

1981

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

Utah Supreme Court

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SWEETWATER PROPERTIES, SBC  
INVESTMENT COMPANY and  
BLACKJACK TRUST.

**Case No. 17064**

**vs.**

TOWN OF ALTA, UTAH, a  
municipal corporation.

**Defendant-Appellant.**

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& GURMANKIN

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May 19, 1981

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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-Respondents,

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REPLY BRIEF ON REHEARING

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## PRELIMINARY STATEMENT

The Town of Alta has filed its Brief on Rehearing, based upon the following:

1. An admonishment to the Court that the Town will not countenance on this rehearing any revision of the Court's earlier decision in the matter;

2. A demonstrably false "statement of fact" that the present action results from respondents' failure to negotiate in good faith;

3. A claim that §§10-2-414 and 10-2-415 U.C.A. (1953) (Supp. 1979) enact a separate method of annexation; and

4. An assertion that because §10-2-416 U.C.A. (1953) (Supp. 1979) is in plain conflict with Alta's reading of §§10-2-414 and 10-2-415, §10-2-416 must be ignored. All of these positions are wrong. While only (3) and (4) above can reasonably be thought to affect the issues on rehearing, and necessitate response, (2) is a fairly obvious attempt to affect future proceedings between the parties, and ought to be disposed of for that reason.

## ARGUMENT

I. Sections 10-2-414, 10-2-415, and 10-2-416 can and must be reconciled.

Alta's argument with regard to §§10-2-414 and 10-2-415 is little more than that the last sentence of §10-2-416 must be ignored because it doesn't suit what Alta wishes to do. That is plainly impermissible. Section 10-2-416 must be given effect. The most apparent solution is to plus the last sentence of §10-2-416 into either §10-2-414 or §10-2-415.

This is, municipalities would be forbidden to enact policy

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without first obtaining a petition of landowners,

or, having enacted the policy declaration, the municipality would be forbidden to proceed to adopt an ordinance of annexation without a petition. Sensible arguments based upon the language of §§10-2-414 and 10-2-415 can be made for either position. Thus, it can be said that the language of §10-2-414 "on its own initiative, on recommendation of its planning commission, or in response to an initiated petition of landowners", referring to ways in which municipalities enact policy declarations, is merely a reflection of the authority conferred by §10-2-416 to annex with a petition, and by §10-2-420 to annex without a petition. Thus it can be said that the language of §10-2-415 "if an annexation proposed in the policy declaration, in the judgment of the municipality, meets the standards set forth in this chapter" includes the "standard" of §10-2-416 prohibiting annexation without a petition. Sensible arguments based upon the language of §§10-2-414 and 10-2-415 can be made against both these positions. For example, the language of §10-2-414(1) seems to envision the municipality, rather than landowners, drawing the annexation map (to include the whole area into which the municipality anticipates future expansion under the standards of the Act), and the first sentence of §10-2-414(2) seems to anticipate that, at least in some cases, the policy declaration will precede the petition. Further, to read the phrase "standards set forth in this chapter" in the first sentence of §10-2-415 as referring to the §10-2-416 requirement of a petition, does not account for the preceeding phrase: "in the judgment of the municipality." The obligatory requirement of a petition of

seem to be the kind of discretionary criteria in reference (neither would the mandatory standards of §10-2-417). The apparent reference is to the sort of preferential matters set out in the statement of legislative policy in §10-2-401.

Given that the last sentence of §10-2-416 did not develop as an organic part of the Act, but was added on in the Senate to prevent just the kind of reading of §§10-2-414 and 10-2-415 given by the Court in the Slip Opinion of January 14, it is useless to expect that the language of the three sections can be fully coordinated and harmonized. The Court must find, at least in general form, an interpretation that

1. recognizes that the decision whether property should be annexed rests first with the landowners, not the municipality, and requires the municipality to respect this prerogative; and
2. recognizes that, at least for the purpose of serious, long-range planning for future expansion, the Legislature intended that municipalities be able to pass policy declarations in advance of receipt of petitions, and, by applying §10-2-418, obtain a limited, nondiscriminatory right to control growth on their borders.

The Court need not attempt a much more specific reading. The Court need not exhaustively catalogue the circumstances in which a municipality may sua sponte initiate a policy declaration to be sure that Alta's Policy Declaration is not within those circumstances in this case. It is only if one wholly ignores the first principle of the annexation law stated above, as the Court did in its Slip Opinion of January 14, that one can adopt the sort of minimal compliance standard there adopted that could approve the Alta Policy Declaration in this case. Certainly if the initiatory right



municipalities, it cannot be held that a municipality may discriminatorily focus upon a single small parcel of land (upon which the County has approved development the Town Council dislikes), and, by adoption of a pro forma "policy declaration", blanket it with development restrictions, forcing its owners to consent to annex. Certainly if it may do such a thing, it may aggrandize itself territorially in successive half-mile bites entirely without the consent of landowners, and without accomplishing the purpose of the legislature to obtain serious, long-range planning for growth. To so interpret the new annexation law also encourages its unconstitutional application, as in this case: the municipality may attempt to coerce annexation upon condition the owner surrender vested development right in county approvals and permits.

If the Court concludes, as it did in its Slip Opinion of January 14, that municipalities may initiate annexation and may complete it entirely without landowners' consent, it might be appropriate to conclude, as the Court did, that it is entirely within the discretion of the municipality what it puts into its policy declarations, so long as it touches the bases listed in §10-2-414. It might even be sensible to conclude, as the Court apparently did, in response to a landowner's suit, that it is not fatal even if the municipality fails to touch some of the bases (such as Alta's failure to include any statement of tax consequences to residents, or any plan and timetable for extension of urban services): if the "affected entities" do not protest the policy

If the Court concludes, as it must in view of §10-2-416, that municipalities may not initiate and proceed in annexation without the consent of affected landowners, different results are certainly indicated. It must be observed that notice of the pendency of declarations must be given affected landowners, and that some of the information they are required to contain is for the benefit of landowners. §10-2-414. The apparent purpose for this is to permit them to participate informedly in the public hearings on the proposal, and thus affect the political process by which it is determined whether to proceed, and to provide them useful information upon which to decide whether to file or join a petition to annex.

The information of special interest to affected landowners which a policy declaration must contain is listed in §10-2-414(2). Certainly owners within the area proposed to be annexed will want to know the municipality's view of the need for urban services in the area, the "plans and timeframe" of the municipality for extending such services, how the services will be financed, and the tax consequences to old and new residents. In this area, and unless the most minimal standard of self-satisfactory compliance is applied, the Alta Policy Declaration is hopelessly deficient.. See Respondents earlier Brief at pages 17 to 31.

In response to the questions posed for review on this rehearing, it appears that the Court may approach the duty of enforcing §10-2-416 in a variety of ways. It might enforce a simple rule that municipalities may not enact policy declarations without a prior petition of landowners. It might

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of municipalities to adopt policy

declarations without petitions, at least where the declaration reflects a seriously considered, long-range plan for future expansion, while forbidding the municipality to proceed with annexation until a petition has been received and a specific policy declaration relating to the specific parcel to be annexed has been adopted. It might take a broader approach of accepting responsibility to review challenged petitions for reasonable compliance with the requirements of §10-2-414 as read in light of the prohibition of §10-2-416.

The first approach is essentially mechanical, and, while it finds support in the language of §§10-2-414 and 10-2-415, it cannot be entirely coordinated and harmonized with the language of those sections. The latter suggests that such an approach may not fully realize the legislative intent. The second approach has the advantage of definiteness, but does require the application of some standards to determine whether a policy declaration reflects a genuine long-range planning effort. The third approach may not entirely accord with the Court's historic approach of declining to interfere with municipal discretion in annexation - but this State has never before had an annexation law which adds to the old single requirement of a landowners' petition ten pages of "standards" and procedures so plainly intended to qualify the discretion of municipalities. Moreover, such an approach ought not to be difficult or ponderous, or to encourage interference every time a municipality attempts annexation. The application of two basic rules would seem to be all

necessary:

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## 1. Policy declarations enacted wi

to annex must reflect a genuine long-range plan for municipal expansion; policy declarations regarding immediate annexation of specific parcels require a prior petition to annex.

2. All policy declarations must reasonably comply with the requirement of §10-2-414 that they "include and address" in a serious way the matters listed there; it is not enough, as the Court permitted in its earlier opinion, to merely include these matters.

## II. Respondents have negotiated in good faith with the Town.

In its Slip Opinion of January 14, 1981, the Court observed: "There is nothing in the record to indicate that Sweetwater ever filed a written notice of its intent to develop the property and identifying any legal or factual barriers preventing annexation." Alta's recent Brief attempts to erect this statement into an "explicit finding" of this Court that Sweetwater has failed to "negotiate in good faith regarding annexation of its property pursuant to the Alta Policy Declaration", for the apparent purpose of compromising Sweetwater's rights under the one-year limitation of §10-2-418.

The remark in the January 14 Opinion is not an "explicit finding" about anything, but an observation on the state of the record, and it does not purport to refer to "good faith negotiations". While the record does not contain the notice which was in fact sent by respondents, it does contain evidence of the negotiations which occurred. The testimony appears at pages 74-76 of the Transcript.

The testimony is uncontradicted that in late August or early September of 1979, after receiving Alta's Preliminary Policy Declaration, and when Sweetwater's plans to develop its property and negotiations with the County for the purpose



of Alta in the office of the Town's counsel. At trial, the Town's counsel, who apparently now deny it, confirmed that such a meeting occurred. (Tr. p.74.) The Town was represented by its Mayor, members of its Council and Planning Commission, and counsel. Sweetwater was represented by its president, its project manager, its architect and counsel. When the discussion reached the question whether Sweetwater could expect to develop its property if it consented to be annexed, the Town's Mayor announced that Sweetwater should not try to make a deal with Alta, and the chairman of the Town Council announced that if he could control the site, he would permit no development. (Tr. p.74.)

In short, Sweetwater's attempt to negotiate with the Town was rejected by the Town. The evidence shows that it was the Town which refused to negotiate, and the Town made no effort at trial to produce contrary evidence.

Following filing of the Complaint - which respondents regarded as a form of written notice of objections and intent to develop - respondents served upon the Town their formal notice of intent to develop and factual and legal barriers to the proposed annexation. A copy of the notice is attached as Exhibit "A". Among other things, the notice advises that a petition of a majority of the owners of the land Alta had announced it was willing to annex could not be obtained, in view of the Town's apparent intent to restrict development. The Town has never responded to this notice. It has never indicated that it would relent in its announced intent to suppress development. It has never indicated that it was

less than the whole area included in the map attached to its Policy Declaration. Alta has no right to require that all development potential of a property, including vested rights in existing County approvals and permits, be surrendered or a condition to forced annexation. Yet, in response to a direct request that it indicate some other position, it has refused any reply, and now apparently complains of Sweetwater's lack of good faith in not volunteering an annexation petition of its property alone in the circumstances.

Respondents have done their best to deal with the Town. The Town has refused to respond in any constructive fashion. The position taken by the Town throughout has not encouraged negotiations but demanded capitulation and surrender of valuable property rights. If any finding is appropriate from these facts, it is a finding that respondents have complied with the requirements of §10-2-418, including the one-year limitation thereof, and are free to develop their property in the County.

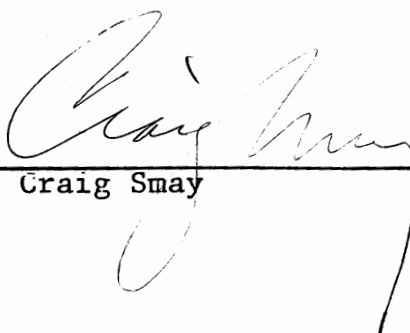
### CONCLUSIONS

The Alta Policy Declaration is what it says on its face it is: an attempt to suppress a particular project on a particular parcel because the parcel happens to be within the half-mile zone described in §10-2-418. Respondents have attempted to deal fairly with the Town's designs, but have been rebuked.

The Alta Policy Declaration does not purport to fall within the category of long-range policy declarations which the Court might hold can be enacted without a petition of landowners. It does not purport to comply in any serious way with the requirements of §10-2-414 as read in the light

of the last sentence of §10-2-416 - it is Alta's position that that sentence is a dead letter. Upon both these grounds the Alta Policy Declaration should be declared ineffective to take advantage of the development restrictions of §10-2-418. Further, the Court is entitled to, and should find that respondents have complied with the one-year limitation of §10-2-418, and are entitled to be free of further interference from the Town in the development of respondents' property.

Respectfully submitted this 19th day of May, 1981.

  
E. Craig Smay

CERTIFICATE OF MAILING

This is to certify that the undersigned mailed a true and correct copy of the foregoing Reply Brief on Rehearing to Robert S. Campbell, Jr. and James P. Cowley at 310 South Main, 12th Floor, Salt Lake City, Utah 84101 on this 20<sup>th</sup> day of May, 1981.

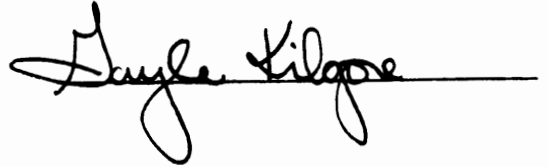
A handwritten signature in cursive script, reading "Doyle Kilgore", is written over a horizontal line.



EXHIBIT "A"

January 4, 1980

Town Council  
Town of Alta  
Alta, Utah

RE: Further Notice Under § 10-2-418, Utah  
Code Ann. 1953 (Supp. 1979)

Sirs:

Sweetwater Properties, Inc., SBC Investment Company and Blackjack Trust, owners of property subject to your Policy Declaration dated September 13, 1979, have heretofore, by the filing of the complaint and amendments thereto in that certain action entitled Sweetwater Properties, Inc.; SBC Investment Company and Blackjack Trust v. Town of Alta, Utah and Salt Lake County, Utah, Civil No. 79-5788, Third Judicial District Court of Salt Lake County, State of Utah, given you notice of legal and factual barriers to annexation of their property to the Town of Alta. The following are more recent developments which constitute additional legal and factual barriers to such annexation:

1. The proposed annexation will destroy the value of the property to be annexed by forbidding development. The intent of the Town of Alta to prevent development on the subject property is set forth in the Policy Declaration. No other intent has been disclosed. Such effect is not merely illegal because confiscatory, but renders it impossible to obtain support for annexation among affected landowners.
2. The requisite petition to annex the subject property cannot be obtained because a majority of affected landowners is opposed.
3. Alta is unable to provide the same level of services at the same rates as presently provided by Salt Lake County.
4. The owners of the majority of the property subject to the Policy Declaration, if annexed against their will, will be entitled to promptly disconnect.

5. Any owner annexed against his will will be able to successfully contest the annexation because it is patently unreasonable, arbitrary and capricious.

6. Any annexation could be successfully contested by affected residents on the ground the annexation law is unconstitutional.

It is possible that affected opinion on the proposed annexation would change were the Town to indicate a disposition to permit development of the affected property commensurate with that permitted under County jurisdiction.

Please be advised that should the conditions described above continue past September, 1980, the undersigned intend to commence development on their property under existing County permits.

Very truly yours,

SWEETWATER PROPERTIES, INC.

By 

Brian C. Swinton, President

SBC INVESTMENT COMPANY

By 

H. Ross Brown, Jr., Partner

BLACKJACK TRUST

By 

George T. Johnson, Trustee