1972

Electors of the Proposed Body Corporate, of the Town of Cottonwood City v. Board of County Commissioners of Salt Lake County And William E. Dunn, Phillip R. Blomquist And Ralph Y. Mcclure, Constituting The Members of Said Commission : Brie Of Appellants

TABLE OF CONTENTS

INDEX OF AUTHORITIES

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

ELECTORS OF THE PROPOSED BODY CORPORATE, OF THE TOWN OF COTTONWOOD CITY,
Plaintiffs and Appellants,

vs.

BOARD OF COUNTY COMMISSIONERS OF SALT LAKE COUNTY and WILLIAM E. DUNN, PHILLIP R. BLOMQUIST, and RALPH Y. McCLURE, CONSTITUTING THE MEMBERS OF SAID COMMISSION,
Respondents.

Case No. 12748

BRIEF OF APPELLANTS

STATEMENT OF NATURE OF CASE

This is an action in mandamus to compel the Board of County Commissioners of Salt Lake County to approve Appellants' petition for incorporation upon a finding that the petition substantially conforms with the requirements of the law of the State of Utah.

DISPOSITION OF CASE IN LOWER COURT

The District Court denied Appellants' Writ of Mandamus and dismissed the case with prejudice.

NATURE OF RELIEF SOUGHT ON APPEAL

Appellants seek to have this Court issue an order requiring the lower court to issue a Writ of Mandamus compelling the Board of County Commissioners of Salt Lake County to approve Appellants' petition in the absence of a finding by said Commission that Appellants' petition substantially fails to comply with any of the requirements prescribed in Utah Code Annotated (1953) Sec. 10-2-6.

STATEMENT OF FACTS

The Appellants, who represent a majority of the electors of a proposed body corporate of the Town of Cottonwood City on or about the 28th day of September, 1971, pursuant to the statutory requirements of the Utah Code Annotated, filed a Petition for Incorporation with the Board of County Commissioners of Salt Lake County and William E. Dunn, Chairman. The said Petition contained the signatures of a majority of the electors residing in the proposed Town, and attached thereto was a map showing the boundaries of the proposed body corporate and a legal description of the said area desired to be incorporated. On or about October 4th, 1971, the Board of County Commissioners of Salt Lake County and William E. Dunn, Chairman denied Appellants' Petition without stating the

basis for said denial. However, the Chairman William E. Dunn stated prior to the denial that the Petition would be denied solely on the basis of the loss of income that would result to Salt Lake County if such Petition were granted. Appellants have complied with all requirements of the law governing the incorporation of towns and no objections have been raised by the Board of County Commissioners of Salt Lake County regarding the procedure or form employed by Appellants in presenting their Petition, nor have any defects in the Petition been claimed by the Board of County Commissioners of Salt Lake County.

Appellants contend that the Board of County Commissioners of Salt Lake County has exceeded its statutory authority by denying this Petition and further contend that the County Commission's denial is arbitrary and capricious and without foundation in the law.

ARGUMENT

POINT I.

THE COUNTY COMMISSION'S STATUTORY DUTIES IN THE INCORPORATION OF TOWNS ARE ONLY MINISTERIAL AND NO DISCRETIONARY POWERS ARE GRANTED TO THE COMMISSION.

Counties are a creation of the State Legislature and as such they are vested only with those powers expressly given them by the Legislature. Utah Code Annotated (1953) Section 10-2-6 provides the method by which towns are incorporated:

> "Whenever a majority of the electors of any unincorporated town having a population of not less than one hundred and less than seven thousand desire to have said town incorporated they may file a petition for the purpose with the Board of County Commissioners, stating the legal description and boundaries of the territory desired to be incorporated. On approval of such petition by the said Board and the filing of a copy thereof with the County Recorder such town shall constitute a body corporate and politic under the name and style proposed. The Board of County Commissioners shall appoint the first president and Board of Trustees, who shall hold office until the next municipal election and until their successors are elected and qualified."

The above statute grants the County Commission a mere ministerial ascertainment that the statutory requirements have been complied with. The Statute does not empower the Commission with discretionary authority to disapprove the merits of incorporation since the Commission is merely directed to approve the *petition*, and not the *incorporation*. The Commission's sole duties are to determine: (a) whether a majority of the electors have signed the petition, (b) that the population is not less than one hundred nor more than seven thousand, and (c) that the Petition contains an adequate description of the boundaries of the proposed area to be incorporated. An elector, as used in this section, is a person over 21 years of age who has been a citizen of the United States for ninety days, and who has resided in the State one year, in the county four months, and in the precinct sixty days. (Constitution of Utah, Art. IV Sec. 2.)

Although there are no Utah cases directly in point, cases from other jurisdictions clearly illustrate the authority of similar officers under similar statutes. In *State* v. *Village of Gilbert*, 120 N. W. 528, 107 Minn. 364 (1909), an action was brought to have a village disincorporated on the grounds that it was not a nucleus of population. The Minnesota Supreme Court finally held that the Board of County Commissioners had no discretion to determine the reasonableness of incorporation. The Board only had to approve if the Petition was in proper form and contained the requisite number of signatures. In so holding, the Court states:

> "In our examination of this class of cases we have failed to discover any instance where such a body has been vested with judicial or quasi-judicial powers sufficient to consider and finally determine the merits of the question (of incorporation). That the Legislature intended to introduce so radical a change is not warranted by the language of the amendment." *Id.* at 553.

In *State ex rel. Brunette* v. *Sutton*, 71 N. D. 530, 3 N. W. 2d 106 (1942), it was noted that Courts frequently observe that under incorporation statutes the non-legislative agency has "little discretion in such matters". *Id.* at 111. The Illinois Supreme Court in deciding a similar case stated:

> "Whether cities, towns or villages should be incorporated . . . presents no question of law or fact for judicial determination. It is purely a question of policy to be determined by the legislative department." *City of Galesbury* v. *Hawkinson, et al.*, 75 Ill. 152, 157 (1874).

Antieau, in his comprehensive multi-volume treatise entitled *Municipal Corporation Law*, made the following conclusion after analyzing the decisions of several state supreme courts:

> Thus courts have sustained incorporation statutes under which bodies other than the legislative determine whether there exists predescribed conditions, such as: Did the territory possess the requisite number of inhabitants? Was the petition signed by a majority of the electors? And, did the majority of the voters favor incorporation? Antieau, *Municipal Corporation Law*, Sec. 1.01 (Vol. I, p. 6); Citing *People, ex rel. Rhodes* v. *Fleming*, 10 Colo. 553, 16 P. 298 (1887); *Lynn* v. *City of Payette*, 38 Idaho 705, 224 P. 793 (1924); *et al.*

In 62 *Corpus Juris Secundum*, Municipal Corporations, Section 22, several state statutes are construed and the conclusion is that state statutes generally assign to the county commissioners or to the courts the responsibility of determining whether there has been a compliance with the statutory requirements of incorporation, such as the signing of the petition by the requisite number of persons and the existence of the requisite population in the proposed municipality. In several cases the statutes have been interpreted as giving the county commissioner or the court only ministerial authority and if it is found that the statutory requirements are met the laws make it mandatory upon the board or court to approve incorporation. (*State* v. *Downey*, 430 P. 2d 122, 102 Ariz. 360; *In re Village of Riggins*, 200 P. 2d 1011, 68

Idaho 547; *State* v. *Incorporated Town of Spavinaw City*, 300 P. 703, 150 Okla. 23; *Attwood* v. *Board of Sup'rs of Wayne County*, 84 N. W. 2d 708, 349 Mich. 415. For further citations see 62 C. J. S. p. 101 note 93 and 43, C. J. p. 94 note 81).

In determining the duty of the Commission in the incorporation of towns, a comparison of the provisions for the incorporation of cities should be made since there is no rationale basis for different procedures to be required. Comparing the two procedures, the only major difference is that in the incorporation of cities after the petition is filed an election must be held and a majority of the electors determines if the city is to be formed. There are absolutely no discretionary duties granted to the Commission and it acts merely as a ministerial agent to determine whether the petition and election conform to the provisions provided therein. In the case of incorporation of towns, inasmuch as a majority of the electors must sign the petition, there is no need for an election since the petition states the will of the majority of the electors in the proposed town. There are no reasonable distinguishing features between cities and towns which support the contention that the County Commissioners are granted discretionary powers to determine the merits of the incorporation in towns when they are given no similar authority in the incorporation of cities. It is therefore clear from an analysis of the entire municipal incorporation laws embodied in the Utah Statutes that the Commissioners' duties in the incorpora-

tion of cities and towns are purely ministerial and that the will of the majority of the electors of the area determines whether the area is incorporated.

POINT II.

THE DELEGATION OF DISCRETIONARY AUTHORITY TO COUNTY COMMISSIONERS ALLOWING THEM TO DECIDE THE QUESTION OF INCORPORATION IS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWERS.

The Utah Constitution Article XI, Section 5 provides that corporations for municipal purposes shall not be created by special laws and that, "the legislature by general laws shall provide for the incorporation, organization and classification of cities and towns in proportion to the populations, which laws may be altered, amended, or repealed." The Utah courts have held that the legislative power is vested in the Legislature and such legislative power may not be delegated to other agencies except where specially directed or permitted by the Constitution. (*State* v. *Goss*, 79 Utah 559, 11 P. 2d 340.) The Utah Supreme Court has also held that the creation of a city and the fixing of its territorial limits is essentially a legislative and not a judicial function. (*Plutas Min. Co.* v. *Orme*, 76 Utah 286, 289 P. 132.)

Pursuant to the above Constitutional provisions and judicial interpretations, it is clear that the legislative function of incorporating cities and towns cannot be delegated

in the absence of a Constitutional provision authorizing such delegation.

In the *Plutas Min.* case, *supra*, in interpreting the scope of authority given to the Court in the disconnection proceedings of Utah Code Annotated 10-4-1 (1953 as amended), the Court held that the Legislature may delegate to the judiciary its authority to restrict corporate limits of a city. But the Court also held that since the changing of the territorial limits is primarily a legislative function, Courts are bound to confine the exercise of the power conferred upon them by the Legislature within the expressed or necessary implied language of the act so conferring such power. The Court found it necessary to state that the *statutory guidelines rather than the Court's discretion*, must be followed in the disconnection process. Consequently, it is clear that if the Legislature is to delegate any of its authority in municipal incorporation matters it must provide substantial statutory guidelines and the delegee of the authority must strictly adhere to the guidelines rather than substituting its own discretion.

The above principle was reiterated in *In re Town of West Jordan*, 7 Utah 2d 391, 326 P. 2d 105 (1958) in which the Court stated:

> "Even though the changing of the territorial limits of a municipal corporation is primarily a legislative function, the disconnection of lands under this section involves the ascertainment of facts to determine the conditions upon which the law is to take effect, and this is a judicial function."

In that case the Court recognized that some authority was delegated to the Courts in ascertaining whether a specific set of facts fit within the specific guidelines given by the Legislature. However, even in disconnection proceedings the Court is strongly limited in the exercise of its discretion, and its only function is in essence ministerial, i.e. the ascertainment of facts.

This Court made the above conclusion in a similar case in *Carter* v. *Beaver County, Service Area No. One*, 16 Utah 2d 280, 399 P. 2d 440 (1965), in which the County Service Area Act was declared unconstitutionally vague in that it delegated unlimited authority to the County Commission without providing the necessary guidelines or standards by which the Commission could determine its functions.

Indeed Courts frequently observe that under the incorporation statutes a non-legislative agency has little discretion in such matters, *Antieau, Municipal Corporations Law*, Vol. I Section 1.01. This principle was again summarized in *Attwood* v. *Board of Sup'rs of Wayne County*, 84 N. W. 2d 708, 349 Mich. 415:

> "The creation of municipal corporations is universally acknowledged to be strictly a legislative function, and it is the general view that the legislature cannot, without violating the rule 'delegatus non potest delegare', delegate to another agency the authority to create municipal corporations, whenever and wherever such agency may deem proper, or according to whatever conditions such tribunal or board may see fit to require or dispense with.

The question of incorporation being a legislative one, statutes will be construed in case of any doubt to deny the administrative board any discretion to pass upon the merits or reasonableness of the petition for incorporation." (Emphasis added.)

The obvious reason for interpreting incorporation statutes to deny the administrative board any discretion to pass upon the merits or reasonableness of the petition for incorporation, is an effort to avoid the Constitutional issue involved. It is a well settled principle that courts will construe statutes wherever possible to uphold their Constitutionality. "To save incorporation statutes Courts will read in the conditions that the court or commission has no discretion in regard to refusing or granting the petition for incorporation." Antieau, *Municipal Corporations Law*, Vol. I Section 1.01 citing *State, ex rel. Behrens* v. *Crisman*, 354 Mo. 174, 188 S. W. 2d 937 (1945); *State, ex rel. Williams* v. *Second Judicial District Court*, 30 Nev. 225, 94 P. 70 (1908).

If Utah Code Annotated Section 10-2-6 (1953) is interpreted broadly giving the County Commissioners discretionary powers without the required guidelines, it is indeed an unconstitutional delegation of Legislative power. Therefore, in order to preserve its constitutionality it must be strictly interpreted to deny the County Commission any discretion to pass upon the merits or reasonableness of the petition for incorporation.

POINT III.

A CONSIDERATION OF THE MERITS OF

APPELLANTS' INCORPORATION PETITION BY THE COUNTY COMMISSIONERS RESULTS IN A VIOLATION OF ARTICLE VI SECTION 26, AND ARTICLE XI SECTION 5 OF THE CONSTITUTION OF UTAH.

Article VI Section 26 of the Utah Constitution provides:

> The Legislature is prohibited from enacting any private or special laws in the following cases: . . . 12. Incorporating cities, towns or villages. . . .

Article XI Section 5 provides:

> Corporations for municipal purposes shall not be created by special laws. The legislature by general laws shall provide for the incorporation, organization and classification of cities and towns in proportion to population, which laws may be altered, amended or repealed. . . .

The test of whether a law is a general law or a special law is determined by its application. (See *Words and Phrases*, General Laws. See also Antieau, *Municipal Corporation Law* Vol I Sec. 2-12). It follows that the test of whether the Legislature has passed a general law regarding the incorporation of towns, is to determine whether the application of the law is general and uniform in all instances. Courts have long upheld the right of the Legislature to classify cities by population as long as the classifications are reasonable and consistent with their intended purpose. Therefore, appellants do not challenge the Legislature's right to classify municipalities into several classes of cities and towns. However as stated in

Higgins v. *Johnson County Commissioners*, 153 Kan. 560, 112 P. 2d 128 (1941):

> "Where a classification is made on the basis of population . . . (and) all counties and cities which come within the population class cannot come within the provisions of the act, it is not a general law."

Clearly, in order for Utah Code Annotated (1953) Section 10-2-6, to be considered a general law, all proposed towns having a population of more than 100 and less than 7,000 which submit a petition substantially complying with the provisions stated therein, must be allowed to incorporate. In the absence of a Legislative instruction to consider other standards or criteria, this incorporation must be allowed regardless of the economic or other impact on the county. If the county is given unlimited discretion to consider the merits of the incorporation without any guidelines from the Legislature, the application of the law is by no means general. Indeed, the Commission will determine its own standards or criteria with each petition, and incorporation of towns will be based solely upon the ideas of the particular Commissioners in office rather than upon general, uniform laws prescribed by the Legislature. The result is a government of men rather than of laws, and the granting of unlimited discretion cannot lead to incorporation by general laws as required by the Utah Constitution. This Court has already ruled in *Carter* v. *Beaver County Service Area No. One, supra*, that the unlimited delegation of discretion or authority from the Legislature to the county is unconstitutional.

The result in this case is similar if the county is allowed to consider any criteria or standards it deems appropriate in allowing towns to incorporate.

CONCLUSION

It is clear from the legislative scheme for the incorporation of cities and towns that the Board of County Commissioners' duties with respect to processing a petition for incorporation are purely ministerial. In the case of town incorporation a majority of the electors must sign the petition and therefore the will of the electors is determined at the outset and no election is necessary. If the statutory requirements are complied with by the petition and if the signators represent a majority of the qualified electors in the proposed town area, the County Commission must approve the petition and the town is incorporated. The statute provides no discretionary authority for the Commission to question the merits of the incorporation of cities or towns.

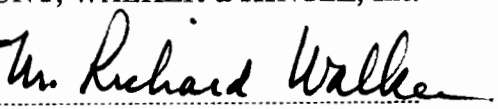
Furthermore, the authority to regulate the incorporation of the cities and towns is vested solely in the Legislature and it would be an unconstitutional delegation of responsibility to vest in the County Commissioners discretionary authority to consider, without any guidelines, the merits of a petition for incorporation.

In addition, the Utah Constitution requires cities and towns to be incorporated by general laws and if the county is allowed unlimited discretion to consider the merits of each incorporation, the effect of the law is not general but is rather special.

The Appellants respectfully request that this Court issue an order requiring the lower court to issue a Writ of Mandamus requiring the Board of County Commissioners of Salt Lake County to perform their ministerial duties and approve Appellants' incorporation petition upon a finding that it substantially complies with the law.

Respectfully submitted,

HUNT, WALKER & HINTZE, Inc.



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