

1980

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

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, :

vs. :

Case No. 17064

TOWN OF ALTA, UTAH, :  
a municipal corporation, :

Defendant and :  
Appellant. :

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BRIEF OF TOWN OF ALTA ON REHEARING

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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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Clerk, Supreme Court, Utah

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BRIEF OF TOWN OF ALTA

ON REHEARING

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NATURE OF THE CASE

On January 14, 1981, this Court issued its unanimous Opinion reversing the judgment and order of the trial Court and determining that the Policy Declaration of the Town of Alta under date of September 13, 1980, was a legitimate and proper exercise of the police power as authorized by 10-2-414 and 10-2-418, U.C.A. 1979 (Repl. Vol. 2A 1953). The case was ordered remanded for dismissal in accordance with the unanimous Opinion.

Salt Lake County, as amicus curiae, petitioned the Supreme Court for rehearing on the specific and limited issue of whether the annexation statute of 1979 authorized involuntary annexation of property without the consent of any affected

landowner. On the other hand, Sweetwater petitioned the Court for rehearing on virtually every issue urged in its original appeal and which had been rejected by the January 14, 1981 Opinion.

A rehearing was granted by this Court to consider the limited issue of:

"Under what circumstances can the Town of Alta, sua sponte, initiate a Policy Declaration for annexation pursuant to 10-2-401-423, U.C.A. 1953, as amended."

#### SUMMARY STATEMENT OF POSITION

The issue which is to be addressed on rehearing does not affect, in fact or in law, the merits of the controversy between Alta and Sweetwater. Sweetwater never claimed in the trial Court and Alta never argued that the Alta Policy Declaration of September 13, 1979, worked or had the effect of an annexation of the Sweetwater property. Rather, the Alta Policy Declaration was no more and no less than that -- a declaration that it was desirous of annexing the Sweetwater property because of the immediate contiguity of the property to the then Town boundaries of Alta. No one in this Case, least of all Sweetwater, has ever argued that the Alta Policy Declaration did attempt to or in law resulted in the annexation of the Sweetwater property.

Accordingly, Alta respectfully submits that the issue specifically defined on rehearing has no bearing upon the case and controversy between Alta and Sweetwater. It is strictly in

the nature of a collateral matter that does not affect the ultimate opinion by the Court dated January 14, 1981 to reverse and set aside the judgment of the trial Court.

While this Court has not made it a practice to review or pass upon questions that would constitute obiter dicta were the same made a part of any opinion issued in the case, it is appreciated that from time to time, the Court may be desirous of a review of larger questions of law than those presented before the Court under the facts because of the general public importance of the issue. It is to the latter end and that end only that this additional brief in behalf of Alta is submitted to the Court. Any opinion by this Court on rehearing regarding the circumstances under which Alta may initiate a policy declaration for annexation would be academic and an advisory opinion under the exigent and uncontested facts of the Case at Bar.<sup>1/</sup>

#### PRELIMINARY STATEMENT OF FACTS

Because the facts of this case and the applicable law has already been set out in extensio under prior briefing schedules of the Court, it will not be recounted here. It is sufficient to say that in mid-July, 1979, Alta reviewed a proposed preliminary Policy Declaration regarding the possible future annexation of the Sweetwater property. Such was undertaken pursuant to, and this Court has found in its January 14, 1981 Opinion to be in substantial compliance with, 10-2-414. After

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<sup>1/</sup> See, Baird v. State, 574 P.2d 713 (Utah 1978).



allowing some 60 days for public comment and reaction, Alta at a regularly scheduled Town meeting on September 13, 1979, enacted the proposed Policy Declaration as an ordinance of the Town. Said ordinance did not annex, attempt to annex, or work an annexation of the Sweetwater property. Rather, it was a declaration of intention to annex issued pursuant to 10-2-414.

Because of the objection of Sweetwater to possible annexation in the future of its property, rather than negotiate with Alta, pursuant to the requirements of 10-2-418, it filed on September 10, 1979, its Complaint in the District Court for Salt Lake County seeking an injunction to restrain Alta from even enacting a policy declaration. The record is clear that Sweetwater failed to undertake any negotiations in good faith with Alta in an attempt to bring about an annexation as contemplated by the Statute, 10-2-418.

It was on the <sup>basis</sup> ~~belief~~ of the Policy Declaration of Alta (which did not attempt to annex or affect in law, an annexation of Sweetwater) that the District Court invalidated and voided the Alta Policy Declaration, found that such Declaration, ipso facto, worked a taking in the constitutional sense of the Sweetwater property, and enjoined Alta from ever amending or enacting any further policy declaration affecting the Sweetwater property.



## A R G U M E N T

### POINT I

THE CONDITIONS UNDER WHICH A MUNICIPALITY  
SUA SPONTE INITIATES A POLICY DECLARATION

LEADING TO ANNEXATION, ARE SET OUT IN  
10-2-414, U.C.A. 1979 (REPL. VOL. 2A 1953)

The query under the Order on Rehearing requests an advisory view as to the circumstances under which Alta, on its own motion, could "initiate" a Policy Declaration for annexation under the annexation statute 10-4-401, et seq.

The answer to that query is contained in 10-2-414. As the opening stanza of the statute demonstrates, a municipality may adopt a Policy Declaration regarding the proposed annexation of private and abutting property. That Policy Declaration may be undertaken sua sponte without a petition of any other public agency or private individual:

"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." (Emphasis Added)

This is precisely what Alta did. It announced its intention to enact a Policy Declaration in July of 1979. It called for public comments and it notified those affected entities which Section 414 plainly required.

The Policy Declaration of Alta ultimately enacted as an ordinance on September 13, 1979 only constituted the "adoption of a policy declaration with regard to an annexation" as set forth in Section 414.

Since the proposed Policy Declaration of Alta was <sup>opposed</sup> ~~necessitated~~ by owners of Sweetwater, the requirements of good faith negotiations between Sweetwater and Alta, as declared in 10-2-418, were activated, the Sweetwater property being situated within one-half mile of Alta. 10-2-418 declares:

"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." (Emphasis Added)

Sweetwater was required to negotiate in good faith regarding annexation of its property pursuant to the Alta Policy Declaration. It did not do so and this Court

explicitly so found based upon the record of trial under its January 14, 1981 Opinion.

Notwithstanding the failure of Sweetwater to negotiate regarding possible annexation of its property, under the requirements of 10-2-418, Alta did not annex and has not to this date annexed the Sweetwater property as a result of the September 14, 1979 Policy Declaration. The record will support no other conclusion.

## POINT II.

THE PROCEDURAL METHODOLOGY FOR ANNEXATION  
UNDER A MUNICIPAL POLICY DECLARATION IS  
REASONABLY CLEAR IN THE CONTEXT OF THE  
PUBLIC POLICY OF ANNEXATION.

If one were to assume, as a <sup>pure</sup>~~sure~~ hypothesis, that the Alta Policy Declaration of September 13, 1979 were unopposed by any landowner or affected taxing entity, if the municipality <sup>desired</sup>~~said~~, it is apparent that it could proceed under 10-2-415 with the adoption of an ordinance (by two-thirds vote of the governing body) of annexation predicated upon the Policy Declaration, as prescribed in 10-2-415. Upon the latter "ordinance of annexation" being passed incident to the terms of the earlier "Policy Declaration" of the municipality, the real property "shall then and there be annexed". 10-2-415, U.C.A., 1979 (Repl. Vol. 2A 1953).

While an "ordinance of annexation" was never enacted by Alta in the Case at Bar, Section 415 suggests that if there had been no protest of an abutting landowner engaged in real property development or improvement and that there were no protests from affected entities as defined by the annexation statutes, an "ordinance of annexation" would accomplish a de jure annexation of the property, and upon recordation of the plat and a copy of the ordinance with the County Recorder, the annexation is completed and thereafter the "inhabitants shall enjoy the privileges of the annexing municipality."

On the other hand, if a developing landowner does protest a proposed Policy Declaration, further negotiations and action regarding the proposed municipal annexation is carried forth under 10-2-418. Such an interpretation is consistent with the rule of statutory construction of this Court that two separate statutes dealing with the same subject matter are to be read in harmony and not in such a way as to render unenforceable either one or both.

### POINT III

THE LAST SENTENCE OF 10-2-416, U.C.A. 1979  
(REPL. VOL. 2A 1953) IS IN APPARENT CONFLICT  
WITH SECTIONS 10-2-414, 415, 417, 418 AND THE  
LEGISLATIVE POLICY OF THE MUNICIPAL ANNEXATION  
STATUTE SET FORTH IN 10-2-401, U.C.A. 1979 (REPL. VOL. 2A 1953).

The last sentence of 10-2-416, U.C.A. 1979 (Repl. Vo. 2A 1953) states:

"Except as provided for in section 10-2-420, no annexation may be initiated except by a petition filed pursuant to the requirements set forth herein."

It is claimed by Sweetwater and Salt Lake County that this sentence embodies the sole method for annexing contiguous property to a municipality in this State. On its face (and by the interpretation of Sweetwater), this provision conflicts with the legislative prerogative of a municipality:

- (1) to initiate a Policy Declaration on its own motion under 10-2-414;
- (2) to adopt an ordinance of annexation by two-thirds vote of the governing body based upon a proposed Policy Declaration statement which meets the standards set forth in the Act; and is not protested by any affected entity; and
- (3) to enter into good faith negotiations between an objecting landowner, desiring to develop or improve property, concerning legal and factual barriers preventing annexation under 10-2-418.

Section 10-2-416 is entitled "Petition by landowners for annexation". It provides the method for initiating annexation of real property by a private landowner. This is only part of the Municipal Code relating to annexation by petition enacted in 1979. In construing 10-2-416, the substantive provisions of 10-2-414, 415, 417 and 418, as well as the legislature's declaration of public policy set forth in 10-2-401, must be



harmonized with other sections of the Act. As this Court recently stated in Osuala v. Aetna Life & Casualty, 608 P.2d 242, 243 (1980):

"If there is doubt or uncertainty as to the meaning or application of the provisions of an act, it is appropriate to analyze the act in its entirety, in the light of its objective, to harmonize its provisions in accordance with the legislative intent and purpose."

If Sweetwater's position prevails, i.e., that 10-2-416 is the only method of initiating and accomplishing annexation, then the other sections of the Act are meaningless and can be taken to be nothing more than idle commentary masquerading as law. The concept of the Policy Declaration initiated by a municipality under 10-2-414 would be a meaningless gesture. A municipality would have the power to issue a Policy Declaration but would be without authority to act upon it, contrary to the express language and intent of 10-2-415. This Court has not countenanced such tortured judicial construction of statutes. Worthen v. Shurtleff & Andrews, Inc., 19 Utah 2d 80, 426 P.2d 223 (1967). The additional steps of formulating Policy Declarations, holding public hearings, providing notice to affected landowners and governmental entities, appeals to the boundaries commission and other protections placed into the 1979 Act, would be language without meaning or purpose if annexation were limited exclusively to the petition of private landowners.

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

The question posed on rehearing by this Court cannot affect the substantive merits of the contest between Alta and Sweetwater. Those issues have been resolved by the January 14, 1981 Opinion of this Court.

As to the advisory query on rehearing, it is clear that the annexation statute, 10-2-414 anticipates and authorizes a municipality to formulate on its own motion or upon the petition filed by others, a Policy Declaration which may ultimately lead to annexation. If the Policy Declaration is opposed by a landowner whose property is proposed for development, the provisions of 10-2-418 are applicable and an annexation may not be effectuated until after good faith negotiations have taken place over a period of one year. If there is no objection to a proposed Policy Declaration by any landowner and there is no objection from any "affected entity", 10-2-415 does suggest that if it is so intended, the municipality can enact into ordinance a Policy Declaration which accomplishes an annexation. The statute 10-2-416 is ambiguous if it is read in juxtaposition with other sections of the Annexation Statute. In any event, there is no nexus <sup>of</sup> ~~to~~ that ambiguity <sup>to</sup> ~~and~~ the facts in the Case at Bar.

Alta, in enacting its Policy Declaration of September 13, did not enact an ordinance of annexation. Such should be kept

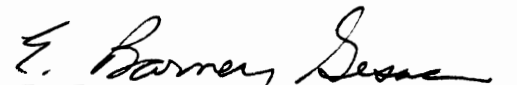


upper-most in mind in the event that an advisory opinion is written by the Court on rehearing regarding annexation through the sole medium of a municipal policy declaration.

DATED this 6<sup>th</sup> day of May, 1981.

Respectfully submitted,

  
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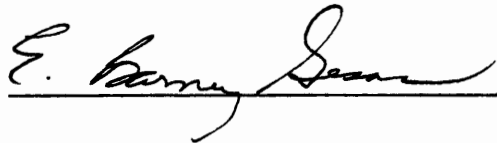
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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing  
BRIEF OF TOWN OF ALTA ON REHEARING were served on counsel  
of record at the respective addresses indicated, by mailing  
said copies to their offices, first class mail, postage  
prepaid, this 6<sup>th</sup> day of May, 1981:

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