1971

In the Matter of the Disconnection of Territory From Layton City, A Municipal Corporation of the Sta Te of Utah : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE DISCONNECTION OF TERRITORY FROM LAYTON CITY, A MUNICIPAL CORPORATION OF THE STATE OF UTAH.

Case No. 12456

BRIEF OF RESPONDENT

Appeal from a Judgment of the Second District Court for Davis County Honorable John F. Wahlquist, Judge

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RESPONSE TO APPELLANT'S STATEMENT

Respondent agrees with appellant's statement of the nature of the case and the disposition of the matter in the lower court. Respondent does not agree with appellant's statement of facts except that, as in appellant's Brief, reference in this Brief to petitioner refers to Robert D. Sawyer since he was the principal agent and manager for the partnership owner of the tract in question.

Respondent also agrees that in March, 1968, petitioner filed this action in the District Court to disconnect approximately 80 acres from Layton City, and that upon

hearing of the action before Honorable John F. Wahlquist, the District Court entered an order disconnecting the 80-acre tract in question. As in appellant's Brief, reference to the material facts of record is made in the points of the argument below and will not be duplicated here.

ARGUMENT

POINT I

THE FACTS SUPPORT THE TRIAL COURT'S DECISION AND THE APPELLANT CANNOT SHOW THAT THE DECISION WAS CLEARLY AND PATENTLY ERRONEOUS.

Utah Code Annotated, Section 10-4-2 (1953) provides:

> If the court finds that the petition was signed by a majority of the real property owners of the territory concerned and that the allegations of the petition are true and that *justice and equity* require that such territory or any part thereof should be disconnected from such city or town, it shall appoint three disinterested persons as commissioners to adjust the terms upon which such part shall be so severed as to any liabilities of such city or town that have accrued during the connection of such part with the corporation, and as to the mutual property rights of the city or town and the territory to be detached. [Emphasis added.]

In its earlier rulings regarding disconnection under this statute, this Court has made it very clear that the de-

termination of whether "justice and equity" require disconnection is not to be made by the trial court rotely deciding whether or not the case falls into one of the "categories" of past cases, but rather by assessing all the facts of the instant case to determine in which direction the scales of justice tip. *Kennecott Copper Corp. v. City of Bingham Canyon*, 18 Utah 2d 60, 415 P.2d 209, 211 (1966); *In re Chief Consolidated Mining Co.*, 71 Utah 430, 266 P. 1044, 1046 (1928). No one would question appellant's contention that this gives the trier of fact wide discretion, but our judicial system has long placed the primary responsibility for resolving issues which require a balancing of all the facts upon the trier of fact who sees the evidence presented at trial.

In the instant case a hearing was held wherein the parties which could be benefited or damaged by the subject disconnection presented evidence to support their respective positions. The trial court weighed all the evidence and concluded that the advantages of disconnection to all concerned clearly outweighed the disadvantages, and that therefore, justice and equity would best be served by granting the landowner's request. This Court has ruled in previous disconnection cases that the appellate court must defer to the trial court's conclusion *unless it is clearly and patently erroneous.* In other words, the granting of disconnection is a *factual determination* and unless the facts were so one-sided as to permit only one conclusion, the trial court's finding should be affirmed. On this point, this court in ***In re*** *Chief Consolidated Mining Company, et al., supra.* stated:

"The facts in each case, under well recognized principles of law, must, to a very large extent, determine that question.

"*The determination of the facts upon which resolution of the issues is predicated is primarily for the trial court.* The loss of sales and use taxes is not in and of itself sufficient to justify denial of the petition for disconnection. In this instance the court concluded that whatever benefits would result from the denial of the petition were outweighed by the advantages to be gained by granting it, which justified the judgment it rendered in favor of the plaintiff. *Under traditional rules of review that judgment must not be disturbed inasmuch as it is not made to appear that it was clearly and patently erroneous.*" [Emphasis added.]

The appellant, by the assertions it makes in its Brief regarding the present status of the land in question and the municipal services presently available to it from the City of Layton, has completely disregarded a number of important facts to which the parties stipulated prior to the commencement of trial, including the following:

1. That there presently are no roads (except for an unimproved county road on the easterly boundary), improvements or buildings upon the land involved in this action (hereinafter sometimes referred to as "the subject territory");

2. That Layton City provides no water, garbage service or sewer service to the subject territory;

3. That the nearest Layton City water line runs approximately 400 feet from the border of the subject property;

4. That the East Layton Township is presently providing sewer and water service to the subject territory. (Pretrial Order R. 23-27.)

The conclusion of the trial court that disconnection should be allowed in this case is amply supported by the facts established of record. The subject territory is located approximately three miles, as the crow flies, from the downtown Layton City area (T. 29); it is approximately 1½ miles between the subject territory and any existing tract development in Layton (T. 30). At all times pertinent, the subject territory has been used strictly as farming land, on which petitioner raised a little wheat and oats (T. 36). The land is still essentially agricultural land on which there are no roads and no water or sewer lines extending to the property from Layton; the nearest Layton sewer line is at least a mile away (T. 35-36). The Layton City Attorney candidly admitted that the subject territory is, in fact, undeveloped, and that it contains no inhabitants (T. 12).

The subject territory was not within the limits of Layton City when the city was incorporated, but was subsequently annexed by Layton; the property owner's consent to the annexation was not sought or obtained and Layton City almost by happenstance annexed only half the property owner's parcel, putting the city line right down the middle of that parcel (T. 17).

Petitioner testified that for any feasible development of the property, the land must have available sewer and water service and roads and other services coming into the community in a convenient manner; it must have power, telephones, gas, garbage collection, snow removal, police protection and fire protection (T. 23-24). The petitioner had preliminary discussions with Layton City officials as early as 1960 with respect to the prospects of obtaining city sewer and water services for the subject territory (T. 18-19). During these early discussions, petitioner was informed that Layton City had a 1960 Master Plan which called for roads and improvements and also the provision of water and sewer service to the subject territory. Some five years thereafter, and in reliance upon Layton City's Master Plan for such roads, improvements and services, the petitioner purchased the subject territory (T. 20).

After the petitioner acquired the subject property, he again contacted Layton City officials with respect to the possible development of the parcel and the available services to that area. In 1967, he conferred with Byron McGregor, Layton City Engineer, and was told that he could not commence development of the area, i.e., that there were no sewer or water services available at that time. McGregor indicated Layton had "nothing in the immediate area or plans at the time" (T. 30-31). Petitioner, at the time of this 1967 meeting with McGregor, made notes on a drawing of the parcel, and those notes show that McGregor informed petitioner that the only possibility of getting water to the parcel was by the re-

activation of an old water main coming from a reservoir a considerable distance from the parcel; that Layton could only, even with such reactivation of the old line, bring water to the northwest corner of the parcel (Exhibit E); and that Layton had "no intention of running a sewer line" into the subject territory at that time (T. 33-34).

At the time Call Engineering Company was developing plans for water and sewer service to the subject territory, representatives of Call were also advised that there was no service available to that area from the City of Layton (T. 91-92). Call Engineering went ahead and developed feasible service plans, and petitioner and the Town of East Layton implemented them. As a result, the subject territory presently has adequate water available to it from a 10-inch main which runs parallel to Cherry Lane in the East Layton portion of the parcel; it was designed and has the capacity to handle any residential development of the area (T. 27-28). The territory is also presently being served by a natural drainage sewer system having the capacity to service all of the subject territory and the entire foothill area to the east (T. 26-29, 92-94). Expert testimony was heard to the effect that any sewer system now proposed by Layton would be duplicitous and that the water system proposed by Layton, utilizing standby power and pump stations, would not only be unnecessary, but undesirable from an engineering standpoint (T. 38-40, 86-87, 102).

The petitioner testified that it would be difficult, if

not impossible, to develop a project which straddled a line between two cities or towns (T. 40-44). It was his judgment that dealing with two taxing bodies would create a "complicated situation" and if one sewer or water system was used to serve both sides of the line, the non-residents of the city providing the service would likely be charged substantially greater rates than the residents. He further pointed out that building restrictions, zoning ordinances, etc. would be different and all plans and specifications would have to be approved by both townships involved (T. 43-44). Expert testimony also established that development of the parcel in two separate cities would create substantial engineering problems (T. 95-97, 110). The engineer for East Layton testified "it would be folly" to try to supply necessary services to the development from a city on each side (T. 115). He testified further that duplicative facilities would be extremely costly (T. 115-116).

East Layton officials testified that if disconnection were disallowed, East Layton would charge the Layton residents of the project utility service fees "double the standard fee for any resident . . . simply because they pay no tax base to it" (T. 119-120). Those same officials also testified that East Layton presently offers all conventional municipal services to that portion of the subject territory lying within the boundary of East Layton, i.e., sewer, water, fire, police, etc. (T. 120-121); and that East Layton constructed the existing sewer and water lines with the intent of serving the entire parcel involved here (T. 122).

None of the subject territory has to date been platted. The only recorded plat is on 11 lots in the southern half of the whole parcel, which part was in East Layton even before the disconnection (T. 18).

The development proposed for the subject territory is "planned unit development" where the residential areas are clustered together and large common areas are left available for parks, drives and recreation areas (T. 20-21). Petitioner testified that it is particularly important, in carrying out planned unit development, that an area be developed as one parcel, since common walls, yards and other common areas cannot be divided by a city line (T. 21-22). East Layton has approved zoning ordinances allowing for the planned unit development contemplated by petitioner, whereas Layton City's present ordinances would not permit such development (T. 40 and Stipulated Fact, Pretrial Order p. 25).

At the trial below, Layton City officials attempted to justify their previous unwillingness to supply needed services to the subject territory by testifying that the services sought by petitioner "would be available" to that property if and when it was developed (T. 147-149). Such testimony is completely self-serving and rather incredible in light of the fact that Layton was aware from at least 1967 that petitioner desired to go ahead with development as soon as the necessary services were available, and Layton still did absolutely nothing. Such testimony is also in curious conflict with the evidence adduced below that there are residents of Layton residing

in an area east of the subject territory to whom Layton even now refuses to offer any sewer and water service (T. 137-138).

The trial record indicates that the City of Layton obviously does not rely on this land becoming valuable residential property in the near future, i.e., it has no water or sewer plans, nor has it incurred any bonding or other obligations relating to such potential use. Since the subject territory is located on the outermost boundary of Layton City, and there is no chance of the city expanding all around the property, thus making it an "island," the fact of potential residential use is irrelevant, and only its *existing nature* is important here.

To date, petitioner has invested over $400,000.00 in his project and Layton City has contributed nothing to that development (T. 45). The tax loss to Layton City from disconnection is minimal, as petitioner pays under $500 a year property tax on the 80 acres, and the land is not a source of revenue to Layton City except for those taxes (T. 36-37).

Petitioner testified that Layton has done nothing to implement its 1960 Master Plan with respect to the subject territory (T. 37); that the only roads into the area have been developed by the petitioner and not by Layton City (T. 164); and that in his judgment, Layton renders no significant municipal services to the subject territory and confers no benefits upon it (T. 37).

Petitioner testified that, all things considered, he preferred to have the subject territory disconnected from

Layton City and developed as part of the East Layton Township (T. 46). Appellant, in its Brief (p. 13) makes the statement that "there is not a single precedent either in Utah law or any case from any other state known to the city's counsel or submitted to the court by petitioner's counsel" supporting the trial court's consideration of the owner's preference as a key factor. However, one of the very cases cited by appellant, *Creery v. Town of Okoboji*, 253 N.W. 810 (Iowa 1934) clearly establishes that this is one of the four factors to be weighed by the court (albeit to a lesser extent than the others). Any claimed paucity of authority on this point undoubedly arises from the simple premise that a landowner's preference for disconnection from one city and/or annexation to another city can be assumed from the mere fact of his petition.

Respondent submits that where, as here, each of two towns claims to be able to serve the subject territory, and no real damage will result to the town from which the property is severed, and there is no sound reason for preserving the boundary line status quo, the landowner's expressed preference to be in one town and not the other should be accorded considerable weight.

POINT II

AN ACTION FOR DISCONNECTION OF TERRITORY FROM A CITY IS NOT DETERMINED BY ATTEMPTING TO FIT THE APPLICATION WITHIN ONE OR TWO LIMIT-

ED CATEGORIES, BUT RATHER BY THE COURT'S APPRAISAL OF WHAT IS THE MOST JUST AND EQUITABLE RESULT IN LIGHT OF ALL THE FACTS IN EVIDENCE.

While appellant correctly states in its Brief that the standard of "justice and equity" expressed in Section 10-4-2 U.C.A. (1953) is given form and content by past decisions of this court, appellant incorrectly attempts to limit the application of that standard to the static factual situations presented in those prior cases.

Past decisions are obviously instructive, for similar facts in cases with similar results tend to rebut any claim of clear and patent error. However, appellant's characterization of Utah cases granting disconnection as all falling within one or two categories is a gross over-simplification. These decisions were all made on a case-by-case evaluation of all the facts presented, and while certain facts may be present in more than one case, such facts cannot be viewed as a determinative legal standard. Rather than try to "categorize" these cases as all involving or not involving certain facts, one should examine them to see what kinds of facts are properly considered in determining the justice and equity issue in a disconnection proceeding.

In *Young v. Salt Lake City*, 24 Utah 321, 67 Pac. 1066 (1902), the court found that justice and equity warranted disconnection where the facts showed the land to be unplatted, five miles from the business section of the city, unable to receive any municipal benefits, and

"unfit for municipal or residential purposes." It is interesting to note that the land at that time deemed "unfit" for residential use is situated in the foothills just north of Emigration Canyon in Salt Lake County, an area which undoubtedly would warrant a different conclusion today as to its fitness for such use.

The potential of land to become residential property when at the time of the disconnection proceedings it has not been so used, is only relevant if (1) it is apparent that disconnection of the land will create a hiatus or island within the city, making service to the surrounding area more difficult, or (2) the city has somehow relied to its detriment on the property being so used in the near future. Certainly, if the residential area of the city is likely to expand all around the proposed disconnected property, making sewer and water systems, police and fire services, etc. more difficult, the potential residential use is important. In the instant case, however, the subject territory is on the outermost boundary of Layton City and there is no chance of the city expanding all around the property. Layton City simply does not have the risk of someday being forced to service around an "island" if this land is allowed to be severed. Furthermore, the record demonstrates that Layton City has only minimal financial obligations, and none of these were specifically incurred in reliance upon the future residential potential of the subject territory. (See R. 38 and 43).

The absence in the instant case of any sound or accepted reason for maintaining the boundary line in its

status quo, makes it apparent that the appellant's strenuous argument to deny disconnection because of the potential residential use of this land is centered on appellant's desire to receive future tax revenues from the subject territory. This has been ruled by this court to be an invalid reason for denying disconnection. *Kennecott Copper Corp. v. Cty of Bingham*, 18 Utah 2d 60, 415 P.2d 204 (1966); and *Application of Peterson*, 92 Utah 212, 66 P.2d 1195 (1937). Where, as here, the city has not serviced the subject territory, nor obligated itself to do so, and disconnection will not make service to the rest of the city more expensive, the additional revenues are unnecessary because the area serviced is not increased.

This court granted severance in the next three cases following *Young*. *In re Fullmer*, 33 Utah 43, 92 Pac. 768 (1907); *Christensen v. Town of Clearfield*, 66 Utah 455, 243 Pac. 376 (1926); and *In re Town of Smithfield*, 70 Utah 564, 262 Pac. 105 (1927). In *Fullmer* and *Smithfield*, the appellants' arguments that the evidence did not support the findings received only slight consideration. In both cases, the trial court's decision to disconnect was summarily affirmed because the evidence was found to be ample to support a finding that the land did not receive any direct or appreciable benefit from being within the city. In *Christensen*, the court was more explicit in spelling out such a lack of benefits or services, stating that, just as here, the land was agricultural, one to two miles from the business section, not platted for any municipal purpose, not within the city water services and without city sidewalks, curbs, gutters, fire and police service.

One of the reasons Layton seeks to retain the subject territory is a fear that this case may start a trend along Layton's eastern border of landowners seeking to disconnect from Layton and be annexed by East Layton. In *Application of Peterson*, 92 Utah 212, 66 P.2d 1195 (1937), this court rejected such a "domino theory," stating:

> "That the owners of other agricultural lands may seek to have their lands withdrawn from the corporate limits is a question which can be met in the proper way when that question arises, if it ever does." 66 P.2d at 1197.

In the *Peterson* case, the land was located on the western boundary of the town, was agricultural in character, had never been used for any other purpose than to raise hay and other farm products, and it had no buildings upon it except a small shack. Furthermore, although the town had a sewer system, it was located at too high an elevation to serve any portion of the severed lands. City water was available to the land but could be more conveniently provided from a privately owned system. The nearest water fire hydrant maintained by the town was about a mile distant. The land was about a mile from the business section of town. There was no paving or sidewalks or other improvements abutting or near the land. The case was unique in that the city had financially obligated itself for sewer and water systems while the land was within the city. The court still allowed disconnection since the obligations were incurred after the application and as indicated, it was not feasible to use the

city's systems to serve the land. The court also noted that no island or hiatus would occur from granting severance and that the city's loss of potential tax revenue was not a proper ground for denial.

The facts as found in *Peterson* are almost identical to those in the instant case, and the facts that differ support disconnection. The court's reasoning in that case should be highly persuasive on this appeal.

The most recent Utah cases in point are *Howard v. Town of North Salt Lake*, 7 Utah 2d 278, 323 P.2d 261 (1958) and *Kennecott Copper Corp. v. City of Bingham*, 18 Utah 2d 60, 415 P.2d 209 (1966). In both these cases the court granted severance. In *Howard*, the court found that the town water system did not extend into the disconnected area. The water system of Layton City does not extend into the subject territory in the instant case (Stipulated Fact, R. 25). The court also found in the *Howard* case that the only structures which were upon the disonnected territory consisted of the buildings and facilities of the owners of the land. The court found that there were no sidewalks, curbs or gutters within the involved area. There are no sidewalks, curbs or gutters within the involved area in the instant case (Stipulated Fact, R. 25). The court further found that two principal roads traversed the area. There are no roads upon the subject territory in the instant case (Stipulated Fact, R. 25). The court in the *Howard* case found that there was no evidence that the police of North Salt Lake did any patrolling in the involved area. Furthermore, the court

found that no garbage removal was conducted by the town in the disconnected area. These facts are the same in the instant case (Stipulated Fact, R. 25 and T. 44 and 124). It is significant that the same judge who tried the instant case, Hon. John F. Wahlquist, was also the trial judge in the *Howard* case.

In the *Kennecott* case, the City of Bingham's ordinances were making expansion of mining operations difficult and Kennecott Copper applied to have the land severed from the city. The severed property was 90 per cent of the city's area, yet the court still found justice and equity supported the desire of the landowner since at the time of the application there were no inhabitants in the severed area, and thus, no city benefits running to the property.

This court has established in the foregoing cases the clear proposition that when land is distant from the business center of a community, has no improvements upon it, receives no water from the town, has no dwellings thereon, has no inhabitants, receives very few services from the community, is not particularly necessary for the present or future needs of the community, and there is no interdependent relationship between the property in question and the community, then disconnection of the property should be allowed.

Out of all the Utah decisions on the issue of severance, only in one instance has the landowner's request been denied. *In re Chief Consolidated Mining Co.*, 71 Utah 430, 266 Pac. 1044 (1928), involved an applica-

tion by the operator of a mine to have some of its land disconnected from the city limits of Mammoth City. While the request was granted for the lands that did not contain any mines, it was denied as to severance of the mining lands. This decision is not based on the nature of the lands being non-agricultural, as appellant implies in its Brief, but rather on the fact that the city and the mine were so integrated with and interdependent upon one another that severance would have been extremely unjust. The mine was the only reason the town existed. Virtually every resident of the city worked for the owner of the mining property and the court refused, quite properly, to let the employer free itself from supporting a city it created and relied on. It is clear that the facts in the instant case are completely different from those present in the *Consolidated Mining* case. In this case, as the trial court found, there is a complete absence of any significant interdependence between the subject territory and the City of Layton. For that reason, the *Consolidated Mining* case is of no aid to the appellant here.

POINT III

APPELLANT'S AUTHORITIES FROM OTHER JURISDICTIONS ARE INAPPOSITE TO THE INSTANT CASE.

The cases appellant cites to the court from other jurisdictions are inapposite and of no authoritative value here. The two Iowa cases [*Iowa P & L Co. v. Incorporated Town of Pleasant Hill*, 112 N.W. 2d 304 (Iowa

1962), and *Creery v. Town of Okoboji*, 253 N.W. 810 (Iowa 1934)] cited by appellant are totally unreliable as authority because the Iowa statute is crucially different from Utah's. Under Iowa law, a petition for severance *must* be denied if the city "is *capable* of extending into such territory substantial municipal services." ***Iowa P & L Co. v. Incorporated Town of Pleasant Hill, supra.*** In Utah, while capability of service is a factor to be considered in the balance, it by no means is determinative. In addition, the *Creery* case involved a potential hiatus and unlike here, there was no adjacent city the petitioner was seeking severance to join. Thus, the owner's desire would have resulted in a strip of county land, bisecting the city. This is hardly analogous to changing the boundary line between two cities.

Shelton Grain and Supply Co. v. Village of Shelton, 134 N.W. 2d 815 (Neb. 1965), also concerned a landowner who was seeking to disconnect his land from towns altogether, not deannexation from one to join another, and thus this case offers no unique insight on the instant one. This case is further distinguishable because Nebraska law provides a trial *de novo* in its Supreme Court for severance cases. Therefore, this case does not mean petitioner's grounds for severance were rejected as much as it means they were not proved in accordance with Nebraska's statutes.

While appellant's statement of *Brooks v. City of South Sioux Falls*, 73 N.W. 2d 339 (S.D. 1955) is correct as far as it goes, two distinguishing facts were left

out by appellant. First, the petitioner's land was the only good residential land left within which a rapidly growing city could expand because of a river, railroad, and an industrial area on all other sides. Second, while the case involved two cities sharing a common boundary, the petitioner made no claim that he would join the City of Sioux Falls if the court severed him from South Sioux Falls. Thus, the court was faced with a situation of an "island" of county land in the middle of two cities should it grant the disconnection.

Finally, *In re Alteration of Lines, Etc.*, 95 A.2d 506 (Pa. 1953) is totally irrelevant. This case concerned an attempt to achieve a severance and annexation of territory under a statute designed to settle boundary disputes. The court merely held that this statute was inapplicable to severance and thus could not affect it.

Appellant's reliance upon cases where disconnection would have created unregulated, untaxed and unprotected "islands," is completely misplaced. In this case the trial court was most careful to insure that its deannexation order would not create such an "island" out of the subject territory. The order of disconnection was *expressly conditioned* upon the petitioner making application for annexation of the property by the Town of East Layton (R. 43 and T. 212). That application was made and was approved, and the subject territory has now been formally annexed to the Town of East Layton (R. 46-47).

CONCLUSION

The Utah courts have always decided deannexation cases by balancing all the facts and circumstances on a case-by-case basis to determine if justice and equity would best be served by granting or denying the severance request. Since the trial court's decision must be based primarily upon facts presented at the hearing, its findings and conclusions should be given considerable deference by this court, and its decision should not be reversed unless clearly and patently erroneous. In this case a trial judge of considerable experience in disconnection cases carefully weighed all of the evidence and came to the conclusion that the petitioner had established the allegations of his petition and that justice and equity required that disconnection be granted. It is respectfully submitted that the decision of the trial court was not clearly and patently erroneous and should, therefore, be affirmed.

Respectfully submitted,

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