

1980

## Sweetwater Properties et al v. Town of Alta, Utah : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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SWEETWATER PROPERTIES, SBC  
INVESTMENT COMPANY and  
BLACKJACK TRUST,

Plaintiffs and  
Respondents,

Case No. 17064

vs.

TOWN OF ALTA, UTAH, a municipi-  
pal corporation,

Defendant and  
Appellant.

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BRIEF OF APPELLANT

TOWN OF ALTA

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Appeal from Judgment of the Third District Court  
in and for Salt Lake County  
The Honorable James S. Sawaya, District Judge

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FILED

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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SWEETWATER PROPERTIES, SBC  
INVESTMENT COMPANY and  
BLACKJACK TRUST,

:

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Plaintiffs and  
Respondents,

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Appeal No . 17064

vs.

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TOWN OF ALTA, UTAH, a municipi-  
pal corporation,

:

Defendant and  
Appellant.

:

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BRIEF OF APPELLANT

TOWN OF ALTA

---

NATURE OF THE CASE

Sweetwater Properties, et al. (hereafter "Sweetwater" or "Respondents") seeks to obstruct the Town of Alta (hereafter "Alta" or "Appellant") from performing its legislatively delegated and municipal power under Statute <sup>1/</sup> to execute a proper and sanctioned Policy Declaration relating to the willingness of Alta to annex to its municipal boundaries immediately contiguous property of Sweetwater upon which there was proposed a large-scale urban development. The Sweetwater property subject to the Alta Policy Declaration has its situs in the upper reaches of Little Cottonwood Canyon in Salt Lake County, Utah.



## DISPOSITION IN LOWER COURT

After several admittedly invalid beginnings, the Second Amended Complaint filed by Sweetwater on November 30, 1979, alleged that the Alta Policy Declaration of annexation was without statutory authority, was contrary to law and void, sought a declaratory judgment to that effect, and in addition, demanded compensatory damages of \$1,000,000, a prohibitory injunction restraining Alta from adopting any further such policy declarations and an order mandating Salt Lake County to issue construction permits for the development of the Sweetwater land.<sup>2/</sup> Alta filed an Answer by way of specific denial of the claims of Sweetwater, averred with particularity that its Policy Declaration relative to the Sweetwater property was legislatively authorized, that it substantially complied with the statutory criteria, and affirmatively alleged that the underlying Statutes and the Policy Declaration were valid, enforceable and in the public interest.

A Counterclaim also sought a prohibitory injunction against Sweetwater from undertaking its large scale urban development on the borders of Alta except in accordance with the statutory requirements of 10-2-401 U.C.A. (Repl. Vol. 2A) (R. 74-80).

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<sup>2/</sup> Although the Second Amended Complaint of Sweetwater referred generally to the adoption of the Alta Policy Declaration as a violation of the "taking" provisions of the Federal and State Constitutions (R. 60), the prayer for relief of Sweetwater did not request the Court to declare that the Policy Declaration, ipso facto, constituted an unconstitutional taking of property, and it did not otherwise claim that a "taking", in law, had already been affected. Yet the lower Court permitted evidence and argument on the issue of the unconstitutional expropriation of private property and made specific Findings, Conclusions and Judgment on the issue. (R. 242-249)

The Case came on for trial before the District Court on February 22, 1980. After trial and argument, the lower Court entered Findings of Fact, Conclusions of Law and a Judgment, prepared word for word by Sweetwater, in which it determined:

1. That the Policy Declaration of Alta with respect to the Sweetwater property was deficient in law and contrary to Statute (R. 255);

2. That even if the Alta Policy Declaration were in conformance with statutory enactment, the Declaration would constitute a taking of property without Just Compensation or due process of law in violation of Federal and State Constitutions. (R. 255);

3. That Alta should be and is permanently enjoined from ever executing a supplemental, amendatory or additional Policy Declaration with regard to the Sweetwater property, or any part thereof. (R. 256);

4. That Alta was unentitled to take anything by its Counterclaim requiring compliance with Utah Law and the implemented Policy Declaration. (R. 256);

5. That Salt Lake County, although a passive party in the Case, was mandated to resume administrative approval of the development plans of Sweetwater. (R. 256);

6. That since Sweetwater had failed to present any evidence in support of its claim of \$1,000,000 compensatory damages as a result of the Alta Policy Declaration, the Court had no other alternative than to dismiss that claim on the merits with prejudice. (R. 256);

7. That the Counterclaim of Alta for injunctive relief against Sweetwater, in enforcement of the annexation Statute, was without cause and dismissed with prejudice.

On May 7, 1980, the trial Court stayed the enforcement of Judgment pending appellate review by this Court. The lower Court refused, however, to lift that portion of the Judgment that permanently prohibits Alta from amending, supplementing, or enacting a statutory Policy Declaration as to the Sweetwater property. (R. 273-4)

From the principal Judgment and injunctive Order of the trial Judge, Alta prosecutes this appeal.

#### RELIEF SOUGHT ON APPEAL

The Judgment and Order of the lower Court determining that the Alta Policy Declaration was void and unenforceable, determining that the Declaration (even if statutorily adequate and factually complete) would constitute an unconstitutional taking of the Sweetwater properties, and perpetually enjoining Alta from ever entering another or amended Policy Declaration as to Sweetwater, should be reversed in this appeal and remitted to the District Court with directions to dismiss the Complaint.

The Order of the lower Court on the Counterclaim of Alta should be reversed and the case remitted with directions that the trial Court order Sweetwater to comply with the statutory provisions of 10-2-418 U.C.A. (Repl. Vol. 2A 1979 Supp.)

## STATEMENT OF FACTS

The principal facts of this case are succinctly stated in accordance with Rule 75(p)(2) Utah Rules of Civil Procedure as follows:

### 1. General Description of Alta.

The Town of Alta has been incorporated as a municipal body politic of the State of Utah for over ten years. Situated near the watershed of Little Cottonwood Canyon in Salt Lake County, the significant industry of Alta is skiing and other mountainous activities in the warmer months. It maintains a unique mountainous environment within and immediately adjacent to the Town, which prompts, in the public interest, considerations of environmental balance, protection of the watershed and other ancillary factors.

The preservation of the natural environment within and around Alta was a principal basis for incorporation and such has played a major role in the municipal activities and governmental operations of the Town. Its particular situs at the head of Little Cottonwood Canyon poses a number of municipal and governmental questions that are ordinarily unassociated with massive urban development in the populated areas of Salt Lake Valley. Significant areas counterminus to Alta are owned by the United States and administered by the Forest Service; other land sections are part of the closely controlled watershed of Salt Lake City Corporation.

### 2. Municipal Services of Alta.

Over the years, Alta has developed a full complement of

government services, it has played a key role in the construction of the sewer outfall line which courses the entire Canyon, it has developed its own culinary water system, it has organized and maintains a police force and fire protection, it maintains a fully-equipped avalanche program, and it operates as administrative staff and election services. (R. 239)

Alta has appointed and maintains a planning and zoning staff and commission, through which zoning ordinances, long and short-arranged planning is undertaken, and recommendations are made to the Town Council. Alta has made it a municipal policy to depend upon non-residents of the Town in the larger and interstitial planning and zoning engagements and goals.

### 3. Sweetwater Condominium Development.

The 25 acres of Sweetwater lies immediately tangent to the west boundaries of Alta. In June of 1979, Sweetwater announced that it intended to construct on the 25 acre parcel 226 commercial units known as "time-sharing condominiums" together with an array of tennis courts, sauna, and other supporting facilities. (R. 237-8)

Access to the Sweetwater property was contemplated via an indirect "by-pass road" which was constructed only as an alternative access route between Alta and the lower parts of the Canyon (in the event that the principal state highway, U-215, was blocked by avalanche).

### 4. The Policy Declaration Statute, 10-2-401, et seq.

In response to problems of municipal government generated by large-scale urban development in non-incorporated areas



immediately counterminus to city boundaries in Salt Lake County, the Utah Legislature, in 1979, enacted Chapter 2 Title 10 of the Utah Municipal Code, 401 and succeeding sections. One of the signal policies of the legislation was to regulate large-scale urban development in an unincorporated area which, by reason of the immediate proximity to the municipal boundaries of a city, directly impacted upon the municipality, its general welfare and development, and its capacity to provide a high level of governmental services.<sup>3/</sup> Under 10-2-401(5), the Legislature expressly recognized the high, public interest served by potential annexation:

"(5) Areas annexed to municipalities should include all of the urbanized unincorporated areas contiguous to municipalities \* \* \*."  
[Emphasis added.]

10-2-401(3) recognizes the imposition upon a city that results from the grand development schemes of property on the tangential edge of the municipality. The legislative purpose was, inter alia, to arrest that imposition and balance the needs of and demands upon the municipality with the benefits to the unincorporated property realized by its contiguous location.<sup>4/</sup>

##### 5. Statutory Policy Declaration and Boundary Commission.

The 1979 Legislation sets forth two public interest factors that are of significance herein.

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<sup>3/</sup> The public policy underpinning the 1977 Legislature is set out in the opening stanza, 10-2-401 U.C.A. (1979 Supp.)

<sup>4/</sup> It is plain enough that the 226 unit time-sharing condominium development of Sweetwater more than satisfied the statutory definition of an "urban development" so as to fit within the statutory framework, which in turn subjected Sweetwater to the Alta Policy Declaration.

(i) That no municipality shall annex property to and as a part of its boundaries unless it has issued a "Policy Declaration". 10-2-414 U.C.A. (Repl. Vol. 2A 1979 Supp);

(ii) That to protect a municipality from the deprecating influences of adjacent but unincorporated property development, no urban property development within one-half mile of municipal boundaries may take place if a city has adopted a "Policy Declaration" stating its willingness to annex the particular property. 10-2-418 U.C.A. (Repl. Vol. 2A 1979 Supp.)

A property owner, whose land is affected by a municipal "Policy Declaration", may notify the municipality in writing of his desire to effectuate the annexation or the reasons why it is opposed. If at the end of 12 months from the filing of said notice, the owner, after having made a good faith effort to annex, has failed to so do, the property may be developed as unincorporated land.<sup>5/</sup> The Statute defining the substantive and procedural elements of a municipal "Policy Declaration"<sup>6/</sup> requires that a copy of the Declaration shall be given to the governing body of each "affected entity" and to the "local boundary commission". An "affected entity" is, by Statute, defined as a political subdivision or governmental body possessing taxing powers whose territory, service delivery or revenues will be directly and significantly impacted by a proposed, municipal boundary change. 10-1-104(8) U.C.A. (Repl. Vol. 2A 1979). The local boundary commission, on the other hand, was established by Statute<sup>7/</sup> to resolve disputes

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<sup>5/</sup> The Statute does not at all proscribe the conditions, terms, or property use under which annexation is affected or implemented. 10-2-418 U.C.A. Those factors are, rather, left to the municipality and the owner in good faith negotiations to be undertaken subsequent to the issuance of the Policy Declaration.

<sup>6/</sup> 10-2-414 U.C.A. (Repl. Vol. 2A 1979 Supp.)

<sup>7/</sup> 10-2-404 through 6, U.C.A. (Repl. Vol. 2A 1979 Supp.)



between a municipality and another affected entity arising out of the statutory policy to encourage municipal annexation of a large unincorporated urban development.

Because of their particular relevancy to this case, 10-2-414 and 418 are set out in haec verba as Attachments 1 and 2, respectively, to this Brief.

6. The Alta Policy Declaration on Sweetwater.

Pursuant to Statute, Alta held a public hearing on July 12, 1979, regarding the Sweetwater property, the proposed high density time-share condominium development thereon, and the possible annexation of the 25 acre parcel within the municipal boundaries. Sweetwater agents were in attendance. (R. 243) Following the public hearing, Alta prepared and there was regularly executed on July 26, 1979, a "Policy Declaration" with respect to the Sweetwater parcel. (Ex. 7-P, R. 233) Although the Statute requires that only notice of 30 days be given of a policy declaration, the Town Council resolved that such should be extended for public comment before the Policy Declaration was finally adopted as a City ordinance. Pursuant to Statute, written notice of the public hearing on the Policy Declaration was published and copies of the notice were sent by U. S. post to all known and affected property owners, including Sweetwater, as well as to the local boundary commission and Salt Lake County. (R. 234) As scheduled and notified, the public hearing was held on September 13, 1979 following which Alta adopted by ordinance the Policy Declaration. (R. 233-4, Ex. 6-P)

The September 13, 1979 public meeting was attended by agents of Sweetwater who participated in the public discussions. (R. 234) The Policy Declaration, available for full public review, substantially complied with all requirements of the Statute<sup>8/</sup> by expressly setting forth that:

(i) The Sweetwater development would severely impact the Town of Alta and its residents and that accordingly, pursuant to Statute, Alta favored annexation of Sweetwater.

(ii) A map of the Sweetwater property was attached pursuant to 10-2-414(1);

(iii) The specific criteria for annexation were that an annexation petition be signed by sufficient property owners pursuant to law, that the Sweetwater property be master planned pursuant to the regulations of Alta and consistent "with all rights and privileges" enjoyed by Alta residents; an interlocal agreement would be allowed with the existing Salt Lake County Service District; and that all culinary and sanitary facilities along with police and fire protection of Alta would be afforded Sweetwater;

(iv) The character of the Alta community, along with the sensitive environmental balance of the larger area, was set forth pursuant to 10-2-414(2);

(v) The plans and time frame of Alta for extension of municipal services to Sweetwater were described as dependent upon the conduct, desires, and availability

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8/ 10-2-414(1) (2) U.C.A. (1979 Supp.)

of capital funds of the Sweetwater owners;

(vi) Municipal services to Sweetwater would be financed by funds of the development, consistent with past practice; see 10-2-414(2);

(vii) The tax revenues of consequences to both Alta residents and Sweetwater were set forth pursuant to 10-2-414(2);

(viii) The interests of other affected entities were delineated in paragraph 8 of the Policy Declaration (10-2-414(2)).

The Policy Declaration concluded on the public interest concept that annexation was favored pursuant to Statute in order to continue the high quality of governmental services and "to protect the general public health, safety and welfare". The latter, it was noted, included the maintenance of environmental balance at Sweetwater with the properties in Alta. A true copy of the Alta Policy Declaration (Ex. 6-P) is annexed to this Brief as Attachement 3.

#### 7. The Pre-Declaration Activities of Sweetwater.

On the very day set by Alta for the public hearing on the Policy Declaration, Sweetwater, with full knowledge of the procedures being followed by Alta, demanded from Salt Lake County and received initial foundation permits for commencement of construction of several of the condominium units. The permits were issued approximately two hours prior to the adoption by Alta of its Policy Declaration. Following passage

of the Declaration, Salt Lake County stated that no further permits would be issued until a final ruling on the Policy Declaration and thereafter, Alta and Sweetwater agreed that any further construction would abide the adjudication of this controversy.

#### 8. Alta Zoning and Effect of Declaration.

The Policy Declaration did not describe or define the municipal zoning designation which would be accorded the Sweetwater property upon annexation. That matter, as in all other similar cases, would be left to the later time of annexation and zoning proceedings. Alta could not, even if it had desired, legally satisfied its legislative responsibilities by setting forth in the Policy Declaration the zoning and use density of Sweetwater. That classification assumed annexation and it was plain that the Policy Declaration did not annex Sweetwater nor did it even initiate the substantive annexation process.

That pivotal fact aside for the moment, the Sweetwater property, as of September 13, 1979, was zoned FM-20 in Salt Lake County. The zoning ordinances and map of Alta defined and provided for a variety of residential and commercial zones, including FM-20. (R. 267) Sweetwater produced no evidence at trial to demonstrate that an FM-20 zone had ever been the subject of application in Alta or that such had ever been refused.

While many categories of zoning classification are extant in Alta, a substantial portion of the City, namely the ski slopes and other terrain so steep as to forbid practice

development, is zoned FR-100. The latter zone is defined as open recreational use only, and has never been applied to areas where foreseeable residential development might occur. (R. 267)

9. Findings and Judgment of the Lower Court.

The Findings and Conclusions entered by the trial Court in favor of Sweetwater were prepared by Sweetwater and, with the most de minimis exception, were untouched by the trial Court. The Findings determined specially the County approvals obtained by Sweetwater incident to development in 1979, determined specially the monies expended by Sweetwater in the proposed development of its 226 unit time-share condominium complex, determined that the Alta zoning map implied that the Sweetwater property, if annexed, would be zoned FR-100 (permitting one residential unit per 100 acres)<sup>9/</sup> and factually resolved that the inter-local government agreement envisioned in the Policy Declaration would likely be pragmatically unsuccessful.

The trial Court further found, as fact, that the Alta Policy Declaration, even assuming statutory adequacy, "presently" forbids all reasonable and probable use of the Sweetwater property. It further found as fact that annexation of Sweetwater to Alta and the ensuing zone of FR-100 would forbid "in [sic] the future all reasonable and profitable use of the property". (R. 243)

Beginning at Finding 27 (R. 241), the lower Court wrote out its own prescription of the factors to be included in the

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9/ Finding 16, R. 239.



Policy Declaration and in that regard found the Alta Policy Declaration inadequate in the following particulars:

(i) that Alta did not give written notice to Salt Lake County Service Area #3 or Salt Lake City.

Finding 27;

(ii) that the map attached to the Alta Policy Declaration includes only the Sweetwater property and other adjacent tracts. Finding 28;

(iii) that the Policy Declaration does not include a statement addressing the municipal need for annexation. Finding 30;

(iv) that the Policy Declaration did not include plans and time frame for annexation or how municipal services will be financed, upon annexation. Finding 31, 32;

(v) that the Policy Declaration demonstrates an intent of Alta to suppress development of Sweetwater by the passage of the Policy Declaration, itself, or by "forced annexation, or both". Finding 37;

(vi) that the Alta Policy Declaration is a "present, complete restriction of development of Plaintiff's property" and the affect of annexation will be a "future, complete restriction of development of Plaintiff's property." Finding 38;

(vii) The lower Court further concluded, as a matter of law, that the Alta Policy Declaration, as

enacted, violates the policy of the 1979 Statute.

Conclusion 7.

(viii) The Court further concluded that the Alta Policy Declaration was enacted for the purpose of suppressing development of unincorporated territory by subjecting the property, upon annexation, to a master plan and zoning map which would wholly forbid Sweetwater development. Conclusion 6.

(ix) Further, the lower Court conclusions detail 8 separate deficiencies in the Alta Policy Declaration (Conclusion 12), and that the Declaration would constitute a taking of property without Just Compensation or due process in violation of Federal and State Constitutional provisions (Conclusion 16).

The Judgment of the lower Court decreed that the Policy Declaration was not in compliance with the annexation Statute, that the Declaration would constitute an unconstitutional taking of property without Just Compensation or due process of law and that Alta was permanently enjoined from issuing any further Policy Declaration of any type with regard to Sweetwater, or in any manner interfering with the development of the Sweetwater property.



## A R G U M E N T

### POINT I

#### THE TRIAL COURT PALPABLY ERRED IN PERPETUALLY ENJOINING ALTA FROM EXECUTING AN AMENDATORY OR FURTHER POLICY DECLARATION REGARDING SWEETWATER.

Whatever else be legally deficient in the Judgment and Order of the lower Court (of which there are many), it is patent error for the trial Court to have permanently enjoined Alta from executing an amendatory or additional Policy Declaration in connection with the Sweetwater property. That it did only demonstrates the remarkable excesses of the Judgment. Such Order is quite beyond the jurisdiction of the trial Court. The rule of law has been firmly established that the judicial branch of government does not have the power or authority to enjoin future or prospective legislative action. The roots of the proposition are found in the elementary constitutional concept of separation of powers.

One of the landmark cases which sets down the rule that courts do not possess the right to enjoin a legislative body from exercising its legislative authority is New Orleans Waterworks Company v. City of New Orleans, 174 U.S. 471, 17 S. Ct. 161, 41 L.Ed. 518 (1896). In that case the waterworks company sought to enjoin the City of New Orleans from enacting any ordinances which would give to other water companies the right to supply water to the city. In upholding a decree from the state court denying such injunction, the Court, writing through

Mr. Justice Harlan, declared:

"If it be said that a final decree against the city, enjoining it from making such grants in the future, will control the future action of the city council of New Orleans, and will therefore tend to protect the plaintiff in its rights, our answer is that a court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character." Id. at 481.

In laying the foundation for such a holding, the United States Supreme Court noted that the separation of powers doctrine prevents such action on the part of the courts:

"But the Courts will pass the line that separates judicial from legislative authority if by any order or in any mode they assume to control the discretion with which municipal assemblies are invested, when deliberating upon the adoption or rejection of ordinances proposed for their adoption. The passage of ordinances by such bodies are legislative acts which a court of equity will not enjoin. [Citations omitted.] If an ordinance be passed and is invalid, the jurisdiction of the courts may then be invoked for the protection of private rights that may be violated by its enforcement.

\* \* \*

The mischievous consequences that may result from the attempt of courts of equity to control the proceedings of municipal bodies when engaged in the consideration of matters entirely legislative in their character are too apparent to permit such judicial action as this suit contemplates." Id. at 481-82 [Emphasis added.]

To the precise same effect is the decision of the United States Supreme Court in McChord v. Louisville & Nashville Railroad Co., 183 U.S. 483, 22 S. Ct. 165, 46 L. Ed. 289 (1901). Citing from an earlier opinion of Mr. Justice Field, the Court stated:

"The rule was also applied by Mr. Justice Field in Alpers v. San Francisco, 32 Fed. 503, where complainant sought an injunction to restrain the passage of an ordinance which he alleged would impair the obligation of a contract he had with the City. Mr. Justice Field said: 'This no one will question as applied to the power of the legislature of the state. The suggestion of any such jurisdiction of the court over that body would not be entertained for a moment. The same exemption from judicial interference applies to all legislative bodies, so far as their legislative discretion extends. \* \* \* The courts cannot in the one case forbid the passage of a law nor in the other the passage of a resolution, order, or ordinance. If by either body, the legislature or the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. \* \* \* It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary.'" Id at 496-97. [Emphasis added.]

See also, City of Louisville v. District Court in and for the County of Boulder, 543 P.2d 67 (Colo. 1975); Public Service Comm. v. Eighth Judicial District Court in and for Clark County, 123 P.2d 237 (Nev. 1943); Serrano v. Priest, 557 P.2d 929 (Cal. 1977); State v. Odell, 362 P.2d 254 (Wash. 1961).

The trial Court did not enter a solitary finding that the Alta Policy Declaration was executed in bad faith, or was arbitrary and capricious or fraudulently conceived. Even if it had found any such factors, or all of them, to have been manifested, it would not endow or justify the trial Court in imposing a permanent judicial bar to further and future legislative action of Alta. Surely, even in this day, the order of the lower Court ranks as a unique product in judicial enforcement. It must not stand and should be overturned on appeal.

Since the entry of Judgment and the pendency of this appeal, Alta has been required to endure the excessive reach of the lower Court Judgment. That reach should be summarily terminated in this review, notwithstanding the other fallacies inherent in the lower Court Judgment and Order.

## POINT II

### FINDINGS OF THE TRIAL COURT ON STATUTORY COMPLIANCE OF THE ALTA POLICY DECLARATION

ARE MISCONCEIVED IN LAW AND CLEARLY ERRONEOUS.

#### 1. Threshold Considerations.

The trial Court failed, in this Case, to bear in mind the fundamental precept that guided the entire proceeding. The Sweetwater Complaint did not seek to attack the validity of a municipal annexation by Alta, for there had been no annexation or even attempted annexation. Nor did the Sweetwater Complaint attempt to set aside zoning ordinances of Alta or a zoning classification to which the Sweetwater property had been, was or would be subjected. No zoning ordinance or land use classification had been, in fact or law, enacted or made applicable by the Alta Policy Declaration. It was unmistakably clear that no annexation would possibly take place or would any zoning classification of Alta have application to Sweetwater in consequence of the Policy Declaration. None of those issues were before the Court, for each and all anticipated and required future and further action upon the part of Sweetwater and Alta, either in subsequent negotiations incident to or arising out of annexation or in subsequent proceedings involving



zoning and land use.

The trial Court prematurely assumed that such issues were before it in this case. In so doing, it misconceived the purpose and effect of the Alta Policy Declaration. Simply put, the Declaration was a statutory procedure to encourage annexation and to reasonably protect the public interest and property development during the course of annexation discussions and proceedings. That the Court proceeded with the consideration of the panoply of factual and legal questions regarding annexation, zoning, and obstruction or impairment in present or future property use, was irrelevant under the Complaint as initially filed and the triable issues framed by the pleadings.

Sweetwater did not urge that the Alta Policy Declaration was hatched in bad faith, or in an arbitrary or capricious manner. While such claims, had they been made, would have possibly permitted some inquiry into the motive and purpose of the Declaration, it would not have sanctioned a premature examination and determination of annexation and zoning procedures. Those questions were all a matter of sheer speculation and irrelevancy at the time of trial. That the trial court misconstrued the entire maturity of the annexation and zoning issues underscores the significance of the error committed.

2. Contrary to Court Determination, the Policy Declaration was Presumed Valid.

In Sims v. Smith, 571 P.2d 586 (Utah 1977), this Court laid down the firm rule of this jurisdiction that legislative acts are presumptively valid. The same principle of law has been applied, to political subdivisions and municipal legisla-

1975), cert. den. 425 U.S. 915; Buhler v. Stone, 533 P.2d 292 (Utah 1975). In Buhler, this Court declared:

"An initial observation applicable to this problem is that legislative acts are entitled to a presumption of validity; and that courts should interfere with the legislative prerogative only with reluctance." [Emphasis added.]

The lower Court, in the instant action, found that the relevant statutory Sections were duly enacted by the Utah State Legislature (R. 233), that Town Council of Alta is the duly elected, authorized enacting legislative body (R. 233) and that the Alta Policy Declaration was duly enacted. (R. 234) Accordingly, the Policy Declaration is clothed with the presumption of validity and regularity that may not be set aside except upon a clear showing by Sweetwater that the Declaration failed statutory or constitutional muster. The burden of proof, in that regard, rests with Sweetwater. Branch v. Salt Lake County Service Area No. 2, 23 U.2d 181, 460 P.2d 814, 815 (1969). The presumption engaged in by the lower Court was the antithesis.

### 3. Substantial Compliance of the Policy Declaration.

In determining whether the Alta Policy Declaration of September 13, 1979 satisfied the requisites of the Statute, 10-2-414 U.C.A. (Repl. Vol. 2A 1979 Supp.), the rule of construction is one of substantial compliance. The argument of Sweetwater before the trial Court that the Policy Declaration must be strictly construed against Alta and strict compliance must be observed by the municipality was fundamentally flawed.

To begin with, the Statute, itself, regarding the Policy Declarations of annexation, specify liberal construction so that the intent of the City will be determined by the spirit and not by precise letter. 10-1-103 U.C.A. (Repl. Vol. 2A 1979 Supp.) declares in that regard:

"The powers herein delegated to any municipality shall be liberally construed to permit the municipality to exercise the powers granted by this act except in cases clearly contrary to the intent of the law." [Emphasis added.]

The Supreme Court of Kansas, in Clark v. City of Wichita, 343 P.2d 973 (Kan. 1975), was presented with an annexation process which bears striking resemblance to that of 10-2-414 herein. Under the Kansas statute, a municipality was required to submit a "plan" and "timetable" for the proposed annexation of property prior to adoption of a formal annexation ordinance. The Kansas court found that in determining the adequacy of the annexation declaration, the standard of judicial review for the trial and appellate court was substantial, not strict, compliance:

"[T]he 'plan' and 'timetable' of a municipality cannot be a 'guarantee' to the owner of land in the proposed area of annexation. Our rule has always been that substantial compliance with an annexation statute is all that is required.

\* \* \*

Whether a city has acted within its authority in adopting an annexation ordinance is determined by a substantial compliance test." Id. at 985-86. [Emphasis added.]

To the same effect, see Scottsdale v. State ex rel. Pickrell, 405 P.2d 871 (Ariz. 1976).



In advancing the argument of substantial compliance, Alta does not retreat from the position that its Policy Declaration of September 13, 1980 met all requirements of 10-2-414 and other relevant sections of the 1979 Legislation. However, to the extent that any policy declaration may be open to an element of subjective attack, it is perfectly clear that under the framework of the instant Statute and the case law, substantiality of compliance must be the legal criteria upon which adequacy is adjudged. The Policy Declaration did not impair or obstruct the use to which Sweetwater could place its property. Rather, following the legislative goal which encourages annexation of major urban developments on unincorporated property, Alta declared its policy to favor annexation of Sweetwater in order to avoid the detriment of extraterritorial time-share condominium development on the borders of the City.

#### 4. The Alta Policy Declaration Complied With Utah Law.

In those instances wherein municipal conduct or ordinance is questioned, it often appears that the alleged fault is so numerous that the intent is to psychologically overwhelm the case making difficult the identification and segregation of specific and prejudicial error. The Findings and Conclusions herein lists 21 separate inadequacies in the Alta Policy Declaration. It is undoubtedly contended that anyone of the 21 alleged deficiencies is enough to invalidate the Declaration. <sup>10/</sup>

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<sup>10/</sup> The great mass of the Findings against the Policy Declaration are padantic, mechanical and wholly insubstantial. Many of them Sweetwater has no standing to even raise, much less claim prejudice therefrom.

But the theory of quantatative fault will not work in this Case. The Utah Statute, 10-2-414 does not anticipate that the Policy Declaration be the equivalent of an environmental impact statement of the Federal Environmental Protection Agency. The objective and goal of the Policy Declaration is dramatically different. The Statute, whose criteria is set out in two sentences of Section 14(2), envisions a simple and plain statement of the factors which encourage annexation of the property. In the most essential parts, the Statute requires that a Policy Declaration shall include only the following:

(i) A map or legal description of the unincorporated territory;

(ii) The specific criteria for annexation, which is no more than the territorial area which may be annexed under 10-2-417 U.C.A. (Repl. Vol. 2A 1979 Supp.);

(iii) A description of the character of the community;

(iv) The need for municipal services in the unincorporated area;

(v) The plan and time frame of the municipality for extension of City services;

(vi) A statement as to how the services will be financed;

(vii) An estimate of the tax consequences to residents in both the City and the unincorporated area;

(viii) A statement as to the interests of "affected

5. The Findings of the Trial Court are Clearly Erroneous.

The Alta Policy Declaration incorporates and sets forth a statement as to each declaratory element in 10-2-414. The Findings of the lower Court to the contrary are clearly erroneous and cannot stand in this judicial review.

(a) Finding No. 27.

The trial Court found that Alta did not, prior to the adoption of the Policy Declaration, give written notice thereof or solicit comments from Salt Lake County Service Area or Salt Lake City. The short answer to that Finding is that it had no legal obligation to do so, although both the Service Area and Salt Lake City were aware of public discussion and the prospects of a Policy Declaration being issued. The recital by the trial Court of legal inadequacy because of the lack of written notice is unsupported in law and clearly erroneous.

(b) Findings 28 and 29.

The lower Court determined that the map attached to the Alta Policy Declaration included only Sweetwater and other property "fragments" and that it excluded the majority of property within the County Service Area. The Court noted that "nothing prevented inclusion of all said territory in said map". The short answer, again, to that Finding is that the map is statutorily required to encompass only the unincorporated area viz., Sweetwater. The trial Court finding to the contrary is plainly erroneous in law.

(c) Finding No. 30.

The lower Court found that the Alta Policy Declaration did not contain a statement regarding the need of Sweetwater for municipal services. In point of fact, paragraph 5 of the Policy Declaration expressly states:

"5. Need for Municipal Services. The Town of Alta presently owns, operates and maintains a culinary water system and a sanitary disposal system. In addition, the Town provides police and fire protection to its residents, as well as an avalanche warning and control system and guardianship of the watershed. All such services are necessary in view of the location of the area involved and the fact that the same lies within the watershed of Salt Lake City. In addition, all services would be available to the Sweetwater Property. The Town recognizes that the Sweetwater Property anticipates obtaining such services from Salt Lake County. However, such would result in an unnecessary duplication of services and an inefficient use of resources, which would severely impair the programs now in operation." [Emphasis added.]

Finding No. 30 of the trial Court is contrary to fact, clearly erroneous, and should be set aside in this review.

(d) Findings No. 31 and 32.

Contrary to the lower Court's determinations that the Policy Declaration was without a statement as to plan and time frame as well as the financing of proposed extended services, Paragraph 6 of the Declaration simply but plainly states that Alta pursues a policy (not unlike that of other municipalities) of requiring service extensions into undeveloped areas to be capitalized from funds of the property owner or developer. The Policy Declaration provided that there was no precise timetable for carrying

out the annexation, the latter being within the hands of Sweetwater. The implication was clear, however, that Alta was ready and able to meet any time frame satisfactory to Sweetwater.

Moreover, in answer to the absence in the Policy Declaration of a statement on tax consequences, Paragraph 7 of the Declaration provides specifically:

"7. Estimate of Tax Consequences.

- a. Sales Tax: It is estimated that the maximum revenue would be \$2,000.00.
- b. Property Tax: Under the present structure, there would be no loss in revenue to the county."

Findings 31 and 32 lack factual validity and are clearly erroneous.

(e) Finding No. 34.

The lower Court, in this Finding, determined that the Alta Declaration did not set forth the interests of the Salt Lake County Service Area No. 3 or Salt Lake City. The answer to both Findings is that neither the Service Area nor Salt Lake City are "affected entities" who must be noticed and described under a Policy Declaration. The County Service Area does not possess powers of taxation and Salt Lake City is not an entity whose territory will be directly or significantly affected by the possible boundary change of Alta if Sweetwater were to be annexed. Finding 34 is plainly erroneous.

(f) Finding No. 35.

The lower Court made the astonishing determination that while the Alta Policy Declaration described the



"physical characteristics" of Little Cottonwood Canyon, it omitted to describe the "urban or municipal" character of the Community. The Statute merely provides that a Policy Declaration shall contain a statement regarding "the character of the community"; no reference can be found in the Statute to the "urban or municipal character", per se.

The larger Alta Declaration, as well as Paragraph 4, sets forth a general and reasonable description that substantially and plainly satisfies the criteria of the Statute regarding a statement on "the character of the community". Finding 35 is a clear demonstration of the excesses to which the Findings in this Case extend.

(g) Finding No. 36.

The trial Court faulted the Alta Policy Declaration for the failure to address the questions of "present or future development of the Sweetwater property", assuming annexation for any purpose. There are two flaws which are fatal to Finding No. 36. First, the Statute does not require that a dissertation be set forth in the Policy Declaration as to present or future developments of the unincorporated area; such reason, itself, is dispositive of Finding No. 36 and renders it clearly erroneous.

But there is a second and larger effect in Finding 36 that underscores a major misconception at the trial level of the relevant issues in this Case. Sweetwater argued and the trial Court accepted the proposition that

present and future development of Sweetwater, as a part of the assumed annexation within Alta, was a mandatory topic that was required in the Policy Declaration. Thus, the trial Court attempted to look beyond the Policy Declaration to determine what zoning, property uses, condominium density, and other developmental factors would be applicable, if annexation were to ultimately take place. Those issues are all premature at the Policy Declaration stage. The Statute, 10-2-414, does not at all contemplate the analysis of present or future development; those questions are to be left to the substantive annexation proceedings, negotiations, and resolves of the parties, subsequent to the Policy Declaration and at the time that the property owner opts to negotiate regarding annexation.

This catalytic defect in the Sweetwater position shows up all throughout the Findings signed by the trial Court. As immediate exemplars, the derisive and corroding effect of the Sweetwater argument for inclusion of present and future development plans in the Policy Declaration are seen in Findings 37 and 38. Both are rendered vulnerable and clearly erroneous as a result. <sup>11/</sup>

(h) Conclusion of Law No. 9.

The trial Court erroneously concluded that Salt Lake County Service Area No. 3 was an "affected entity" under

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<sup>11/</sup> See also Findings 41, 42, 26, 24, 14-18 and Conclusions of Law 6, 7, 8, 15, and 17 to the same application and effect.



the Statute 10-2-414, and as a matter of law, its interest in the Policy Declaration was required to be explicated. The Conclusion is fundamentally flawed. The Service Area has no powers of taxation under Utah law, the latter element being a pivotal standard of an "affected entity". Sections 17-29-10.2 U.C.A. (Repl. Vol. 2B) adumbrates the powers of a Service District. The power to tax is not on the list. The revenue requirements of a Service District are to be inculcated within the general tax levied and collected by a County. The error of Conclusion No. 9 is manifest.

(i) Conclusion No. 14 - - Willingness to Annex.

The trial Court concluded as a matter of law that the Alta Policy Declaration was invalid because it demonstrates that the City "is not presently willing to annex" Sweetwater. The Policy Declaration contradicts such determination by the explicit statement, in Section 1, that annexation is favored. Indeed, were it otherwise, there would have been no interest upon the part of Alta to issue the Policy Declaration in the first instance.

The fact that the Declaration set forth that an "interlocal" agreement with the County Service District would "be allowed" was neither a precondition to annexation nor a flaw in the Declaration.

Alta was aware, at the time of preparation of the Policy Declaration, that Salt Lake County Service Area No. 3 was in existence and had the capacity to provide

mainline sewer, utility service. Because connection to the Service Area sewer outfall line might be more economically feasible than to pump sewage uphill into the center of Alta, the Policy Declaration provides that an interlocal agreement would be "allowed". That is not to say that it was required or, to use the language of the trial Court, "a precondition to annexation". Such argument is an invention of Sweetwater without any factual or legal support.

At trial, Sweetwater presented to the lower Court Exhibit 3-P, an unexecuted document entitled "Policy Resolution No. 1". The "Resolution" purporting to be a paper of Salt Lake County Service Area No. 3, stated, in substance, that the Service Area would not enter into any interlocal agreement with Alta regarding Sweetwater. The Resolution, as shown by the official minutes of the Service Area, was drafted by and presented to the County Service Area by Sweetwater and their legal counsel. From that point, Sweetwater attempted to bootstrap itself into the position of arguing that the interlocal agreement was, on the part of Alta, a condition precedent to the Declaration, and since the Service Area was purportedly unwilling to execute an interlocal agreement, Alta was correspondingly unwilling to annex. The argument is falsely premised in fact, irrelevant in law and should be set aside in this appeal.

### POINT III

THE TRIAL ERRED IN LAW AND IN FACT  
IN DETERMINING THAT THE ALTA POLICY  
DECLARATION CONSEQUENTIALLY RESULTED  
IN A "TAKING" OF THE SWEETWATER PROPERTY.

Throughout the Findings and Conclusions, the trial Court flirts with the notion that the Alta Policy Declaration resulted in a delay and/or obstruction of the development of the Sweetwater as a large 200 unit time-share condominium project, and that such Declaration worked a confiscation for taking of property without Just Compensation or due process of law. The rambling argumentative character of the Findings and Conclusions ultimately twist their way to the second principal paragraph of the Judgment in which it is ordered and adjudicated:

"That in the circumstances of this case, the imposition of urban development restrictions upon the Sweetwater property under Section 10-2-418 as a result of said Policy Declaration would constitute a taking of property without just compensation or due process of law, in violation of the Fifth Amendment to the Constitution of the United States and Article I Section 7 and Article I Section 22 of the Constitution of Utah, and for such purpose said Policy Declaration is therefore without authority, contrary to law, and void. [Emphasis added.]"

Before proceeding to the central issue of whether the Policy Declaration did effect an unconstitutional taking of the Sweetwater property, several aspects of the quoted Judgment bear particular note:

(i) To begin with, the trial Court uses the phrase "urban development restrictions" arising from the Policy Declaration within the critical context of 10-2-418 U.C.A. (Repl. Vol. 2A 1979 Supp.). Unfortunately, the trial Court never gets around to defining what it means by "urban development restrictions" at any point in the Findings or Conclusions. While the phrase is employed as a subtitle to Section 10-2-418, it is clear that such is only intended to define the area (one-half mile within the territorial boundaries of a municipality) that may be the subject of a Policy Declaration. Accordingly, the adoption of the phrase "urban development restrictions" in the Judgment is without factual nexus or legal efficacy.

(ii) The language of the Judgment relative to the Policy Declaration constituting an unconstitutional confiscation or taking of property is, for some unannounced reason, prospective and hypothetical. Thus, it is declared that the Policy Declaration "would constitute a taking of property without Just Compensation or due process of law \* \* \*". Apparently faced with the plethora of opposing judicial authority on the subject, the Judgment was not so bold as to declare that the Policy Declaration actually triggers the "taking" clause of the Federal and State Charters. Yet the Judgment squarely states that as a result of the Policy Declaration, possible future annexation and "taking", the Policy Declaration is "without

authority, contrary to law, and void". By definition, such has reference to present conduct. The Judgment of the trial Court is a massive non-sequitur.

(iii) The judicial effect of Paragraph 2 of the trial Court Judgment is to strike not only the Alta Policy Declaration, but Section 10-2-414 and 418 as constitutionally void and unenforceable. If the Alta Policy Resolution were issued in furtherance of and pursuant to 10-2-414 through 418, and if the Policy Declaration constitutes a "taking" without Just Compensation or due process of law, and void, then the Policy Declaration Statutes, themselves, must also fall as unconstitutional. While the Conclusions of Law and Judgment of the trial Court do not expressly reach that result, they do so implicitly.

1. Neither the Policy Declaration nor Statute Forecloses Property Use.

The regulation of property development (in this case, the huge time-share condominium project of Sweetwater in Little Cottonwood Canyon) does not stem from the Alta Policy Declaration, but rather, from the Statute 10-2-418. The latter sets forth, in substance, that no urban development on a property the subject of a Policy Declaration may occur for a 12-month period and until the developer has made a good-faith effort to annex his property. The time frame commences to run from written notice by the developer to the municipality setting forth the reasons why annexation is precluded. At the end of



the period, assuming good faith efforts have been made to annex, the property owner is free to begin development as intended.

In the constitutional sense, such statutory regulation has no more effect, in law, and probably less than a zoning ordinance. Is it nonetheless to be said that the Policy Declaration is tantamount to a "taking" in contradiction of Article I Section 22 of the Utah Constitution or the Fourteenth and Fifth Amendments of the United States Constitution? There is no judicial authority so holding.

2. The Intention of Alta Regarding Sweetwater Development.

The Findings and Conclusions of the trial Court are fairly laced with the innuendo that the Policy Declaration of Alta was executed for the express purpose of "stopping" the time-share condominium proposal of Sweetwater.<sup>12/</sup> The Findings contain a vague but factually bankrupt suggestion that Alta was of the intent to "suppress" the Sweetwater development. The record of this case is absolutely devoid of any evidence, direct or circumstantial, regarding the animus of the City to halt the Sweetwater project. Alta has not stated its position with respect to the desirability or undesirability of the Sweetwater condominium proposal and it has not declared (nor should it at this stage) what the future of the Sweetwater project would be if the subject property were annexed to the Town.

The only intent which may be presumed from the Policy Declaration executed by Alta is that the City desired to and

did exercise the rights granted to all municipalities by the Legislature under 10-2-414 et seq. to have some voice in a large-scale urban, residential project which would undeniably have substantial impact upon the Town.

No development restrictions have been or are imposed upon Sweetwater or its property by the Policy Declaration. The only restriction that could conceivably be urged is one of time delay, and that is a regulation imposed by legislative enactment, not by the Policy Declaration.

3. The Statute and the Alta Policy Declaration Achieve a Legitimate Public Purpose.

Contrary to the Findings and Conclusions of the trial Court, as well as the Judgment entered, the issue of this contest is not whether Sweetwater may ultimately realize the construction of its 200 unit time-sharing condominium project. Rather, the question at large is whether or not a municipality may, through a Policy Declaration, address, minimize, or resolve the impact of an enormous urban, residential development on the rim of the Town limits.

To begin with, it is plain enough that 10-2-401 et seq. addressed the procedure, methodology and substance of municipal annexation of real property. The rule has long been in this jurisdiction and recently reaffirmed that the power and process of annexation is an inherent legislative function with which the judiciary will not ordinarily interfere. Freeman v. Centerville City, et al., 600 P.2d 1003 (Utah 1979).

Secondly, the case law has previously and effectively dealt with the question of constitutionality of annexation vis-a-vis the "taking" and "due process" clauses of the Constitution. Thus, in Hunter v. City of Pittsburgh, 207 U.S. 161, 28 S. Ct. 40, 52 L.Ed. 151 (1907), a larger municipality pursued the statutory process of annexing a smaller, contiguous municipality. It was urged that the annexation procedure was unconstitutional as a deprivation of private property without due process since the property annexed would be subject to the stricter ordinances of the larger municipality. The U. S. Supreme Court, in an opinion authored by Mr. Justice Moody upheld the annexation process and in so doing, declared:

"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 intrusted to them. \* \* \* The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. \* \* \* All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. \* \* \* 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." Id. at 178 [Emphasis added.]

The Sweetwater property resides in no sanctuary, antiseptically sealed from the Town boundaries of and properties within Alta. Indeed, Alta existed long before the proposed Sweetwater

project and had much to do with the creation of utility facilities and environment which purportedly would make the Sweetwater project economically desirable. The annexation Statute and the Alta Policy Declaration are, based upon sound judicial authority, conceived in the public interest and supported in the public regard.

Moreover, there can be no doubt in this day that peripheral development on the edge of a City is of legitimate public concern and that the exercise of reasonable extra-territorial jurisdiction is properly and constitutionally sanctioned. In the 1978 decision of Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 99 S. Ct. 383, 58 L. Ed. 2d 292 (1978), the U. S. Supreme Court affirmed an Alabama statute (of parallel consequences to the Utah Statute) which authorized a municipality to subject adjacent and unincorporated properties, within three miles, to police, sanitary and business regulations of the City. The Statute was attacked as an unconstitutional violation of the due process clause as well as the equal protection clause of the Fourteenth Amendment of the U. S. Constitution.

The U. S. Supreme Court, in Holt Civic Club, upheld the constitutional validity and enforceability of the Alabama statute, stating:

"The imaginary line defining a City's corporate limits cannot corral the influence of municipal actions. A city's decisions inescapably affect individuals living immediately outside its borders. \* \* \* Indeed, the indirect extraterritorial effects of many purely internal municipal actions could conceivably have a heavier impact on surrounding environs than the direct regulation contemplated by Alabama's policy jurisdiction status."  
58 L. Ed. 2d at 301 [Emphasis added.]

The federal Court went on to declare without equivocation that the reasonable regulation of property on the envelope of City boundaries is a matter of lawful, public concern:

"The Alabama Legislature could have decided that municipal corporations should have some measure of control over activities carried on just beyond their "city limit" signs, particularly since today's police jurisdiction may be tomorrow's annexation to the city proper. Nor need the city's interests have been the only concern of the legislature when it enacted the police jurisdiction statutes. \* \* \* Unincorporated communities like Holt dot the rim of most major population centers in Alabama and elsewhere, and state legislatures have a legitimate interest in seeing that this substantial segment of the population does not go without basic municipal services such as police, fire, and health protection." 58 L. Ed. 2d at 304 [Emphasis added.]

This Court has not had occasion to pass on the constitutionality or enforceability of the annexation Statute. But the concern of the Utah Legislature and of Alta is of no less moment with respect to large development on the edge of municipal boundaries. Duplication of services, impact upon municipal development, and the benefits of City services and facilities without corresponding responsibility are all matters of public concern to the State Legislature under 10-2-414 and to Alta under its Policy Declaration in this Case. The U. S. Supreme Court has laid to rest and rejected the position of Sweetwater, as inculcated in the Judgment of the trial Court, with respect to federal constitutional questions. Holt Civic Club v. Tuscaloosa. supra. This Court should do likewise with respect to the State constitutional questions raised by the Judgment of the trial Court with respect to the Utah Statute and Alta Policy Declaration.



## POINT VI

### THE POLICY DECLARATION OF ALTA DID NOT EFFECT A PRESENT OR PROSPECTIVE TAKING OF THE SWEETWATER PROPERTY.

The argument of Sweetwater that its property has been or would be taken by the September 13, 1979 Policy Declaration of Alta is specious. The Declaration did not appropriate the the Sweetwater property, it did not preclude development of that property for any use, and it did not deprive the owner of the benefits of the land. The Policy Declaration did not even so much as master plan the area in and around Sweetwater. It would have been no legal diatribe if it had so done, but it did not. Yet the trial Court in Findings 38 and 41 determined that the Alta Policy Declaration constituted a "present complete restriction" and prohibition of "all future reasonable and profitable" development and use of the property. Conclusion No. 16 states that the restrictions under the Statute "as demanded by Alta" (in its Policy Declaration), would constitute a taking of the property without Just Compensation and the Judgment so expressly ordered.

The Findings are clearly erroneous, and the Judgment and Conclusions are a severe aberration in the law of eminent domain and property expropriation.

#### 1. Master Plan and Zoning.

The Alta Policy Declaration falls far short of an attempt to zone or master plan the Sweetwater property. Even as to the latter and far more restrictive police power regulation,

the law has been settled beyond all reasonable debate that the establishment of a master use plan and the zoning of property, establishing restrictions in property use and development, do not work an unconstitutional "taking" of property. Village Euclid v. Amber Realty Co., 272 U.S. 395, 47 S. Ct. 114 71 L. Ed. 313; American Law of Zoning, Vol. 1, p. 93, §3.10 (2d Ed.)

Surely, if the Alta Policy Declaration had attempted to zone or master plan the Sweetwater property to preclude existing use or foreclose future development, a closer jurisdictional issue would be presented. Even then, this Court has declared that a zoning ordinance, passed pursuant to law and for the protection of the public health, safety and welfare, was valid and not subject to attack as depriving a landowner of his property without Just Compensation. Salt Lake City v. Western Foundry & Stove Repair Works, 55 Utah 447, 187 Pac. 829 (1920). This Court therein declared:

"There can be no doubt but that the enforcement of the ordinance [excluding the enlargement of an existent foundry in a residential district] will work a hardship upon the defendant, and as to it will occasion some financial loss. \* \* \* Under the circumstances it would seem the police power would extend to the needs of the general public, and the power to regulate or prohibit by ordinance an invasion of a district by industrial enterprises ought not to be questioned on the ground that the exclusion of an industrial plant would be the taking of property for public use without just compensation." [Brackets inserted.] 187 Pac. at p. 831

## 2. The Policy Declaration Does Not Affect a Taking

### Under the Laws of Utah.

A fair analysis of the Alta Declaration manifests that it does not destroy or abridge, nor does it seek to destroy or

abridge the rights of Sweetwater in its property. The Declaration does not impose restrictions or even regulate the future use of Sweetwater and it does not begin to pass upon or affect possession or title to the property. Under any legal criteria recognized by this Court, a taking of the Sweetwater holdings has not taken place. Hampton v. State Road Commission, 21 U.2d 342, 445 P.2d 708 (1968); Oregon Shortline R.R. Co., v. Jones, et al., 29 Utah 147, 80 Pac. 732 (1905); Stockdale v. Rio Grande Western R.R. Co. & Anhauser Bush Brewing Assn., 28 Utah 201, 77 Pac. 849 (1904).

Finding 38 of the lower Court that "the effect of annexation" of Sweetwater to Alta and "subjection of Sweetwater to the Town's Master Plan will be a future, complete restriction of development" of Sweetwater is a conjectural fantasy, wholly unsupported by even a scintilla of evidence. Yet that Finding paved the way for the Judgment of the Court that the Alta Policy Declaration had "taken" the Sweetwater property.

The Judgment of the trial Court does not come even within the shadow zones of an enforceable order on the issue of a present or prospective unconstitutional expropriation of Sweetwater. To permit the Judgment to stand would be not only to invalidate a legally sustained and supported Policy Declaration issued pursuant to Statute in the public interest and welfare, it would be the equivalent of striking, as unconstitutional, the annexation Statute, itself.

## C O N C L U S I O N

The Judgment of the trial Court should be reversed on all counts and the Complaint of Sweetwater dismissed. The reasons are the most compelling.

First, the Policy Declaration adequately satisfies the requirements of the Declaration Statute, 10-2-414. That Statute does not foresee a bulging environmental impact statement, but rather a plain and simple statement encouraging annexation and setting forth the services to be provided, financing, and the interests of statutorily defined entities. The attempt of Sweetwater to pick and scratch at the Policy Declaration here and there claiming some 21 separate deficiencies, is not only unavailing, but counter-productive. That the trial Court was persuaded to sign such Findings and Conclusions only invokes the clearly erroneous test which is plainly satisfied in this Case.

The Findings and Judgment are precocious, premature and jump the gun with respect to the Policy Declaration. They erroneously assume that annexation is an accomplished fact and that Alta will master plan and zone Sweetwater within the City limits so as to completely restrict future development. The thread of that position, which finds its way throughout the Findings and Conclusions, are without legal relevancy in the context of the Declaration and in all events, are bankrupt of evidentiary foundation. Wild conjecture and speculation of Sweetwater are no basis for invalidating a proper police power declaration of a municipality.

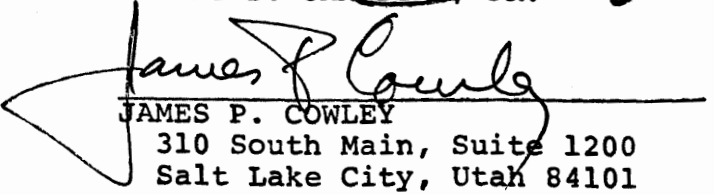
The Judgment declaring the Policy Declaration to have effected an unconstitutional taking of the Sweetwater property under Federal and State Constitutions is egregious error and unsupported in law. No decision of this Court or of the United States Supreme Court has even come close to the excesses of the lower Court Judgment. Were the law otherwise, a policy declaration under the Utah Statute would be a legal impossibility. Indeed, the Judgment of the lower Court is the equivalent of a declaration of unconstitutionality of the annexation Statute 10-2-414 et seq.

Lastly, the Judgment of the trial Court, perpetually enjoining Alta from executing a further Policy Declaration as to Sweetwater or "in any manner" interfering with the development of the Sweetwater property in the unincorporated area of Salt Lake County, is unprecedented. Such Judgment constitutes an attempt by judicial order to obstruct the ordinary and inherent processes of legislative discretion.

The Judgment of the lower Court should be reversed and the Complaint of Sweetwater should be dismissed. The Counterclaim of Alta, requiring the recognition of the Policy Declaration by Sweetwater, should be affirmed by order of this Honorable Court.

Respectfully submitted,

  
ROBERT S. CAMPBELL, JR.

  
JAMES P. COWLEY

310 South Main, Suite 1200  
Salt Lake City, Utah 84101

Attorneys for Appellant



**10-2-414. Policy declaration—Contents—Hearing—Notice—Amendment—Costs of preparation.**—Before annexing unincorporated territory having more than five acres, a municipality shall, on its own initiative, on recommendation of its planning commission, or in response to an initiated petition by real property owners as provided by law, and after requesting comments from county government, other affected entities within the area and the local boundary commission, adopt a policy declaration with regard to annexation. Such policy declaration shall include:

(1) A map or legal description of the unincorporated territory into which the municipality anticipates or favors expansion of its boundaries. Where feasible and practicable areas projected for municipal expansion shall be drawn along the boundary lines of existing sewer, water, improvement, or special service districts or of other existing taxing jurisdictions to: (a) eliminate islands and peninsulas of unincorporated territory; (b) facilitate the consolidation of overlapping functions of local government; (c) promote service delivery efficiencies; and (d) encourage the equitable distribution of community resources and obligations; and

(2) A statement of the specific criteria pursuant to which a municipality will favor or not favor a petition for annexation. Such statement shall include and address the annexation standards set forth in this chapter, the character of the community, the need for municipal services in developed and developing unincorporated areas, the plans and timeframe of the municipality for extension of municipal services, how the services will be financed, an estimate of the tax consequences to residents in both new and old territory of the municipality, and the interests of all affected entities.

Before adopting the policy declaration the governing body shall hold a public hearing thereon. At least 30 days prior to any hearing, notice of the time and place of such hearing and the location where the draft policy declaration is available for review shall be published in a newspaper of general circulation in the area proposed for expansion except that when there are 25 or fewer residents or property owners within the affected territory, mailed notice may be given to each affected resident or owner. In addition, at least 20 days prior to the hearing, mailed notice and a full copy of the proposal shall be given to the governing body of each affected entity and to the local boundary commission. The policy declaration, including maps, may be amended from time to time by the governing body after at least 20 days' notice and public hearing. When a policy declaration is prepared in response to a petition, the municipality may require the petitioners to pay all or part of the costs of its preparation.

History: C. 1953, 10-2-414, enacted by L. 1979, ch. 25, § 15.

**10-2-415. Resolution or ordinance of annexation—Two-thirds vote—Filings with county recorder.**—If: (1) an annexation proposed in the policy declaration, in the judgment of the municipality, meets the standards set forth in this chapter; and (2) no protest has been filed by written application by an affected entity within five days following the public hearing, the members of the governing body may by two-thirds vote adopt a resolu-

(d) The annexation shall not create unincorporated islands within the boundaries of the municipality except that existing islands or peninsulas within a municipality may be annexed in portions, leaving islands, if a public hearing is held and the governing body of the municipality adopts a resolution to the effect that the creation or leaving of an island is in the interest of the municipality; and

(e) If the territory proposed for annexation includes urban development, the annexation of which would displace municipal-type services presently being provided by an affected entity applying for boundary commission review, the actual taxes and other revenue which would be lost by the affected entity through annexation shall not significantly exceed the affected entity's actual delivery costs of services assumed by the municipality. In computing the tax and revenue loss and service delivery costs, only the figures for the applicable budget year preceding the day on which the petition for annexation is filed shall be used.

(2) The governing body of a municipality may, under the provisions of the Interlocal Co-operation Act [11-13-1 to 11-13-27], agree with other municipalities for periods of two years, which may be automatically extended, to abide by annexation standards more stringent than the above.

(3) Municipalities shall not annex territory for the sole purpose of acquiring municipal revenue or for retarding the capacity of another municipality to annex into the same or related territory, in either case, without the ability and intent to benefit the annexed area by rendering municipal services in the annexed area.

History: C. 1953, 10-2-417, enacted by L. 1979, ch. 25, § 18.

**10-2-418. Urban development restrictions.**—Urban development shall not be approved or permitted within one-half mile of a municipality in the unincorporated territory which the municipality has proposed for municipal expansion in its policy declaration, if a municipality is willing to annex the territory proposed for such development under the standards and requirements set forth in this chapter; provided, however, that a property owner desiring to develop or improve property within the said one-half mile area may notify the municipality in writing of said desire and identify with particularity all legal and factual barriers preventing an annexation to the municipality. At the end of 12 consecutive months from the filing with the municipality of said notice and after a good faith and diligent effort by said property owner to annex, said property owner may develop as otherwise permitted by law. Urban development beyond one-half mile of a municipality may be restricted or an impact statement required when agreed to in an interlocal agreement, under the provisions of the Interlocal Co-operation Act [11-13-1 to 11-13-27].

History: C. 1953, 10-2-418, enacted by L. 1979, ch. 25, § 19.

**10-2-419. Annexation across county lines.**—Territory lying contiguous to the corporate limits of any municipality may be annexed to that mu-

ORDINANCE NO. \_\_\_\_\_

POLICY DECLARATION OF  
THE TOWN OF ALTA

WHEREAS, on the 26th day of July, 1979, the Town Council resolved to propose the adoption by the Town of Alta of a Policy Declaration pursuant to the provisions of Section 10-2-414, Utah Code Annotated (1953), as amended; and

WHEREAS, the Town of Alta scheduled a public hearing on said proposal for 10:00 o'clock a.m. on September 13, 1979, at the Gold Miner's Daughter Lodge in Alta, Utah and gave and published notice thereof, all as required by the provisions of Section 10-2-414, Utah Code Annotated (1953), as amended; and

WHEREAS, the Town Council of Alta conducted the public hearing as scheduled on September 13, 1979, at the time and place scheduled; NOW THEREFORE,

BE IT ORDAINED by the Town Council of the Town of Alta that the "Policy Declaration" proposed, as provided by and pursuant to the provisions of House Bill No. 61, as codified in Title 10, Chapter 2, Utah Code Annotated, be and the same is hereby adopted and approved with respect to the area herein referred to as "Sweetwater Property", which includes the adjacent area known as the Blackjack Condominiums and other (undeveloped) land as delineated on the attached map.

POLICY DECLARATION  
SWEETWATER PROJECT

1. Declaration of Policy. The Town of Alta hereby declares that the proposed development of the Sweetwater Property would severely impact the Town of Alta, and that it would be in the best interests of the residents of the Town and the owners, developers and ultimate users of the Sweetwater Property and adjacent property if such area now outside the Town, but within one-half mile of the Town boundary, as shown on the attached map incorporated herein as Attachment "A", were annexed to the Town. The Town hereby adopts a policy favoring the extension of its boundaries so as to include the area designated on Attachment "A", according to the procedures set forth in House Bill No. 61 as enacted.

2. Criteria for Annexation. The Town further declares that such annexation must be according to the procedures for annexation established by the ordinances of the Town, to wit: that all annexations must be reviewed by a public hearing before official Town Council action is taken. It is expressly acknowledged that no prior approval of any zoning, development, construction or improvement on the Sweetwater Property by any other government or public body or agency shall be binding upon the Town of Alta, nor shall acceptance of such approval be made a condition precedent to submittal of an annexation petition.



In addition, the Town of Alta favors annexation of the Sweetwater Property only upon the following criteria:

- a. That a petition signed by a majority of the property owners and the owners of at least one-third of the real property value be submitted as provided by law.
- b. The Area presently undeveloped would be master planned in keeping with the rules and regulations of the Town of Alta, with all rights and privileges enjoyed by the residents of the Town of Alta.
- c. An "interlocal" agreement with the existing service district will be allowed.

3. Annexation Standards. With respect to the annexation standards set forth in House Bill No. 61, Section 18, the Town declares as follows:

- a. The property here favored for annexation is contiguous to the Town.
- b. The property lies within the area projected for municipal expansion under this policy declaration.
- c. The property is not presently within the boundaries of another incorporated municipality.
- d. Such annexation will not create an unincorporated "island" as that term is defined.
- e. Such property presently contains urban development, as that term is defined, which presently receives municipal-type services from Salt Lake County.



However, the favored annexation would probably not result in a loss of revenues to Salt Lake County greater than the costs of services now being provided by Salt Lake County, which costs would be assumed by the Town of Alta.

- f. That such favored annexation is not and would not be for the sole purpose of increasing revenues.

4. Character of Community. The Town states that its boundaries lie within an area of the county which supports a unique and sensitive environmental balance. It is the policy of the Town to foster and enhance the beneficial existence of development and nature. Such requires careful growth and improvement. Because of the nature of the location of the Town, it is subjected to unusual problems with respect to avalanche control and the protection of the people from avalanche danger, as well as traffic control problems and uninhibited passage on the road that would service this area. These problems include snow removal and the control of parking.

5. Need for Municipal Services. The Town of Alta presently owns, operates and maintains a culinary water system and a sanitary disposal system. In addition, the Town provides police and fire protection to its residents, as well as an avalanche warning and control system and guardianship of the watershed. All such services are necessary in view of the

location of the area involved and the fact that the same lies within the watershed of Salt Lake City. In addition, all services would be available to the Sweetwater Property. The Town recognizes that the Sweetwater Property anticipates obtaining such services from Salt Lake County. However, such would result in an unnecessary duplication of services and an inefficient use of resources, which would severely impair the programs now in operation.

6. Timetable and Financing of Services. The Town of Alta presently has no timetable for the extension of municipal services into the Sweetwater Property. The Town follows an established policy of requiring that the extension of services into an undeveloped area be paid wholly from the funds of the affected developer or owner. The Town is presently able to provide the administrative services necessary to allow and oversee such an extension by the developer, assuming proper annexation were approved.

7. Estimate of Tax Consequences.

- a. Sales Tax: It is estimated that the maximum revenue would be \$2,000.00.
- b. Property Tax: Under the present structure, there would be no loss in revenue to the county.

8. Interests of Affected Entities. The only other "entity" affected by the proposed development and the annexation

policy herein declared is Salt Lake County. The service district could continue to service this area under an interlocal agreement if so desired. As is discussed hereinabove, the single effect upon said County by annexation of the Sweetwater Property would be a minor decrease, if any, in present tax revenues. However, that decrease would be offset by a similar and possibly larger reduction in the overall cost of services provided by the County.

9. Other Considerations. The Town of Alta hereby declares after analyzing the results of a public hearing on this matter on 7/12/79, that the annexation favored herein will allow the continuation of the high quality of urban governmental services to the area in question and will provide for the protection of the public health, safety and welfare. Such policy is further necessary in order to insure the environmental balance of the location of the property and to enhance the quality of life of the residents of Little Cottonwood Canyon without inhibiting the enjoyment of the public land by the citizens of the Salt Lake Valley and of the nation.

IN WITNESS WHEREOF, the Town Council of the Town of Alta, Utah, has duly approved, adopted and passed this Ordinance at a regular meeting on the 13th day of September, 1979, and further declares that the immediate preservation of the peace, health

and safety of the Town requires that this Ordinance become effective immediately upon the posting thereof by the Town Clerk in at least three (3) conspicuous places within the Town limits.

By /s/ William H. Levitt  
William H. Levitt  
Mayor

ATTESTED:

/s/ Logan Hebner  
Acting Town Clerk

Date of Posting:

9/13/79

