

August 20, 1984

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Salt Lake City, Utah 84101

RE: Water Service to Circle K Store
located at 7800 South 700 East

Dear Messrs. Clyde and Appel:

Your letter to the City Council, dated August 16, 1984 has been referred to us. Inasmuch as the one Utah case you cited was a 1950 North Salt Lake case, let us cite from a 1980 North Salt Lake case, wherein the Utah Supreme Court wisely noted:

In this, as in most controversies, there are two sides to the coin, neither wholly irrational.
Triangle Oil, Inc. v. North Salt Lake Corporation,
609 P.2d 1338 (Ut. 1980) p. 1339.

Your scholarly five page letter certainly raises some fine points on your side of the matter. Rather than spending the time at this stage of the situation to respond in kind with a five page letter concerning our client's legal position, let us suggest that the practical and real issue before us is getting the water to your client.

Sandy City policy requires your client to sign an annexation petition to obtain municipal water service. Your client can obtain water by complying with this policy. Mr. Jeffrey Appel stated in an open and public City Council meeting that Circle K was willing to annex the property into Sandy City. There appeared to be no legal or factual barriers preventing annexation.

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August 16, 1984

FILE NO.

*ADMITTED IN WASHINGTON, D.C.
**ADMITTED IN ARIZONA AND WYOMING

Sandy City Council
800 East 100 North
(440 East 8680 South)
Sandy, Utah 84070

Re: Water Service to Circle K Store
Located At 7800 South 700 East

Dear Council Members:

Jeffrey Appel of this office had the opportunity to appear before you on July 17, 1984 regarding this matter. At that time, we were speaking in terms of annexation of the Circle K property at the above location to Sandy City. The reason for our pursuit of that course of action was based on representations to our client by Sandy City personnel that this was the only available means by which to acquire Sandy City water service to the property. These representations were made despite the fact that there had been historical water service to the property by Sandy City and its predecessor, Union and Jordan Irrigation Company, as evidenced by the existence of a water meter on the parcel at the time the property was purchased by Circle K. For the reasons set out below, we firmly believe that the Circle K property located at 7800 South 700 East is entitled to immediate water service from Sandy City and that annexation to Sandy City is unnecessary as a condition to its receiving water service.

The day after the meeting with the Council, we began to explore the circumstances surrounding the historical water service to the Circle K parcel in hopes of determining the basis for water service, the reason the water meter was there and why the meter had then been removed. Our clients were somewhat disturbed and confused at this point in time in that they had been assured by the seller that the lot had Sandy City water and had been served by your system for quite some time.

In the course of this inquiry and research, we uncovered the following pertinent facts:

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1. When one of the predecessors-in-interest to Circle K, Jesse Sharp, purchased the property in 1946, the residence on the parcel (which was not removed until Circle K began construction this past year) was connected to the Union and Jordan Irrigation Company and was within the service area of that company. The culinary or domestic water service aspect of Union and Jordan was a public utility regulated by the Public Service Commission.

2. Pursuant to an agreement dated November 15, 1973, Sandy City purchased the entire water system from Union and Jordan, including all the assets and obligations thereof; which includes the obligation of continued water service. Under the terms of this agreement, Sandy City undertook all of the service obligations of Union and Jordan within the boundaries of the then existing service area of that utility. At this time, the predecessors-in-interest of Circle K were receiving culinary water service from this system.

Circle K, as a successor-in-interest to this property, is entitled to water service upon the same terms and conditions and at the same rate as all other similarly situated customers within the Union and Jordan service area. As the successor-in-interest to the Union and Jordan system, Sandy City is obligated to provide that service pursuant to the express terms of its agreement with Union and Jordan.

Paragraph 3(a) of the agreement expressly provides:

3. In consideration of such sale and in connection therewith, the City hereby covenants and agrees:

(a) That following the sale it will continue to supply culinary water to all culinary users of Company who desire to continue service; and that in respect to such customers residing outside the corporate limits of City, it will not charge such customers higher rates than it charges other customers residing outside City for similar service.

The property has been continuously provided culinary water from the Union and Jordan system from the time of this contract

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until Circle K commenced construction. At that time, Sandy City removed the water meter without the consent of Circle K midway through Circle K's construction efforts. The provision concerning rates for water service to customers on the old system indicates the overriding intent of the agreement that water users of the old utility continue to receive service on a non-discriminatory basis, even if they reside outside of Sandy's municipal boundaries.

Paragraph 3(c) of the agreement obligates Sandy to provide water service not only to existing customers, but also to potential customers within the entire service area of the old company. Specifically, Paragraph 3(c) provides: "That to the best of its ability, City will ensure an adequate supply of culinary water to all areas now serviced by the company which are now undeveloped as the same become developed". By this provision, Sandy City obligated itself to provide water service to all undeveloped property within the Union and Jordan service area that may be developed in the future. Of course, if Sandy City does not have the ability to serve them -- for instance, due to economic constraints of service or lack of available water supply -- then Sandy City may temporarily deny water service, however, Sandy City has never contended that economic feasibility or water availability is a problem. Its denial of service is based solely on a desire to force the annexation of this property into its corporate boundaries. This is not a proper basis for the denial of water service to Circle K in light of Sandy's express contractual obligation to continue to serve the property (current customers and newly developed properties) within the Union and Jordan service area.

Based on the foregoing, it is our opinion that Circle K has an enforceable right to receive water service to its property from Sandy City. Refusal to serve this property in the absence of annexation is wrongful and violates the express terms of the Union and Jordan-Sandy City agreement. There is no ambiguity to this agreement and no basis to controvert its express intent.

As previously stated, in its purchase of the Union and Jordan Irrigation Company, Sandy City took over the operation of that public utility in toto and acquired all of the obligations of that utility. The case of North Salt Lake v. St. Joseph Water and Irrigation Company, et al., 118 Utah 600, 223 P.2d 577 (1950) provides support for the position of Circle K. That case ruled that acquisition of a water company by a municipality carried

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with it the obligations of the former company and guaranteed the continuation of the rights and privileges of the water users of the Company. The point is that while a city may normally refuse service to potential water users outside municipal boundaries, such is not the case where the city acquired a working water system. In the latter situation, the City must provide service as the predecessor company did and may not discriminate against classes of water users.

This statement is supported by decisions in other jurisdictions. The case of Fellows v. City of Los Angeles, 90 Pac. 137 (Cal. 1907), in the fact situation fairly similar to that at issue in this matter, the California Supreme Court provided relief for the water user:

The water, as we have seen, was appropriated to a public use, of which plaintiff was and is a beneficiary. The City cannot thus continue to hold and control property so appropriated to public use and at the same time refuse to perform the public duty which such possession and control imposes.

90 Pac. at 141.

Applying this case to the instant situation, the water of the Union and Jordan Irrigation Company was devoted to public service and service to Circle K's lot was continued by Sandy City until this year. Sandy City cannot contrive to strip the service from that lot without breaching its contract and obligation to persons within the service area of the old public utility, specifically Circle K.

In the case of Sawyer v. City of San Diego, 292 P.2d 233 (Cal. 1956), the California Supreme Court reviewed another similar situation, in which a municipality sought to deny contractual water service outside of its boundaries. The California Supreme Court viewed water service in terms of a trust relationship between the city and the water users in the old service area. That Court quoted the case of Durant v. City of Beverly Hills, 102 P.2d 759 and Fellows, supra, stating:

When necessary for its purposes a municipality may purchase an entire water plant system so that 'after operating the system and supplying the persons entitled to use the water, it could

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devote the surplus to the use of inhabitants of the city.' (citations omitted). In these operations the municipality is not selling surplus or excess waters to the prior users. The purchaser of the system is impressed with a trust and the city, 'with respect to this part of the water, will hold title as a mere trustee bound to apply it to the use of those beneficially interested'.

292 P.2d at 236.

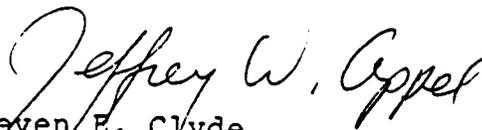
As the current owner of a lot served by Union and Jordan and later by Sandy City under the agreement, Circle K is one of the intended beneficiaries of the water formerly within the service jurisdiction of the Union and Jordan Irrigation Company. When Sandy City took over the entire operation of that water service entity, it became the trustee of the waters destined for service within the service area, including the lot purchased by Circle K. Sandy City's obligation under this agreement is to serve all lots within the service area.

We believe that the City has adopted a mistaken and illegal position with respect to the denial of water service to Circle K. Hopefully, this letter will aid in the clarification of the misconceptions surrounding this situation. By this letter, we request that Sandy City live up to its contractual obligation and immediately provide a water connection and commence water service to Circle K's property located at 7800 South 700 East.

Circle K has already suffered losses due to the delay of the opening of its store. We sincerely hope that this unfortunate situation can be immediately resolved without further delay and without the necessity of legal action.

Respectfully submitted,

CLYDE, PRATT, GIBBS & CAHOON


Steven E. Clyde
Jeffrey W. Appel

/dp
cc: Jim Howell
Circle K Corporation