

1979

Peter Doenges, Miles Crockard, William Bowen,  
Richard H. Watson, Carl Peterson, and Emigration  
Improvement District v. City of Salt Lake City, A  
Municipal Corporation: Emigration Properties  
Partnership, A Utah Limited Partnership, Bowers-  
Sorenson Construction Company, A Utah  
Corporation, and Fred A. Smolka : Brief of  
Appellants

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Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Walter R. Miller, Jack L. Crellin; Attorneys for Defendant-Appellant Salt Lake City Douglas J. Parry; Attorney for Defendant-Appellant Emigration Properties Roger F. Cutler, Walter R. Miller; Counsel for Salt Lake City E. Craig Smay; Attorney for Plaintiff-Respondent Peter Doenges

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IN THE SUPREME COURT OF THE STATE OF UTAH

PETER DOENGES, MILES CROCKARD,  
WILLIAM BOWEN, RICHARD H. WATSON,  
CARL PETERSON, and EMIGRATION  
IMPROVEMENT DISTRICT,

Plaintiff-Respondents,

v.

CITY OF SALT LAKE CITY, a  
municipal corporation;  
EMIGRATION PROPERTIES PARTNERSHIP  
a Utah limited partnership, BOWERS-  
SORENSEN CONSTRUCTION COMPANY, a  
Utah corporation, and FRED A. SMAY,

Defendant-Appellants.

APPEAL FROM THE  
THIRD JUDICIAL DISTRICT COURT  
HONORABLE JUDGE

BRIEF OF

Emigration Properties  
Bowers-Sorenson  
Fred A. Smay

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Defendant-Appellants,

Case No. 16649

---

APPEAL FROM JUDGMENT OF THE  
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY  
HONORABLE DEAN E. CONDER

---

BRIEF OF APPELLANTS

Emigration Properties Partnership  
Bowers-Sorenson Construction Company  
Fred A. Smolka

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IN THE SUPREME COURT OF THE STATE OF UTAH

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PETER DOENGES, MILES CROCKARD,  
WILLIAM BOWEN, RICHARD H. WATSON,  
CARL PETERSON, and EMIGRATION  
IMPROVEMENT DISTRICT,

Plaintiff-Respondents,

v.

CITY OF SALT LAKE CITY, a  
municipal corporation;  
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SORENSEN CONSTRUCTION COMPANY, a  
Utah corporation, and FRED A. SMOLKA,

Defendant-Appellants,

---

Case No. 16649

I. NATURE OF THE CASE

This appeal is from a Memorandum Decision of Judge Dean E. Conder, of the Third Judicial District Court, holding that the annexation procedures of Section 10-2-401, Utah Code Ann. (Pocket Supp. 1977) limiting the petitioning portion of the annexation procedure to persons owning property within the area to be annexed violated the equal protection requirement of both the United States and Utah State Constitutions.

II. PROCEEDINGS AND DISPOSITION BELOW

On April 10, 1979, the Salt Lake City Commission voted unanimously to annex portions of Emigration Canyon to Salt Lake City. On April 17, 1979, a Temporary Restraining Order was issued, restraining the City from taking any steps

in furtherance of the Commission's decision of annexation. (Record on Appeal at R. 181 (hereinafter pages in Record will be referred to as "R. \_\_\_\_").) On May 29, 1979, plaintiffs' motion for a preliminary injunction and the defendants' motions to dismiss the complaint and to dissolve the Temporary Restraining Order were heard before the Honorable Bryant H. Croft. Judge Croft found that the complaint did not state a claim upon which relief could be granted and that there was no injury claimed or shown to support injunctive relief. (Partial Transcript of Proceedings, May 29, 1979, p. 8, at R. 1041.) Without dismissing the Complaint, Judge Croft allowed plaintiffs ten days in which to amend to state a claim including a claim for injunctive relief. (Id., pp. 14-15, at R. 1053-53.) Plaintiffs filed their Second Amended Complaint on June 7, 1979. Request for injunctive relief pursuant to Rule 65(a) was omitted and no direct injury to the plaintiffs was alleged. (R. 359.)

The Temporary Restraining Order was continued until August 20, 1979, even though a bond was never filed and even though the Complaint in this action did not seek preliminary injunctive relief.

On August 9, 1979, the defendants' motions for summary judgment and the plaintiffs' cross-motion for summary judgment were heard before the Honorable Dean E. Conder. Aside from the depositions and affidavits on file, no evidence was offered by the plaintiffs in further support of the Second Amended Complaint.

As a matter of law, the District Court of the Third Judicial District found and held by Memorandum Decision dated August 20, 1979, that the provisions of Section 10-2-401, Annexation of Contiguous Territory, Utah Code Ann. (Pocket Supp. 1977), limiting to landowners the petition process triggering a hearing on the question of annexation violated both the United States and the Utah State's Constitutions' "equal protection" requirements. (R. 603-605.) (A copy of the statute Sections 10-2-401 and 10-2-402 are attached hereto as Exhibit "A".) In its Memorandum Decision, the district court also granted a permanent injunction. (R. 605.) The district court found all other issues moot, and refrained from making a decision on any issues.\* (R. 605.) The Memorandum Decision did not, nor did the court, request separate Findings of Fact or Conclusions of Law.

On August 27, 1979, Defendant-Appellants filed a Notice of Appeal from the district court's Memorandum Decision. (R. 748.) Ten days later, upon the unsolicited submission by plaintiffs, the court signed a document entitled Findings of Fact, Conclusions of Law and Judgment.

On September 18, 1979, the defendants filed a Notice of Appeal from the entry of the Findings of Fact and Conclusions of Law and Judgment raising the issue, inter alia, that the district court was without jurisdiction to enter Findings of Fact and Conclusions of Law as the court was without jurisdiction

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\* Judge Conder explained in a conference on October 15, 1979, that he had not considered or decided defendants' motions for summary judgment except to the extent of the issue of constitutionality and had made no decision or determination of any other issues raised.

with the filing of the Notice of Appeal. The defendants filed a motion to set aside the Findings of Fact and Conclusions of Law or in the alternative, to amend them. The court concluded that as a Notice of Appeal had been filed, it had been divested of jurisdiction and could not consider the matter.

### III. RELIEF SOUGHT ON APPEAL

The Defendant-Appellants respectfully request that this Court: (1) Strike the Findings of Fact and Conclusions of Law and Judgment entered by the district court on September 6, 1979, as that court was without jurisdiction to proceed in the matter after the filing of the Notice of Appeal on August 27, 1979; Or, in the alternative, to strike the Findings of Fact and Conclusions of Law on the ground that they are not supported by the evidence or the law;

(2) Reverse the Memorandum Decision of August 20, 1979 and find that the annexation provisions of Section 10-2-401, Utah Code Ann. (Pocket Supp. 1977) are constitutional within the equal protection provisions of both the Federal and State Constitutions;

(3) Find that the district court erred in failing to grant the Defendant-Appellants' motions for summary judgment;

(4) Enter judgment for the Defendant-Appellants and dissolve the permanent injunction;

(5) Find that the Salt Lake City Commission had the authority and had properly voted for annexation of Emigration Canyon; and

(6) Order that annexation be forthwith completed.

#### IV. STATEMENT OF FACTS

A. The Residents of Emigration Canyon Properly Petitioned the Salt Lake City Commission to Consider Annexation to Salt Lake City of Certain Areas Within Emigration Canyon.

Between September 15, 1977, and August 8, 1978, three petitions for annexations of different contiguous areas within Emigration Canyon were filed with the Salt Lake City Commission. These petitions requested that the Salt Lake City Commission consider annexation of these areas to Salt Lake City.

Petitions containing the signatures of more than one-half of the landowners owning more than one-third of the land within the area requesting annexation and a plat of the entire area to be annexed under the petitions were filed with the City as required by statute. These filings complied in all respects with the requirements of the annexation statutes, Sections 10-2-401 and 10-2-402. (Johnson Depo., p. 4, at R. 898.)

B. Upon the Filing of the Petition, Salt Lake City Began Considering the Advisability of Annexation and Held Numerous Public Hearings at which all Interested Parties were Allowed to Speak. Salt Lake City immediately began investigating the possibility of the proposed annexation. The three petitions were consolidated and considered as one by the Board of City Commissioners. (Mayor Wilson Depo., Exhibit 1, at R. .)

The proposed annexation was investigated and studied by the Salt Lake City Planning and Zoning Commission from November of 1977, until the final hearing and recommendation of

August 10, 1978. (Jorgensen Depo. pp. 18, 41, at R. 824.) During this period the Commission held numerous public hearings. (Jorgensen Depo., p. 41 & Ex. 9, at R. 824.) At these hearings, petitions were received from any interested party including the Plaintiff-Respondents. Beginning November 10, 1978, Plaintiff-Respondents, through their attorney, Craig Smay, filed petitions with the Planning and Zoning Commission in opposition to the proposed annexation. (Jorgensen Depo., Exhibit No. 9, p. 1, at R. 824.) Again, on behalf of himself as a resident living within Emigration Canyon, and also on behalf of Plaintiff-Respondents, Mr. Smay appeared and presented arguments in opposition to the proposed annexation at the informal hearing before the Planning and Zoning Commission on March 10, 1979. (R. 824, Id. at, Ex. No. 9, p.8.) also present at that hearing and participating therein was the Plaintiff-Respondent Miles Crockard. (R. 824, Id. at, Ex. 9, p. 9.) In addition, Plaintiffs' representative and attorney, Craig Smay, was available to the Planning and Zoning Commission to answer questions on the Plaintiff-Respondents' behalf in opposition to annexation. (R. 824, Id., at Ex. 9, pp. 32-33.)

During the hearings and investigation, the Planning and Zoning Commission concluded that "The only way the area can be properly served is in the City." (R. 824, Id. at 47.) The only access to this area was through the City. (R. 824, Id. at 58.) And, as part of the County, the area could not be developed. (R. 824, Id. at 15.) The Commission also found that the proposed annexation met the statutory

requirement of contiguity. "The east boundary [of the City] is the west boundary of the area to be annexed." (R. 824 Id. at 9.)

The Planning and Zoning Commission found that new zoning was an essential part of the annexation as Salt Lake City did not "have a classification that would meet the needs of Emigration Canyon." (R. 824 Id. at 19.) Therefore, an extensive investigation was conducted considering water and sewer service, flood control, school, fire, garbage and police as well as the soil conditions, the amount of slope of the ground, and the traffic capabilities of the Canyon to determine just what zoning would be appropriate. (R. 824 Id. at 19-21; 43-44, 46, 47.) Two zoning regulations were proposed for Emigration Canyon. "R-1C" and "B-3C", both with an "F-1" overlay. (R. 824 Id. at 4-7.) These zoning classifications were "geared to the terrain, the special problems that you find in canyon or canyon-like areas." (R. 824 Id. at 5.)

After more than nine months of hearings wherein the arguments and petitions of all interested parties, both for and against annexation were considered, and the reports of all city commissions and departments were considered, the Planning and Zoning Commission, by letter dated August 24, 1978, recommended that the Salt Lake City Commission approve annexation of the areas within Emigration Canyon under certain specific conditions. (R. 824 Id. at 43-44, 18, 41 and Exhibit No. 1.)

It is the feeling of the Planning Commission that areas adjoining the City Limits, affecting the City, and where development can take place, should be annexed to the City wherever possible,

thus filling the basic reason for a city, that of providing proper service to developable areas. In the case of Emigration Canyon, adequate services can be provided only by Salt Lake City.

It is, therefore, the recommendation of the Planning Commission that a public hearing be held to consider annexing the property as requested. . . . (R. 824, Id. at Ex. 1.)

After receiving the recommendation from the Planning and Zoning Commission and the reports from all the department heads, the City Commission began its own investigation and hearings on the matter. As explained by Mayor Wilson at his deposition, the decision of the City Commission not only to join the petitions for annexation, but also to grant annexation of the area contained within the petition was based on extensive investigation by the City Commission. (Mayor Wilson Depo. pp. 27-33, at R. - .)

Public hearings were held in late January and early February, 1979. Three days were set aside for hearings on this matter. During these public hearings no witness was cut off. Mr. Smay, a representative of the Plaintiff-Respondents, testified and was given an opportunity to discuss any and all matters he desired. (Wilson Depo. p. 30, at R. .)

A. . . . We allowed at least a full day for our department heads to come in and give us their both written and oral recommendations.

Q. Then you also had the public hearings where citizens could come and voice their opinions?

A. Yes. We had three days of hearings. The first day basically was the department head input. The second day was basically--both sides would organize presentations. And then the third day was from any member of the public that hadn't had a chance to testify could come to the mike and express their feelings. (Mayor Wilson Depo. p. 29, at R. .)



C. Plaintiff-Respondents Participated Extensively in the Hearings on Annexation. Throughout the annexation proceedings, the Plaintiff-Respondents had every opportunity to be heard. Following the filing of the petitions for annexation, numerous and extensive public hearings were held where the plaintiffs not only were given an opportunity to, but did appear and argue in opposition to annexation.

First, the Salt Lake City Planning and Zoning Commission investigated the proposed annexation and held numerous public hearings beginning in November of 1977, and concluding August 10, 1979. (Exhibit #9 to the Jorgensen Deposition is the Minutes to all the meetings held to consider the annexation of Emigration Canyon. See, R. 824.) At these hearings petitions were received from any interested party. A petition was filed on behalf of the Plaintiff-Respondents by Craig Smay on November 10, 1977, opposing annexation and explaining the reasons therefore. (Jorgensen Depo., Exhibit #9, p. 1, at R. 824.) Again on behalf of himself and the Plaintiff-Respondents, Mr. Smay appeared at the March 10, 1978 informal hearing before the Planning and Zoning Commission and argued Plaintiff-Respondents' reasons for opposing annexation. (Jorgensen Depo., Exhibit #9, p. 8, at R. 824.) Also, taking part in that hearing was the Plaintiff-Respondent Miles Crockard. (Id., p. 9, at R. 824.) In addition, the Planning Commission had Craig Smay available to answer questions on behalf of those opposing annexation. (Id., Ex. 9 pp. 32-33, at R. 824.)

Three days of public hearings were held by the City Commission during which all interested parties were again allowed to speak, including Mr. Smay speaking for the Plaintiff-Respondents. (Bowen Depo., p.24, at R. .)

Mr. Crockard attended and participated in Planning and Zoning Commission hearings on the matter. (Jorgensen Depo., Exhibit #9, p. 9, at R. 824.) Mr. Peterson, the renter who had been asked by Plaintiff-Respondents to lend his name to the law suit did not bother to attend any of the hearings. (Petersen Depo., pp. 14-15, at R. 826.) Mr. Bowen, attended the public meetings concerning annexation at Bonneville School, the City Commission and the Planning and Zoning Commission. (Bowen Depo., pp. 5, 6, at R. - .) Mr. Bowen also voiced his position to the Mayor in his office privately (Id., pp. 6, 18, 21, at R. , , .) and to the City Commission at the public hearings. (Id., pp. 6, 21-22, 24, at R. , - , .) Mr. Bowen even presented an alternative annexation proposal to the City Commission which was considered but rejected as contrary to the annexation laws. (Id., pp. 24-26, at R. - .) Although not overly active, Mr. Watson also attended and participated in the public hearings concerning annexation. (Watson Depo., p. 16, at R. 827.)

The Plaintiff-Respondent Doenges was actively involved in the annexation process as he provided information to the City Commission and Planning Commission and attended the hearings.

And along the way I have also provided some information to the City Commission and tried to contribute to the digestion of the facts and hearsay that our informal group has been advancing

to the City Commission and concerned neighbors.  
(Doenges Depo., p. 8, at R. .)

Mr. Doenges testified that he had submitted documents and had prepared typed testimony that were given to the City Commission for consideration. Plaintiff-Respondent Bowen also submitted prepared, typed testimony to the City Commission. (Doenges Depo., p. 9, at R. .) Mr. Doenges testified that he, with Plaintiff-Respondent Bowen, submitted "fairly voluminous documents" to the City Commission which are part of the Public record stating "engineering estimates and cost figures that we thought might pertain based on our inspection of the survey maps that would bear on development feasibility relative to the proposed zoning ordinance." Doenges also testified that he made recommendations to the City Commission for the appointment of a "blue ribbon commission" to study total annexation of the Canyon. (Doenges Depo., p. 9, at R. .) It is interesting to note at this point that the City Commission adopted Mr. Doenges and the other Plaintiff-Respondents' recommendation that a "Blue Ribbon commission" be appointed. In the Mayor's motion to adopt the recommendation of the Planning and Zoning Commission, as modified, the Mayor moved that a "Blue Ribbon Commission" be established to advise the Salt Lake City Planning Commission, as suggested by Doenges, Bowen and others. (Mayor Wilson Depo., Exhibit #1, at R. .) A "Blue Ribbon Committee" was approved by the City Commission. (Letter from City Recorder to the City Commissioners, April 10, 1979, Wilson Depo., Exhibit #4, at R. .)

In addition to the oral testimony which was given at the hearings, these three days, numerous letters, reports

and documents were also received which formed the basis for the decision to vote in favor of annexation. As Mayor Wilson explained, there was,

A stack that was about three or four inches thick and included recommendations from various city departments and also included recommendations from both developers and Canyon residents.

. . . .

It was also summarized by our department of development services. (Wilson Depo. p. 31, at R. .)

During the period between the public hearings in January of 1979, and the final vote in April of 1979, there was considerable agitation in Emigration Canyon in an effort to remove names from the petitions and re-add them. Representative of the Plaintiff-Respondents, Mr. Craig Smay, on at least two occasions, sent letters to the residents of the Canyon in an effort to persuade them to remove their names from the petitions favoring annexation. (Gardner Depo., pp. 15-16, 24, at R. 843-44, 52.) In the first instance, Mr. Smay informed the residents of the Canyon that in certain circumstances if the proposed zoning was adopted, the residents would not be able to build on their existing lots. (Gardner Depo. pp. 31, 15-16, 20-21, at R. 859, 843-44, 848-49.) Mr. Smay also suggested, in a letter to the residents of Emigration Canyon, that if annexation were accomplished, the tax burden of the residents in the annexed area would be greatly increased. (Gardner Depo. pp. 24, 37, at R. 852, 865.)

Mr. Smay was busy attempting to get people to withdraw their names from the petitions, Mr. Gardner, an

employee of the Defendant-Appellant Emigration Properties Partnership, was discussing with the residents of the Canyon the value of annexation, (Gardner Depo., pp. 43-45, at R. 871-873.) and attempting to get residents to re-sign petitions for annexation. (Gardner Depo., p. 14, at R. 842.)

On April 10, 1979, Walter Miller of the City Attorney's office, and representatives of Defendant-Appellants met to review the petitions to determine the number of signatures on the final petitions. (Gardner Depo. pp. 48-49, 50, at R. 876-78.) Although expressly invited (Gardner Depo. p. 53, at R. 881), Mr. Smay did not attend this meeting. (Gardner Depo. p. 55, at 882.) However, Mr. Miller of the City Commission office did review a list of concerns submitted by Mr. Smay to assure that the petitions met the statutory requirement. (Gardner Depo. pp. 49-50, at R. 877-78.) The City Attorney's office determined that the petitions did meet the statutory requirements:

I have reviewed the petitions for annexation with Craig Smay, attorney for the plaintiffs in the above action, and Dave Johnson, President of Great Basin Title Company, retained by the developers, and each has described the insufficiencies or sufficiencies of the Emigration Canyon petitions they respectively perceive. Based upon that review, I am of the opinion that a majority of property owners on each of the annexation petitions presently favors connection to the City on the following particulars:

Petition #1	55.76%
Petition #2	100.00%
Petition #3	100.00%

The total property owners petitioning represent, by my figures, 61.25% of all property owners in the subject area. (Letter from Wally

Miller, Deputy City Attorney to Board of City Commissioners, April 10, 1979.) (Affidavit of Mildred Higham, at R. 171-172.)

Prior to the actual vote, interested parties were given opportunity to present their views to the City Commission. Craig Smay spoke, and without making any specific objections, claimed that the petition was not valid. (Gardner Depo. p. 50, at R. 879; Craig Peterson Depo. p. 6, at R. 823; Wilson Depo p. 30, at R. .)

A city's purpose for being is to:

Provide for the safety, preserve the health, promote the prosperity and improve the morals peace, order, comfort and convenience of the inhabitants. (U.C.A. § 10-8-2.)

After extensive hearings and investigations, the City Commission concluded that annexation would accomplish these purposes and protect the entire Canyon community. Therefore, after all interested parties had been heard, the Mayor moved that Report No. 90 of the Public Planning and Development Commission be filed and with certain recommendations annexation of the portion of Emigration Canyon encompassed within the petitions be approved. (Mayor Wilson Depo., Ex. 1, at R. .) The Mayor's motion carried unanimously. (Ibid.) The City Attorney was directed to prepare the necessary ordinances and contracts consistent with the proposed zoning ordinance necessary to implement annexation. (Mayor Wilson Depo., Ex. 4, at R. .) The Mayor's motion carried unanimously. (Ibid.) The City Attorney was directed to prepare the necessary ordinances and contracts consistent with the proposed zoning ordinance

necessary to implement annexation. (Mayor Wilson Depo., Exhibit 4, at R. .)

D. The Plaintiff-Respondents have Neither Claimed nor Shown an Injury Resulting from the Provisions of Section 10-2-401.  
No claims have ever been made, either in the complaint or by way of any evidentiary submissions that any of the plaintiffs in this case have suffered a protectable injury as a direct result of the petition provisions of Section 10-2-401.

In their Complaint filed on April 1, 1979, and their Amended Complaint for Declaratory and Injunctive Relief filed April 26, 1979, plaintiffs alleged as a practical matter, two causes of action--that the Salt Lake City Commission had not considered the evidence submitted and if this evidence were properly considered, annexation would not be decreed, and that the petition provision of the statute was unconstitutional.

The Plaintiff-Respondents include four residents of Emigration Canyon and the Emigration Improvement District. The latter certainly will not be injured by annexation. In fact, the Emigration Improvement District does not oppose annexation and by letter dated July 26, 1979, requested that it be withdrawn as a party plaintiff because "annexation of the canyon by Salt Lake City would facilitate the purposes of the Improvement District." (R. 538.) Plaintiff-Respondent Carl Peterson is a university student and renter living within the area to be annexed. He did not become involved in opposing annexation until after the City Commission voted to annex the area on April 10, 1979. At that time, his landlord, who



opposed annexation and who had the right to sign or refuse to sign the petition, asked Mr. Peterson if he would be willing to be a plaintiff in this action.

He [the landlord] asked or had told me that someone had called and asked if they knew of anyone renting in the area, and they of course knew that I was there, and they had said that he would ask me if I would be willing to participate in this [action]. (Carl Peterson Depo. p. 5, lines 21-24, at R. 826.)

Mr. Peterson was told that if he was willing to help he should call Mr. Smay. (R. 826 at 6.) Although now named as a plaintiff, Mr. Peterson had no other involvement. He is not paying counsel to represent him. (R. 826, Id. at 9.) At his deposition he only claimed that he opposed annexation because that if people wanted the city services they should move downtown. (R. 826 Id. at 7.)

Mr. Crockard lives in the area to be annexed, participated in all of the hearings, and under the statute had a right to sign or refuse to sign the petition for annexation. Mr. Crockard refused. He certainly was not and could not be adversely affected by the provisions of § 10-2-401 as he is included within those individuals who may petition the Commission to investigate the possibility of annexation. Mr. Crockard's only complaint and only claim to injury was that annexation would cause a change in his lifestyle. (Crockard Depo. pp. 16, 18, at R. 972, 974.)

Plaintiff-Respondent William Bowen lives within Emery Canyon, but not within the area to be annexed. From the inception of the annexation movement, he has been very



active in opposing annexation. He claimed no injury to himself. He feared that small property owners living within the annexed area would not be able to build. (Bowen Depo., pp. 9-10, at R. - .) He also hoped that other areas would be included within annexation. (Id., pp. 6-7, at R. - .) At all times, Mr. Bowen was represented at the hearings and participated personally. In fact, Mr. Bowen met with the Mayor to present an alternative plan for annexation. (Bowen Depo. pp. 18, 27-28, at R. ; Doenges Depo. p. 9, at R. .)

Finally, the Plaintiff-Respondent Richard Watson is a resident within the area to be annexed who had purchased property within Emigration Canyon after November, 1978, (Watson Depo. p. 4, at R. 827.) His name did not appear on "the last assessment rolls" as those rolls had been prepared prior to his purchase of the property. Mr. Watson opposes annexation because the property he owns contains an easement for a road, which he was aware of when he purchased the property. (Id., p. 10, at R. 827.) If development in the annexed areas takes place, he fears that road will be built. (Id., p. 10, at R. 827.) In addition, Mr. Watson opposes annexation because it would mean increased taxes, split neighborhoods, and the requirement to connect to the City sewer and water systems. (Id., p. 10, at R. 827.) Mr. Watson is represented by Craig Smay, who participated at the public hearings convened to consider the annexation proposal. (Watson Depo., p. 9-10, at R. 827.) Finally, the Plaintiff-Respondent Peter Doenges was extensively involved in the hearings on annexation. He

prepared and submitted studies and, with others, reviewed reports submitted by proponents of annexation. In fact, Mr. Doenges testified that his submissions were "fairly voluminous". (Doenges Depo., p. 9, at R. .)

1. No evidence of injury was ever presented to the court

On April 17, 1979, Judge Durham granted Plaintiffs' motion for a Temporary Restraining Order on the ground that unless annexation were enjoined before it was completed, Plaintiffs would lose their standing to challenge annexation. No evidence was presented at this hearing.

On May 29, 1979, Judge Croft heard Defendants' motions to dismiss the Complaint and to dissolve the Temporary Restraining Order. (Partial Transcript of Proceedings of May 29, 1979, pp. 4, 14 & 15, at R. 1044, 1053-54.) Judge Croft found that the plaintiffs had not stated a claim nor shown any irreparable damage as a result of the annexation procedure.

THE COURT: It simply gets back to, well maybe you can state a claim upon which relief can be granted, but I don't think you have done so yet. . . . And therefore, I find difficulty in reading into your Complaint a claim upon which injunctive relief can be granted. (Partial Transcript of Proceedings of May 29, 1979 Hearing, P. 2, at R. 1042.)

THE COURT: Before we get to that, you see, we have got to get you into court properly and they have challenged the validity of your Complaint. Maybe I read more into it than is there. I think it can be summed up, as I said before, you don't state a claim upon which the relief you seek can be granted. (Partial Transcript of Proceedings of May 29, 1979 Hearing, p. 4, at R. 1043.)

THE COURT: . . . I think that your claim for relief under 65(b) ought to be clearly and concisely stated if you are going to rely upon

65(b). If you are going to rely upon 65(a), I think you have got to do something more than you have done to allege irreparable damage to the plaintiffs that would justify injunctive relief. (Id., p. 14, at R. 1053.)

Plaintiff-Respondents filed a Second Amended Complaint on June 7, 1979. In this Second Amended Complaint, as suggested by the court, the plaintiffs stated two causes of action--the first that the petition was defective and that the City Commission had acted improperly, and the second that the petition provisions of § 10-2-401 violated the equal protection requirements of both the Federal and State Constitutions. All claims for injunctive relief were dropped from the Second Amended Complaint and there were no allegations whatsoever that any of the plaintiffs had been injured in any way. The only claim alleged was that the act of annexation would:

affect the rights of plaintiffs in that lands in which plaintiffs have the interest heretofore set forth will be subjected, as the result of such acts, to the jurisdiction of Salt Lake City, including, at least, the jurisdiction to tax and assess and to plan and develop. (Plaintiff-Respondents' Second Amended Complaint, p. 4, at R. 362.)

This claim for damages was only alleged as a consequence of the City Commission's acts of annexation. The Plaintiff-Respondents made no claim that the provisions of Section 10-2-401 either directly or adversely affected the rights of the Plaintiff, except the blanket claim that Plaintiffs had been denied equal protection. (Id. p. 4-5, at R. 362-63.)

All of the parties filed cross motions for summary judgment and submitted the issue to the judge after hearing on August 9, 1979. No witnesses were offered, no testimony taken

except whatever was contained in the depositions and affidavits on file.

At the hearing, Judge Conder also questioned the Plaintiffs' claim to damages and asked Mr. Smay, attorney for Plaintiffs in which way the Plaintiffs had been injured. The only reference in the Complaint or in any of the documents filed or argument given to possibility of an injury is the following:

THE COURT: Thank you. Second question. Under Rule 65(a) which is injunctive relief, and this is going to come up by reasons of the other motions in the file, do you claim there is irreparable harm caused to the plaintiffs and have you pled irreparable harm caused to you to warrant the issuance of a preliminary injunction?

MR. SMAY: Yes, clearly irreparable harm, and it is recognized in a number of cases having the status of your land in which you're interested change from one authority to another counter [center] to the city is irreparable harm, if in fact it wouldn't be illegal. (Transcript of Proceedings, August 9, 1979, pp. 48-49, at R. 1103-04.)

The right to remain part of the county is not a right protected by the Fourteenth Amendment.

There has been no showing of any claimed injury to any recognizable right resulting directly from the petition provisions of Section 10-2-401.

## V. ARGUMENT

A. The Plaintiff-Respondents do not have Standing to Challenge the Constitutionality of Section 10-2-401, Utah Code Ann. (Pocket Supp. 1977) as the provisions of that Section have not and will not "directly and adversely" Infringe on any of their Constitutionally Protected Rights.

Neither this Court nor any other court has the power, per se, to review and annul acts of the legislature on the grounds that they are unconstitutional. That question may be considered only when some direct injury is suffered or threatened to be suffered by the one assailing the act.

The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. (Commonwealth of Massachusetts v. Mellon, 262 U.S. 447, 488 (1923).)

The controlling question determining standing is whether Plaintiff-Respondents "have sustained or are immediately in danger of sustaining some direct injury "as a result of the statute's enforcement. (Cramp v. Bd. of Public Inst., 368 U.S. 278, 279 (1961).)

This being a declaratory judgment action in which the requirements for standing are strict, (Tileston v. Ullman, 318 U.S. 44,45 (1943).), before any court has jurisdiction to determine the constitutionality of the statute, it must determine whether the parties had the requisite standing. Plaintiff-Respondents must have suffered or will suffer in fact an actual and direct injury as a result of the petition provisions of Section 10-2-401 in order to challenge its constitutionality.

We may once more repeat what has been so often said, that one who would strike down a state statute as violative of the Federal Constitution, must show he is within the class with respect to whom the act is unconstitutional, and must show that the alleged unconstitutional feature injures

him, and so operates as to deprive him of rights protected by the Federal Constitution. (The Plymouth Coal Company v. Pennsylvania, 232 U.S. 531, 545 (1913).)

Clearly, Plaintiffs cannot sue for wrongs that do not affect them.

In order that the validity of a state statute may be "drawn in question" it must appear that the plaintiff in error has a right to draw it in question by reason of an interest in the litigation which has suffered, or may suffer, by the decision of the state court in favor of the validity of the statute. (Tyler v. Judges, 179 U.S. 405, 408 (1900).)

The issue was squarely addressed by the United States Supreme Court in Tileston v. Ullman. There a physician filed a declaratory judgment action in the state court to determine whether the state statute prohibiting the use of drugs or instruments to prevent conception and the giving of assistance or counsel in their use is unconstitutional. The physician alleged that if the statute was enforced he would be prohibited from giving advice concerning the use of contraceptives to three patients whose condition of health was such that their lives would be endangered by child bearing. The United States Supreme Court dismissed the action claiming that the plaintiff's life was not in danger and therefore he did not have standing.

We are of the opinion that the proceedings in the State Court present no constitutional question which appellant has standing to assert. The sole constitutional attack upon the statutes under the Fourteenth Amendment is confined to their deprivation of life--obviously not appellant's, but his patients'. There is no allegation or proof that appellant's life is in danger. His patients are not parties to

these proceedings and there is no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life, which they do not assert in their own behalf. [cites omitted] No question is raised in the record with respect to the deprivation of appellant's liberty or property in contravention to the Fourteenth Amendment. . . . (Tileston v. Ullman, 318 U.S. 44, at 46.)

Not only must the plaintiffs personally suffer a direct and recognizable injury, the injury must be pleaded. In McGowan v. Maryland, 366 U.S. 420, 429 (1961), the Supreme Court refused to consider the constitutional issue rising under the First Amendment of a Sunday closing law as that constitutional right had not been alleged in the complaint by the particular plaintiffs:

First, appellants contend here that the statutes applicable to Anne Arundel County violate the constitutional guarantee of Freedom of Religion in that the statutes' effect is to prohibit the free exercise of religion in contravention of the First Amendment, made applicable to the States by the Fourteenth Amendment. But appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing. In fact, the record is silent as to what appellants' religious beliefs are. Since the general rule is that "a litigant may only assert his own constitutional rights or immunities," United States v. Raines, 362 U.S. 17, we hold that appellants have no standing to raise this contention.

These principles are dispositive of the action. Plaintiff-Respondents never pleaded, nor attempted to prove that they had suffered a direct injury to a constitutionally protected right as a result of the annexation procedure dictated by Section 10-2-401. The Plaintiffs in their Complaint claim that the statute is unconstitutional in:



(a) That the annexation procedure limits the petition process of an annexation to land owners of record on the latest assessment rolls while denying to others the right to sign the petition;

(b) That the requirement that those signing the petition include a majority of the property owners results in weighted voting; and

(c) The use of the last assessment rolls grants a right to individuals who have sold their property subsequent to the completion of the rolls to sign a petition while denying the opportunity to purchasers who purchase the property subsequent to the formulation of the latest assessment rolls. (Plaintiffs' Second Amended Complaint, p. 5, ¶ 13, at R. 363.)

Plaintiffs argued that "defendant has attempted to impose its jurisdiction upon lands in which plaintiffs are interested by proceedings taken pursuant to a statute which is unconstitutional and void. (Ibid., ¶ 14, at R. 363.)

Thus, the only claimed injury is the changing of the status of Plaintiffs' land from being land in the county to land in the city. This being true, the only Plaintiffs conceivably having standing to assert this injury are the Plaintiffs who own property within the area to be annexed--Doenges, Crockard and Watson. Miles Crockard and Peter Doenges, however, had an opportunity to sign the petition or refuse to. (Doenges Depo., pp. 4-5, at R. .) Therefore, the petition provisions of Section 10-2-401 do not deny them any right. "He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or property." (Thomas Cusack Co. v. Chicago, 242 U.S. 526, 530 (1916).)

Plaintiff-Respondent Watson, at his deposition, alleged that he purchased property within the area to be



annexed in approximately November, 1978, after the assessment rolls were determined. (Watson Depo., p. 4, R. 827.) Therefore, his name did not appear and he could not sign the petition. But, Equal Protection does not require perfection (James v. Strange, 407 U.S. 128, 133 (1972).) Mr. Bowen, however, favored annexation. He wanted more area included within the annexation. (Bowen Depo., pp. 5-6, at R. .) His interest was in someone else's property. A right he does not have standing to assert. Bowen will not be personally injured by the exclusion of this area from the city. Further, Mr. Bowen made his opinions known at the hearings. Mr. Peterson, a renter, did not have his property transferred to city jurisdiction. Thus, he could not have suffered this alleged injury.

The Emigration Improvement District certainly had no constitutional right to protect. First, in a letter to the court dated July 26, 1979, the Improvement District admitted that annexation would accomplish its purpose in being and asked to be removed as a plaintiff. (R.538.) It certainly could not be injured if its purposes were being accomplished by annexation. And there is certainly no right for a water district to vote in any election or as a district to sign any petition. Plaintiff-Respondent Bowen lives outside the area to be annexed, none of this property would be transferred into the city's jurisdiction. He opposed the annexation because it did not include the area in which he resides.

The Plaintiffs did not carry their burden or even make any effort to show that the use of the latest assessment

rolls created an invidious distinction. (See, infra, at 40.) There must be a way to finally determine potential petitioners so that the City Commission can finally know whether it can act. A city commission cannot take action unless the requisite number of signatures are on a petition. Without some standard of establishing finality in ownership, it would be impossible for the commissioners to determine whether, on the date of voting on an annexation petition, the requisite number of signatures were present. The Commission is not equipped to review every parcel of land to determine property ownership on the very day of the vote. Petitioners also have a right to know whether their petition is valid, and with whom they must deal to petition a city commission to commence determination of the advisability of annexation. The latest assessment rolls are the best determiners.

B. Equal Protection is not Violated by Limiting the Petition Process Triggering a Hearing to Consider a Petition for Annexation to Real Property Owners where the Hearing Process Grants to all Interested Individuals an Opportunity to be Heard on the Annexation Petition.

1. Plaintiff-Respondents have neither pleaded nor proven a direct and adverse infringement on any constitutionally protected right.

In this sense, the concept of standing focuses on the party seeking relief, rather than on the precise nature of the relief sought. See *Flast v. Cohen*, supra, 392 U.S., at 99-100. The decisions of this court have also made it clear that something more than an "adversary interest" is necessary to confer standing.

There must, in addition, be some connection between the official action challenged and some legally protected interest of the party challenging that action. See *Flast v. Cohen*, supra, at 101-106. (*Jenkins v. McKeethan*, 395 U.S. 411, 423 (1969).)

In their Complaint, Plaintiffs allege that Section 10-2-401 of the Utah Code denies the "franchise to other persons substantially affected by and interested in the annexation." (Plaintiffs' Second Amended Complaint, p. 5 ¶ 13A, at R. 363.) The right infringed would be the right to be heard. But such is not the effect of this provision.

Section 10-2-401 provides that a majority of landowners within a given area may request, by way of petition, that a city commission investigate and determine the advisability of the annexation of that territory to the municipality. This petition does not determine whether annexation will take place. It is merely a triggering device which triggers consideration of the proposal by the body legislated by the state to make that determination. Immediately upon receiving a valid petition, the city commission must investigate and consider the petition. This investigation and consideration includes public hearings. In the present case numerous public hearings were held wherein all interested citizens, including the Plaintiffs and their representative, were allowed to participate and to make their views known. (Supra, at 9-13.) The determination of annexation was made by the City Commission only after the opinions and views of all parties who had availed themselves of the opportunity to

speaking had been heard. The effect of Section 10-2-401 is to grant to everyone the equal right to be heard on any proposed annexation during the hearing process.

It is clear that the constitutional validity of a statute must be determined by its natural and reasonable effects.

With respect to these contentions, it is enough to say that in passing upon constitutional questions the Court has regard to substance and not mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect. (Near v. Minnesota, 283 U.S. 697, 708 (1931).)

In Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932), Chief Justice Hughes explained exactly how an alleged denial of equal protection must be weighed by the court.

Discrimination, like interstate commerce itself, is a practical concept. We must deal in this matter, as in others with substantial distinctions and real injuries. (Id., at 481.)

. . . .

The same considerations, with respect to discrimination applied to the claim that the statute in question violates the equal protection clause of the Fourteenth Amendment.

. . . .

In determining whether there is a denial of equal protection of the laws by such taxation, we must look to the fairness and reasonableness of its purposes and practical operation. . . . (Id., at 482.)

Looking at the purposes and practical operation, of Section 10-2-401, it is obvious that the plaintiffs in this case have suffered no real injuries. They had, and availed themselves of the opportunity to be heard. See pages 6-13, supra.

The record clearly shows that the Plaintiff-Respondents have not been denied equal protection, have not been denied an equal right to be heard on the annexation provisions. What has happened is that the Plaintiff-Respondents have lost in the political process and are now attempting judicially to reverse what the legislature lawfully has accomplished. In Thompson v. Whitley, 344 F. Supp. 480 (E.D.N.C. 1972), a similar situation occurred. Here, under a statutory annexation scheme, residents within the area to be annexed were denied the right to vote on an annexation referendum. In finding that such a scheme was constitutional, the district court explained:

. . . thus right to vote in the referendum here does not relate except indirectly to participation in representative government. Indeed, the newly annexed citizens brought into the township over their protests may thereafter vote in township elections and have their votes counted fully to influence township decisions---including future annexations and perhaps even de-annexations. (Id., at 484.)

The Utah statute grants more.

2. Plaintiff-Respondents have not been denied any constitutionally protected right to vote.

In Berry v. Bourne, 588 F.2d 422 (4th Cir. 1978), a case squarely on point, the Fourth Circuit held that a law under which the governing body of a city may annex an area by resolution upon the filing of a petition signed by a certain percentage of the landowners within that area does not deny equal protection to anyone. The South Carolina statute in question authorized the governing body of any city, upon the

filing of a petition by seventy-five percent or more of the freeholders in any area contiguous to the city requesting annexation, to annex such area. The registered voter denied the right to vote on the annexation filed suit alleging that this denial violates voters' rights under the equal protection clause.

In denying the claim, relying on Hunter v. Pittsburg, 207 U.S. 161 (1907), the Fourth Circuit held that no one was denied the right to vote as the decision was made by the city's governing body. The court held that the petitioning process "involves no election" (Id., at 425) and therefore the Court expressly rejected the application of Kramer v. Union School District, 395 U.S. 621 (1969) and Cipriano v. Houma, 395 U.S. 701 (1969), (Id., at 424), cases relied on by the Plaintiff-Respondents in the court below. Where no one is granted the right to vote on an annexation "there is no basis for an equal protection claim." (Berry, supra, at 424; See also, Citizens Comm. to Opp. Annex. v. City of Lynchburg, Va., 400 F.Supp. 68, modified on other grounds, 528 F.2d 816 (4th Cir. 1975), app. denied, 423 U.S. 1043 (1976).)

The procedure examined by the Fourth Circuit in Berry is precisely the procedure mandated by Section 10-2-401. There is no election. Upon the petition of a majority of the land-owners, the city commission may annex contiguous areas upon adoption of an appropriate resolution. There is no basis for an equal protection claim.

This Court reached the same conclusion in Freeman v. Centerville City, et al., No. 15904 (Utah Sup. Ct. September 21, 1979).



annexed to the City of Centerville by an ordinance passed by that municipality. Freeman made the exact same claim of injury as the Plaintiffs in this case. The Plaintiff opposed annexation on the ground that Section 10-2-401 was unconstitutional. The Court disagreed.

Plaintiff specifically claims a deprivation of his property because annexation to a different jurisdiction will significantly alter his property rights in connection with such matters as annexation, zoning, and water rights. (Id., at 2.)

This Court found that the legislature was under no legal requirement to provide for an election by those affected by the proposed annexation. (Id., at 3-4.) The Supreme Court concluded, after reviewing the statute,

We find no basis in the Constitution for making the general annexation process subject to conditions beyond those stated in the statute. (Id., at 4.)

The Court went on to explain that the annexing municipality, in considering a petition, was required to consider all interests involved and it was not bound by the petition.

It is, however, the duty and responsibility of the annexing municipality to exercise the prudence and sound judgment that will prevent inappropriate annexations and assure that they are in the public interest. The governing body of the municipality must take into account not only the welfare of the petitioners, but also the welfare of those who reside within its established borders in determining whether to pass an ordinance of annexation. Accordingly, a municipality is not bound in the exercise of its judgment by a petition, even though signed by a majority of landowners, to pass an ordinance necessary to complete annexation. Cottonwood City Electors v. Salt Lake County Bd. of Comm'rs, 28 Utah 2d 121, 499 P.2d 270 (1972). (Id., at 5.)

Since no one voted for or against annexation except the City

Commission, no group could claim that it had been denied equal protection.

In a concurring opinion, Justice Hall explained that as the plaintiff had actual notice of the hearing, and was in attendance, he therefore had no standing to challenge the lack of notice. The situation is similar here. Plaintiff-Respondents all had notice of the hearing, all participated in the hearings and made their opinions known, they now have no standing to challenge the process. As explained in Freeman, the petitioning process is not the same as an election. It is only the triggering process for the consideration of annexation and therefore the equal protection requirements for a direct election do not apply.

As this Court recognized in Freeman, the annexation procedure of Section 10-2-401 provides first that a majority of the landowners living within an area desiring annexation must request of the annexing territory that it consider the prospects of annexation. This petition is merely a triggering device and not an election.

In enacting § 10-2-401, the Legislature established a means for annexation which calls for the consent of both the annexing municipality and a majority of the property owners in the area seeking annexation. The initiation of the annexation process by petition is not the equivalent of an election nor need it be. It is only the triggering process for the concerned municipality to consummate the annexation procedure by exercising its legislative power if it deems it appropriate to do so. (Freeman v. Centerville City, et al., No. 15904 Utah Sup. Ct. (filed September 21, 1979).) (Emphasis supplied)

This was the point missed by Plaintiff-Respondents and the



court below. In reliance on constitutional requirements established by cases where the election was the final determinative act, the lower court held that a "triggering" petition was equivalent and required the same protections. This simply is not correct.

The United States Supreme Court has discussed this same issue in Concerned Citizens of Southern Ohio v. Pine Creek Conservancy District, 429 U.S. 651 (1977). Under the Ohio statute in question, the filing of a petition signed by a certain percentage of the owners of land located within the the area desiring to form a conservancy district triggered the formation of a conservancy court. It was the conservancy court's responsibility first to evaluate the desirability of establishing the proposed district and then to decide whether one should be formed. The petition of the landowners did not create the district, but only initiated consideration of the matter. Following this process, in the Concerned Citizens case, the conservancy court determined that a conservancy district ought to be established.

Parties objecting to the formation of the district, landowners and non-landowners alike, argue that the procedure violated the Constitution, inter alia, on the ground that residents of towns opposing formation of the district were denied equal protection because they were excluded from the petition process. The three-judge district court rejected plaintiff's claims without consideration. The Supreme Court reversed and remanded Per Curium, stating that the three-

judge court needed to evaluate each of the constitutional challenges.

In dissent, Justices Rhenquist, Powell and Stevens argued that this would be a waste of time, for following correct authority the lower court would have arrived at the same result. Dealing specifically with the question of the equal protection requirement of an individual's right to be heard in opposition, the three agreed:

To the extent the claim here protests the "discrimination" against the freeholders in a town whose governing body signs the petition, in that they "were deprived of the right to oppose the district," it is simply wrong on the facts. . . . Rather, opposing freeholders in such towns remain as free as opposing freeholders in towns where petitions are circulated, to appear before the conservancy court and "object to the organization and incorporation of said district. . . ." [cite omitted] They are entitled to no more under the Constitution. (Id., at 658) (Emphasis added.)

Other state courts reach the same conclusion. The Supreme Court of New Mexico found constitutional an annexation provision excluding the petition process to landowners in Torres v. Village of Capitan, 92 N.M. 64, 582 P.2d 1277 (1978). The statute provided that a city may annex contiguous territory whenever a petition signed by the owners of a majority of the number of acres within that area is filed. A majority of the landowners and owners of more than 50 percent of the area to be annexed filed a petition for annexation. After consideration the annexation was approved. A suit was filed challenging the annexation on the ground that the exclusion of non-landowners from the petition and the requirement that petitioners own more than 50 percent of the

land within the area to be annexed violated the equal protection clause of the Constitution. The New Mexico Supreme Court disagreed. The Court could not equate the petition procedure triggering consideration by a municipality of an annexation proposal with an individual's voting rights. (Torres v. Village of Capitan, 92 N.M. 64, 582 P.2d 1277, 1282 (1978).)

We hold that petitioning for annexation of land in this case is not a fundamental voting right and that §14-7-17, supra, is constitutional. (Id., at 1283.)

In so holding, the court explained that these petition procedures do not involve elections and therefore do not infringe upon the fundamental right to vote." (Ibid.)

The California Supreme Court also squarely met the issue in Curtis v. Board of Supervisors of Los Angeles County, 501 P.2d 537 (Cal. 1972). The California statute being challenged -- a municipal incorporation statute -- contained two provisions separately considered by the court. One was a determination of the constitutionality of the same procedure as that mandated by the Utah Code Section 10-2-401, except for the numbers required. The California provision in question required:

Proceedings for municipal incorporation were initiated by the "filing with the board of supervisors . . . a petition signed by at least 25 percent of the qualified signers, representing at least 25 percent of the assessed value of the land included in the proposed city limits." (Id., at 540 n. 4.)

("Qualified signer" was defined as the "owner of an interest in fee" or the purchaser of land under a written agreement. (Ibid.).) Excluded were all residents who own no land "although these persons admittedly are also financially and politically interested. .

(Id., at 545.)

The California Supreme Court found that limiting the petition process to landowners did not deny non-landowners their right to be heard. It was not a denial of equal protection.

As the court explained:

30. Section 34303 provides that proceedings before the board of supervisors are initiated by a petition signed by at least 25 percent of the landowners representing at least 25 percent of the assessed value of land. (See fn. 4, supra.) We perceive no constitutional objection in permitting a group composed of 25 percent or more of the landowners, whether or not they represent 25 percent of the value of land, to initiate incorporation proceedings, and consequently we find no constitutional impediment to the board of supervisors acting on the petition for incorporation of Rancho Palos Verdes. . . . (Id., at 553 n. 30.)

31. Our holding that the protest procedure of section 34311 is unconstitutional does not leave the nonresident or corporate landowner bereft of statutory protection. He may appear before the local agency formation commission to oppose incorporation and request exclusion from the proposed city (§ 54795). These commissions may, and often do, disapprove unsound incorporation proposals or require the revision of proposed boundaries. . . . The landowner may again appear before the board of supervisors to oppose incorporation or request exclusion (§§ 34311, 34315). . . .

The difference between these remedies and the protest procedure of section 34311 is that they confer upon the landowner no right to veto incorporation, but extend to him only the opportunity to persuade a public body that nonincorporation, exclusion, or lower taxation is in the public interest. (Id., n. 31.)

The petition procedure in Utah, South Carolina, New Mexico and California initiate hearings on the advisability of annexation. In no case is the petition determinative. Plaintiffs had no right to vote on the annexation proposal.

Dealing specifically with claims similar to those of plaintiffs, the courts have long held

that there is no absolute right under the due process clause to vote on a proposed alteration of political boundaries. (Doyle v. Municipal Comm'n, 340 F.Supp. 841, 844 (D.Minn. 1972).)

See also, Hunter v. Pittsburg, 207 U.S. 161, 178, 179 (1907); Adams v. City of Colorado Springs, 308 F.Supp. 1397 (D.Colo. 1970); aff'd, 399 U.S. 901 (1970).

The United States Supreme Court has expressly stated and reaffirmed that equal protection and due process do not apply to annexation procedures that only trigger hearings and a final decision is subsequently made, not compelled by the petitioning process -- this decision being made by a separate body.

3. There is no constitutionally protected right to maintain a person's property within or without a political subdivision of the state.

In Hunter v. Pittsburg, 207 U.S. 161 (1907), the United States Supreme Court explained the "settled doctrines" regarding a state's statutory authority over annexation.

Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it. (Hunter v. Pittsburg, 207 U.S. 161, 178-79 (1907).)

Although pronounced in 1907, the principle remains unaltered by that Court and repeatedly followed.<sup>1</sup>

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<sup>1</sup>See, e.g., Board of Sup. of Harrison Co., Iowa v. Bd. of Sup. of Pottawattomie Ct., Iowa, 289 U.S. 708 (1932); City of Hillsboro v. Pub. Serv. Comm., 255 U.S. 562 (1920); City of New York v. McEntee, 263 U.S. 698 (1923).

In affirming a dismissal of a property owners' action to have a municipal annexation ordinance declared invalid, the Tenth Circuit, relying on the Supreme Court's opinion in Hunter, concluded that neither federal due process nor the concept of equal protection was available to the plaintiffs.

Neither the due process clause nor the concept of equal protection is available to persons seeking to obstruct the ordinary and necessary exercise of a state's political functions. . . . (International Harvester Co. v. Kansas City, 308 F.2d 35, 39 (10th Cir. 1962), cert. den'd, 371 U.S. 948 (1963).)

The Sixth Circuit, again relying on Hunter, in Detroit Edison Co. v. East China Township School Dist. No. 3, 378 F.2d 225 (6th Cir. 1967), cert. den'd, 389 U.S. 932 (1967), in affirming the lower court, concluded:

The District Court, relying principally on Hunter v. City of Pittsburgh, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907) for the proposition that "[a]ny alteration of municipal boundaries is a matter within the complete discretion of the state and not confined by any rights secured by the federal constitution," held that the annexation procedure followed was a legislative matter not justiciable under the due process or equal protection clauses of the Fourteenth Amendment. (Id., at 228.)

In East China Township, the plaintiffs sought a declaration that the annexation of two larger school districts to the school district in which they owned property violated the Fourteenth Amendment of the Federal Constitution. Plaintiffs argued that the statute was unconstitutional because the individual plaintiffs were denied the right to vote on the annexation proposal. The Sixth Circuit affirmed the district court's dismissal "because plaintiffs have failed to state a claim upon which relief may be granted."



In Hammonds v. City of Corpus Christi, 343 F.2d 162 (5th Cir.), cert denied, 382 U.S. 837 (1965) the Fifth Circuit reached a similar conclusion. In Hammonds plaintiffs sued to enjoin Corpus Christi from asserting any control over the alleged annexed territory, alleging that the annexation violated the due process clause of the Federal Constitution. The district court dismissed for lack of jurisdiction inter alia on the ground that "(1) the annexation of lands to a city has been held, without exception, to be purely a political matter entirely within the power of the State Legislature to regulate." The Fifth Circuit affirmed.

The appellants rely upon many cases dealing with the protection afforded by the 14th Amendment, but none which specifically relate to an annexation situation. The judge and appellee rely upon Hunter v. City of Pittsburg, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907). Although the judge quoted at length from that opinion, appellants neither cite the case nor make any attempt to distinguish it. The Tenth Circuit, in International Harvester Co. v. Kansas City, 308 F.2d 35, also cited with approval and quoted from the Hunter case.

We find no error or fault in the opinion and judgment of the district court, and they are affirmed. (Id., at 164.)

Annexation is a political question--this district court lacked power to review the City Commission's actions.

Although we may disagree with the mode of annexation or annexations themselves, the remedy of those aggrieved is not in the courts, but in the State Legislature. (Hammonds v. City of Corpus Christi, Texas, 226 F.Supp. 456 (S.D. Tex. 1964).)

None of the Plaintiff-Respondents either directly or personally have been injured in areas protected by the Constitution. They had no right to vote and their right to be heard has been preserved and exercised through their participa-

tion in the hearings. "They are entitled to no more under the constitution."

Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. . . . Although the inhabitants and property owners may by such changes [changes in boundaries of municipalities] suffer inconvenience and their property may be lessened in value by increased taxation, or for any reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. (Hunter v. Pittsburg, 207 U.S. 161, 179 (1907).)

It has been continually reaffirmed that the right to remain outside a municipality or to be included within a municipality is not a right protected under the Constitution.

We find no right of annexation available to anyone, owners or residents, regardless of economic status. (Wilkerson v. City of Coralville, 478 F.2d 709, 711 (8th Cir. 1973).)

As the Supreme Court explained in Hunter,

The state . . . at its pleasure . . . may expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done conditionally or unconditionally with or without the consent of the citizens or even against their protest. (Hunter v. Pittsburg, 207 U.S. at 179.)

There is no constitutional right to maintain ones property within or without a municipality.

C. Plaintiff-Respondents Failed to Sustain their Burden of Showing that the State did not have a Compelling Interest in Limiting the Petitioning Provisions of the Utah Annexation Statute to ". . . a majority of the owners of real property, as shown by the last assessment rolls, . . ." of the Property Located within the Area to be Annexed.



The test for whether a state's statutory scheme violates the equal protection clause of the Fourteenth Amendment is whether the classification drawn is reasonable in light of its purpose. "The presumption of reasonableness is with the state." (Salsbury v. Maryland, 346 U.S. 545, 553 (1954).)

It is . . . a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in enactment of which it has transcended its power. (Atchison, Topeka & Santa Fe Railroad Co. v. Matthews, 174 U.S. 96, 104-105 (1898).)

This presumption of reasonableness means this:

[T]he burden of establishing the unconstitutionality of a statute rests on him who assails it, and . . . courts may not declare a legislative discrimination invalid unless, viewed in light of facts made known or generally assumed, it is of such a character to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as a denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it. (Metropolitan Casualty Insurance Co. v. Brownell, 294 U.S. 580, 584 (1934).)

This Court does not view this any differently:

In addressing the question of constitutionality of this act of the legislature, we bear in mind the fundamental precepts: that all presumptions favor validity; the courts will strike down such an act with reluctance and only where that is clearly necessary; and that in case of uncertainty the act should be construed so that it will be constitutional whenever that reasonably can be done. (Great Salt Lake Authority v. Island Ranching Co., 18 Utah 2d 45, 414 P.2d 963 (Utah 1966).)

In Thompson v. Whitley, 344 F.Supp. 480 (E.D.N.C. 1972), the plaintiff in that case argued that the presumptions of constitu-

tionality and reasonableness were not applicable where a statutory scheme denied them a fundamental right--the right to vote on an annexation. Although the court in Thompson agreed that the plaintiffs "suffer discrimination by this statutory scheme", (Id., at 484.) it disagreed that voting on annexation was a "fundamental right" and would not apply the stricter standards of review. (Ibid.)

In this case, although the Plaintiff-Respondents claim that they and others in different circumstances and situations have been denied equal protection because they have not been allowed to participate in the triggering process. They have done nothing to show that this distinction is invidious. It was the Plaintiff-Respondents' burden to show that the classification violated the Fourteenth Amendment, and this burden they have not sustained.

Although it may not be perfect, the annexation ordinance establishes safeguards--those entitled to petition are those individuals primarily affected by the proposed annexation. The safeguards are embodied in the requirement that the signers must be property owners appearing on the last assessment rolls. This requirement establishes a method of determining the true owner, it establishes finality. This assures that there is some relationship between the petitioners and the tax burden.

The real property owners have the greatest interest in the property rights affected. They will be directly affected by increased taxes or required improvements such as

sewage connections. These costs may or may not be passed on to renters. And the real property owners will be the ones most benefited as the value of the property may increase with the advent of city services. Fire insurance will decrease as there will be a fire station closer to the property. Clean running water will be available. Thus, there is a basis for distinguishing between property owners and non-property owners. The classification is founded upon a reasonable distinction, and although this Court may have a better idea that is not the standard for finding a violation of the Fourteenth Amendment. (Torres v. Village of Capitan, 92 N.W. 64, 582 P.2d 1277, 1283 (1978).)

D. After a Notice of Appeal is Filed, the District Court had no Jurisdiction over the Matter to File Findings of Fact and Conclusions of Law.

The law is clear that once a notice of appeal has been filed, the district court loses jurisdiction of the matter except to entertain motions necessary to facilitate the appeal which are pending at the time the notice of appeal was filed.

On August 20, 1979, Judge Dean Conder of the Utah State Third Judicial Court entered his Memorandum Decision on the cross-motions for summary judgment which were argued before the court on August 9, 1979. In the order, the court held that Section 10-2-401 was unconstitutional, therefore, the court granted plaintiffs' motion for summary judgment. Nowhere in the Memorandum Decision did the court request the filing of Findings of Fact, and Conclusions of Law. As this Court is

well aware, where there is no request for Findings of Fact and Conclusions of Law on a motion for summary judgment where Findings of Fact and Conclusions of Law are not required by statute, it is presumed that the court did not intend to enter any, and that the Memorandum Decision was the final decision.

Plaintiffs appealed before specifically designated findings and conclusions were entered by the trial court, allegedly in the interest of time. Neither of the parties challenged this on appeal; indeed, both treat the memorandum decision as the court's final disposition of the case. Generally, where no request has been made for findings of fact, the presumption is that the trial court found all facts necessary to support its order and judgment. (Seal v. Mapleton City, No. 15948 (Utah Sup.Ct. 27 July 1979).)

Due to the statutory requirements that the notice of appeal be filed within 10 days, on August 27, 1979, these Defendants, filed a notice of appeal (R. 748-49) in the district court for the Third Judicial District. Eight days later, plaintiffs submitted Findings of Fact, Conclusions of Law and Judgment to the Court. Two days after that a second unrequested set of Findings of Fact and Conclusions of Law were submitted. These were signed September 6, 1979.

The law is clear, that once a notice of appeal has been filed the district court is without authority to enter Findings of Fact and Conclusions of Law. The trial court's jurisdiction ceased upon perfection of an appeal and jurisdiction of the Utah Supreme Court attaches.

It is the general rule that the trial court loses jurisdiction while an appeal is pending except in regard to matters which will be in furtherance of the appeal. (State v. Torres,

510 P.2d 735 (Sup. Ct. Ariz. 1973); National American Life Insurance Co. v. Baxter, 385 P.2d 956 (Sup. Ct. N.M. 1963).)

Whenever an appeal is perfected . . . it stays all further proceedings in the court below upon the judgment or order appealed from, or upon matters embraced therein. . . but the court below may proceed upon any other matters embraced in the action and not affected by the order appealed from.

. . . .

The perfectin of an appeal is completed when the formalities prescribed by the Rules on Appeal are complied with, and "stays all further proceedings in the court below" since jurisdiction is thence forth vested in the appellate court. (Navarro v. Lippold, 195 P.2d 543 (D. Ct. of App. Cal. 1948).)

This applies to the entry of findings of fact and conclusions of law after a notice of appeal has been filed.

In Mirabal v. Robert E. McKee General Contractor, Inc., 74 N.M. 455, 394 P.2d 851 (1964), we held that the trial court properly refused to pass upon requested findings and conclusions filed after the filing of the notice of appeal, because the trial court had lost jurisdiction to do so. It follows logically therefrom that the trial court in the present case lacked authority to enter findings and conclusions 19 days after the filing of the notice of appeal and over a month and a half after the entry of judgment. (University of Albuquerque v. Barrett, (86 N.M. 794), 528 P.2d 207, 209 (1974).)

Likewise, the district court in this case lacked authority to enter findings and conclusions 10 days after the filing of a notice of appeal and almost a month after the entry of judgment.

E. The Court Erred in Failing to Grant Defendant-Appellants' Motions for Summary Judgment and Dissolve the Temporary Restraining Order.

1. Annexation is a political matter wholly within the power of the Legislature to regulate.

As this Court recently recognized in Freeman, supra,

The power to change or modify municipal boundaries is a legislative function, and as long as the statutory process is complied with, the courts will not generally interfere with the legislative prerogative, even though a person's property by becoming subject to a different jurisdiction may be subject to different rules, obligations, or assessments. Bradshaw v. Beaver City, 27 Utah 2d 135, 493 P.2d 643 (1972); see also In Re Town of West Jordan, 7 Utah 2d 391, 326 P.2d 105 (1958); Application of Peterson, 92 Utah 212, 66 P.2d 1195 (1937); Plutus Mining Co. v. Orme, 76 Utah 286, 289 P.2d 132 (1930); Kimball v. Grantsville City, 19 Utah 368, 57 P. 1 (1899). Cf. Hunter v. City of Pittsburgh, 207 U.S. 161 (1907); Dillon on Municipal Corporations (5th Ed.) 617, §355. (Freeman, supra, at 3.)

A court's role in reviewing decisions of governing bodies of municipalities in annexation cases is limited by the political nature of those proceedings. In an action to restrain the County Commissioners of Juab County from exerting authority over territory segregated for a municipality, this Court explained:

In view of the fact, however, that the changing of the territorial limits of a city is primarily a legislative function, courts are bound to confine the exercise of the power conferred upon them by the Legislature within the expressed or necessarily implied language of the act so conferring such power. (Plutus Mining Co. v. Orme, 76 Utah 286, 289 P.132, 135 (1930).)

Further, courts are without authority to decide the "propriety" or the "desirability" of a particular annexation.

Annexation is a legislative function which under the constitutional separation of powers cannot be delegated to the courts except for this narrow fact finding determination. The court has no discretionary power to determine whether the proposal is good or

bad, wise or unwise. (City of Clinton v. Owners of Property, 191 N.W.2d 671, 677 (Iowa 1971).)

The function of the judiciary is merely to make a determination as to whether the conditions prescribed by the legislature for annexation have been met. The political and economic advisability of annexation, and the policy questions involved in the problem of municipal expansion, are to be determined solely by the legislative branch and the municipalities, if the power is so delegated.

The courts are and should be reluctant to intrude into the prerogative of the legislative branch of government, and will interfere with such action only if it plainly appears that it is so lacking in propriety and reason that it must be deemed capricious and arbitrary, or is in excess of the authority of the legislative body. (Bradshaw v. Beaver City, 27 Utah 2d 135, 493 P.2d 643, 645 (1972). See, also, Child v. City of Spanish Fork, 538 P.2d 184 (Utah, 1975); Tygesen v. Magna Water Co., 226 P.2d 127 (Utah 1950).)

This Court explained this principle in Tygesen v. Magna Water Co., 226 P.2d 127 (Utah 1950). Tygesen, was an action for a writ of prohibition, prohibiting the defendants from issuing and selling general obligation bonds. Under the authority of Chapter 24, Laws of Utah 1949, the board of county commissioners in each county in the State was empowered to establish improvement districts for the purpose of operating systems for supply, treatment and distribution of water; and systems for the collection, treatment, and disposition of sewage. Under this authority, the Magna Improvement District was formed. Plaintiffs sought to prohibit the Magna Water Company from issuing bonds pursuant to the authority of the act on the ground that the County Commission acted beyond its constitutional and



statutory authority. Further, the plaintiffs argue that as the act did not provide for review by the courts, it violated sections 7 and 11 of Article I of the Utah State Constitution, the Due Process Clauses. This Court held that the acts of municipalities or quasi-municipalities, when done within the powers given by statute, are not subject to review by courts unless manifest abuse of those powers is evident.

The governmental acts of quasi-municipalities are like those of true municipalities, and when a municipality acts within the powers given it by statute, its acts are not subject to review by courts unless there is a manifest abuse of those powers or unless such right to review is granted by statute. (Id., at 132.)

This Court held that the Act did not violate due process because the provisions of the Act gave "ample opportunity to interested owners to protect their right and to prevent the formation of such district where the owners of the majority of the real property based on the assessed valuation thereof, object." (Id., at 133.)

Only recently this Court, in Child v. City of Spanish Fork, 538 P.2d 184 (Utah 1975), had before it the question as to whether a court could examine the motives, purposes and reasonableness of city council action. In Child, the real property owners within an area to be annexed by Spanish Fork sought declaratory judgment that the city's requirements for annexation were improper. Specifically, plaintiffs appealed to this Court, arguing, (1) that the action of the City Council was beyond its powers; and that it was arbitrary and unreasonable; and (2) that it violated plaintiff's constitutional



rights to equal protection of the laws. This Court affirmed the district court's dismissal of the plaintiff's complaint and explained:

Certain principles are applicable in considering the plaintiff's contentions. The first is that a determination of city boundaries is a legislative function, which is performed by its governing body. The second logically follows therefrom: That in carrying out that duty the city council is endowed with broad discretion to make decisions and determine policies which it thinks will best fulfill its responsibilities. Consequently, as in all legislative matters, courts are reluctant to interfere therewith; and do so only when the decisions or actions are clearly outside the authority of the governing body, or are so wholly unreasonable or unjust that they must be deemed capricious and arbitrary in adversely affecting someone's rights. (Id., at 186.)

In Bradshaw v. Beaver City, 493 P.2d 643 (Utah 1972), plaintiffs, all residents of Beaver City, sought to enjoin the annexation of a tract of about 21 acres of land which was north of the city and belonged to the Interstate Development Company. Plaintiffs contended that the annexation was arbitrary, unreasonable, capricious and not done in accordance with law and the prerogatives of the defendant City Council. The trial court granted defendant's motion for summary judgment.

Plaintiffs claimed that the annexation was an unlawful act of the City Council. In response to this claim, the district court held:

The court finds that even if the facts set forth in the First Cause of Action were determined to be true, it would be outside the scope of authority of this court to make a ruling or determination on matters that are within the discretion of the legislative authorities and mayor of Beaver City. (Id., at 645.)

All other allegations of the complaint were similarly disposed

of by the district court. This Court affirmed, explaining:

The determination of the boundaries of a city, what may or may not be encompassed therein, including annexation or severance is a legislative function to be performed by the governing body of the city. The courts are and should be reluctant to intrude into the prerogative of the legislative branch of government, and will interfere with such action only if it plainly appears that it is so lacking in propriety and reason that it must be deemed capricious and arbitrary, or is in excess of the authority of the legislative body. (Ibid.)

The law is clear in Utah. The determination of the boundaries of a municipality and the reasons for a city's decision to annex adjacent territory are beyond the scope of judicial review.

Plaintiff-Respondents in this action asked the district court to determine the propriety of the City Commission's action, to reweigh and to re-evaluate the evidence before the City Commission, and to determine whether that action, in view of that Court's economic and social theory, was reasonable or wise. Such an inquiry is beyond the scope of that court's jurisdiction.

2. There was no evidence offered that the acts of the City Commission in approving annexation were either arbitrary or capricious.

At the hearing on Plaintiff-Respondents motion for preliminary injunction and the Defendant-Appellees motion to dismiss, Judge Croft explained to the plaintiffs just exactly what had to be done if the court was to review the acts of the City Commission.

THE COURT: Secondly, you are attempting to bring before the Court the proceedings to date before the Board of City Commissioners asking this Court to rule that what they have done to date is void and contrary to law. Now, isn't that what your claim for relief is?

MR. SMAY: That is right. . . .

THE COURT: Certainly, we cannot do anything more than review the action of the City Commission up to the time Judge Durham issued a restraining order.

MR. SMAY: What those actions were is a matter of evidence which can be presented.

THE COURT: Which can be presented by bringing the record of the proceeding before the Court on an extraordinary writ. (Partial Transcript of Proceedings, May 29, 1979, at 3-4.)

This was never done. When the issue was submitted on summary judgment, the Plaintiff-Respondents had not brought any record of the City Commission's proceedings before the court. Consequently, it would be impossible for the district court to determine that the City Commission had acted arbitrarily and capriciously. Therefore, defendants' motion for summary judgment on this point should have been granted.

Although as explained, supra, this Court should not reweigh the information considered by the Commission in reaching its decision, the information supplied to the Commission and the evidence of the Commission's conduct demonstrates that it was well informed at the time of the vote on annexation. Its actions were neither arbitrary nor capricious. (See, e.g., Mayor Wilson's Depo. pp. 18-22, 31, 33 & Ex. 9, at R. .)

The facts show that the city conducted extensive public hearings on the Annexation Petitions, which included

discussions of proposed zoning ordinances, public service requirements, and improved health and safety for canyon residents. The City Commission members who voted on the Annexation Petitions were also provided with extensive and detailed studies by various city departments, including fire, police, sewage, water, and health which concerned the impact of annexation upon the city resources and the residents of the annexed area. Clearly, it cannot be said that a decision reached by a legislative body after this much research and consideration is arbitrary and capricious.

3. In approving the petition for annexation, all of the requirements of Section 10-2-401, Utah Code Ann. (Pocket Supp. 1977) were followed and adhered to.

a. On the morning of the City Commission's action, the City Attorney reviewed the latest maps and assessment rolls and petitions. He determined that not only as to the consolidated petition, but even as to each of the three petitions separately, there were the requisite signatures petitioning for annexation.

Based upon that review, I am of the opinion that a majority of property owners on each of the annexation petitions presently favors connection to the City on the following particulars:

Petition #1	55.76%
Petition #2	100.00%
Petition #3	100.00%

The total property owners petitioning represent, by my figures, 61.25% of all property owners in the subject area. (Letter from Wally Miller, Deputy City Attorney to Bd. of City Commissioners, April 10, 1979.) (at R. 171-172.)

On the date of the vote there were sufficient signatures under the statute to require the City Commission action.

b. The signers of all petitions were fully informed of the area requested to be annexed by the particular petitions. Both Mr. Gardner and Mr. Johnson in their depositions testified that they had shown the proper maps to all of the residents living within the area outlining the areas to be annexed. (Gardner Depo., pp. 43-44, at R. 871-872; and Johnson Depo., p. 33, at R. 927.)

c. The Salt Lake Planning and Zoning Commission found that the area to be annexed was contiguous to Salt Lake City. (Jorgensen Depo. pp. 8-11, at R. 824.) Specifically, the Commission found that petition No. 1 was contiguous to Salt Lake City and that petitions 2 and 3 are contiguous to petition 1. Consolidated, that contiguous area is contiguous to Salt Lake City.

d. Plaintiff-Respondents claim that the action was not timely, suggesting that the City should have not done such a thorough job in investigating the proposals. Such a position is untenable. No evidence was presented of any unnecessary delay, but only of a desire of the Commission to review all the issues thoroughly.

e. The record in the district court shows that no unincorporated island will be created as a result of the annexation. Section 10-2-402 prohibits only those annexations "which would result in unincorporated islands being left within the boundaries of the municipality." In order to come within

the ambit of this prohibition, Plaintiff-Respondents would have had to show that the proposed annexation would: (1) create an unincorporated island; and (2) that said island would lie within the boundaries of the municipality. No such showing was made or even suggested to the district court.

F. The Findings of Fact Signed by the Judge after the Notice of Appeal had been Filed, Transferring Jurisdiction to this Court, are not Supported by the Evidence.

A number of the Findings of Fact and Conclusions of law do not reflect the evidence before the court. Pertaining to Finding 3 and 4, there was no evidence presented which supported the finding that Plaintiff-Respondents Doenges, Crockard and Watson were residents and property owners of the area sought to be annexed at all relevant times. Furthermore, there was no evidence in the record to support the finding that Watson was an owner of real property in the area to be annexed "for more than one year". Specifically, Watson at his deposition testified that he had only moved into the area in November of 1978, long after the assessment rolls had been filed. (Watson Depo., p. 4, at R. 827.)

As is more full explained infra, Conclusion No. 3, that Plaintiff-Respondents have standing to challenge the constitutionality of Section 10-2-401, is incorrect. There is no evidence to support any claim of standing that was before the court at any time prior to the entry of the Memorandum Decision on August 20, 1979. Further, Conclusion of Law No. 5 is incorrect in that there was no evidence presented, no

argument made or claim stated in any pleading of any injury to the Plaintiff-Respondents, let alone an irreparable injury. (See, supra, pp. 18-20; also see Transcript of Proceedings of August 9, 1979, pp. 48-49, at R. 1103-1104, where Plaintiff-Resondents' attorney alleged the only injury to Plaintiff-Respondents is the transfer of their property from the county into the city of Salt Lake. This, as explained above, is not irreparable injury.

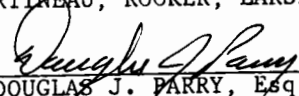
## VI. CONCLUSION

The Plaintiff-Respondents are without standing to raise the issue of constitutionality of Section 10-2-401, Utah Code Ann. (Pocket Supp. 1977). There is no constitutional right to vote on an annexation proposal. Annexations are for the legislature to decide. Where the decision of annexation is made by a munciipal commission, a party having the right to be heard before that commission is not denied equal protection or due process. Therefore, the Memorandum Decision of the district court should be reversed. Further, the court below was without jurisdiction to enter Findings of Fact and Conclusions of Law. This Court should reverse the district court in its entirety and find that the annexation resolution of the Salt Lake City Board of Commissioners was proper and order annexation of Emigration Canyon.

DATED this 9th day of November, 1979.

Respectfully submitted,  
MARTINEAU, ROOKER, LARSEN & KIMBALL

By

  
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## PART 4—EXTENSION OF CORPORATE LIMITS

### Section

- 10-2-401. Annexation of contiguous territory.
- 10-2-402. Limitations on annexation.
- 10-2-403. Annexation deemed conclusive.
- 10-2-404. Annexation across county lines.

**10-2-401. Annexation of contiguous territory.**—Whenever a majority of the owners of real property and the owners of at least one third in value of the real property, as shown by the last assessment rolls, in territory lying contiguous to the corporate boundaries of any municipality, shall desire to annex such territory to such municipality, they shall cause an accurate plat or map of such territory to be made under the supervision of the municipal engineer or a competent surveyor, and a copy of such plat or map, certified by the engineer or surveyor as the case may be, shall be filed in the office of the recorder of the municipality, together with a written petition signed by a majority of the real property owners and by the owners of not less than one third in value of the real property, as shown by the last assessment rolls, of the territory described in the plat or map; and the governing body of the municipality, at a regular meeting shall vote on the question of such annexation. The members of the governing body may by resolution passed by a two-thirds vote, accept the petition for annexation, subject to the terms and conditions as they deem reasonable, and the territory shall then and there be annexed and within the boundaries of the municipality. If the territory is annexed, a copy of the duly certified plat or map shall at once be filed in the office of the county recorder, together with a certified copy of the resolution declaring the annexation. The articles of incorporation of the municipality shall be amended to show the new territory annexed to the municipality and a copy of the articles of amendment shall be filed with the secretary of state and county clerk or clerks in the same manner as prescribed in 10-2-108. On filing the maps, plats and articles of amendment, the annexation shall be deemed complete and the territory annexed shall be deemed and held to be part of the annexing municipality, and the inhabitants thereof shall enjoy the privileges of the annexation and be subject to the ordinances, resolutions and regulations of the annexing municipality.

**History:** C. 1953, 10-2-401, enacted by L. 1977, ch. 48, § 2.

### Conditions to annexation.

City was permitted to provide for added or expanded services by imposition of reasonable conditions precedent to the annexation of new territory, and its demand for transfer of water rights in return for annexation was not inconsistent with, nor in excess of, the powers of the city council,

nor was it unreasonable and arbitrary. *Child v. City of Spanish Fork*, 538 P. 2d 184.

City had no duty to issue bonds, thus obligating entire city to pay for the acquisition of additional water needed as result of annexation, in order to avoid requiring transfer of annex area property owners' water rights to the city as a condition precedent to annexation. *Child v. City of Spanish Fork*, 538 P. 2d 184.

## EXHIBIT "A"



CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing BRIEF OF APPELLANTS was served by hand delivering the same on the 9th day of November, 1979 to the following: E. Craig Smay, Esq., Attorney for Plaintiffs, 141 East First South, Salt Lake City, Utah 84111; Walter R. Miller, Esq., City Attorney, Room 101 City & County Building, Salt Lake City, Utah 84111; and to Robert B. Hansen, Esq. Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114 and Kent S. Lewis, Esq., Salt Lake County Attorney's Office, Salt Lake County Complex, Building 3, 21st South State Street, Salt Lake City, UT 84115.

  
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