1982

Highland Town v. Gibbons Realty Co. : Reply Brief of Appellant

Utah Supreme Court

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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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REPLY BRIEF OF APPELLANT

APPEAL FROM A FINAL ORDER OF THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH.
HONORABLE GEORGE E. BALLIF, JUDGE, PRESIDING

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Appellant herewith files its Reply Brief pursuant to the provisions of Rule 75 (p) (1) Utah Rules of Civil Procedure.

REPLY TO RESPONDENTS' STATEMENT OF FACTS

Respondents at page 2 of their brief, characterize that portion of Highland City containing respondents' "rectangle" as "a peninsula extending east of the main portion of the city." This is a conclusion not warranted by the facts. Highland has no commercial district or any other location commonly known as "the main portion" of the city. The area sought to be disconnected is as vital to the interests of Highland as any other. Indeed, because of its recreational potential, Respondents' property could well be referred to as the "main portion of the city." Respondents' characterization, therefore, tends to minimize the importance of the territory under consideration.

Respondents, at page 4 of their brief, say "there is no evidence that the zoning of the property in question would be changed if returned to the jurisdiction of Utah County." On the other hand, though, there is abundant evidence that Respondents have always intended to use the territory for the purpose of extracting gravel (T. 130, 249). Respondents have never at any time denied this intention. Indeed, they went so far in October, 1978, as to file a separate lawsuit against both Highland City and Utah County for the purpose of having Highland City's zoning of the territory in question and Utah County's zoning of adjacent property declared invalid, as violative of both State and Federal Constitutions. That case is entitled Gibbons Realty Company, a Utah Corporation, Plaintiff, vs. Highland Town, a Municipal Corporation of the State of Utah, and Utah County, a political subdivision of the State of Utah, Defendants; and was filed in the Fourth Judicial District Court of Utah County under Civil No. 50233.

These steps taken by Respondents certainly would not indicate an unliklihood that the zoning will be changed.

Respondents at page 6 of their brief say, in what purports to be a statement of fact, but what instead amounts to a legal conclusion, that "....the maps introduced in evidence show that there would be no islands or peninsular masses

created by the disconnection of the property in question." Appellant submits that the contrary is true, and that the map submitted by stipulation with Appellant's brief clearly shows the creation of an island consisting of the so-called "Kjar Property."

Finally, Respondents at page 6 of their brief state as a fact that "the property is not needed for the future growth of Highland City." This is clearly erroneous. Testimony is abundant that the territory is very much needed, for one reason or another, to foster and accommodate the future growth of Highland City. This is particularly clear in the testimony of Mayor Donald R. LeBaron (T. 76, 77, 78, 182, 183, 228).

REPLY TO POINT I OF RESPONDENTS' BRIEF

In a somewhat cavalier manner Respondents attempt to dismiss out of hand the very considerable significance of the language in Sections 10-2-501 (3) and 10-2-503, Utah Code Annotated (1953), as amended, authorizing any interested persons to testify against the granting of a disconnection petition, and providing for consideration by the Court of the "other factors" set forth in their testimony.

Respondents characterize these important substantive provisions as "isolated wording," as though to suggest that the Legislature simply didn't know what it was doing when it wrote the language.

Indeed, disconnection hearings cannot be limited forever to the consideration of just the stereotypical, stringently limited areas relied on in an earlier era. If the Legislature deems it worthwhile that the Courts consider new and different "other factors", so be it.

In Heathman vs. Giles 13 Utah 2d 368, 374 P.2d 839, (1962), quoted at page 9 of their brief, Respondents themselves, quote language tending to limit the rule of "noscitur a sociis" to "doubtful words or phrases." Appellant submits that the rule does not apply here for the reason that "among other factors" is not a doubtful phrase at all.

As stated in Appellant's Brief at page 14, the controlling word, "other", does not have a doubtful meaning. It always means "different." It never means "similar to" or the "same". Appellant's quotation from 67 Corpus Juris Secundum at page 908 makes that abundantly clear. If "other factors", means "different factors", then Respondents' attempt to use "noscitur a sociis" is irrelevant and in no way helpful to Respondents' position.

For the same reason the rule of "ejusdem generis" referred to in Respondents' brief at page 10 does not apply either.

Even if "ejusdem generis" were otherwise appropriate, it would not be of any help to Respondents here because it applies only where general words follow, rather than precede,

the specific ones. Appellant pointed this out in its brief at page 15 in quoting from Lyman vs. Bowmar, Colo. 533 P2d 1129 (1975).

In an effort to get around the logic of that holding Respondents cite Application of Central Airlines, Okla., 185 P2d 919 (1947). There the Court was concerned with the words "shall include", a phrase that is far more restrictive than "among other factors", the distinction of course, being the use of the word "other". "Shall include" can mean "similar" or the "same", but "other" cannot. Indeed, "other" has to mean "different from". Therefore, the cited case is of no help whatsoever to Respondents' position.

At page 12 of their brief Respondents arrive at the illogical conclusion that it is fine for the Court to hear all the evidence that any interested party desires to talk about, but wrong for the Court to pay much attention to it. They talk about "mistaken ideas" and "unsubstantiated fears." On the contrary, the Court should have declared all of the evidence presented to be relevant, then decided whether to allow disconnection on the basis of its weight and quality.

Appellant's evidence referred to in paragraphs 1 through 11 on pages 13 through 16 of Respondents' brief is all relevant to the ultimate question, and the Court not only should have heard it, but also carefully weighed it along with the

other matters that it did deem to be relevant.

Some particular objections of Respondents are wholly without merit and require comment. In paragraph 2 they refer to some supposedly improper action--"manipulation", to use their word--on the part of Appellant in entering into a long term lease, with option to buy, of some property owned by Respondent Utah Power and Light Co. As Respondents well know, this property is intended to serve as a City Park (T. 182) and it was right and proper that Appellant should seek to tie it up. Appellant certainly cannot be criticized for that action, or for the fact that it would, in fact, create an island and constitute another valid reason why the territory should not be disconnected.

In paragraph 5, Respondents make quite a point of the idea that Respondent J. Keith Hayes' overture toward being released from the lawsuit was due to some pressure brought by the City. No impropriety was alleged at the trial, and it doesn't really matter why Hayes wanted to pull out. This merely adds to the weight of the evidence that the Court should have considered.

In paragraph 7, Respondents attempt to obscure the obvious fact that if Gibbons and Reed has its way a tremendous increase in the volume of truck traffic will appear on the streets of Highland City with all its attendent evils.

Authority for this fact is Emery Carter, Executive Vice President of Gibbons and Reed who said "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). So Mrs. Mathis' concerns were certainly justified.

The Court should have followed the intent of the two controlling statutes. Not only should it have heard all the testimony offered by Appellant's witnesses, but should have deemed it all relevant and then proceeded to give it the same consideration and to weigh it as carefully as it did the evidence adduced by Respondents.

It was pointless and wasteful of the time of the Court, counsel, and witnesses to hear the evidence but refuse to pay any attention to it. This certainly wasn't contemplated by the statutes.

REPLY TO POINT II OF RESPONDENTS' BRIEF

Although they cite several Utah cases, Respondents are unable to come up with any definition of the words "justice and equity." All that they are able to do is give illustrations of some findings made in those cases in which disconnection was allowed. In fact, Respondents are quite candid in admitting that Utah statutes do not define the phrase at all.

There is nothing in the quotations from the cases that would indicate that counsel for the cities involved in them even made an effort, as Appellant did, to present any evidence of "such other factors." Indeed, it may very well be that this is the first Utah disconnection case in which this sort of evidence has been relied on to any extent whatsoever.

If that is so, the Court has not had an adequate opportunity in the reported cases to weigh such new and different evidence against the old categories in attempting to decide whether the standard of "justice and equity" has been met.

For example, the evidence presented by Dr. LaMond Tullis about the surveys taken among Highland's residents showing a strong aversion to the type of gravel extraction envisioned by Gibbons and Reed (T. 149) makes it difficult to conclude that a mere handful of landowners are entitled, as a matter of "justice and equity" to disconnection from Highland City over the strenuous disapproval of the vast majority of Highland's residents.

Respondents sidestepped Appellants issue as to the meaning of the word "require" in the context of the phrase "justice and equity require." The cases cited by Appellant at page 17 of its brief, to which Respondents made no response at all, clearly show that the word "require" does not merely mean "allow" or "permit." "Require" means "imperitive need",

"compel", or "mandatory", and none of these conditions have been shown to exist in this case.

The issue of whether the Court was obligated to give the same consideration to Appellant's evidence as it did to Respondents' (Point I) is intertwined with the issue of whether "justice and equity" "require" the disconnection (Point II). If this Court finds that the trial Court erred in not deeming Appellant's evidence to be "relevant", it must certainly conclude that Appellant's evidence is strong enough to sustain a finding that "justice and equity require" a finding against disconnection, rather than for it.

REPLY TO POINT III OF RESPONDENTS' BRIEF

The map filed by stipulation along with Appellant's brief clearly shows the fact that the "Kjar property" is nothing but an island--out there entirely by itself--with no connection whatsoever with the rest of the City of Highland--unless, of course, the Order of Disconnection should be reversed.

Respondents would leave the City in a shambles--consisting, geographically, of two entirely separate territories trying to function as a single city--an almost impossible task.

Evidence of this fact, unfortunately, could not have been introduced at the trial--simply because it didn't exist at the time.

However, the information was conveyed to the Court and Counsel soon after the annexation came into being. Appellant's attorney wrote a letter to the Court on September 16, 1981, (R. 144) fully setting forth the facts. At that time, no Findings or Conclusions had been prepared, and no Order of Disconnection had been signed. So the Court had considerable time in which to consider the new facts. It would have been a simple thing to schedule a further hearing, or in lieu thereof, to modify the Findings and Conclusions and to reverse the Order.

Substantial justice could have been provided in this manner, but it was not. What we have, instead, is a situation that flies directly in the face of the statute (10-2-503), the intent of which is to prohibit disconnection of territory where it results in the creation of such islands as the Kjar property.

Respondents make much of the point raised in Campbell vs. American Foreign SS Corp., 116 F 2d 926 (2d cir. 1941), quoted in Respondents' brief at page 25, about newly discovered evidence having to be in existence at the time of the trial. That case would not seem to apply here because, as previously pointed out, this case had not come to an end. Indeed, no decision had been made, there was no jury involved, and only the slightest inconvenience would have occurred in scheduling another few minutes of testimony and argument. It was such a

little thing to do in order to prevent such an unfortunate result.

The other case particularly relied on by Respondents, Patrick vs. Sedwick, Alaska 413 P2d 169 (1976) is not really in point. In fact, all the general grounds for the granting of a new trial set forth in that case, and paraphrased on page 25 of Respondents' brief are met here.

There is no merit, either, in Respondents' argument that Appellant "managed" the evidence in the case, and presumably therefore, should be denied the relief it seeks. The leasing of the Utah Power and Light property, and the annexation of the Kjar property were proper in every respect and certainly in the public interest.

The Court had an obligation to take the simple and timely actions necessary to guarantee a proper resolution of this case. All it had to do was take a little more evidence and hear a little more argument. This it failed and refused to do, and, thus, deprived Appellant of substantive rights to which it was entitled. This amounted to an abuse of the Court's discretion.

CONCLUSION

Respondents' able counsel has argued his points well, but has been unable to show that Appellant was not entitled to have the testimony of its witnesses heard and considered.

by the trial Court in the same manner as Respondents' own witnesses; that "justice and equity require" the disconnection of the territory; or that the denial of Appellant's motion for a new trial or to amend Findings, Conclusions, and Order should have been denied by the Court.

Instead, the Order of the Court should be reversed and the case remanded for the reasons set forth here and in Appellant's original brief.

Respectfully submitted,

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CERTIFICATE

I certify that I personally delivered two copies of the foregoing Reply Brief of Appellant to the office of BRYCE E. ROE, Attorney for Respondents, 340 East 4th South Street, Salt Lake City, Utah 84101, and that I mailed two copies to JOHN C. BACKLUND, Attorney for Intervenors, 350 East Center Street, Provo, Utah 84601, this _____day of July, 1982.