1980

Sweetwater Properties et al v. Town of Alta, Utah : Motion to Strike and Reply Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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.	:	

MOTION TO STRIKE AND

REPLY BRIEF OF APPELLANT

TOWN OF ALTA

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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IN THE SUPREME COURT OF THE STATE OF UTAH

SWEETWATER PROPERTIES, SBC INVESTMENT COMPANY and BLACKJACK TRUST,	:	
Plaintiffs-Respondents,	:	
-vs-	:	Case No. 17064
TOWN OF ALTA, UTAH, a municipal corporation,	:	
Defendant-Appellant.	:	

MOTION OF THE TOWN OF ALTA TO STRIKE PORTIONS OF RESPONDENTS' BRIEF

The Appellant, the Town of Alta, pursuant to the Rules of this Court, herewith moves to strike Appendix C to the Brief of Respondents in its entirety, together with all argument and references thereto in Respondents' Brief, and specifically page six (6) of Respondents' Brief. Appellant further moves that the Court exclude the same from any consideration on the Appeal of this matter.

This Motion is made and predicated upon the following grounds, to wit:

1. Respondents have undertaken in their Brief conduct which cannot be countenanced by this Court. They have attached as Appendix C to their Brief certain Petitions of reputed landowners, which Petitions were never before the lower court, were never offered as evidence at the trial of

this matter and which are dehors the transcript, testimony and record that is before this Court.

2. That the attached documents are dated July 11, 1980, several months subsequent to the trial of this matter in February of 1980. The documents are, therefore, wholly outside the record of this case, are immaterial to the issue presented on appeal, are prejudicial and must not be considered part of the record of this case.

3. Rule 12(f) U.R.C.P. anticipates that this Court will strike from the brief or filing of a party any matter that is "immaterial" or "impertinent". The tactics of the Respondents in attempting to parade before this Court non-evidentiary material plainly outside of the record should not be condoned and the materials incorporated in the Respondents' Brief, the subject of this Motion, should be stricken as immaterial and improper.

4. This Court has let it be known that it will not permit supplementation of the record on appeal by considering new or non-evidentiary matters for the first time. In Corbett v. Corbett, 24 Utah 2d 378, 472 P.2d 430 (1970) the Court stated the rule to be as follows:

> "On Appeal to this court we review the judgments and orders appealed from on the basis of the record upon which the trial court acted, and do not permit the supplementing of our record with matters not before the trial court." Id. at 433.

See also, to the same effect, Reliable Furniture Co. v. Fidelity and Guaranty Insurance Underwriters, Inc., 14 Utah 2d 169, 380 P.2d 135 (1963).

As the Supreme Court of New Mexico stated in Baca v. Swift & Co., 74 N.M. 211, 392 P.2d 407 (1964):

> "There is pending herein a motion to strike from the Appelle's briefs Exhibits 2 and 3, being reports relating to the matter, one being the superintendent's report to Swift & Co. and the other a medical report. These were not admitted into evidence nor considered by the jury. They will be stricken and not considered by the Court. It was improper for counsel to inject evidence into the case by way of his brief, nor admitted into evidence by the trial court or considered by the jury. * * *" Id. at 410. (Emphasis added.)

WHEREFORE, the Appellant, the Town of Alta, moves that certain portions of the Brief of Respondents, as well as Appendix C attached thereto, be stricken by the Court as though not filed.

Respectfully submitted this 5th day of September, 1980.

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TABLE OF CONTENTS

STATUTES

CASES CITED

TABLE OF CONTENTS (Continued)

IN THE SUPREME COURT OF THE STATE OF UTAH

SWEETWATER PROPERTIES, SBC INVESTMENT COMPANY and BLACKJACK TRUST,	:	
Plaintiffs-Respondents,	:	
-vs-	:	Case No. 17064
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REPLY BRIEF OF THE TOWN OF ALTA

The Town of Alta (hereafter "Alta") respectfully submits this Reply to the Brief of Respondents filed on the 7th day of August, 1980.

STATEMENT OF FACTS

The Brief of Respondents (hereinafter collectively referred to as "Sweetwater") is laced with inaccuracies and unfounded statements which Respondents attempt to fob off as fact. Appellant will not attempt to refute such misstatement but simply submits that the Statement of Facts in Appellant's Brief sets forth the material facts upon which this action is founded.

POINT I.

THE JUDGMENT OF THE TRIAL COURT IS FOUNDED SOLELY ON SPECULATION.

The Brief of Sweetwater suffers from illusions and fantasy.

Throughout its argument Sweetwater makes direct reference to the imagined fact that Alta has prohibited, and will prohibit, the Sweetwater development. Early on Sweetwater claims that the Alta Policy Declaration voids all present planning and permits and downzones Sweetwater's property to bar development. (See Sweetwater Brief p. 9.) This same manufactured claim is made numerous times throughout the Brief. Such fantasy forms the sole and only foundation of each of the points of the Sweetwater Brief, as well as the judgment of the trial court.

A. No Such Prohibition Has Occurred.

It is imperative that this Honorable Court not be misled by the statements and imaginings of Sweetwater. The fact of the matter is that all that has occurred to date is the passage of a policy declaration by Alta. It is not Alta which has temporarily delayed the Sweetwater condominium project, but rather the prohibition which was written into the statute by the Utah Legislature. §10-2-418 U.C.A. Alta has not asked that the project be prohibited. Alta has, however, made the request that the Utah law, §10-2-418, be observed and obeyed by Sweetwater. Alta has not declared that Sweetwater never be allowed to place 200 timeshare condominium units on its property in Little Cottonwood Canyon. Alta has simply enacted a policy declaration under the relevant Statute. §10-2-414. It is the Act, not Alta, which imposes a temporary building moratorium.

B. The Sweetwater Property Has Not Been Annexed.

Sweetwater argues in Point II of its Brief that Alta has, at the present time, exercised the power of eminent domain over the subject property and has initiated rezoning of the property which will result in no development. This argument, again, assumes facts which simply do not exist. Alta has not annexed the Sweetwater property. Alta has not rezoned the property in any manner; nor does Alta presently have the power or inclination to do so.

While Alta did state, in its Policy Declaration, that if the property were annexed it would be zoned in conformance with the Alta master plan, no indication is given that the zoning designation will be of any particular character, or for that matter, any different from that already existent on the property. The Alta zoning map, like the County zoning map, allows for FM-10 and FM-20 zoning. Nothing is set forth or required to be set forth in the Policy Declaration which would indicate that the Sweetwater property would or would not be given an FM-20 zone.

The point is that this Court cannot engage in wild and abandoned conjecture, it cannot base its decision on speculative hypotheses of the future. If this Court finds that the trial court engaged in such premature speculation, it should reverse. A review of the Findings and Conclusions of the lower court manifests that such conjectural hypotheses are

rampant.

C. The Sweetwater Permits Have Not Been Voided.

Point III of the Sweetwater Brief argues that the Alta Policy Declaration voids the building permits which were issued by Salt Lake County. Sweetwater speaks of Alta's supposed imposition of "development restrictions" upon the property without ever defining what it intends by that phrase.

If by "development restrictions" Sweetwater is speaking of the limited prohibitions of §10-2-418, its argument is clearly ill-conceived. Extraterritorial jurisdictional rights granted to municipalities, to assist in protecting the municipality from harmful peripheral development, have been upheld as constitutional in numerous jurisdictions. See, e.g. Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 99 S. Ct. 383, 58 L. Ed. 2d 292 (1978); Schlientz v. City of North Platte, 112 Neb. 477, 110 N.W.2d 58 (1961); Krughoff v. City of Naperville, 41 Ill. App. 3d 334, 354 N.W.2d 489 (1976); Garren v. City of Winston-Salem, North Carolina, 463 F.2d 54 (4th Cir. 1972); City of Raleigh v. Morand, 100 S.E.2d 870 (N.C. 1957); Walworth Co. v. City of Elkhorn, 133 N.W.2d 257 (Wi 1965).

If, on the other hand, Sweetwater is concerned with the future of its development should the property be annexed to the Town of Alta, the short answer is that no prohibitions, restrictions or bars have been placed on the property by

Alta and no annexation has occurred. Alta has not indicated its view with respect to Sweetwater's project, nor is such an indication a required element of a policy declaration.

Therefore, the Sweetwater argument, upon which the judgment of the trial court is based, that the Alta Policy Declaration voids the permits of Salt Lake County, is contrived and without foundation. Alta has done nothing more than pass a statement of willingness to annex pursuant to §10-2-414 U.C.A. and asked that the statute, including the prohibitions of §10-2-418, be upheld. The County building permits, if validly issued, are not touched by the Policy Declaration.

Sweetwater further cites numerous authorities for the proposition that the building permits once issued, may not be rescinded. However, each case cited differs materially from the case at bar. In each case urged by Sweetwater the affected municipality had actually rezoned the property or actually rescinded the permits. In the case here at issue, no such rezoning has occurred and no action has been taken with respect to the permits. Unlike the cases cited by Sweetwater, the judgment of the trial court in this instance is based wholly upon the unfounded and unrealized fears of the Respondents.

D. The Claim of Taking is Imagined.

Lastly, Sweetwater urges that the Alta Policy Declaration

has resulted in a present taking of the Sweetwater property. The argument presented by Sweetwater exhibits its own greatest weakness. The Sweetwater Brief states that:

> "If, however, the owner consents to annexation and the municipality takes the opportunity to downzone the property to nondevelopment, the result is the same. . . . (Respondents' Brief p. 43.) (Emphasis added.)

In phrasing its argument with the word "if" Sweetwater admits that the argument is conjectural and that to decide in its favor, this Court (and the court below) must assume certain events which have not yet occurred. If the Sweetwater property is annexed and if there is an attempt to rezone the property, only then might Sweetwater conceivably raise the fragmentary argument as to an unconstitutional taking. The very real danger exists that one or both of the two contingencies will not occur, resulting in a ruling from this Court as to an hypothetical matter which did not actually happen.

There is a long-standing rule of law which prohibits the issuance of advisory opinions. The function of this Court is that of adjudicating only cases and controversies. Sanders v. Wyman, 464 F.2d 488 (2nd Cir. 1972), cert. den. 409 U.S. 1128, 93 S. Ct. 950, 35 L. Ed. 2d 261; Fuller & Co. v. Grant Investments Co., 492 P.2d 881 (Colo. App. 1971). The argument of Sweetwater violates both of these principles.

The fears of this land developer as to the future of its project have not come about. The only prohibition which has be

effected is that contained in §418 of the Code. That sort of limited restriction has been recognized numerous times as effecting a legitimate public purpose, i.e., to protect a municipality from the impact of massive-scale development on its periphery. Holt Civic Club v. Tuscaloosa, supra. Sweetwater's argument as to possible future development restrictions and downzoning by the Town of Alta is an invention to which neither this Court nor the trial court should be a party.

POINT II.

THE ALTA POLICY DECLARATION IS IN COMPLIANCE WITH THE POLICY OF §10-2-401, ET SEQ.

Sweetwater argues in its Brief that the Alta Policy Declaration does not harmonize with the purposes of the statute and that, therefore, the Policy Declaration is void. It is apparently that faulty argument which underpins at least a portion of the Judgment of the trial court.

Section 10-2-401, U.C.A. contains the clearly-stated purposes and objectives of the Statute. Summarized, those purposes are to insure that all urbanized areas, requiring urban services, be included within the incorporated municipalities of the State. This objective will then avoid the situation where a municipality is required to provide municipal services, such as police and fire protection, to an area

outside its boundaries; as well as to avoid the unincorporated area from effectively being ruled by a neighboring governmental body.

The Alta Policy Declaration is a clear response, pursuant to §10-2-401, to the precise situation envisioned by the Legislature. The Policy Declaration, taken in total, is a statement of the willingness of Alta to annex what is intended to be a substantial residential and recreational community. Alta's only desire, as stated in the Policy Declaration, was to minimize the inevitable impact which Alta would have on the project and which the project would have on Alta. It cannot be doubted that the very existence of the project would require Alta to extend its police, fire and avalanche protection systems not only in emergency situations, but on a daily basis as well. This is the situation sought to be precluded by the Statute. It is, therefore, clear that the Policy Declaration is in accordance with, and not opposed to, the legitimate objectives of the Statute.

A. No Intention to Downzone.

The argument of Sweetwater (that the purposes of the Statute are violated because Alta is using its Policy Declaration as a vehicle for downzoning the property) is unfounded and illogical. While the Policy Declaration declares that the property, if annexed, would be integrated into the Alta master zoning plan, there is no statement, or even the slightest

indication, that the property will receive a prohibitive zoning designation.

It is undisputed that the Alta zoning map (R. 267) allows for the same zoning as Sweetwater's property presently has. It is also clear that the zoning which Sweetwater fears, FR-100, has never been, nor is it now, designated on properties where there is clearly development potential. (R. 267.)

B. The Policy Declaration Evidences an Ability to Provide Services.

Sweetwater also contends that Alta is not presently able to provide services to the development, therefore contradicting the goal of the Statute to provide services as soon as possible. §10-2-401(4). This argument flies in the face of the clear language of the Policy Declaration as well as the facts of the Case.

The Alta Policy Declaration first enumerates that the Town provides a full range of municipal services, including police, fire, avalanche protection, sewer and water. (R. 239.) The Policy Declaration then states that all of these services are available to Sweetwater, (Exh. 6-P) and that the extension of those services depends upon the timetable and abilities of the developer. (Exh. 6-P.) There is also an indication in the Policy Declaration that to facilitate the developer, extension of the water and sewer services may be allowed through an interlocal agreement with the neighboring Service

Area.

Sweetwater has not shown that Alta will be unable to provide the services needed. In fact, the record shows that Alta's police and fire systems are the only ones which can practically and effectively service the condominiums in an emergency, the County's nearest facilities being located miles away in the Salt Lake Valley. Nor has Sweetwater shown that sewer and water could not be provided directly from the Town, if the developer desired to pay the additional costs.

In short, the purpose of the Statute is not violated by the Alta Policy Declaration, since there has been exhibited a present willingness and ability to provide necessary services. The Policy Declaration is in complete harmony with §10-2-401, et seq. and should be given the effect outlined by the Legislature.

CONCLUSION

It is urged by the Town of Alta that the Policy Declaration adopted by it on September 13, 1979 be upheld and accorded the full authority intended by §10-2-401, et seq., Utah Code Annotated (1953), as amended. The document is in full and substantial compliance with not only the purpose but the letter of the Statute. It stands as nothing more or less than a statement of willingness to comply with the desires and objecti of the Legislature.

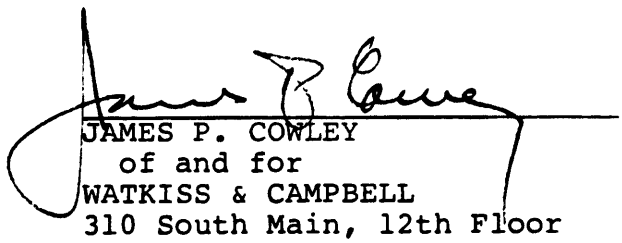
The judgment of the trial court, prepared by Sweetwater,

is erroneous and grounded exclusively on the speculative and invenvted fears of Sweetwater. No annexation has occurred, no downzoning has taken place, no absolute or permanent development prohibition has been placed on the property of Sweetwater. To uphold the trial court in this matter will be to uphold and render an advisory opinion.

The judgment of the trial court should be overturned in this appeal.

Respectfully submitted,

ROBERT S. CAMPBELL



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