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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE DISCONNECTION OF CERTAIN TERRITORY FROM HIGHLAND TOWN	)	
HIGHLAND TOWN, Appellant,	)	
vs. GIBBONS REALTY COMPANY, et al., Respondents.	)	Case No. 18191

BRIEF OF RESPONDENTS

Appeal from a Final Order of the Fourth Judicial District Court of Utah County

Honorable George E. Ballif, Judge

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NATURE OF CASE

This is a statutory proceeding under 10-2-501 Utah Code Annotated 1953 for disconnection from Highland Town (now Highland City) of approximately 131 acres of real property.

LOWER COURT'S DISPOSTION OF CASE

Following a trial, the court ordered (R. 159) that the property be disconnected, that neither party was to pay to the other any sum as a result of the disconnection (except that the petitioners were to pay property taxes prorated to the date of the order of disconnection), that Highland Town should file with the Secretary of State and the Utah County Recorder appropriate amendments to the articles of incorporation, and that certain costs were to be borne by the petitioners.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the order of the disconnection.

STATEMENT OF FACTS

Highland Town was incorporated in August 1977 (R. 196). Included in the incorporated area was a rectangle owned by the petitioners on the eastern edge of a peninsula extending east of the main portion of the city. Petitioners' property contained approximately 131 acres of a total of approximately 2,142 acres within the city (R. 65).

On June 2, 1978, this proceeding was initiated by the owners of all of the property in the 131 acre area, viz., Utah Power and Light Company, Gibbons Realty Company, John K. Hayes, Lillian Y. Hayes, David R. Hayes, Gerny J. Hayes, Robert D. Hayes, and Virginia D. Hayes.

A number of facts were established by the terms of a pretrial order entered on February 11, 1980: the description of the property sought to be disconnected ("the territory"); Highland City has no sewer system; the territory is part of a peninsula extending east of the remainder of Highland City; all of the described territory has been zoned by Highland City as residential property, but none of it has been used as such; the petitioners are all of the property owners within the described territory; there are no registered voters or any other persons living within the territory; and disconnection of the territory will not effect the ability of the City to provide police protection or fire protection to other areas of the City (R. 65-66).

Evidence was presented to the court respecting the various factors set out in 10-2-503 Utah Code Annotated 1953, including projected streets or public ways, water mains and water services, sewer mains and sewer services, law enforcement, zoning, other municipal services, and whether or

not the disconnection would result in islands or unreasonably large or varied shape peninsular land masses.

Existing or Projected Streets or Public Ways

The only public roads in the territory are State Road 92 and State Road 146, both of which are maintained by the State of Utah. There is a dirt road established and maintained on its own property by Utah Power and Light Company (TR. 68-71). Except for the state roads, the only access to the Gibbons Realty Company property is by way of a road that runs in the direction of Alpine City then turns to the east and into the Gibbons Realty property from the north, but this route is a long one, exceeding ten miles (R. 295), and would require crossing other privately owned property (R. 218). The only feasible access to the property of Gibbons Realty is from the state road (R. 216-217). There was no evidence presented as to any projected streets or public ways within or to the area.

Water Mains and Water Services

Highland City does not have a water system. Residents of the city are supplied water by Highland Water Company without any involvement by the city (R. 272). From the water system there are no laterals that would serve the property owned by Gibbons Realty (R. 240), and there was no evidence of any laterals to serve property owned by the other petitioners within the territory. After this proceeding was initiated, some additional plans were projected for the Highland Water Company system, but even under the projected plans, at least half of the property in the territory could not be served (R. 428). One of the petitioners, Gibbons Realty Company, developed

its own water supply in the form of a well costing approximately $100,000. At the time the well was commenced, the company did not know of the plan to incorporate Highland Town (R. 201-202).

Sewer Mains and Sewer Services

At the time the proceeding was commenced, and as of the date of the pretrial order, Highland City had no sewer system (R. 65), and most of the city's residents are dependent upon septic tanks for disposal of sewage. Subsequent to initiation of the proceeding, Highland City tied into a sewer system developed by the Timpanogos Region (R. 272), but the tie-in is on the west side of the city, remote from the territory (R. 273). Money for the tie-in was committed after the petition was filed (R. 429), and the main would have run to the school whether or not the petitioners' property was to be in the city (R. 375).

Law Enforcement

The Utah County Sheriff is the Highland City Marshall, and his deputies are assistant town marshalls. They supply law enforcement services to Highland City under a contract, Highland City having no police force of its own (R. 266). The duties of the sheriff and his deputies are about the same as they were before the town was incorporated. A deputy sheriff works contemporaneously as a deputy and a person on contract with Highland City, patrolling a particular area (R. 397).

Zoning

There was much testimony by officers and residents of Highland City that one of the main reasons for keeping the territory within the city was to prevent the operation of a gravel pit in the territory, and there was testimony that municipalities prefer to control the uses to which nearby

property is put, but there is no evidence that the zoning of the property in question would be changed if returned to the jurisdiction of Utah County. Even if the territory were disconnected, the possibility of any of the petitioners having a gravel operation approved is not good (R. 387). The property is zoned residential, as is virtually all of the property within Highland City, but the territory is not suitable for residential use and there is no residential development in it (R. 291). The territory is remote from the Timpanogos Region sewer area and the municipal sewer lines and much of the area is not suitable for septic tanks (Exhibit 15), which would be necessary for residential use. The lower area of the Gibbons Realty property would not be suitable for residences (R. 391). There are no houses or other buildings on the property (R. 255), and it is unlikely that anyone would build a residence on that part of the property lying next to State Road 92 (R. 263).

Other Municipal Services

Highland City has no fire department. It obtains its fire protection services under contract with the City of Alpine, and receives some fire protection services from American Fork (R. 263). There are no fire hydrants in the area, and in the event of fire, the fire departments would have to use pumpers. The main responsibility of the contracted fire departments is to fight grass and brush fires (R. 264). The condition of the roads are such that Alpine is unable to furnish effective fire protection for part of the property lying south of the junction of State Road 92 and State Road 146 (R. 356).

Garbage disposal is handled by a private company with whom the residents deal directly. The city provides no garbage disposal service (R. 274).

There are no sidewalks in the area and no subdivisions (R. 274). The city map submitted at trial shows that no subdivisions have been platted in the area.

The map attached to the petition and the maps introduced in evidence show that there would be no islands or peninsular masses created by the disconnection of the property in question. By virtue of the disconnection, the city's east side will be less peninsular, rather than more.

The loss of revenue from the elimination of taxable property would be insignificant. Exhibits 5 and 6 show the minimal taxes that were paid on the property other than that of Utah Power and Light Company for the purposes of Highland City. The testimony of the Utah County Assessor in exhibit 9 established that the territory represents a very small fraction of the assessed valuation of the property in Highland City (R. 247-250).

The evidence also established that the territory is not needed for the future growth of Highland City. Since its incorporation, the city has annexed additional territory and now has approximately twice the acreage it had at the time of incorporation. Its population has increased from seven or eight hundred in August of 1977 to about two thousand five hundred at the time of trial (R. 276). The "Official Utah County Master Plan Series Land Use Element," Exhibit 14, suggests that eight persons per acre is an optimum number for a city. At eight persons per acre Highland City, with its present acreage, would be able to accommodate a population of over 30,000.

ARGUMENT

I

THE TRIAL COURT PROPERLY CONSIDERED ALL EVIDENCE RELEVANT TO ITS DETERMINATION OF PETITIONERS' RIGHT TO DISCONNECTION.

The court, on evidence with respect to which there was no substantial dispute, found that the only streets in the territory were two highways maintained by the State of Utah, and private ways created and maintained by property owners; that there were no publicly owned and operated water mains or water services or sewer mains or sewer services extending to, traversing upon or planned in any manner to connect to the territory within the reasonably forseeable future; that law enforcement in the territory exists to the same extent as a part of Highland Town as it did, or upon disconnection would; that zoning restrictions now existing on the land probably would be essentially the same upon disconnection; that disconnection of the territory would not result in islands or unreasonably large or varied shaped peninsular land masses; that the territory is considered by town officials to be a future location for a water pressure tank and water mains to traverse from the city's projected water sources into town; that city officials consider the territory to be suitable for a park or a cemetery, or both, but no master plan has officially set aside for development of any of these areas for such future uses; that since initiation of this action sewer outfall lines have been constructed in Highland Town, but no laterals have extended into the territory nor is there any plan to take them into the territory in any particular location; that fire protection provided to Highland Town is under contract with the City of Alpine, and disconnection would eliminate contractual responsibility for the area in question and diminish the expense of such protection; that commissioners were duly appointed and held a public hearing; and that there was no basis for either the petitioners paying any sum to Highland Town or Highland Town paying any sum to the petitioners as a result of the disconnection, except that the petitioners should pay taxes for the current year, prorated as of the date of the final order of disconnection.

On the basis of its findings of fact the court entered the following conclusions of law:

> 1. Disconnection of the territory will not leave the municipality with a residual area within its boundary for which the costs, requirements, or other burdens of municipal service would materially increase over previous years over which it would become economically or practically unreasonable to administer as a municipality, and disconnection will not result in islands or unreasonably large or varied shaped peninsular land masses within or projecting into the boundaries of Highland Town.
>
> 2. Justice and equity require that the territory be disconnected from the municipality.
>
> 3. The allegations of the petition are true.
>
> 4. The petitioners are entitled to an order disconnecting the territory from Highland City.
>
> 5. There should be no financial contribution either way between Highland Town and the property owners in the territory to be disconnected, except that taxes for the current year should be prorated as of the date of the final order of disconnection.

It thus appears that the court considered all of the factors enumerated in the statute. The city, however, relies upon two statutory clauses as a basis for its argument that the court did not consider all of the factors that should have been considered in making its determination. The first is a part of paragraph (3) of 10-2-501 U.C.A. 1953:

> 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. [Emphasis added.]

The other is a clause in 10-2-503 that the court shall consider "among other factors" the effect of the disconnection on streets, public ways, water mains, water services, sewer mains and sewer services, law enforcement, zoning, and other municipal services, and the configuration of the municipality after the territory is removed.

Relying on those sections, Highland City attempted to transform this disconnection case into a zoning case.

Latching onto some isolated wording, the city is asking this court to construe 10-2-502 and 10-2-503 as if there were no standards at all for disconnection of property from a municipality, and that the court is required to take into account any matter that anybody "deems relevant," regardless of that person's interest in, or the matter's relation to, the case, and that the court must also consider factors which have nothing to do with municipal services or the practicality of the municipality continuing to function as such if territory is disconnected from it. In urging this construction, the city is disregarding well-established rules of statutory construction.

The first rule it casts aside is the one announced in Cannon v. McDonald, 615 P.2d 1268, 1270 (Utah 1980), that "in interpreting the statutory language, care must be taken to construe the words used in light of the total context of the legislation." The second is that of noscitur a sociis, to the effect that the meaning of terms may be derived from the company they keep, the basis of which was pointed out in Heathman v. Giles, 13 Utah2d 368, 374 P.2d 839, 840 (1962):

> Where there is doubt or uncertainty as to the interpretation of a statute there are two well known rules of statutory construction which are helpful. The rule of noscitur a sociis, literally "it is known from its associates," requires that the meaning of doubtful words or phrases be determined in the light of and take their character from associated words or phrases. Sutherland in his treatise on Statutory Construction states: "* * * Where two or more words are grouped together and ordinarily have a similar meaning, but are not equally comprehensive, the general words will be limited and qualified by the special words."

The court also discussed the rule of ejusdem generis, also rejected by the city, and explained the basis of the two rules:

> Another closely related rule which is universally accepted as valid is that of ejusdem generis, meaning "of the same kind," which rule is that: when general words or terms follow specific ones, the general must be understood as applying to things of the same kind as the specific.
>
> These are, of course, neither artifical nor arbitrary rules but arise quite naturally from the process of reasoning as to what the statute was intended to mean. Common sense and experience teach that when a group of related things are specifically enumerated, the mind is focused upon that class of things, and that the addition of general terms is proposed to avoid inadvertent omission and to include like things of the same class. In accord with this is the fact that if the broadest meaning of the general expression were intended, it would have been sufficient by itself without any use of the specific terms.

Citing Lyman v. Town of Bow Mar, 553 P.2d 1129 (Colo. 1975), the city takes the position that the rule of ejusdem generis does not apply because the "among other things" precedes, rather than follows, the particular words. The Colorado court did so state in a case in which the general words used had well accepted meanings; and it is also true that the rule of ejusdem generis is generally stated as applying to general terms that follow specific ones. But this is probably because many statutes are written in just that way, and courts recognize that the rule of ejusdem generis is but a particular application of the rule of noscitur a sociis. It is the association of the words that is important, not whether the general term precedes or follows the particular terms.

In Application of Central Airlines, 185 P.2d 919, 923 (Okl. 1947), the Supreme Court of Oklahoma was faced with the construction of a statute where the general term, "shall include" preceded the particular terms defining "transportation company." The court said:

> By the rule of construction known as "ejusdem generis," as declared in Board of Com'rs of Kingfisher County v. Grimes, 75 Okl. 219, 182 P. 897, "General words do not explain or amplify

particular terms preceding them, but are themselves restricted and explained by the particular terms." This rule has no literal application in the instant case where the general words precede those of specification. But it does not follow that the same principle does not apply where, manifestly, the specific words have reference to the same subject matter as that of the general words. That it does so apply is declared in 59 C.J. 980, as follows:

"So words of general import in a statute are limited by words of restricted import immediately following and relating to the same subject."

The underlying authority for such application is to be found in the ancient and generally accepted rule of construction known as "Noscitur A Sociis" (46 C.J. 496 and cases there cited) which, according to Broom's Legal Maxims, means: "The meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it."

In discussing the maximum "ejusdem generis" the Supreme Court of Florida, in Ex Parte Amos, 93 Fla. 5, 12 So. 289, 293, following numerous cases cited therein, declared:

"The maxim is a mere specific application of the broader maxim 'noscitur a sociis,' 'which means that general and specific words which are capable of an analogous meaning being associated together take color from each other, so that the general words are restricted to a sense analogous to the less general."

See also 82 C.J.S., Statutes, §§ 331 and 332, and 14 Words and Phrases (Perm. Ed.), pp. 191 et seq.

The "among other factors" language appears in 10-2-503, the full text of which is as follows:

The court for the purposes of determining whether or not territory shall be disconnected shall consider whether or not disconnection will leave the municipality with a residual area within its boundaries for which the cost, 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 streets or public ways, water main 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 unreasonably large or varied shaped peninsular land masses within or projecting into the boundaries of the municipality from which the territory is to be disconnected.

The first sentence colors the section as a whole, and indicates a legislative intention to protect the city's continued existence, its ability to grow, and its ability to continue to perform the services for its inhabitants even though part of its territory may be taken away. The factors enumerated are those that would have an effect upon the "cost, requirements, or other burdens of municipal services," and suggest that the "other factors" should also be factors that have an effect upon the economics and practicality of continuing to administer the area as a municipality.

The court made findings of fact with respect to the configuration of the city after disconnection of the territory; streets and highways, existing and projected; water main and water services; sewer mains and sewer services; law enforcement; and zoning, being all of the factors enumerated in 10-2-503. It also made findings with respect to ideas of town officials respecting future development of the property; fire protection; and possible development of a water system and the establishment of park or cemetery.

The city argues, however, that the court should have taken into account every factor that the city or those speaking for it "deemed relevant" to the proceeding. The court interpreted the statute as requiring it to hear all of the evidence that the city wished to produce, but as not requiring the court, itself, to attribute relevance to such evidence. This makes sense. It is reasonable for the legislature to permit a city to introduce a wide range of information, with the thought that by not severely restricting the presentation of evidence, there may be matters presented to the court which will be relevant to the disconnection. But that is not the same as requiring the trial court to deem the evidence relevant, when it is apparent that it is based upon mistaken ideas and unsubstantiated fears.

In its brief the city argues that the following factors should have been given weight by the trial court in determining whether "equity and justice" required disconnection:

1. The opinion of the Mayor that disconnection of the territory would hamper the city in carrying out its responsibilities for the peace, health, and safety of its residents, that water and air quality would be adversely effected and that the homeowners had made investments to preserve their homes "from degradation and anything else that might happen." This in the face of other testimony that disconnection itself would have no such effect. The Mayor was not talking about the effect of disconnection, but the effect of a particular use of the property if, at some future date, the zoning authority permitted such use. But, as the trial court recognized, this was not an issue in this disconnection case.

2. In August 1979, after this proceeding was initiated, the city entered into a lease agreement with Utah Power and Light Company under which the power company leased a portion of its property to the city at $1.00 a year and gave the city an option to purchase it. Existence of the lease was then used by the city as the foundation for an argument that the Utah Power and Light Company property would be part of the city, and disconnection would create an island. There may have been other valid reasons for the lease, but the action has the appearance of manipulation.

3. That Mr. Bagley of Gibbons and Reed Company had at one time told the town council that the company desired to construct and operate a gravel extraction plant and might later desire to include a cement batch plant and an asphalt batch plant. Again, this has nothing to do with the question of disconnection, since the right of the company to conduct such an operation

would depend upon either establishing that right as a pre-existing use, or obtaining proper zoning from the authorities, be they officers of Highland City or Utah County, or some other political entity.

4. A public opinion survey as to the type of environment and the quality of life the citizens of Highland City desire. As established by the other evidence, however, the disconnection of a portion of the city would have no effect upon the environment to be found within Highland City. The disconnection is a political matter that does not affect the physical uses or appearance of the property in question.

5. That one of the petitioners, J. Keith Hayes, testified that he and his family had made an effort to get out of the lawsuit, and that they had made an "overture" toward being released from the petition for disconnection. True or not, the Hayeses never took any formal steps to remove their names from the petition or to be dismissed from the proceeding, and it is doubtful that they would have had a right to do so. Moreover, cross examination of Mr. Hayes indicated that the "overture" probably resulted from pressure put upon him by the city.

> Q. I take it, Mr. Hayes, that since filing this petition you have had some contacts by representatives of Highland City about withdrawing from this petition?
>
> A. I have had a number of them, yes. Several of them, yes.
>
> Q. It has been suggested strongly to you that that is something you ought to do, has it not?
>
> MR. MADSEN: Let me object to the characterization of the question.
>
> THE COURT: Well, its cross examination, Mr. Madsen. I'll let him answer. You may answer Mr. Hayes.
>
> MR. HAYES: Yes.

Q. (By Mr. Roe) And who was it that contacted you first do you recall?

A. I believe most of the contacts had been made by Mayor LeBaron. Probably not all of them.

6. That Utah Power and Light Company had no particular policy relating to disconnection matters, and its officer signed the papers as an accommodation. But this does not relate to any of the factors that go to the justice and equity of disconnecting the property from the city. The evidence as to city services and the effects of disconnection are the same regardless of the motivation of one or more of the petitioners.

7. The testimony of Virginia Mathis that she was bothered by trucks going past her house. This testimony relates to a condition that presently exists in Highland City which is not the responsibility in any way of any of the petitioners, and could have no bearing upon the resolution of the disconnection question despite the fact that she believes that if there is a disconnection there may be more trucks.

8. The testimony of Gordon Buckley Rose, a Utah County planner, that the county would have great difficulty in providing services if the territory were "de-annexed." Although he made this general statement, the only example he gave was the problem of fire engines turning the corner where State Highways 92 and 146 converge, which is the same problem that Highland City already has.

9. Rejection of the testimony of the Mayor of North Salt Lake. The proffered testimony was the opinion of the Mayor as to the desirability of having gravel operations within the town rather than have them outside and not subject to the town's control. This was opinion testimony that had no

bearing on the question of the disconnection of property from Highland City. It represents nothing more than a personal preference of a witness who had no interest in the particular proceeding.

10. The extent to which Gibbons and Reed Company, if permitted to do so, might extract and haul sand and gravel along the state highway. While this might have an effect upon the question of the zoning of the Gibbons Realty Company property, it has nothing to do with the disconnection. As testified by Mr. Rose, the county planner, the possibility of one of the petitioners getting a gravel operation upon disconnection from Highland City was "not good."

11. The Mayors of the city and of the intervening cities of Alpine, Pleasant Grove, and Linden were of the opinion that there would be an advantage for the property in question remaining under Highland City's control. No justification was given for this opinion, and it is difficult to see its relevance to the question of disconnecting the property.

The trial court heard virtually all of the evidence that the city and the intervenors wanted to present. After it was presented, however, the trial court was required to make a judgment as to whether the evidence was material to the disconnection issue in light of the factors set out in the statute. The trial court attempted to make a judgment as to the effect of disconnection upon the municipality and on its ability to continue offering the services that it was obligated to offer as a municipality. It made that determination, and made it on the basis of objective evidence as to the consequences of disconnection. The city, however, would have the court regard the proceeding as one in which the desires of the residents of the city should be controlling, in other words, that the proceeding should be a matter

of choosing up sides -- majority wins. Such a construction would raise serious constitutional issues.

II

THE COURT PROPERLY FOUND THAT JUSTICE AND EQUITY REQUIRE DISCONNECTION OF THE TERRITORY.

One of the criteria established by 10-2-502 Utah Code Annotated 1953 for disconnection of territory from a municipality is that it shall be required by "justice and equity." The statute does not attempt to define what constitutes "justice and equity," but this court has recognized that there is a relationship between "justice and equity" and the criteria set out in 10-2-503.

In In the Matter of the Disconnection of Territory and Restriction of the Corporate Limits of the City of Draper, Utah, decided by this court on April 27, 1982, but not yet reported, the court said:

> The substantive criteria for determining whether a disconnection should be ordered are set out in Utah Code Ann., 1953, §10-2-502 and §10-2-503. The former provides that a decree of disconnection should be granted if required by "justice and equity." Whether the general standard of "justice and equity" has been met in a particular case turns in large measure on the facts. In re Chief Consolidated Mining Co., 71 Utah 430, 266 P. 1044 (1928). The varied circumstances of each disconnection case do not allow for exact and clear-cut criteria. However, the legislature in §10-2-503 has established more specific criteria which are relevant in determining whether a disconnection would be consistent with justice and equity and sound principles of city planning. That section provides:
>
> > 10-2-503. Criteria for disconnection. 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 cost, requirements, or other burdens of municipal services would materially increase over previous years or for which it would be economically or practically unreasonable

> to administer as a municipality. The court should consider, among other factors, the effect of the disconnection on existing or projected streets 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 unreasonably large or varied-shaped peninsular land masses within or projecting into the boundaries of the municipality from which the territory is to be disconnected.

Prior to 1971, the specific criteria for disconnection were not included in the statute. They were added by Chapter 10, § 1, Laws of Utah 1971. Previously "justice and equity" had been the only statutorily prescribed criteria.

Nevertheless, this court had applied factors very much like those now appearing in 10-2-503, recognizing that "justice and equity" are related to the ability of the city to continue to carry on its functions in a reasonable manner after disconnection of territory.

In In re Peterson, 87 Utah 144, 48 P.2d 468 (1935), the court reversed a disconnection decree on procedural grounds, but in doing so discussed one factor that might be considered in determining "justice and equity," saying:

> The mere fact that the town of Moab would lose its income heretofore derived from the taxation of the land in question does not justify the refusal of petitioner's application to have his land segregated from the town.

The case was tried again, and again the court held that the property should be disconnected. Again the city appealed, and in Application of Peterson, 92 Utah 212, 66 P.2d 1195 (1937) the court listed some of the criteria to be considered in determining whether to disconnect territory from a municipality. Upholding the trial court's disconnection decree, this court said:

> * * * The land is located on the western boundary of the town; it is agricultural in character; has never been used for any other purpose than to raise hay and other farm products; it has no residents on it except a small shack erected without permission of the owner. The town has a sewer system and waterwork system, both of which have been constructed and the indebtedness to pay for the same incurred since the petition for severance was filed. The sewer is located at too high an elevation to serve any part of the severed land. City water is available to the land but it can be more conveniently served from a privately owned system, the pipeline of which goes through it, and in which the petitioner is a large owner. The nearest fire hydrant maintained by the town is about a mile distant. The land is about a mile from the business section of the town. There is no paving or sidewalk or other improvements abutting or near the land, although it abuts on an abandoned state highway which is now being maintained by the town. Power and light services are available, but these are furnished by a private concern and not by the town government.

In Kennecott Copper Corporation v. City of Bingham Canyon, 18 Utah2d 60, 415 P.2d 209 (1966), this court had occasion to take another look at the material factors. The court said:

> In the disconnected area there are no dwellings, no inhabitants, and there is no reasonable prospect of any such use in the future. The City has heretofore furnished police and fire protection, waste and garbage collection, sewage disposal facilities, and has maintained roads and streets. The plaintiff contends that because no one lives in that area there will be no disadvantage to the loss of these services; and that the necessary extension of its mining operations has been seriously hampered because of various factors, including the city's requirements relating to zoning regulations and construction permits.

The decree of disconnection was upheld despite the fact that the city expected to lose about $28,000 a year in sales and use taxes. In discussing the meaning of "justice and equity," the court said that the facts of each case must, to a very large extent, determine that question, and in determining that question the court noted that there was no "interdependent relationship" between the property in question and the city of such a nature as to warrant denial of the petition.

After its decision in Kennecott Copper, the court decided In The Matter of The Disconnection of Territory from Layton City, 27 Utah2d 241, 494 P.2d 948 (1972). The decision of the trial court disconnecting the territory was upheld by this court, which said:

> At the time of pretrial some issues of fact were agreed to by the parties as follows: (1) There are no improvements or buildings upon the territory sought to be disconnected and the only road is an unimproved county road on the easterly boundary of the land; (2) Layton City provides no water, garbage service or sewer service to the territory; (3) The nearest city waterline is approximately 400 feet from the boundary of the petitioner's property; (4) The city provides fire protection to the territory; (5) That the part of the petitioner's property lying outside the boundaries of the city is being developed by the petitioner and East Layton Town is providing sewer and water service to that part of the tract.

In addition to the stipulated facts, the trial court on the basis of evidence produced at the hearing, made the following findings:

> that topography of the petitioner's entire tract of land made it desirable that the subject property be developed as a part of the entire parcel for residential purposes and that the territory prior to the commencement of these proceedings was unimproved and uninhabited and had not been used for other than agricultural purposes. The court also found there were no city streets, improvements or buildings within the territory and that the city supplied no substantial municipal services to the area. The court further found that the city will not suffer substantial loss of tax revenue, nor will its municipal functions be in any substantial way effected or impaired by the disconnection. Based upon these findings the court concluded that justice and equity required that a decree be entered disconnecting the territory in question from Layton City.

On the basis of those admitted and established facts, this court upheld the decree of disconnection.

Disconnection was also decreed, and the decree upheld, in Howard v. Town of North Salt Lake, 7 Utah2d 278, 323 P.2d 261 (1958). The findings supporting the decree were that the town had been organized primarily to

provide a culinary water system; that the town had spent substantial money to acquire and develop the water supplies, but no part of the facilities extended into the area disconnected; that there were no houses in the area; that the only structures were those used by industrial facilities; that there were no sidewalks, curbs or gutters; that none of the property had been planted or subdivided for residential development; that the two principal roads in the area were maintained by the State of Utah and Davis County; that one of the plaintiffs, Salt Lake Refining Company, constructed its own road from the public streets of Salt Lake City to its plant; no water was being furnished to any industry or person within the disconnected area; that North Salt Lake would be able to furnish Salt Lake Refining Company water for culinary purposes but not for its industrial requirements; that the town had no fire fighting facilities; that its town marshall worked one shift per day but did no patrolling within the refinery area; that no garbage removal was conducted by the town within the disconnected area; and that the disconnection would not destroy the symmetry of its boundaries. See also, In re Smithfield City, 70 Utah 564, 262 P. 105 (1927); In re Fullmer, 33 Utah 43, 92 P. 768 (1907); and Christensen v. Town of Clearfield, 66 Utah 455, 243 P. 376 (1926).

There are two Utah cases in which disconnection petitions were denied, in whole or in part, and the denial was upheld by this court. They are In Re Chief Consolidated Mining Co., 71 Utah 430, 266 P. 1044 (1928), and Continental Bank and Trust Company v. Farmington City, 599 P.2d 1242 (Utah 1979). In both of these cases the petition for disconnection was denied because of the interdependence of the territory and of the municipality. In the first case, there was a close relationship between the mining activities

and the municipal services being provided within the city, and in the second case there was a close relationship between the city's providing of police and security forces, culinary water, and traffic control, and the need for the city to respond to emergencies in an amusement park. There was also evidence that Farmington had become increasingly dependent upon the park for tax revenues. In both of the cases it appeared that disconnection would have a very serious effect upon the remaining part of the municipality, and that the municipality had committed itself and provided various services to the areas within the territory. The cases represent a fairly common view as expressed by the Nebraska Supreme Court in Bisenius v. City of Randolph, 82 Neb. 520, 118 N.W. 127, as follows:

> * * * The test of whether "justice and equity" requires such disconnection is whether the land has a unity of interest with the platted portion of the municipality and the maintenance of a municipal government * * *.

In the present case there is no symbiotic relationship between the territory and the remaining parts of the municipality, there is no interdependence, and there is no unity of interest. The evidence, taken as a whole, indicates that the city's desire to retain the territory within the boundaries of the municipality is based almost entirely upon its desire to control all future use of the property. The property is remote from the center of the city, it receives no substantial services from the city, it has no residents, and it receives no benefit from being included within the city limits. The facts established at the trial closely parallel those in the many cases in which this court has approved a finding that justice and equity require that the territory be disconnected. And, as this court stated in City of Draper, supra:

In ruling on a petition for disconnection, the trial court's findings of fact will not be disturbed unless clearly erroneous. Kennecott Copper Corp. v. City of Bingham Canyon, 18 Utah2d 60, 415 P.2d 209 (1966). The burden is on the appellant to demonstrate that the trial court committed error, and not that appellant should have won its case. We review the evidence, and the inferences arising therefrom to favor the trial court's findings of fact, Ovard v. Cannon, Utah, 600 P.2d 1246 (1979); Rogers v. Hansen, Utah, 580 P.2d 233 (1978).

III

THE COURT PROPERLY DENIED HIGHLAND CITY'S MOTION FOR A NEW TRIAL AND ITS MOTION TO AMEND FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

At the time the petition was filed in this proceeding, at the time of the trial, at the time the court filed its memorandum decision on August 28, 1980, at the time the commission met, and it is not known for how long thereafter, the territory was on the eastern outskirts of the city.

During the pendency of the proceeding, the city negotiated with Joseph A. Kjar respecting annexation by the city of the Kjar property which lies to the east of the territory. At the trial, Mr. Kjar testified that he had talked with Mayor LeBaron about a possible annexation, indicating that he desired to be included within the city, but was told by the Mayor that "this action was pending, and that until it was resolved we couldn't very well move completely on that request" (R. 378).

Nevertheless the city must have continued to talk with Mr. Kjar, and before the formal findings of fact, conclusions of law, and decree were entered, the city had annexed the Kjar property. On this basis, the city moved for a new trial, or for amendment of the findings, conclusions, and decree on the ground of newly discovered evidence. The court denied the motion and its denial is assigned as error by Highland City.

In numerous cases this court has announced and applied the rule that the granting or denying of a motion for a new trial is a matter that lies within the sound discretion of the trial court, and that the action of the trial court will not be overturned unless it appears that the action was arbitrary or that it clearly transgressed any reasonable bounds of discretion. See Lee v. Howes, 548 P.2d 619, 621 (Utah 1976); Smith v. Shreeve, 551 P.2d 1261, 1262 (Utah 1976); and Page v. Utah Home Fire Insurance Company, 15 Utah2d 257, 391 P.2d 290, 292 (1964). Where a motion for a new trial is based upon newly discovered evidence, the exercise of discretion by the trial court must be based on a showing of substantial material evidence, from which it appears there is at least a reasonable likelihood that it would affect the result in a new trial. Uptown Appliance and Radio Company v. Flint, 122 Utah 298, 249 P.2d 826, 828 (1952).

Although Rule 59 provides that when a new trial motion is made, the court may open the judgment and take additional testimony, the motion to reopen is also addressed to the sound discretion of the trial court. See Lewis v. Porter, 556 P.2d 496, 497 (1976).

The City regards the evidence as important because annexation of the additional 80 acres of property changed the configuration of the city, resulting in an "unreasonable, large or varied-shaped peninsular land mass" projecting into the boundaries of Highland City, or in creation of an island. The possibility of such an annexation was presented during the trial when Joseph A. Kjar testified that he was interested in having his property annexed by the city. Under these circumstances, it is doubtful that the receipt of this evidence upon reopening of the case would have resulted in a different finding by the court. Moreover, the evidence sought to be

produced by Highland City is not "newly discovered evidence" within the meaning of Rule 59. In Patrick v. Sedwick, 413 P.2d 169, 177 (Alaska 1976), a medical malpractice case, the defendant doctor contended on appeal that the trial court had erred in denying his motion for a new trial which was based on the ground that, since the trial, there had been discovery of a new medical technique which would have changed the prospects of the plaintiff and would have reduced the amount of damages awarded. The court set out the general grounds for the granting of a new trial on the basis of newly discovered evidence, that it must be such as would probably change the result on a new trial; must have been discovered since the trial; must be of such a nature that it would have not been discovered before trial by due diligence; must be material; and must not be merely culmative or impeaching.

In upholding the action of the trial court in denying the motion for a new trial, the court observed:

> In addition to the foregoing requirements, it is established that for any evidence to come within the category of "newly discovered" such evidence must relate to facts which were in existence at the time of the trial.

See also Campbell v. American Foreign SS Corp., 116 F.2d 926, 928 (2 Cir. 1941), in which Judge Swan stated:

> * * * The facts alleged in support of the motion do not constitute "newly discovered evidence" within the rule. That phrase refers to evidence of facts in existence at the time of the trial, of which the aggrieved party was excusably ignorant. If it were ground for a new trial that facts occurring subsequent to the trial have shown that the expert witnesses made an inaccurate prophecy of the prospective disability of the plaintiff, the litigation would never come to an end. The weight of authority is against the granting of a new trial on the ground of unexpected improvement in the plaintiff's condition, unless the evidence is sufficient to show fraud.

See also 6A Moore's Federal Practice (2d Ed.), ¶ 59.08(3), p. 59-115.

In the present case the city has had in its power to make changes in the facts, and has done so on at least two occasions since the filing of the petition. In each case the changes in the facts, brought about by the city, have been used as a basis for argument against disconnection. First, prior to trial, the city negotiated a lease with Utah Power and Light Company for certain property lying within the territory to be disconnected, and sought to establish that fact as a reason for not permitting the disconnection. Then, after the trial was concluded, and apparently after all hearings were concluded, the city took steps to annex other property which would change the boundaries to such an extent that it might argue, as it did in its motion for a new trial and has on this appeal, that the trial should go for naught. The case does not reach the standards of the Alaska case, cited above, because the newly discovered evidence was not something that just happened, but something that the city made happen. The city's ability to "manage" the evidence should not lead to a conclusion that "justice and equity" require that the territory not be disconnected, nor does it show that enforcement of the judgment would no longer be "equitable" if the motion is treated as one under Rule 60(b), Utah Rules of Civil Procedure.

CONCLUSION

This action was fully and fairly tried. Except for an opinion of the Mayor of North Salt Lake, all of the evidence "deemed relevant" by the city and by the intervenors was listened to by the court. But legislation permitting the city to present such evidence as it deems to be relevant, does not make it relevant. If it did it would be impossible for a court to reach a rational decision in a case of this type. The city argues that the court in its

memorandum decision indicated that the evidence with respect to the feelings of the residents in Highland City, the hopes of the Mayor, and vague plans for the future were not considered, but the court's language could also mean that in light of the other evidence in the case these matters were not sufficient to have a bearing upon the question of whether "justice and equity" required disconnection of the territory. This conclusion is consistent with the many cases decided by this court under prior statutes, where "justice and equity" was substantially the only criteria, and the present one, adopted in 1971, in which the legislature has dilineated the factors that should be taken into account by the court in determining whether "justice and equity" require disconnection.

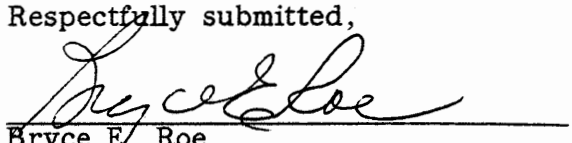
Although the legislation provides that the factors specifically enumerated in 10-2-503 are not the only factors to be taken into consideration by the court, rules of statutory construction require a holding that the statute, properly construed, contemplates that the other factors to be taken into account will be those that are similar to the ones enumerated, and that are related to the question of whether or not "disconnection will leave the municipality with a residual area within its boundaries for which the cost, 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." All the factors going to that question were considered by the court and the court on the basis of the evidence concluded that "justice and equity" did in fact require disconnection of the territory from Highland City.

The motion for a new trial is based upon evidence which is not in fact "newly discovered evidence" and which, because related evidence was

produced at the trial, was not likely to change the result of the trial. The refusal to grant a new trial was not an abuse of the trial court's broad discretion.

In light of the foregoing, the judgment and decree of the trial court should be affirmed.

Respectfully submitted,



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