

1981

Sweetwater Properties et al v. Town of Alta, Utah : Petition for Rehearing

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Giauque, Holbrook, Bendinger & Gurmankin; Attorneys for Plaintiffs-Respondents;
Robert S. Campbell, Jr.; James P. Cowley; Attorneys for Defendant-Appellant;

Recommended Citation

Petition for Rehearing, *Sweetwater Properties v. Town of Alta*, No. 17064 (Utah Supreme Court, 1981).
https://digitalcommons.law.byu.edu/uofu_sc2/2319

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE
STATE OF UTAH

SWEETWATER PROPERTIES, SBC
INVESTMENT COMPANY and
BLACKJACK TRUST,

Plaintiffs-Respondents,

vs.

TOWN OF ALTA, UTAH, a
municipal corporation,

Defendant-Appellant.

Case No. 17064

BRIEF IN SUPPORT OF PETITION FOR REHEARING

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

GIAUQUE, HOLBROOK, BENDINGER
& GURMANKIN
E. CRAIG SMAY
P.O. Box 2670
Park City, Utah 84060
Attorneys for
Plaintiffs-Respondents

ROBERT S. CAMPBELL, JR.
JAMES P. COWLEY
310 South Main, 12th Floor
Salt Lake City, Utah 84101
Attorneys for
Defendant-Appellant

FILED

FEB 2 1981

TABLE OF CONTENTS

	<u>Page</u>
NATURE OF THE CASE	1
DISPOSITION BELOW	1
STATEMENT OF FACTS	1
ARGUMENT	3
Point I. The New Annexation Law Specifically Forbids Annexation Without The Con- sent Of Landowners	4
Point II. Local Service Entities And Munici- palities Are "Affected Entities" Having A Right To Disclosure And To Protest Under The New Law	8
Point III. The Question Of Vested Rights Is Ripe	12
CONCLUSIONS	15

<u>STATUTES</u>	<u>Page</u>
§ 10-1-104(8), U.C.A. (1953) (Supp. 1979)	9
§ 10-2-401, U.C.A. (1953) (Supp. 1979)	1, 7
§ 10-2-414, U.C.A. (1953) (Supp. 1979)	5, 8, 9
§ 10-2-415, U.C.A. (1953) (Supp. 1979)	5
§ 10-2-416, U.C.A. (1953) (Supp. 1979)	4, 5, 13
§ 10-2-417, U.C.A. (1953) (Supp. 1979)	5, 11, 13
§ 10-2-418, U.C.A. (1953) (Supp. 1979)	1, 5, 12, 13
§ 10-6-134, U.C.A. (1953) (Supp. 1979)	10
§ 59-9-7, U.C.A. (1953) (Supp. 1979)	10

MISCELLANEOUS

Vol. 2, 1979 Senate Journal, pp. 1365-66	6
--	---

NATURE OF THE CASE

Respondents seek a rehearing in this matter, following filing of the Court's Opinion of January 14, 1981, reversing a judgment of the District Court of Salt Lake County that an annexation Policy Declaration of the appellant Town was not in compliance with the Utah Municipal Code relating to annexation, § 10-2-401 et seq., Utah Code Ann. (1953) (Supp. 1979), and was therefore ineffective to restrain development of plaintiffs' property under § 10-2-418; that in the circumstances the Town's attempt to restrain development of plaintiffs' property constituted an unconstitutional taking of property and an improper interference with vested rights in Salt Lake County approvals and permits then issued, and restraining the Town from further interference with development of plaintiffs' property.

DISPOSITION BELOW

The Court, by Opinion filed January 14, 1981, reversed the decision of the District Court as described above.

STATEMENT OF FACTS

Appellant has enacted an annexation "Policy Declaration" regarding property belonging to respondents. The stated purpose of the Policy Declaration is to halt development permitted on the property by Salt Lake County.

The District Court found the Policy Declaration deficient for numerous reasons ranging from failure to notify, solicit comments from, and provide an opportunity to

protest to Salt Lake City and Salt Lake County Service Area #3 as "affected entities," to failure to include required subject matters, such as an estimate of tax consequences to residents, and failure to provide any meaningful analysis of required subject matters, such as need of the area to be annexed for services and ability of the Town to provide them. The District Court refused to accord the Policy Declaration the affect claimed by the Town of forbidding development of plaintiffs' property.

The District Court further found that plaintiffs' rights in County approvals and permits then in hand was vested and could not be interfered with by the Town, by the enactment of a Policy Declaration or otherwise, and that, insofar as the Policy Declaration states an intent to permanently and entirely forbid development of plaintiffs' property its enforcement would constitute an unconstitutional taking of property.

This Court reversed upon the grounds:

1. That the state's new annexation law authorizes annexation without a petition from landowners, or against their wishes;

2. That only Salt Lake County was an "affected entity" having a right to notice, comment and protest in this case;

3. That an undefined "substantial compliance" test is applicable to annexation Policy Declarations;

4. That the Policy Declaration in this case does not take plaintiffs' property; and

5. That the issue of interference with vested rights is not ripe.

ARGUMENT

The Opinion of the Court filed January 14, 1981, is erroneous for numerous reasons:

1. It mistakenly holds, in contradiction to the plain language of the statute, that the new annexation law is intended to provide municipalities power to annex without the consent of landowners. This error involves a misconception of the entire purpose of the new statute and of the interests it is designed to protect.

2. It effectively limits the right to be notified, to comment, and to protest in annexation proceedings to counties, thus eliminating the great majority of entities intended by the Legislature to participate in annexation proceedings, and rendering the Legislature's new Boundary Commission scheme largely useless.

3. It applies an outmoded standard of "substantial compliance" to Policy Declarations, together with the rule created under the State's old law that municipal annexation decisions are subject only to municipal discretion, thus defeating the basic purpose of the new annexation law to make municipal annexation decisions accountable, through a process of notice, disclosure, protest, and review by Boundary

Commissions, to protect the interests of counties, other municipalities, local service entities, and landowners.

4. It affectively holds that annexation proceedings may be used by a municipality to force a landowner to relinquish vested property rights.

Point I. The New Annexation Law Specifically Forbids Annexation Without The Consent Of Landowners.

The Court's Opinion of January 14, at pages 3 and 4, recites that the former annexation law required a petition of landowners to initiate annexation, and then holds that this requirement has been eliminated in the new law, that municipalities may annex without the consent, or against the wishes, of landowners by passing a Policy Declaration which, if not protested by an "affected entity", can be promptly followed by an annexation ordinance.

This holding is simply mistaken, and the error affects the entire opinion, including the result.

The requirement of a petition from landowners has not been eliminated in the new law. Municipalities may not proceed without one. Section 10-2-416, U.C.A. (1953) (Supp. 1979), entirely ignored by the Court's Opinion, describes the petition in language identical to the old statute, adding the following prohibition:

"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."

The Opinion here is directly contrary to the legislation, and on this ground alone cannot be allowed to stand.

It is true, of course, that a municipality may create a policy declaration before receiving a petition to annex. § 10-2-414. The fact emphasizes the function of the policy declaration as an advance planning tool, rather than a mere formality initiating annexation. It is also true that § 10-2-415 provides next that:

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 resolution or ordinance of annexation. . .

This hardly eliminates the requirement of a petition to annex as one of the standards set forth in the chapter. For those standards, the municipality must, as the Court did not, read beyond § 10-2-415 at least to §§ 10-2-416 and 10-2-417.

It is also apparently true that the new annexation law, as proposed in the House of Representatives, intended to have the affect recited by the Court's Opinion. The legislation passed the House in essentially the form in which it presently appears. The Senate, however, added two important provisions: (1) the last sentence of § 10-2-416, and (2) and the middle portion of § 10-2-418, reading:

. . . 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.

Vol. 2, 1979 Senate Journal, pp. 1365-66.

In the form enacted, the legislation does not alter, but reaffirms the Legislature's historic concern to protect the interests of private owners.

The legislative history demonstrates two points of vital importance. The new annexation law, as proposed, gave municipalities the power to annex on their own initiative. The Legislature did not concede this power without restrictions, however. For the restraining hand of the landowner, the Legislature substituted the restraining hand of the boundary commission. In respect of the new power to be granted, the Legislature created an elaborate system by which municipal annexation proposals are subjected to notice and disclosure to counties, other municipalities, local service entities, and landowners, and ultimate review by newly created boundary commissions. It is simply not correct, as the Court's Opinion of January 14, does, to apply to the new annexation law the rule created under the old annexation law that annexation decisions are wholly a matter of municipal prerogative. The new legislation, even in its initial form, plainly changed that rule. The error of the Opinion in this regard is plainly demonstrated by its pointed omission, in

quoting the legislative policy set out in § 10-2-401, of subsections (6) and (7). Those provide:

(6) Decisions with respect to municipal boundaries and urban development need to be made with adequate consideration of the effect of the proposed actions on adjacent areas and on the interests of other government entities, on the need for and cost of local government services and the ability to deliver the services under the proposed actions, and on factors related to population growth and density and the geography of the area;

(7) Problems related to municipal boundaries are of concern to citizens in all parts of the state and must therefore be considered a state responsibility.

The matter of annexation is not a matter of merely municipal concern and discretion, as the Opinion holds, it is a matter of State concern, as the statute declares, and the State's concerns are implemented by the boundary commission review process, of which the Opinion of January 14 so cavalierly disposes.

The Legislature then put back into the law, before passage, the requirement of landowner consent. This did not alter the scheme of disclosure and review created by the Legislature. It added to it. In final form the new annexation law has two fundamental features: it subjects municipal annexation decisions to disclosure and review and it preserves the right of landowners to consent to or dissent from annexation.

The Court's Opinion of January 14 demolishes both fundamental features of the new annexation law. It not only

erases the requirement of landowner consent, but, by eliminating virtually all of the entities intended by the Legislature to have disclosure and the right to initiate review, and by reducing the required Policy Declaration to a mere pro forma listing of topics, it eviscerates the boundary commission review process.

It also ignores the connection between the duty of the municipality to make full and fair disclosure to, and solicit the participation of appropriate entities, and the right of landowners to give or withhold consent. Landowners must also be notified of the proceedings and allowed to participate. § 10-2-414. Some of the matters required to be included in the policy declaration are obviously intended to benefit landowners - such as the disclosure of tax consequences so paintedly omitted by Alta in this case. The purpose is plain and landowners have a right to full and fair disclosure so that they may make an informed choice whether to consent or refuse, and whether to enlist the aid of a county or local entity in seeking Boundary Commission review. The Opinion of January 14 simply erases the right of landowners by eliminating the procedures so carefully contracted by the Legislature to protect it.

Point II. Local Service Entities And
Municipalities Are "Affected Entities" Having A Right To
Disclosure And To Protest Under The New Law.

The Opinion of January 14 holds that Salt Lake County Service Area #3, admittedly directly affected in ter-

ritory, service delivery and revenues by Alta's proposed annexation of plaintiffs' property, and admittedly not notified and given opportunity to participate in the annexation proceedings, was not an "affected entity" entitled to such consideration, upon the facile ground that, while service areas have the power to levy taxes, such taxes are actually collected for them by the counties.

Section 10-2-414, setting out the requirements for a policy declaration, provides that a declaration may be adopted only "after requesting comments from county government, other affected entities within the area and the local boundary commission." Required public hearings on a declaration may be held only after 20 days written notice and delivery of a copy of the proposed declaration to each affected entity and the local boundary commission.

Section 10-1-104(8) provides:

"Affected entities" means a county, municipality or other entity possessing taxing power within a county, whose territory, service, delivery or revenue will be directly and significantly affected by a proposed boundary change. . . .

There are numerous entities within counties which have territory and revenue, deliver services, and levy taxes. One might name, in addition to County Service Areas, improvement districts, water, sewer, and fire districts, mosquito abatement districts, school districts, and numerous others. The Court eliminates all of them as "affected entities" for a single reason nowhere mentioned in the

annexation law: all certify their levies to the county, which collects their taxes for them.

If this were a basis for elimination from the category of "affected entities", it is plain that municipalities would also be eliminated, since they also certify their levies to the counties, which collect their taxes.

§ 10-6-134, 59-9-7, Utah Code Ann. (1953).

The definition of "affected entities" specifically mentions "municipalit(ies) or other entit(ies) possessing taxing power within a county." The kind of entities mentioned above, including service areas, possess the same taxing power as municipalities: they levy taxes, which the counties collect for them. Indeed, if the fact that the county collects the tax levied is a disqualification, there are no "other entities having taxing power - - - territory, service delivery or revenue." All of such service entities in this state have the taxes they levy collected for them by the counties.

The Court's Opinion simply eliminates the category of "other entities" created by the Legislature - on the basis of the tax collecting distinction nowhere mentioned in the statute. Certainly there is no such distinction indicated in the legislature purpose that:

Decisions with respect to municipal boundaries and urban development need to be made with adequate consideration of the effect of the proposed actions on adjacent areas and on the interests of other government entities, on the need for and cost of local government services and the ability to deliver the

services under the proposed actions, and on factors related to population growth and density and the geography of the area.

Certainly no such purpose can be accomplished where all local service entities are eliminated from consideration and participation in the annexation process.

The Legislature, in defining "affected entities" and protecting their interests, did not intend the tax collecting distinction created by the Court out of thin air.

The Opinion does not dispute the findings of the District Court that Salt Lake City's service delivery and revenues will be directly and substantially affected by Alta's proposed annexation because the annexation admittedly cannot occur without one of Salt Lake City's water rights. The Opinion nevertheless finds that "there is nothing in the record to show that Salt Lake City would be directly or significantly affected by a proposed boundary change. . . ." If this is intended to indicate that a municipality is not an "affected entity" unless its territory is affected by a proposed boundary change, it is plainly erroneous. If another municipality's territory is affected, annexation is forbidden. § 10-2-417(c). The Legislature cannot be thought to have intended that municipalities are only entitled to disclosure and the right to protest where the annexation is forbidden in any case.

Taken at face value, the practical affect of the Court's Opinion of January 14 is to eliminate disclosure to, or protest by any entities but counties.

Salt Lake County Service Area #3 and Salt Lake City were affected entities in this case. They were not notified, their comments were not sought, their right to protest (as the Service Area has indicated it would have done) was denied. The failure defeats the purpose of the statute in this case, and the Court's unfounded justification of the failure defeats the purpose of the statute entirely.

(The additional comments of the Opinion that "representatives of the Service Area #3 were in attendance at both the public meetings . . . and were fully apprised of the contents of the policy declaration and the considerations made and discussed" are not all false and in plain contradiction to the uncontroverted findings of the District Court - that an employee (singular) of the Service Area was present in a non-representational capacity - they are immaterial. Affected entities are entitled to written notice in advance to their entire "governing body", with a right to comment and protest.)

Point III. The Question Of Vested Rights Is Ripe.

The Opinion of January 14 holds that the question of plaintiffs' vested rights in present County approvals and permits is not yet ripe for decision. The Opinion further holds that where there are "legal and factual barriers" to a proposed annexation, adoption of the policy declaration initiates a year period under § 10-2-418 in which there should be "a good faith and diligent effort to work out those legal and factual barriers by both the municipality and the

developing property owner to accomplish the annexation in accordance with the legislative policies."

If the Opinion is correct that municipalities can annex without the consent of landowners, then the Opinion cannot be correct in its reading of § 10-2-418. If the municipality can annex without consent, then it can annex regardless of whether the landowner believes there are barriers to annexation and wishes to discuss them. No good faith effort to get annexed is necessary on the part of the owner - the municipality can annex whether or not the owner makes an effort, good faith or otherwise.

Furthermore, "legal and factual barriers" to annexation conceivable within the Court's ruling that municipalities can annex without landowner's consent cannot be "worked out" by any amount of "good faith and diligent effort" between the landowner and the annexing municipality. The only legal and factual barriers of this kind are those listed in § 10-2-417, and these are simply non-negotiable. No effort on the part of the landowner and annexing municipality, however diligent, can alter the fact that the territory is non-contiguous, or already incorporated within another municipality, for example.

As a practical matter, the only legal and factual barrier to annexation to which § 10-2-418 can apply is the barrier created by the refusal of owners to consent, the right preserved to them by the last sentence of § 10-2-416. As a practical matter, consent is the subject which the Court

now remits plaintiffs to negotiate with Alta. As a practical matter, the situation imposed by the Court upon plaintiffs is insupportable: unless plaintiffs consent, Alta will continue to claim, as it has steadfastly claimed until now, that plaintiffs have not shown good faith, and that the year limitation never runs.

The conditions upon which Alta proposes annexation are plainly stated on the face of its Policy Declaration. It will not annex unless plaintiffs acknowledge that present permits and approvals from Salt Lake County need not be honored by the Town.

As a practical matter, the Court has ordered plaintiffs to negotiate with Alta the surrender of plaintiffs' vested rights in existing County permits and approvals in order to lift the present wholesale prohibition against development of plaintiffs' property.

The question of vested rights could hardly be more ripe. Plaintiffs must continue in an absolute prohibition of development, which violates their vested rights, or they must surrender their vested rights.

It is no assistance in this situation for the Court to suggest that Alta may yet choose to amend its Policy Declaration. Where there is a present violation of presently vested rights, the matter is not one which can be left to the possibility of future choice.

Further, to the extent that the vested rights recognized by this State's law in development permits are

property rights, it is plain that the affect of Alta's Policy Declaration is a taking of property.

This is true whether one concedes that the taking is permanent as argued above, or only temporary, as the Opinion seems to concede. The Opinion holds that "the fact that the policy declaration may create some delay in urban development or hardship or even financial loss must give way to the needs of the public for orderly growth and development and for the protection of the public health, safety, and welfare. No doubt, but where the rights are presently vested, even interference upon the ground of public health, safety and welfare must be paid for.

CONCLUSIONS

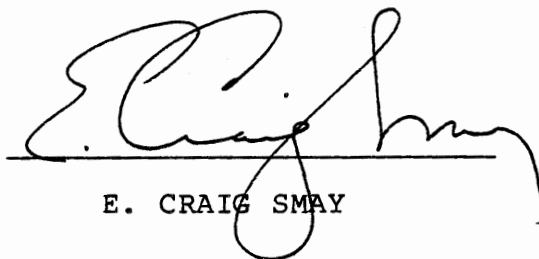
The Opinion of January 14 incorrectly concludes that the Utah's new annexation law authorizes annexation without landowner consent. It compounds that error by attempting to apply to the new law the rule under the old law that annexation is a matter of almost unqualified municipal discretion. The Legislature, in creating the new law discarded that notion, and replaced it with a system of disclosure and review designed to subject municipal decisions to proper consideration of the interest of counties, other municipalities, local service entities, and landowners in recognition of the fact that growth is a matter of state, not simply municipal concern.

The Opinion of January 14 wholly misconceives the new annexation law. It aborts the work of the Legislature

and imposes an improper and unjust result upon plaintiffs.
The Opinion of January 14 may not be allowed to stand. This
matter must be reheard.

DATED this 2nd day of February, 1981.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "E. Craig Smay", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

E. CRAIG SMAY