's power to issue declaratory judgment is broad. UCA 78B-6-401. A plaintiff must first establish four threshold elements: "(1) a justiciable controversy, (2) parties whose interests are adverse, (3) a legally protectible interest residing with the party seeking relief, and (4) issues ripe for judicial determination." *Miller v. Weaver*, 2003 UT 12, ¶15 (citations omitted). However, just as the court has broad discretion to hear claims for declaratory relief, so too may it deny declaratory relief when it would not terminate the uncertainty or controversy. UCA 78B-6-404. The Declaratory Judgment Act, "'should be liberally construed, [but] the courts must, nevertheless, operate within the constitutional and statutory powers and duties imposed upon them. The courts are not a forum for hearing academic contentions or rendering advisory opinions.'" *Utah Safe to Learn-Safe to Worship Coalition, Inc. v. State*, 94 P.3d 217, 224 (UT. 2004) (citations omitted).

Defendants cite a North Dakota case to support the idea that "[d]eclaratory and injunctive relief are appropriate if a municipality fails to comply with the statutory procedures for annexation and zoning, but may not be used to test the wisdom of an annexation or zoning decision." *Braunagel v. City of Devils Lake*, 2001 ND 118, ¶12. However, the court may interfere with legislative decisions that are so unguided by wisdom as to be is

capricious or arbitrary. *Child*, 538 P.2d 186.

In an inverse condemnation action, if "private property is taken or damaged for public use without a formal exercise of the eminent domain power, the property owner may bring an inverse condemnation action under article I, section 22 to recover the value of the property." *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241, 1244 (Utah 1990). Despite dismissing plaintiff's petition for review of the denial of its annexation petition, the court can consider plaintiff's inverse condemnation claim under that provision of Utah's Constitution because it is self-executing. See *Colman v. Utah State Land Bd.*, 795 P.2d 622, 630-35 (Utah 1990). To sustain a claim for damages in an inverse condemnation action, plaintiff must establish "(1) property, (2) a taking or damages, and (3) a public use." *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241, 1244 (Utah 1990).

Despite several court volumes of exhibits and 100 allegations in its complaint, plaintiff's complaint fails to allege a basis for the court to conclude the Council's action could support a claim for inverse condemnation. Simply because plaintiff may have certain expectations about its property does not equate to a vested property interest affected by the Council's annexation decision. Plaintiff cites a California case to support an expansive view of property interests, despite the

states' dramatically different approaches to property rights. Plaintiff fails to establish why the court should equate plaintiff's fee simple interest in property with a vested interest in developing the property for maximum commercial gain, or at least pursuant to its commercial plan of use. Nor does the court see how its allegations of vested commercial rights as determined by the Summit County Commission affect the Park City Council's boundary determination, nor how that affects the court's determination of the issues in this case.

As to the takings arm of the analysis, plaintiff's allegations do not support a regulatory takings claim. Park City's City Council made the determination NOT to annex plaintiff's property into the Park City boundaries. Plaintiff's land is in Summit County. "'A regulatory taking transpires when some significant restriction is placed upon an owner's use of his property for which 'justice and fairness' require that compensation be given.'" *View Condo. Owners Ass'n v. MSICO, L.L.C.*, 2005 UT 91, ¶31 (internal citation omitted). Park City's Council placed no such restriction on plaintiff's use of his property. Nor does their denial of his annexation petition or the other allegations in plaintiff's complaint cause the court to believe justice or fairness would ever require it to award plaintiff damages based on the Council's 2005 decision. Plaintiff's complaint does not establish a basis for the court to

award declaratory judgment or damages. Plaintiff's rights in the land are no different before or after the Park City decision.

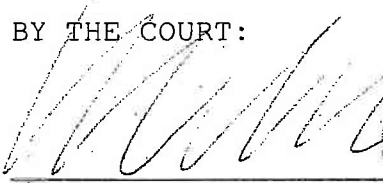
Plaintiff's complaint is dismissed, with prejudice, as to its second cause of action.

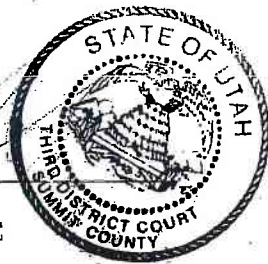
Defendant's motion is hereby GRANTED.

This Ruling and Order is the Order of the court and no further order is required.

DATED this 27 day of April, 2008.

BY THE COURT:


BRUCE C. LUBECK
DISTRICT COURT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050500205 by the method and on the date specified.

METHOD	NAME
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Dated this 22nd day of April, 2008

Deputy Court

