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 And Walker E. Anderson For Himself And All Persons Similarly Situated And Those Opposed To The Petition, Mandamus, Writ, And Town Incorporation : Brief of Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

ELECTORS OF THE PROPOSED BODY CORPORATE, OF THE TOWN OF COTTONWOOD CITY,
Petitioners,

vs.

BOARD OF COUNTY COMMISSIONERS OF SALT LAKE COUNTY, et al.
Respondents,

and

WALKER E. ANDERSON FOR HIMSELF AND ALL PERSONS SIMILARLY SITUATED AND THOSE OPPOSED TO THE PETITION MANDAMUS, WRIT AND TOWN INCORPORATION,
Intervenors.

Case No. 12748

BRIEF OF RESPONDENTS

**Appeal from the Judgment of the Third Judicial District Court
Honorable James S. Sawaya, Judge**

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TABLE OF CONTENTS

CASES CITED Page

OTHER AUTHORITIES CITED

STATUTES CITED

UTAH CONSTITUTION

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from an action in mandamus to compel the Board of Commissioners of Salt Lake County

to approve Appellants' petition for incorporation of the proposed Town of Cottonwood City, under the requirements of Section 10-2-6, Utah Code Annotated, 1953, as amended.

DISPOSITION OF CASE IN LOWER COURT

The Honorable James S. Sawaya, Judge of the Third Judicial District Court, in and for Salt Lake County, State of Utah, heard the matter before the court and ruled Appellants had failed to show Respondents had acted arbitrarily or improperly or abused their discretion. The court found Respondents actions were based upon substantial reasonable grounds and for the best interests and welfare of a majority of Salt Lake County residents. Further, that said statute in question does not impose mandatory duty upon Respondents to act. Said court therefore denied Appellants' Writ of Mandamus and dismissed the case with prejudice.

RELIEF SOUGHT ON APPEAL

The Respondent seeks reaffirmance of the lower court's decision denying Appellants request for a Writ of Mandamus which attempts to compel the Respondent, as a matter of law, to approve the petition of Appellant.

STATEMENT OF FACTS

Appellants filed with Respondents a Petition for incorporation of the Town of Cottonwood City on or about the 28th day of September, 1971. Said petition purportedly was signed by a majority of the electors of the proposed town and pursuant to statutory authority; both of which allegations the Respondents take exception to and contend are false. A legal description of the area was attached to the petition filed which appeared to comply with the statutory requirements but the map as submitted was very rough drawn.

On or about October 4, 1971, Respondents held a public hearing on Appellant's petition together with a petition submitted to Respondents in opposition to Appellants. Respondents received testimony and arguments from both the proponents and the opponents to the incorporation of said Town of Cottonwood City. Respondens for good and reasonable cause denied Appellants' request. Respondents reasons for denial are based upon failure to comply with the statute permitting the incorporation of said town, together with the statutory requirement that Respondents protect the general health, welfare and general good of the residents of Salt Lake County, State of Utah.

ARGUMENT

POINT I

THE COUNTY COMMISSIONERS STATUTORY DUTIES IN THE INCORPORATION OF TOWNS IS

CONTAINED IN SECTION 10-2-6, UTAH CODE ANNOTATED, AND THE INTERPRETATION OF SAID SECTION, AND NOT BY MANDAMUS.

Counties receive their power and authority from the Constitution and statutes of the state. Some powers are expressed and others implied. Some statutes are very specific as to detail and particularity and others are rather broad and general with much left to the agencies and bodies who are to carry out the laws within the guidelines set forth by the legislature.

Municipal corporations possess and exercise only such powers as are expressely conferred or those *necessarily or fairly implied* or those *essential* to the accomplishment of the declared objects and purposes of the corporation. Generally, what the state may do directly, it may authorize its municipalities to. Where power over a particular subject matter has been delegated to a municipal corporation by the legislature, without any express limitations, the extent to which that power shall be exercised rests in the discretion of the municipal authorities and as long as it is exercised in good faith and for a municpal purpose, the courts have no ground upon which to interfere. 56 Am. Jur. 2d (Municipal Corporations) sec. 227.

When the courts do interfere in matters of municipal functions, mandamus is a proper proceeding. However, the Writ of Mandamus will issue *only* where there is a showing of abuse of discretion which must appear to be very clear before the court will interfere. *State vs. Bunge,* 73 P. 2d 516. If said acts complained of are

solely discretionary, the courts will not interfere to compel performance of said acts. (*Haslam vs. Morrison,* 113 U. 14) Thus, the courts will not substitute their own thoughts in discretionary matters for those of the municipal officers. The courts may not agree with the results and other actions taken, but if discretionary, the courts will not interfere. (52 Am. Jur. 2d — Mandamus sec. 78)

Section 10-2-6, Utah Code Annotated, 1953, provides the method by which towns are incorporated in the State of Utah, providing as follows:

> "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 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* 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." (emphasis added)

62 CJS Municipal Corporations, section 111, sets forth the general rule as to powers and functions granted to municipal corporations as follows: The functions of a municipal corporation may be either imperative or

discretionary and whether any particular power or duty is mandatory, permissive, or discretionary, is purely a question of legislative intent. Imperative or mandatory functions must be performed. Usually the mandatory functions are *imposed by words of imperative form* as *"shall" or "must" in the statute. All other than imperative duties are discretionary functions of the municipality.* (emphasis added) Clearly, the statute 10-2-6, Utah Code Annotated must be considered and controls. The key to this grant of power in the matter herein comes from the words "On approval of such petition by the said Board." This foregoing sentence contains none of the "imperative form words such as *shall* or *must.*" In fact, this sentence is clearly the opposite when it states *"On approval."* There is no forced language or mandatory action required on the language.

Checking the history of Title 10, Chapter 2 Utah Code Annotated, indicates sections one through six were all originally enacted together as part of an overall package relating to the creation of cities and towns. Every one of these six sections in Title 10, Chapter 2 of the Utah Code are full of the "imperative form words such as *shall.*" The mandatory word *shall* appears in nearly every sentence in all six of these sections, including section 6. Interestingly however, when the language of the statute in section 6 considered the issue of acting upon the petition, no mandatory words appear but only the words "On Approval." "On approval of such petition by the Board (of County Commissioners)" surely conveys no mandatory meaning or forced actions for

approval. In fact, it would very logically follow that the board may not approve and if it did not approve, it must in accordance with its general grant of power not approve for good and sufficient reasons and not for any arbitrary and/or capricous cause. The powers and functions of municipal corporations are *always* to be considered with respect to the *purpose* and *object* of the creation and existence of the corporation, namely the *welfare and best good of the public.* They are *not* established for the exclusive advantage of the corporations but for the *public at large.* (*Nourse v. City of Russellville,* 78 SW 761; and *Herbert v. Benson,* 2 La. Ann. 770: and 62 CJS Municipal Corporations section 106)

Municipal corporations are primarily incorporated as political subdivisions of the state for the purpose of performing local governmental *functions* in the interest of the *public order, health, safety, welfare* and are divided into two general classes of powers, governmental and proprietary. The governmental functions of a municipal corporation are those conferred or imposed upon it as a local agency to be exercised *not only in the interest of its inhabitants but also in advancement of the public good or welfare as affecting the public generally.* They include the promotion of *public peace, health, safety, and morals* as well as the expenditure of money. (56 Am. Jud. 2d Municipal Corporations section 199). The powers which a municipal corporation may exercise are intended to be used for the advantage of the public and the inhabitants *generally* and not for the

particular advantage of one individual or group or individuals. (56 Am. Jur. 2d Municipal Corporations section 229).

It is readily apparent that the Respondents have been charged with the interest of the whole county. Their interest must be directed towards *public* purposes and interest. Generally, a *public purpose* has for its objective the promotion of public health, safety, morals, general security, prosperity, and contentment of all the inhabitants or residents within the municipal corporation (56 Am. Jur. 2d Municipal Corporations section 230). Thus, the purposes, powers, functions and overall reasons for even creating a municipal corporation boil down to the same general goals and objectives of public good.

With the goals and objectives of municipalities to be as aforestated, it seems logical to determine the legislative intent to permit the board of county commissioners to consider the petitions as submitted and consider same in the light of the test for the good of all of the public. It does not seem logical that the board would be intended to be a rubber stamp upon receipt of a petition. Some inquiry must be made by someone to determine if the public good was being met. The drafters of sections one through six of Chapter 2 surely knew and used to great lengths the mandatory words in all six sections, except for the key words of section six as it relates to approval of said petition.

This section herein in question has been in effect

since 1898 with the only change being a reduction from two hunderd to one hundred people to permit incorporation. In all this time, we can find not Utah cases in point in interpreting the working of section 10-2-6. It is admitted that there is much case law in most other jurisdictions in the area of incorporation of towns and cities, but the wording of their statutes are different than Utah's and therefore said cases would shed little light as to how the Utah Supreme Court ought to interpret this section herein in question. However, it is submitted that the clear import of the wording would not make the Board of County Commissioners a rubber stamp.

POINT II

APPELLANTS HAVE FAILED TO ESTABLISH THAT THEY HAVE IN FACT COMPLIED WITH THE STATUTORY REQUIREMENTS FOR INCORPORATION OF A TOWN AS PRESCRIBED BY SECTION 10-2-6, UTAH CODE ANNOTATED.

Appellants have contended that the Respondent Board is without any authority or power to even investigate or look into or consider facts surrounding proposed incorporations after the Petition has been submitted. With this position Respondent disagrees. We cannot agree that section 10-2-6, Utah Code Annotated, sets forth such guidelines that require the board of county commissioners to exercise no function other than rubber stamping an approval for incorporation if a Petition is once submitted to it. The courts have uniformly held that the legislature may delegate the power to determine facts and circumstances that have taken place

to courts, agencies, and boards without violating the principle and maxim delegatus non protest delegare. These acts are not an unconstitutional delegation of legislative power. The creation of municipal corporations is in absence of limitation a legislative function. The legislature may not only create and provide for the organization of cities and towns but may restrict some of their powers. (McQuillin, Municipal Corporations, Vol. 1, section 3:03) The legislature can create *general laws* and grant to a court, tribunal, commission, board or such other agency the right to *ascertain and determine* if and when the general provisions of law are complied with . . . this also is not in violation of the maxim delegatus non protest delegare. (*Hill v. Kahoka,* 35 Fed. 32: McQuillin, Municipal Corporations, Vol. 1, page 514) It is not an unauthorized delegation of legislative power to pass a *law* and impose on some officer or official body the duty to determine whether such conditions exist as are prescribed by said general law. (*Board of Directors of Northern Wasco Co. People Utility District v. Kelly,* 137 P. 2d 295) The foregoing general law has been well accepted in Utah for many years and set forth in the case of *In Re Fullmer,* 33 U. 43, when the court determined it permissable to delegate powers to courts by general laws for the purpose of determination of the facts and events that had transpired . . . without declaring this a delegation of legislative power and thus an improper and void act.

In the case before the court, the legislature in 10-2-6 Utah Code Annotated has passed an act setting forth

some very specific facts that must be determined and has further left some questions for determination to the board of county commissioners for determination under the general grants of powers, functions, and purposes which created the municipalities under the test heretofore discussed of general public welfare and best good. Thus, a petition was filed with Respondents; a map and/or plat accompanied said petition (even though said map was very rough drawn); boundaries were stated; a legal description was submitted; an allegation of popultion was alleged within the guidelines of between one hundred and seven thousand; but then the statutory requirements stopped. The Petition recited that petitioners constituted a "majority of the electors" of the area . . . but with this contention the Respondents do not agree. Further, there was nothing identifying the area in question as qualifying as an "unincorporated town" as the statute requires.

The question of whether the petition contains "a majority of the electors" will now be considered. Appellant contends that an elector is a person over 21 years of age, who is a citizen of the United States for ninety days, and who has resided in Utah for one year, in the county four months, and in the precinct sixty days and contends authority for this position from the Constitution of Utah, Art. IV, Sec. 2. This position Respondents disagree with and submit is not supported by the case law and reasonable interpretation of the Utah statutes. At the outset, the section of the constitution which Appellant relies upon for its authority does *not* mention

one word about an *elector*. This section is titled qualifications to vote and sets forth some qualification. Sections 3, 4, and 5 of article IV of the constitution must also be considered as well as other statutes of the state and the case law for proper definitions to this term Elector. We would submit that if section 2 of article IV is all inclusive and sets forth the full definition, then why did the framers of the constitution enact section 5, article IV, and set forth the proposition that *Electors* are to be *citizens of the United States*. Section 2 already requires the qualifications to be that of "Every Citizen of the U.S." It is obvious that section 2 is not intended as the definition of an Elector but only constitutional guidelines for *qualifications to vote* . . . as is stated.

Section 20-2-29, Utah Code Annotated sets forth additional requirements for "Qualifications to vote" stating registration is a prerequisite to voting. . . . No person shall hereafter be permitted to vote at any general, special, municipal or school election, or at any primary election . . . without having first been registered. . . . The constitutionality of registration laws has been challenged many times and upheld. In Utah, the case of *Earl v. Lewis,* 28 U. 116, held that the Legislature may rightfully enact a registration law which merely regulates the exercise of the elective franchise and does not amount to a denial of, or abridge or impair, the right itself.

Section 20-6-1, Utah Code Annotated sets forth additional requirements for "Qualifications to vote" as it pertains to voting by absence or physical disability. Said

section holds that any *qualified elector* who has complied with the law in regard to registration, and who on the day of election is absent from the county or city of which he is an elector . . . and any physically disabled elector who is confined in a hospital . . . or any other place . . . who has complied with the law in regard to registration, may vote at any election held in such county or city as herein provided.

Section 20-17-4, Utah Code Annotated sets forth additional requirements for "Qualifications to vote" for people in military service by defining . . . the term elector in military service shall mean any person or persons *qualified* as an elector or electors under the constitution *and laws of the State of Utah* or, being eligible for registration would, *by registration,* be so qualified. Why would this foregoing section use the conjunctive form as to one in the military requirement for electors needing to comply with the Constitution *and* laws of the state if only section 2 of article IV of the constitution set forth all of the definition for electors. The plain meaning of the constitution *and statutes* of the state must be considered we would submit.

In an effort to further unscramble the definition of the key word, Elector, Blacks Law Dictionary, 4th Edition, gives the definition of elector as "a duly qualified voter; one who has the vote in the choice of any officer; a constituent. The case law definition of said term elector states one who elects or has the right of choice or who has the right to *vote* for any functionary or for the adoption of any measure. (*DeBanche v. City*

of Greenbay, 277 NW 147, 148) *Aczel vs. United States,* 232 F. 652, 657, defines elector in a narrower sense, one who has the general right to vote and the right to vote for public officers, one authorized to exercise their elective franchise. *McEvoy v. Christensen,* 159 NW 179, 181, held although the term electors and voters are sometimes used interchangeably, the meaning is not precisely the same. Electors being properly applied to all those *entitled* to vote, whereas voters appropriately designate only those actually voting.

The majority rule seems to hold that the definition of an eletcor is *one qualified to vote.* In the case of *School District v. Cook,* 424 P. 2d 751, 759, the court held that until a person *qualified* to exercise the privilege of voting *actually* takes advantage of his franchise, he does *not become an elector. Kuhrt v. Sulley County Board* 176 NW2d 479, 481, holds an elector includes not only those persons who vote, but also those who are *qualified* and who fail to exercise their rights of franchise. Citizenship and residence alone do not make one an Elector but an elector is one who is qualified to vote held *Donovan v. Comerford,* 162 NE 657. *Grossen v. Registrar* 59 So. 2d 461, 463, held an elector was a person duly qualified to vote, regardless of whether he has exercised his right to vote. The Arizona case of *Ahrens v. Kerby* 37 P. 2d 375, 378, defined the term *qualified electors* and *electors* as used throughout *constitutional* and *statutory* provisions governing initiative and referendum petitions to be synonymous so as to *require all persons signing petitions to comply with registration*

law before doing so. Other jurisdictions have required the signers of *petitions* to be *registered. State v. Dunn,* 235 P. 132; and *Coney v. Topeka,* 149 P. 689.

62 CJS, Municipal Corporation, section 17 (b) sets forth the general rule that statutory requirements as to the *number* and *qualifications* of the *signers* of petitions be fully met. The petitioners *must* actually and bona fidely possess the required qualifications *in their own right at the date of the filing of the petition.* Since the names to a petition basically is a major step in granting jurisdiction in the area for which the petition is prepared, it is obviously imperatve that the signers do properly fit into that basic category designated by the statute.

The "town" as described in Appellant's petition was represented to have a population of 153 of which 94 are adults and 59 children. Ninety four (94) was set forth by Appellant to be the total electors in the proposed new town and 57 was set forth to be the number and majority of Electors on the petition of Appellants. However, when the Salt Lake County Clerk's Office checked the named petitioners with the Registration Records, there were only 17 on Appellant's Petition who were registered to vote, but 47 registered voters on the opposition petition . . . clearly being no majority of the electors for incorporation as that statute requires. In fact, some of the signers of Appellants petition were also signed on the petition filed with Respondents by those in opposition to Appellants petition and who would be in the class of Intervenors herein. At this time,

Respondents are without information as to which side of this issue some petitioners are on since their names appear on both proponents and opponents petition. Since the law is clear that one may withdraw his name from a petition at any time prior to the time that said petition has been acted upon, Respondents are put in the position of making factual determinations in this matter and not serving as a rubber stamp as Appellants would desire them to do. In *Aukamp v. Diehm,* 8 A. 2d 400, 401, the court considered the question of granting a liquor license based upon a signed petition by 25% of the electors . . . the court held the word "Elector" is used in the sense of one qualified to vote at the election and therefore one who *at the time of signing the petition was a registered voter. . . .* Otherwise, the commissioners (Board of County Commissioners) have *no way of ascertaining whether the requisite number of signers of the petition are electors.* This is the exact dilemma here before the court. How can the board of county commissioners determine if one is an elector without checking the registration records to determine such? The mere fact one asserts in a petition that he or she is an elector does not make it so. Other than the voter registration records, we would submit there would be no reasonable way to check ones qualifications as an elector. Thus, it appears to Respondents that one *must* be *registered* to be qualified to vote; an elector being required to be qualified to vote also logically requires that one to be an elector must be registered with the county clerk in the State of Utah.

The second exception raised by Respondents to Appellants compliance to the statutory requirements of section 10-2-6, Utah Code Annotated, is the issue of whether Appellants qualify as an *unincorporated town.*

It is recognized that the term "Town" has a different meaning in different jurisdictions. Historically, the word town originated for a change in the orthography . . . and evolved from the Anglo-Saxon word "tun" meaning an enclosure. This word has developed a more comprehensive meaning in the United States and has generally been used to denote a collection of inhabited houses or a hamlet between a village and a city in size, located at a *certain place.* Said place has been considered to be a closely populated place whether incorporated or not as distinguished from the county or from rural communities. (56 Am. Jur. 2d, Municipal Corporations, section 76) The case of *Taylor v. Edison,* 13 SW 263 held that a town was an aggregation of people living in very close proximity.

It became necessary to distinguish towns as to incorporated and unincorporated since there became many areas with people living in very close proximity and designated as a certain place which was very identifiable but which chose not to be incorporated. Thus, statutes were enacted to permit towns in some jurisdictions to operate under some laws as incorporated towns but still remain and be unincorporated. Thus, these statutes became known as unincorporated town statutes and specifically granted to these areas the right to govern and rule themselves as a closely held interest group with

common goals and objectives without being incorporated. Many of these unincorporated town acts were abandoned as the population grew. The act herein in question was originally enacted in 1884 while Utah was under the jurisdiction of the Federal Courts. In 1898 the Revised Statutes of Utah, Section 299 approved the incorporation of towns as first enacted and said law has been brought down to the present time without any substantial revisions or changes (*Woodring v. Straup,* 45 U. 173). In the late 1800's the language as to the town and its being incorporated or unincorporated at this time had a very distinct meaning. Thus, the general rule and definition of an unincorporated town was considered to be any large collection of houses and buildings, public and private, constituting a ***District*** *place* with a *name* and not incorporated as a city. (62 CJS, Municipal Corporation, section 64)

The courts have held that the term *unincorporated town* was one specifically created by Legislative enactment. It was intended to apply to a specific category of area, being to establish a town government for those certain communities which were not incorporated but *assumed a government as a town.* The courts determined that terms used in statutes must be given their plain, ordinary meaning unless such meaning was inconsistent with the manifest intention of the statutory provisions that one was construing. Thus, the term ***unincorporated*** when used to describe land area of a county ordinarily would mean part of the county *outside of incorporated cities.* (*City of Olivette v. Graeler,* 338

SW 2d 827) The case of *Board of Commissioners of Nye County vs. Schmidt,* 157 P. 1073 specifically referred to unincorporated town governments in their statutes and the court held that the law will not allow a revocation or aleration of a statute by construction when the words have their *proper construction without* it. The court indicated that said term unincorporated town applied to *certain communities* which were not incorporated, but that did in fact assume and operate a government as a town. Said court reaffirmed the common and well followed rule of statutory construction that requires a court to avoid interpretations when that result would result in an absurd consequence and/or contrary to the plain meaning of the statutory language. Clearly the word town and city carries with it the idea of a considerable aggregation of people living in close proximity with each other in a community or in a collective body of inhabitants. (*Holguin v. Villalobos,* 212 SW 2d 498) (*Congregation of Sisters v. Glassell,* 20 So. 2d 923). These areas ought to be politically and *socially* an aggregation of people living in close proximity, (*Cunningham v. Seattle,* 84 P. 641) and ought to be distinguished from the country or rural areas that appear as communities. (*Denver v. Coulehan,* 39 P. 425)

The terms city and town have on many occasions as it relates to the use herein in question been used interchangably and have been construed to possess the same relative requirements. These words imply a unity and continuity of territory. The words imply that this territory have an idea of compactness, unity and continuity

and an assemblage of inhabitants living in the vicinity of each other. (62 CJS, Municipal Corporation, section 9). 56 Am. Jur. 2d, Municipal Corporations, section 19, sets forth the proposition that the term city ordinarily indicates a municipal corporation of the largest and highest class . . . generally possessing a municipal court and other administration of local affairs . . . created for municipal purposes, because it is a miniature government, having legislative, executive and judicial powers. It is a public institution for self government and local administration of the affairs of state. Thus, in *Chesapeake v. Silver Grove* (249 SW 2d 520), the court held that the words city and town imply that the real estate incorporated should be reasonably susceptible to municipal *development* and that some benefits will be returned to the incorporated area.

It is submitted that the area in question herein does not possess the qualities set forth above. By nearly every test given, there appears to be little relationship to the requirement of an unincorporated town. The area of Salt Lake County encompassing the "Cottonwood Area" was well established long prior to the time when the Cottonwood Mall (a commercial business area) was established. This area consists of considerable residential areas and covers a large geographical area. The Appellnts herein have taken a very limited number of properties immediately surrounding the Cottonwood Mall consisting of several apartment houses as the total boundary area for their proposed city. Upon looking at the map of the proposed boundaries of said city, it

appears that the dividing lines for said city separate properties of like kind and description and use. Respondents can in no way determine any reason why one property in the very same area was included and their neighbor next door was excluded except for the factor or need on Appellants part to gain enough signers for their petition. The people who have been *excluded* are in just as *close proximity* to each other and the Appellants as those people who are included. The area that has been *excluded* is as populated and developed as the area included except there are no commercial developments like the Cottonwood Mall. The properties immediately surrounding the Cottonwood Mall Shopping Center is no more identifiable to the Mall than the neighbors surrounding said area that have been *excluded.* The distinct name designation test does not apply any differently to the included area than the excluded area. There has never been any *assumd town government* nor any *ccmmunity development* in this entire area.

The people included and excluded attend the same churches and participate in the same political districts, thus showing no distinction as to the political or social tests which a town possesses. There are no barriers (either natural or artificial) between the included and excluded area. In fact, the boundary lines cut down the middle of streets with similarity of property on both sides of the street, cutting between property lines of abutting neighborhood property with similar houses on each property, and contains very irregular and protruding boundary lines so as to include and exclude those

specific properties that are favorable or unfavorable to Appellants position. In short, the facts are that the area excluded and included are the same, with similar type and quality, homes, possessing the same degree of compactness, unity and continuity with assemblages of inhabitants living in close proximity to each other with intermingled social and political interests. The included area is a very small portion of territory comprising a larger unincorporated inhabited area of Salt Lake County.

Respondents therefore respectfully submit that the area does not meet any of the tests used to establish an unincorporatd town, save it be the fact the area is not incorporated.

POINT III

APPELLANTS PROPOSED CITY IS NOT IN THE BEST INTEREST OF ALL OF THE COMMUNITY, IS AGAINST PUBLIC POLICY AND IS CONTRARY TO THE GENERAL LAW AS TO GUIDELINES FOR CREATION OF MUNICIPAL CORPORATIONS.

A general discussion of principles to be considered in the creation of Municipal Corporations is contained in 62 CJS, Municipal Corporations, section 7, setting forth overall considerations which must be resolved to properly create said corporation. It is well recognized that a body seeking incorporation as a municipal corporation *must* show itself to be substantially within the terms of the legislative requirements. The *general good* of an entire community must be considered however. The word "community" was not necessarily confined

to the proposed corporation limits in considering the issue of promoting the general good of the community in the case of *Virginia Bennett v. Garrett* (112 SE 772). Thus, where corporation limits are *carved* out of a *thickly* settled section, it *must* be construed as *embracing the whole section* with consideration given to those residing *without* as well as those residing *within* the proposed limits of the community. The question is, will the advantages to the whole overbalance the disadvantages.

The population and territory of a proposed municipal corporation must be carefully considered in creating Municipal Corporations. 62 CJS, Municipal Corporations, section 8, discusses questions as to population and affirms that such questions are within the province of the legislature with minimum numerical requirements being mandatory to follow. In determining whether the requisite population exisits, only *actual* residents should be counted with temporary sojourners being excluded from the count. The legislature may or may not impose density requirements of certain population per square mile, but the area incorporated *must* bear a *just proportion* to the population included. The power to establish a municipality cannot lawfully be exercised where the population is absurdly disproportionate in numbers to the area defined by boundaries.

The term "Municipal Corporation" implies the organization of a certain geographical district under authority of law, including within its jurisdiction and control a certan geographical area; territory being an

indispensible element of the existence of a municipal corporation. Where the statute fixes no limitations as to territory requirements, no hard and fast rules can be laid down as to the extent of territory which may be incorporated as a municipality, but such cases must be determined largely according to its *own facts*. The area incorporated should be suitable for municipal purposes, reasonably susceptible to *municipal development* and so conditioned to be subject to municipal government. Consideration must be given to what benefits may be returned to the lands or the inhabitants thereof. It has been held that the area *must* be of such size that the inhabitants may be said to have such human or social contact as to create a community of *public interest* and duty requiring, in consideration of the *general welfare*, an organized governmental agency for the management of their local affairs of a quasi public nature. *Reasonable expected growth of the municipality is needed.* The word city implies *unity, continuity* of territory, *compactness, continuity*, and an assemblage of inhabitants living in the vicinity of each other. The bisection of a city or *thickly* settled community will be carefully considered. Where the only apparent purpose is to *increase the tax base and/or obtain a sufficient number of people necessary to incorporate, grounds to refuse incorporation exist.* (62 CJS, Mupnicipal Corporation, section 9.)

Appellant has attacked the Respondent being anything other than a rubber stamp in approval for their petition. Admittedly there is a separation of powers between th legislative, executive and judicial branches of

our government but clearly the law is not so rigid and fixed that the judiciary and executive branch agencies cannot be vested with the power to determine if facts, events and circumstances have been met. The Utah courts have uniformly held that the legislature can delegate power to determine if some facts or events have been met. Courts and agencies can determine if municipalities have exceeded their powers under the law, and may inquire into what the law is and whether or not the law has been violated or complied with. (*Young v. Salt Lake City,* 24 U 321) The constitution requires the organization of cities and the determination of their boundaries by general laws; they *must,* as a matter of necessity, become effective by events to happen in the future, and to determine when such events have happened, the legislature *must* provide some tribunal to determine the facts. The enlargement or restriction of a boundary is still made by the law as passed and not created by the fact finder who only determines that the *acts, facts and conditions have been met.* Various groups daily determine compliance with laws as passed in determining, whether conditions have been met. (McQuillian, Municipal Corporations, Vol. 1, section 3:05)

If the legislature in the matter before the court has failed to give enough specific instructions and guidelines to the general law of 10-2-6, Utah Code Annotated, to carryout the plain intent of said act of incorporating, then the board of county commissioners under the general grants of power for public policy and welfare must be granted the power or else the entire section herein

in question would be void. If the actions of the Respondents are considered to be discretionary, we would consider such power not as delegation of legislative functions but rather the carrying out of power granted to boards of county commissioners to govern local affairs in an orderly manner for the best good of the whole of their jurisdiction and to the best interest and welfare of the citizens as a whole. If said actions of Respondents are considered to be discretionary but an unconstitutional grant of legislative power, then said section 10-2-6, Utah Code Annotated should be declared to be void and Appellants then must seek their remedies with the legislature to enact other legislation setting forth those guidelines to accomplish their purposes. However, if said actions of Respondents are considered to be ministerial and the action sought from Respondents to be mandatory for their performance, then we submit that said act is void on the basis of public policy considerations that said act would require Respondents to perform acts clearly absurd is result and disruptive to the overall governmental operations in the southeast section of Salt Lake County.

The area to be incorporated *must* possess a reasonably developed community center which will be the focal point for the common social, economic and cultural ties that need to bind a community. (*Scharping v. Johnson*, 145 NW 2d 691) The entire area proposed for the city contains no area for expansion to provide for orderly governmental growth. There is no area for parks, playgrounds, schools, churches, libraries, civic centers, mo-

tels, hotels, etc. that are generally attendant to cities. The only way such future governmental facilities could be provided would be by annexation proceedings to surrounding areas. Obviously the power struggle would be on for additional space for expansion. The proposed city area does not possess any governmental services that generally are provided for residents of cities; namely, police protection, fire protection, water, disposal plants, etc., nor facilities or area to provide the many services that are now being performed for the area residents. The disadvantages to Salt Lake County in having an oasis of a few block area right in the middle of areas which it provides services to, and probably would be asked to continue to provide for the area proposed in this new city, could be beyond ones imagination in scope and comprehension to consider. We can only speculate here but feel compelled to point out some disadvantages since Appellant has stated that Respondents were without any reasons for their decision of denial and therefore acted in an arbitrary and capricous manner.

At the preset time, traffic and parking at the Cottonwood Mall is a serious problem. Additional parking space is needed to handle overflow traffic congestion. Respondents would have no control over this problem for the street area included within said city. 4800 South Street and Highland Drive are major traffic streets for Salt Lake County. Parking has been requested upon these streets during busy times which has been turned down due to traffic conjestion problems.

The planning and zoning problems which this area could create would be out of the control of Respondents which could be at cross purposes to the Master Plan of Salt Lake County Planning and Zoning. This area is so small in size and is situated right in the middle of a densely populated area of Salt Lake County. Whatever is done in the proposed city area would have a very direct effect upon the entire surrounding area and the inhabitants. However, no control nor even right to object nor be heard would vest in area residents who would be forced to "like it or lump it" when adverse decisions would be made affecting their interests. Said area being just so small, there could be no buffer zone for orderly development.

If Appellants prevail, shopping areas in the entire valley of Salt Lake County would be best to incorporate so as to retain total control over the property in the area and retain the sales tax revenue for their own purposes. Towns would appear all over the valley in connection with major commercial developments so as to be able to retain revenue from sales taxes. We would submit that county government would be nearly destroyed financially. Counties would be required to provide the services as they do now, but would not be able to obtain the proceeds under which to provide said services, except through very high property tax.

The majority of the property in the area in question is primarily owned by one person and is under his direct and total control. Respondents submit this city is pro-

posed solely for the benefit of selling an electric power plant which was built by the majority property owner to the city. The use of this power plant and accompanying rights to sell electricity was denied by the courts in the case of *Cottonwood Mall v. Utah Power & Light Company,* 440 F. 2d 36.

It is submitted that the legislature in 10-2-6, Utah Code Annotated, didn't intend to permit creation of cities and incorporate by *only* meeting a minimum population requirement, *regardless of any other circumstances.* When the legislature provided that a corporation may be created, we like the court in *Board of Supervisors of Norfolk County v. Duke,* 73 S.E. 456, 459, do not believe that the act contemplated anything of creation of a city in the *middle* of a *thickly* populated area, "and when it provides for the incorporation of a thickly settled community, it does not mean that the community shall be subdivided in accordance with the caprice and whim of a limited portion of the people at the disadvantage of the entire community. Great and unnecessary burdens might be imposed, with great wrong and injury accomplished under such a construction." In our statute, no territory requirement is stated but surely the legislature did *not* intend than a small part of a large area could be incorporated at least when the large area itself is suitable for incorporation and the rights of the people of the large area are affected by the incorporation of the small area.

Probably the best case in point in opposition to the incorporation of small sections of larger areas is *The*

State of Texas v. Perkins, 360 S.W. 2d 555. Over one-half of the total towns territory in this case was owned by one person; as is the case in the matter herein. No natural barriers separated the proposed town from the excluded area, as is the case herein. No legal or logical reasoning existed as to determining the boundary lines, as is the base herein. Many more residences existed in the immediately contiguous and surrounding area that was excluded than the number included, as is the case herein. Purposes in determining who was included and excluded was to gain favorable qualified voters, as is the case herein. The statutes permitted incorporation by "Towns and villages" as is the case herein.

The court held that defendant was *not* a town as the statutes prescribed. That instead it was only a *portion* of a larger unincorporated, inhabited community, which could *not* be lawfully incorporated without *including substantially all of the town* as it existed at the time of its purported incorporation. By including only a small portion of the area, the court found said boundary to be chosen arbitrarily (unreasonably, not naturally . . . without fair cause or reason) and at the whim and caprice of those who chose the boundary lines. As to these actions, the court held that "if the incorporating petitioners do not respect the rights of the inhabitants of a major portion of the town or village they imperil the validity of their acts in attempting to incorporate . . . our Legislature has consistently authorized towns and villages, *not just an arbitrary slice* thereof, to incorporate." Thus, the conclusion was "Compelled"

to be reached that the attempt to incorporate was without authority of law and *contrary to the public policy of the state.* Furthermore, the court required that the requisite population *must* be shown by the Federal Census as last taken, which it wasn't in the Perkins case nor in the case before the court.

To the foregoing reasoning in *Texas v. Perkins,* we can totally agree and endorse and submit to the court to be the only reasonable, logical conclusion that could be reached.

CONCLUSION

The lower court found that the Respondents did not abuse their discretion. We would submit that said conclusion of the lower court is well substantiated by the foregoing discussion herein. The plan clearly was ill conceived. The best good of the whole of the community will not be served, no reasonal basis for the boundaries exist, the impact upon the County would be most disruptive, considerable problems could arise in the future.

The reasonable meaning of the language of the statute with its fair interpretation to statutory requirements do not exist, and the statutory requirements for number

of qualified electors and town requirements are not existent. Respondents therefore urge that the lower court decision be affirmed and the case dismissed.

Respectfully submitted,

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