1982

Highland Town v. Gibbons Realty Co. : Brief of Appellants

Utah Supreme Court

Bryce E. Roe; Roe and Fowler; Attorneys for Respondents;
Vernon B. Romney; John C. Backlund; Attorneys for Appellants;

IN THE SUPREME COURT OF THE

STATE OF UTAH

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IN THE MATTER OF THE DISCONNECTION OF CERTAIN TERRITORY FROM HIGHLAND TOWN.	:	Case No. 18191

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APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF DISCONNECTION AND FROM AN ORDER DENYING APPELLANT'S MOTION FOR NEW TRIAL, OR IN THE ALTERNATIVE, TO AMEND FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, BY THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE GEORGE E. BALLIF, JUDGE, PRESIDING.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

At the trial in the District Court, Highland Town, now known as Highland City, because of the nature of the proceeding, was referred to as Respondent, rather than Defendant. Inasmuch as Highland City is the party appealing the case to this Court, however, all future references to it in this Brief will be to Appellant. This will prevent confusion with the Petitioners below who hereafter will be designated as Respondents.

This was a proceeding in which Respondents, herein, sought to disconnect approximately 131 acres of territory from the limits of what was then known as Highland Town, but which has since become a third class city. Highland City, acting through its Mayor and City Council opposed the petition of Respondents and the case proceeded to trial.

DISPOSITION IN THE LOWER COURT

The case was tried on February 11 and February 29,

1980, before the Honorable George E. Ballif, sitting without a jury. Evidence was presented by both sides. At the conclusion of the evidentiary phase of the trial it was determined that memoranda would be prepared and oral arguments made after the transcript of the evidence became available. Accordingly, the memoranda were filed and the case argued to the Court on August 22, 1980. The Court then prepared a Decision which was signed August 28, 1980. The Court thereupon appointed a Commission to conduct a public hearing pursuant to statute, which was done on July 7, 1981. The report of the Commissioners was filed with the Court and approved on October 23, 1981. The Court entered its Findings of Fact, Conclusions of Law, and an Order of Disconnection of Respondents' 131 acres of land from Highland City on November 4, 1981. Appellant filed a timely Motion for a New Trial, or in the alternative, to amend Findings of Fact, Conclusions of Law, and Order of Disconnection. The Court entered its order denying the motion on December 10, 1981.

RELIEF SOUGHT ON APPEAL

Appellant seeks an order remanding the case to the District Court with instructions to consider all of the evidence presented by Appellant and Intervenors, both during the trial and in connection with its motion for a new trial, in determining whether or not to allow disconnection of the territory.

STATEMENT OF FACTS

Appellant will treat certain areas in greater detail in the arguments that follow, but the essential facts of the case are these:

Highland Town was incorporated in the summer of 1977. It later became a third class city, known as Highland City. While it varies in length and width, its dimensions can be stated generally to be about three miles long from east to west and from two to three miles wide from north to south. It is located in the northernmost portion of Utah County, between Alpine on the north and American Fork on the South. The 131 acres in question are situated in the east and northeast portions of the city.

While the Respondents include several different individuals and business entities, most of the territory in question is under the effective control or ownership of Gibbons Realty Company. It is anticipated by both Appellant and Respondents that some portion of the area in question will be used by Gibbons and Reed Co. for a gravel and sand extraction process, even though no such activity has been conducted there in the past.

Appellant believes, and its witnesses testified, that the operation of such a process would seriously disrupt the quality of life now enjoyed, not only by the residents of Highland City, but by the residents of Alpine City, as

well.

The disruption would result from increased noise, and vibration; dirt and dust in the air and on the highways; and danger from increased vehicle traffic.

In addition, Appellant presented evidence that a large majority of Highland's residents opposed any industrial development of this type within the city limits, preferring that the city remain essentially a rural, residential community.

The city of Highland is zoned residential and agricultural only, with no commercial or industrial areas.

The territory in question has two state highways and some erstwhile private roads, which are located in property under lease from Utah Power and Light Co., with an option in the city to purchase it.

Law enforcement is provided by Highland City through a contract with the Utah County Sheriff's Department, and fire protection is provided by Highland City through a contract with Alpine City.

There are no publicly owned or operated water or sewer services in the area, although the City hopes to locate a water pressure tank there and to run water lines from it into other portions of the city.

The City hopes sometime to build a cemetary or park, or both in the area.

Appellant believes that the annexation of what is known as the "Kjar property" after the evidence was in, but before the Order of Disconnection was signed by the Court, constitutes an island or an unusually large or varied-shaped land mass projecting into the boundaries of Highland City.

ARGUMENT

POINT I

THE COURT ERRED IN FAILING TO CONSIDER AND TO TAKE INTO ACCOUNT IN ARRIVING AT ITS DECISION, AND IN MAKING ITS FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF DISCONNECTION, ALL THE EVIDENCE PRODUCED AT TRIAL BY APPELLANT'S AND INTERVENORS' WITNESSES.

Two statutes dealing with the conduct of trials relating to disconnection of territory from the boundaries of cities and towns are controlling on the trial Court. They are Sections 10-2-501 (3) and 10-2-503 Utah Code Annotated (1953) as amended. The pertinent language of these sections follows:

> 10-2-501 (3):....the question of disconnection shall be tried before the district court in the same manner as civil cases are tried. <u>The officers of the municipality, or any person interested in the subject matter of the petition may appear before the court and contest the granting of the petition for disconnection by presenting the evidence as they deem relevant.</u> (Emphasis added).
>
> 10-2-503: The Court for the purposes of determining whether or not territory should be disconnected shall consider whether or not disconnection will leave the municipality with a residual area within its boundaries for which the costs, requirements,

> or other burdens of municipal services would materially increase over previous years or for which it would become economically or practically unreasonable to administer as a municipality. The court shall consider among other factors the effect of the disconnection on existing or projected street, or public ways, water mains and water services, sewer mains and sewer services, law enforcement, zoning and other municipal services and whether or not the disconnection will result in islands or unusually large or varied-shaped peninsular masses within or projecting into the boundaries of the municipality from which the territory is to be disconnected. (Emphasis added).

Pursuant to the authority granted by these statutes, Appellant proceeded to produce evidence on a variety of important questions.

Mayor Donald R. LeBaron testified that disconnection of the territory would hamper Appellant in carrying out its responsibility for the peace, health, and safety of its residents (T.76). He gave his opinion as to the effect disconnection would have on water and air quality planning by Highland City. He testified as to the investments made by Highland's homeowners to preserve their homes from "degradation and anything else that might happen." (T.77,78).

Mayor LeBaron said the city was looking at the possibility of developing the Utah Power and Light Company property, which is part of the territory sought to be disconnected, into a recreational area and city cemetary (T.182), and that it would be much easier to control the area if it

were to remain part of the city (T.183). He said that if the territory were not disconnected, the city would run a sewer line into it (T.184). Mayor LeBaron said the city was considering locating a water tower on the Utah Power and Light Company property under lease and option to the city, and that it would probably attempt to locate a pipe to carry water from the tower within about three years (T.228). He testified as to the necessity of a holding pond on the territory in question (T.229). Were it not for the disconnection, all of the line would be inside the city limits (T.230). City police protection would be provided to prevent vandalism around the line (T.231).

Dr. F. LaMond Tullis, a former city councilman, testified that a Mr. Bagley of Gibbons and Reed Company had told the town council that the company desired, at that time, to construct and operate a gravel extraction plant, but that later it might also decide to include a cement batch plant and an asphalt batch plant. The town council thereupon discussed the matter. The council expressed a "similar theme" that the consensus was to have a low density residential community (T.130), and each member of the council then spoke of his opposition to the industrialization of Highland. (T.131).

Dr. Tullis told how public opinion surveys and small neighborhood meetings were utilized to determine what kind of a town the residents wanted. Eighty percent of the households

were canvassed (T.133, 134). Ultimately, a final document was prepared. (T.135).

Dr. Tullis testified that people had moved to Highland because they were fleeing something they didn't like in other places, and they were attracted to Highland because of a certain quality of life and environment they found there. They wanted spacious living and a high quality of air and water. (T.139).

Specifically, according to Dr. Tullis' testimony, they rejected the commercial and industrial development of Highland. (T.140). A master plan was adopted, (T.145), followed by a zoning ordinance establishing residential and agricultural, but no commercial or industrial classifications (T. 146). He testified that the surveys taken indicated people in Highland didn't want any gravel extraction beyond what already existed with the Ashrock operation extracting about 200,000 tons a year (T.149).

J. Keith Hayes, representing the Hayes family, which sold some of the territory in question to Gibbons Realty Company, testified that no gravel had ever been extracted (T.261), that he and his family had made an effort to get out of the lawsuit (T.252), and that they had made an "overture" toward being released from the peitition (T.257).

A proffer of testimony of Sidney Baucom, Vice President of Utah Power and Light Co., was to the effect that the

company had no particular policy relating to disconnection matters, that he signed the papers as an accommodation to Respondents' counsel, and that he did not know until shortly prior to signing the papers whether the power company's property was in the city, or in the county. (T.224).

Virginia Mathis, a housewife and mother, testified that there was already a steady stream of dump trucks going past her house from the Ashrock operation, that the trucks were extremely noisy, that they caused vibrations in her house to the point where objects fell off shelves, that dust was a problem along with the noise, that the present operation was disturbing to the extent of preventing conversation on her front porch, that the safety factor was such as to prevent her children from playing with those across the street, that the trucks had made it impossible the previous year to sell her house, and that any additional gravel extraction operation would "certainly affect our quality of life." (T.120-125).

Gordon Buckley Rose, the Utah County Planner, testified that if the territory in question were "deannexed, we would have a great difficulty in providing services. We have intended for Highland town to provide these services." (T.196).

Lee R. Fox, a deputy sheriff, testified about the peculiar types of criminal activity that he had observed in

the area in question, including beer parties and nude swimming (T. 203-206).

Robert Palmquist, Mayor of North Salt Lake, testified about a large gravel pit located in that city (T. 263). Respondents' attorney objected to the evidence. A proffer was given by Appellant's attorney to the effect that, from Mayor Palmquist's own experiences, a gravel operation has an impact on an immediately adjacent town and that it is much better to retain gravel operations within the town than to have them outside and not subject to the town's control. The Court sustained an objection to this evidence (T. 265).

In addition, the Respondents' own witness, Emery Carter, Executive Vice President of Gibbons and Reed Company, testified on cross examination by Appellant's attorney that in a busy year the company might extract as much as one hundred sixty thousand tons of sand and gravel, and that "you would probably have about one truck every twelve minutes if you are working about 40 weeks a year, eight hours a day, five days a week." (T. 249).

Alpine City, Pleasant Grove City, and Lindon City intervened in the case and Don Christiansen, Mayor of Alpine City, testified that a gravel extraction operation on the property sought to be disconnected would have an adverse effect on the area near the mouth of American Fork Canyon (T. 157), that he was concerned about dust that might come

from the operation into Alpine City (T. 159), that it would create a traffic hazard on Highway 92 (T. 162), and that there would be an advantage for the property in question remaining under Highland City's control. (T. 167).

But the foregoing evidence was almost wholly disregarded by the Court. Indeed, in his "Decision" dated August 28, 1980, (R. 125), the trial judge (page 4) wrote:

> Much of the evidence presented by the respondents, other than that pertaining to municipal services, the Court considers to be irrelevant to a determination as to whether disconnection should be allowed in this case. The Court is mindful of the strong feelings that the inhabitants of Highland have about the possibility of additional sand and gravel operations along the east bench area of the community. The Court construed the statute relative to the evidence it must hear as being that which any interested party would "deem" relevant." The only excluded testimony related to that tendered by the Mayor of North Salt Lake concerning experiences with Gibbons and Reed and its impact on that community. The Court excluded the testimony because it concluded the witness had no 'interest' because of a geographic remoteness to the area in question. However, all of the other testimony not relating to 'municipal services' the Court has heard but at this time must rule that it is irrelevant and that the Court cannot give it credence in effecting its Decision as to whether the disconnection should be allowed. (R. 125).

While it is true that the Court allowed most of Appellant's witnesses to testify, it might just as well not have heard them at all, since the Court proceeded to rule

that nearly all of their testimony was "irrelevant" and that "the Court cannot give it credence." (R. 125).

Why, then, hear the witnesses at all?

The pertinent words of Section 10-2-501 (3), are that any interested parties "may appear before the court and contest the granting of the petition for disconnection by presenting the evidence as they deem relevant."

Certainly, the legislature must be deemed to have had a serious purpose in writing this section. It would have been frivolous in the extreme if it had intended to open the door to every interested party to come and say what he thinks is relevant, but then, in effect, tell him, "but the court really isn't going to pay any attention to what you say." The language of the statute can not have been inadvertent. It constitutes such a departure from the procedure ordinarily utilized in the district courts of the state of Utah, that it simply has to have been written with the intention of greatly enlarging the areas which the Court can, and, indeed, must consider in disconnection cases.

In other words, if the Court, as it acknowledged, (R. 125), is required to hear the testimony of such witnesses, it must also pay careful attention to the testimony, and give it equally serious consideration in arriving at its decision on the question of disconnection. Any other interpretation of the statute is illogical.

It will be argued by Respondents that the evidence that the Court can consider in making its decision is limited to the specific criteria recited in Sec. 10-2-503. This plainly is not so.

The legislature in writing Sec. 10-2-503, obviously intended that the Court should take many other matters into consideration. If not, that statute never would have used the clear and obvious language "the Court shall consider among other factors....."

The words, "among other factors", are so unusual and significant in this context that it is obvious that they were used advisedly for the purpose of opening up a broad spectrum of matters that must be considered and weighed by the Court in arriving at a decision on disconnection.

The conclusion that the evidence deemed "irrelevant" in the Court's decision, should, indeed, be given equal weight to other testimony, becomes inescapable when Sections 10-2-501 (3) and 10-2-503 are read together.

The language of the two Sections, complimenting, and reinforcing each other as they do, and covering the same subject matter, could not have been written by chance. The provisions clearly have the same goal--to open up trials of disconnection cases to full and fair consideration of all matters in order that small groups of land owners, for whatever their reasons, not be allowed to flout the will of the

rest of the residents, however many there be, and arbitrarily pull their property out of the city limits.

In Respondents' reply memorandum (R. 85) they attempt to avail themselves of the rule of "ejusdem generis," in trying to restrict the meaning of "other factors" to the same kind of things thereafter set out in the statute, i.e., municipal services, and peninsular masses.

In doing so, they completely disregard and, in fact, cripple, the clear meaning of the word "other." "Other" in this context cannot be interpreted to mean "similar" or the "same." It must be construed as "additional" or "different." As stated in 67 C.J.S., pg. 908:

> While it is referred to as a word of addition, in its natural, usual, and normal use, it indicates some thing or things in addition to, differing from, or both additional to and differing from, the antecedant thing or things immediately in contemplation.
>
> It has been said that the word "other" ordinarily means different from, different, different in nature and kind, different from that which has been specified, different or distinct from the one or ones mentioned or implied, different person or thing from the one in view or under consideration just specified, not the same.

It is important to note that the phrase used in the statute is "among other factors," not "such other factors as."

The rule of ejusdem generis is but one of construction and does not warrant a court in conforming the operation of a

statute within narrower limits than intended by the legislature. Willard vs. First Security Bank of Idaho, Idaho, 206 P. 2d 770 (1949).

It should be noted that the general words "among other factors" appear before the list of particular matters relied on by Respondents. The court, in Lyman vs. Bowmar, Colo., 533P. 2d 1129 (1975) said that the ejusdem generis rule should be used to construe general words in a statute only when the general words follow, rather than precede, an enumeration of particular classes of persons or things.

Certainly, Highland's government and its citizens, should not be limited in their defense against the efforts of Respondents merely because they were more imaginitive in presenting their case, and that, in doing so, they raised many issues that had not been brought up in previously reported cases.

Some of the points raised by Appellant were thought to be important by Justice Hansen in a dissenting opinion in In Re Consolidated Mining Co., et al, 71 Utah 430, 266 P. 1044 (1928), where he listed the following requirements for disconnection which are pertinent in this case, to wit:

> Does the property sought to be excluded from the city receive any direct and special benefit from the exercise of the powers granted to the city? Is it probable that the future growth and expansion of the city will require the territory sought to be disconnected? Is the property sought to be disconnected necessary for

the use of the city?
71 Utah at 440, 266 P. at 1048.

Certainly, Appellant's witnesses effectively raised the fact that the future growth and expansion of the city requires the territory in question to remain within the city limits, and the fact that it is necessary for the use of the city.

For the foregoing reasons, it is clear that the Court erred in refusing to take into consideration and give "credence" to the evidence produced by Appellant's witnesses at the trial.

POINT II

THE COURT ERRED IN HOLDING THAT JUSTICE AND EQUITY REQUIRE THAT THE TERRITORY BE DISCONNECTED.

Sec. 10-2-502 requires the Court, in a disconnection proceeding, to find, not only that the petition was signed by a majority of the registered voters of the territory concerned and that the allegations of the petition are true, but also that "justice and equity require the territory or any part thereof to be disconnected from the municipality....."

For reasons set forth in Point I of Appellant's Argument, the Court is obligated to consider Appellant's evidence as strongly as it does Respondents' in deciding whether or not to disconnect the territory.

Certainly, the petition of disaffected property owners should not be approved automatically, nor indeed, merely

on the basis of such limited evidence as has been adduced by Respondents.

The evidence Respondents are required to give in a disconnection case must be stronger than they have provided here. To prevail, their evidence must also be stronger than that of Appellant.

When Respondents' claim is measured against the standard of Sec. 10-2-502, "that justice and equity require" the territory to be disconnected, it is even more obvious that it is wanting.

If "justice" is to be given its proper interpretation, the desire of the property owners to pull out of the city in order to facilitate the creation and operation of a new gravel and sand operation with all of its attendant evils cannot be allowed to prevail over the fervent wishes of so many residents of Highland City to maintain the quality of life for which they fled to Highland City from their former homes. The same reasoning, of course, applies to the word "equity."

The word "require" means much more than "allow" or "permit." It means "imperative need", Park vs Candler, Ga. 40 S.E. 523 (1902); or "compel", Hiestand vs. Ristou, Neb., 284 N.W. 756 (1939); or "mandatory", Mississippi River Fuel Corp. vs. Slayton, 339 F 2d 106 (8th Cir. 1966).

Certainly, "justice and equity" don't "require" disconnection of the territory when there are such important and compelling "other factors" in evidence against it, as Appellant has pointed out in its Statement of Facts, and in Point I of its Argument.

POINT III

THE COURT ERRED IN FINDING AND CONCLUDING THAT DISCONNECTION WOULD NOT CREATE ISLANDS OR UNREASONABLY LARGE OR VARIED SHAPED PENINSULAR LAND MASSES PROJECTING INTO HIGHLAND CITY, AND FURTHER ERRED IN REFUSING TO GRANT APPELLANT'S MOTION FOR A NEW TRIAL, OR IN THE ALTERNATIVE, TO AMEND FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF DISCONNECTION IN VIEW OF NEWLY DISCOVERED EVIDENCE AS TO THE ANNEXATION OF THE KJAR PROPERTY.

Sec. 10-2-503, in delineating certain criteria which the Court "shall"consider in deciding as to disconnection, includes the question of "whether or not the disconnection will result in islands or unusually large or varied shaped peninsular masses within or projecting into the boundaries of the municipality from which the territory is to be disconnected."

Appellant doesn't quarrel with the fact that, at the time of the evidentiary phase of the trial, disconnection of the territory in question, because of its location at the eastern edge of Highland City and its rather regular shape, would not have produced the condition referred to in the preceding paragraph.

However, after the presentation of the evidence was concluded, but before the Court ruled, Highland City completed the annexation of what was referred to at the trial as the "Kjar property." It was shown on the plat introduced at the trial. All the Exhibits introduced at the trial were later misplaced and the Utah County Clerk was not able to locate and certify them. Consequently, the parties have stipulated to the substitution of a map which has been filed with the Court.

Upon learning about the annexation, Appellant's attorney wrote a letter dated September 16, 1981, so advising the Court. (R. 144). The Court completely disregarded the annexation and proceeded to make its Findings, Conclusions, and Order of Disconnection, as though it simply had not occurred. Thereupon, Appellant moved for a new trial, or at least a modification by the Court, but this was denied.

The facts created by the annexation clearly contradict Finding number 7, and Conclusion number 1, to the effect that no island or unreasonably large or varied-shaped peninsular land mass would be created by the disconnection.

The annexation would, in fact, create a virtual island out of the disconnected territory inasmuch as the Kjar property lies to the east and is entirely separated from and outside the rest of the city. At the very least, the Kjar annexation, coupled with the proposed disconnection, would create an

unusually large peninsular land mass (the disconnected property, itself) projecting into the city.

While Joseph A. Kjar did testify at the trial of having talked with Mayor LeBaron about the possibility of the annexation of his property (T. 188, 189) this was not an accomplished fact at the time. Thus, Appellant was in no position to introduce evidence during the trial relating to the effect that annexation might have had.

When the city did annex the Kjar property, this created new, compelling evidence not previously available.

The Utah Court, in a criminal case, State vs. Weaver 78 Utah 555, 6 P. 2d 167 (1931), considered a motion for a new trial based on Sec. 77-38-3 (7), Utah Code Annotated (1953), as amended, which is almost identical in substance to Rule 59 (2) (4) Utah Rules of Civil Procedure.

The Court said, at 6 P. 2d 169:

> the Courts are not in accord respecting all these requirements, but fairly agree that the newly discovered evidence be such as could not with reasonable diligence have been discovered and produced at the trial, that it not be merely cumulative, and that it be such as to render a different result probable on the retrial of the case.

Certainly the evidence created by the annexation of the Kjar property met the above criteria in every respect, and should have been taken into account by the Court.

The Judge, at the time the annexation was called to his attention, had not written Findings, Conclusions, or his Order of Disconnection. It was appropriate and proper therefore that he should direct that further evidence of the foregoing situation be presented by Appellant and Respondents along with any legal arguments they may have had as to its effect in light of Sec. 10-2-503.

The district courts are given wide discretion in Utah as to whether or not to grant new trials on the basis of newly discovered evidence. See Crellin vs. Thomas, 122 Utah 122, 247 P. 2d 264 (1952) where a new trial was granted.

Notwithstanding that latitude, however, it appears that the court in this instance abused its discretion by paying absolutely no attention to the fact of the annexation of the Kjar property, and that it, coupled with the disconnection of the 131 acres, clearly created a large peninsular land mass extending into Highland City.

At the very least, the court should have granted Appellant's motion for a new trial or at least amended the Findings of Fact, Conclusions of Law, and Order of Disconnection to reflect the situation created by the Kjar annexation.

Authority for such an action by the Court is contained in Rule 59 (a) Utah Rules of Civil Procedure, which authorizes the Court to "open the judgment if one has been entered, take additional testimony, amend Findings of Fact

and Conclusions of Law or make new findings and conclusions, and direct the entry of a new judgment."

CONCLUSION

For the reasons set forth above, the Court should remand this case to the District Court with instructions to consider all of the evidence presented by Appellant and Intervenors, both during the trial and in connection with Appellant's motion for a new trial in determining whether or not to allow disconnection of the territory, and to take whatever further evidence may be necessary or helpful in arriving at its decision.

Respectfully submitted,

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CERTIFICATE OF MAILING

Mailed two copies of the foregoing Brief of Appellant to BRYCE E. ROE, Attorney for Respondents, 340 East 4th South Street, Salt Lake City, Utah 84111, and JOHN C. BACKLUND, Attorney for Intervenors, 350 East Center Street, Provo, Utah, 84601, this _____ day of March, 1982.