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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 : Reply Brief of
Appellants

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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. SMOLKA,

Defendant-Appellants,

Case No. 16649

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

REPLY BRIEF OF APPELLANTS

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The Defendant-Appellants, Emigration Properties Partnership, Bowers-Sorenson Construction Company and Fred A. Smolka submit this reply to the Plaintiff-Respondents' Response in order to correct and clarify certain misstatements and certain untrue inferences which could be misleading to this Court, and although irrelevant, appear to be included to prejudice this Court. Therefore, a clarification is necessary.

RESPONDENTS' RELIANCE ON CIPRIANO AND KOLODZIEJSKI
IS MISPLACED AND RESPONDENTS' DESCRIPTION OF THE CASES IS INACCURATE

In an attempt to overcome the distinction between the Utah annexation provision which is the subject of this appeal, and the voting provisions contained in the United States Supreme Court decisions relied on by Respondents, the Respondents have suggested similarities which do not exist. As has been pointed

out in Defendant-Appellants' brief, the United States Supreme Court opinions in Cipriano v. City of Houma, 395 U.S. 701 (1969), and Phoenix v. Kolodziejski, 399 U.S. 204 (1970), concerned voting situations, which were the final determinative act. In both cases the voting provisions challenged ratified the legislature's determination that bonds ought to be issued. Upon voter approval bonds could be issued. The Cipriano case dealt with the issuance of local revenue bonds and the Kolodziejski case dealt with elections authorizing the issuance of general obligation bonds. In both cases the United States Supreme Court held that the election which determined whether the bonds would be issued could not be limited to taxpayers, but to meet the constitutional requirements of due process, the election must be open to all members of the electorate.

Unlike the Utah provision, in Kolodziejski and Cipriano the election was the final determinative factor as to whether the bonds would be issued. Aside from this election, the affected citizens had no forum in which to be heard and no opportunity, except for the election, to voice assent or dissent. In their response, Plaintiff-Respondents claim that this was not the case in those two cases. (Brief of Plaintiff-Respondents, at 21-23.) The claim simply is not true. Contrary to representations of the Respondents, the statutes in Kolodziejski and Cipriano were not "identical to that of the Utah Annexation Statute."

(Brief of Plaintiff-Respondents, at 22.) Reading the cases demonstrates Respondents' mistaken understanding of the applicable statutes.

In explaining Arizona Revised Statute, Title 9-782, which was the provision subject to the constitutional challenge in Kolodziejski, the district court explained that the election followed the determination of the governing body to borrow money and that upon the vote of the electorate the bonds would be issued.

When the governing body of an incorporated city or town determines to borrow money under the provisions of this article, the question of issuing bonds under the article shall be submitted to the real property taxpayers who are in all other respects qualified electors of the municipality. No bond shall be issued without the assent of a majority of such qualified electors voting at an election held for that purpose as provided in this article. (Kolodziejski v. City of Phoenix, 313 F.Supp. 209, 210 (D.Ariz. 1969).)

The provision in Cipriano was exactly the same.

Louisiana Revised Statutes Annotated, Chapter 10, §33:4258 states:

Before the resolution authorizing the issuance of bonds under the sub-part is adopted by the governing body, the question of the issuance of the bond shall be submitted to and approved by votes of a majority in number and amount of the property taxpayers who vote in an election held hereunder.

In both the Kolodziejski and Cipriano cases it was the taxpayers who made the final determination as to whether the bonds should be issued and this was the only place affected citizens could voice their assent or dissent.

This is not the same as the triggering effect of the petition in the Utah Annexation Statute under question here. Under the Utah annexation provisions it is the city council that makes the final determination as to whether annexation will take place. And this determination can only be made after public hearings where interested individuals, not just property owners, have a right and opportunity to be heard. In Kolodziejwski and Cipriano only taxpayers can voice their assent or dissent through an election. All other interested individuals are precluded from the process. It is this distinction which has been recognized by the courts, including this Court in Freeman v. Centerville City, Utah, 600 P.2d 1003 (1979).

In further support of their position, the Plaintiff-Respondents cite to a non-existent dissenting opinion of Justice William H. Rehnquist in Phoenix v. Kolodziejwski, 399 U.S. 204 (1970). In its brief, Plaintiff-Respondents claim:

The argument here is similar to that made by Justice Rehnquist dissenting in Kolodziejwski, supra, that non-taxpayers are not injured because, following the vote of the taxpayers, they may appear before the City Council and request that the bonds authorized not be issued. Obviously, that argument was rejected by the Kolodziejwski majority. (Brief of Plaintiff-Respondents, at 30.)

The Kolodziejwski opinion was issued in 1970. William H. Rehnquist was administered the oath and became a Justice of the United States Supreme Court on January 7, 1972. (30 L.Ed.2d

lxvi.) This was two years after the Kolodziejski opinion. Cipriano was decided in 1969, three years before Rehnquist became a member of the Court. Kramer v. Union Free School District, 395 U.S. 621 (1998), the only other Supreme Court case cited by the Respondents concerning this issue was decided in 1969, also long before Rehnquist became a member of the Court. There was a dissent in Kolodziejski written by Justice Stewart. In this opinion, Justice Stewart explained that he dissented because, "I cannot believe that the United States Constitution lays such a heavy hand upon the initiative and independence of Phoenix, Arizona or any other city in our Nation." (399 U.S. at 216.) Justice Stewart believed, that unlike Cipriano, with general obligation bonds the constitutional requirements of due process were not denied because there was "approval of a majority of those upon whom the weight of repaying those bonds would legally fall." (399 U.S. at 218.) Nowhere in the opinion does Justice Stewart discuss a non-taxpayers opportunity to be heard before a city council.

RESPONDENTS' BRIEF CONTAINS STATEMENTS WHICH,
AS WRITTEN, ARE UNTRUE, MISLEADING AND IRRELEVANT.

THEY SHOULD BE STRICKEN.

Certain statements in Respondents' Brief have nothing to do with the issues included in the Docketing Statements. They are misleading in such a way that they suggest obviously

improper acts -- bribery, gerrymandering. These suggestions are not true and Respondents' purported authority does not support such an inference. These inferences should be stricken.

At pages three through six of Respondents' Brief, Respondents set forth what they claim are additional, essential facts to be considered. These facts, for the most part, are irrelevant and prejudiciously mislead. For example, on page six of their response, the Respondents make the following representation:

Majority endorsement of the initial annexation petition by property taxpayers was obtained by the developers by such devices as

(b) Promising payments in exchange for signatures. (Deposition of developer representative Dan Gardner, pp. 37-39.)

This claim is not true and there is no suggestion whatsoever, in the record that there was any "promising of payments in exchange for signatures." For support, Respondents cite to the deposition of Dan Gardner. In his deposition on the pages cited, Mr. Gardner explained that in response to the fears of a number of individuals which were fanned by letters from Respondents' counsel, Mr. Craig Smay, -- that annexation would result in large assessments to the property owners for the water supply lines and sewer trunk line -- the City had made it a requirement of annexation that the developers pay these expenses. These are the payments Respondents refer to. In the cited material, Mr. Gardner explains:

So I prepared a document which we signed ourselves and also in the name of Emigration Properties Partnership saying that we would pay the cost of the supply line, water supply line, the sewer trunk line . . .

This certainly is not a promise "in exchange for signatures."

Again, on page 6 in paragraphs (a) and (d), Respondents allege that another "device" used to obtain signatures was "gerrymandering".

(a) Gerrymandering out of the annexation the major population areas of Emigration Canyon to avoid adverse votes. (Deposition of David Johnson, at 24-28.)

(c) Altering and realtering the annexation plat during the process of obtaining signatures, so that a substantial number of the signatures represent approval of a different proposal than that adopted by the City. (Deposition of David Johnson, at 4, 22, 32-35.)

In support of its "gerrymandering" claim, Respondents cite to David Johnson's deposition, pages 24-28. Mr. Johnson, in his deposition on these pages explained that areas were added to the initial petition because residents in these areas expressed the desire to be included and that the petition was not expanded to cover other areas because the residents of those areas had not expressed a desire to be annexed. This is what Respondents characterize as gerrymandering. These are the same facts that Respondents rely on in their claim that the annexation plat was altered and re-altered during the process of obtaining signatures. It is true that areas were added

as people asked to be included within the area to be annexed, but this was done upon the request of residents within those areas. (See, Johnson Depo., at 24-28.)

Also, at page 3, subparagraph (a) of their "Essential Facts" section, Respondents claim:

(a) It is admitted that the land attempted to be annexed herein had not been, and could not be developed under County jurisdiction. (Brief of Intervenor, p.6). The admitted purpose of the annexation was to obtain city services, chiefly water and sewer, to permit development of the land (Brief of appellant City, p. 2).

Respondents' reference to defendants' brief is ill-founded. At the cited page of the City's brief, the City explains:

The purposes of the petitions appeared to be to upgrade certain service levels in the canyon and to expand potential for residential development within the area. (Mayor's deposition at 23-24.)

This is precisely what was explained in the brief of the other defendants at page 6, also cited as support.

CONCLUSION

The legal principles cited by the Defendant-Appellants in their opening briefs are undisturbed by the Plaintiff-Respondents. The Plaintiff-Respondents have not been denied their rights protected under the constitution by the provisions of the Utah annexation statute. They do not a right to

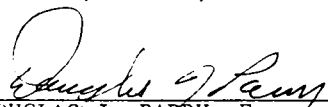
raise the constitutional issues and therefore the Memorandum
Decision of the district court must be reversed.

DATED this 1st day of February, 1980.

Respectfully submitted,

MARTINEAU, ROOKER, LARSEN & KIMBALL

By



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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing REPLY BRIEF OF APPELLANTS was served by mailing the same, postage prepaid, to E. Craig Smay, Esq., Attorney for Plaintiffs, 500 Kearns Building, Salt Lake City, UT 84101; 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 this 1st day of February, 1980.

