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Opinion No. 04-058

Amendment to Municipal Incorporation Statute

QUESTION

A proposed amendment to Senate Bill 3179 validates the corporate existence of territories incorporated within three miles of an existing municipality if territory was incorporated under the mayor-aldermanic charter after January 1, 1996; the territory was included as an incorporated area in an approved countywide growth plan as of January 1, 2004; the territory contains at least 1,300 residents; and the nearest existing municipality does not object to the existence or continued existence of such territory as a municipality in a court proceeding. Does the amendment establish a constitutional classification?

OPINION

The amendment falls outside the caption of the bill in violation of Article II, Section 17, of the Tennessee Constitution. Moreover, the classification established in the amendment is unconstitutional under Article XI, Section 8, and Article XI, Section 9, of the Tennessee Constitution because it suspends the general law requirements for incorporation and is not supported by a rational basis.

ANALYSIS

This opinion concerns the constitutionality of a classification established in a proposed amendment to Senate Bill 3179. The bill contains the following caption:

> AN ACT to amend Tennessee Code Annotated, Title 6, Chapter 1, Part 2, relative to incorporation of unincorporated territory having a population in excess of one thousand (1,000) adjacent to municipalities having a population of less than ten thousand (10,000).

The proposed amendment would rewrite the initial bill. A new subdivision (3) would be added to Tenn. Code Ann. § 6-1-201(b). This statute concerns incorporation of cities under the mayor-aldermanic charter. The new subdivision would provide:

(3) IF:

(1) A territory was incorporated as a municipality after January 1, 1996 within three (3) miles of an existing municipality and such nearest existing municipality does not object to such territory incorporating as a municipality;

(2) Such territory is included as an incorporated area on the County Wide Growth Plan Approved by LGPAC as of January 1, 2004;

(3) Such territory contains at least thirteen hundred (1,300) persons who are actual residents of the incorporated area on the effective date of this act;

(4) Such territory has acted in all respects as an incorporated municipality from the date of its incorporation; and

(5) The nearest existing municipality adjacent to such territory does not object to the existence or continued existence of such territory as a municipality in a court proceeding;

THEN, such territory is declared to be and is authorized to be a municipality, notwithstanding the provisions and restrictions in subsections (a) and (b) to the contrary; provided that the provisions of § 6-58-112(b) and (c) shall apply to such municipality.

(Proposed amendment to SB 3179/HB 3151). Other provisions of the amendment would alter provisions of Tenn. Code Ann. § 6-1-201(a) to reflect the new subdivision. Section 4 of the amendment contains a severability clause.

The request asks about the classification established in this amendment. As an initial matter, however, we note that the amendment falls outside the caption of the bill in violation of Article II, Section 17, of the Tennessee Constitution. Under that provision, "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title." The caption of the bill contains the following restriction: "relative to incorporation of unincorporated territory having a population in excess of one thousand (1,000) adjacent to municipalities having a population of *less than ten thousand (10,000)*." (Emphasis added). If the legislature has adopted a restrictive title where a particular part or branch of a subject is carved out in the limited title, then the body of the act must be confined to the particular portion expressed in the limited title. *Tennessee Municipal League v. Thompson,* 958 S.W.2d 333 (Tenn. 1997). The amendment is not restricted to cities within three miles of a city with a population of less than ten thousand. For this reason, it falls outside the caption of the bill in violation of Article II, Section 17, of the Tennessee Constitution.

The amendment applies to territories that meet the following five criteria: first, the territory must have been incorporated since January 1, 1996; second, the territory must be included as an incorporated area on the countywide growth plan approved by the Local Government Planning Advisory Committee as of January 1, 2004; third, the territory must contain at least thirteen hundred residents on the effective date of the act; fourth, the territory must have acted in all respects as an incorporated municipality from the date of its incorporation; and fifth, the nearest existing

municipality adjacent to the territory must not object to the existence or the continued existence of the territory as a municipality in a court proceeding. It is not clear what evidence would satisfy this requirement. It is also not clear whether the fourth requirement could only be satisfied if the territory had continuously acted as a city up until the effective date of the act. Any city that meets these criteria is declared to be a city even if it failed to meet the requirements for incorporation in Tenn. Code Ann. § 6-1-201(a) and (b). Under these provisions, a territory, in order to incorporate, must have a population of at least 1,500 residents; it must have developed and held a hearing on a plan of services; and it must be located more than three miles away from an existing municipality and five miles away from an existing municipality of 100,000 or more in population.

In effect, the amendment creates a closed class of cities that incorporated between 1996 and 2004. The corporate existence of any city that falls within the class is validated, even if the city is located within three miles of an existing city, has fewer than 1,500 residents, or failed to develop a plan of services when it incorporated. Based on the cities listed in Volume 13 of the Tennessee Code Annotated, this class potentially includes the following cities: Bean Station, Coopertown, Harrogate, Hickory Withe, Midtown, Nolensville, Plainview[1], Pleasant View, and Three-Way. Of these, Midtown, Three-Way, and Plainview had a 1999 population of less than 1,500 residents.

Any discussion of the amendment must be placed in the context of a series of lawsuits regarding municipal incorporation. In 1997, the Tennessee Supreme Court found unconstitutional an act that changed the incorporation requirements under Tenn. Code Ann. § 6-1-201. *Tennessee Municipal League v. Thompson*, 958 S.W.2d 333 (Tenn. 1997). The General Assembly then passed an act permitting certain cities that had incorporated in reliance on this act and a private act also found unconstitutional to hold incorporation elections. 1998 Tenn.Pub.Acts Ch. 1101, § 9(f)(3)(B). The Tennessee Court of Appeals ruled that act unconstitutional under Article XI, Section 8, of the Tennessee Constitution because it found the act created a class of territories that was not supported by a rational basis. *Town of Huntsville v. Duncan,* 15 S.W.3d 468 (Tenn. Ct. App. 1999), *p.t.a. denied* (January 24, 2000), *rehearing of denial of appeal denied* (March 13, 2000), *order amended* (May 1, 2000), *appeal denied, recommended for publication* (May 1, 2000). In 2001, the General Assembly passed an act validating the corporate existence of certain cities incorporated under Tenn. Code Ann. § 6-1-201 and still operating when the act was passed. 2001 Tenn.Pub.Acts Ch. 129. The Court of Appeals has found that statute unconstitutional under Article XI, Section 9, of the Tennessee Constitution because it created a class of territories that was not supported by a rational basis. *Oakland v. McCraw,* 126 S.W.3d 29, *p.t.a. denied* (September 2, 2003).

The cities of Hickory Withe and Midtown have been ordered to cease operating as municipalities. *Oakland v. McCraw,* Fayette County Chancery Court No. 122543 (final order entered February 27, 2004); *State of Tennessee ex rel. Williams v. Midtown*, Roane County Chancery Court No. 14,005 (order dissolving city entered December 3, 2003; motion to stay the order denied

[1] The Tennessee Code Annotated does not list the date of incorporation for Plainview; whether it would qualify to be in the class, therefore, is subject to verification.

at hearing March 12, 2004; written order denying stay not yet entered). A suit challenging the corporate existence of Three-Way is still pending in Madison County Chancery Court. *Humboldt v. Ballard*, Madison County Chancery Court, No. 55416. As grounds, that action states that Three-Way falls within three miles of an existing city and has a population of less than 1,500 and, therefore, fails to meet the incorporation requirements under Tenn. Code Ann. § 6-1-201. These three cities were permitted to hold incorporation elections under Section 9(f)(3)(B) of 1998 Tenn.Pub.Acts Ch. 1101, which was held unconstitutional in *Huntsville v. Duncan*.

Under the general law, a territory must have at least 1,500 residents and be located more than three miles from an existing municipality. *Huntsville v. Duncan*, 15 S.W.3d at 472. The amendment suspends this requirement for the benefit of a closed class of territories. The classification established in the amendment, therefore, must be analyzed under both Article XI, Section 8, and Article XI, Section 9, of the Tennessee Constitution. Article XI, Section 8, of the Tennessee Constitution provides in relevant part:

> The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie, [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

Under the United States Constitution, Amendment 14, Article I, Section 8, and Article XI Section 8, of the Tennessee Constitution, the same rules are applied as to the validity of classifications made in legislative enactments. *City of Memphis v. State ex rel. Ryals*, 133 Tenn. 83, 88, 179 S.W. 631 (1915). All classifications that do not affect a fundamental right or discriminate as to a suspect class are generally subject to the rational basis test. *Harrison v. Schrader*, 569 S.W.2d 822, 825 (Tenn. 1978). Under this test, the classification will be upheld "if any state of facts may reasonably be conceived to justify it." *Id.*

Thus, the sole test of the constitutionality of any particular classification is that it must be made upon a reasonable basis with such reasonableness depending upon the facts of the particular case. *Estrin v. Moss*, 221 Tenn. 657, 430 S.W.2d 345 (1968), *appeal dismissed*, 393 U.S. 318, 89 S.Ct. 554, 21 L.Ed.2d 513 (1969) (upholding a statutory scheme that placed additional regulatory burdens on termite controllers as opposed to others engaged in the business of pest control). The burden of showing that a classification is unreasonable and arbitrary is placed upon the individual challenging the statute. If any state of facts can reasonably be conceived to justify the classification or if the reasonableness of the class is fairly debatable, the statute must be upheld. *Harrison*, 569 S.W.2d at 825-26.

Article XI, Section 9, of the Tennessee Constitution provides in relevant part that "[t]he General Assembly shall by *general law* provide the exclusive methods by which municipalities may

be created, merged, consolidated and dissolved and by which municipal boundaries may be altered." (Emphasis added). In *Oakland v. McCraw, supra,* the Court of Appeals applied an analysis similar to that under Article XI, Section 8, to determine whether a statute was valid under this portion of Article XI, Section 9, referred to as the "Municipal Boundaries Clause."

In *Huntsville v. Duncan,* the Court of Appeals examined an act permitting a certain class of territories to incorporate and found that it was unconstitutional under Article XI, Section 8. The act provided in relevant part:

> (3)(A) Notwithstanding any other provision of law to the contrary, if any territory with not less than two hundred twenty-five (225) residents acted pursuant to Chapter 98 of the Public Acts of 1997 or Chapter 666 of the Public Acts of 1996 from January 1, 1996, through November 25, 1997, and held an incorporation election, and a majority of the persons voting supported the incorporation, and results of such election were certified, then such territory upon filing a petition as provided in Section 6-1-202, may conduct another incorporation election.
>
> (B) If such territory votes to incorporate, the new municipality shall have priority over any prior or pending annexation ordinance of an existing municipality which encroaches upon any territory of the new municipality. Such new municipality shall comply with the requirements of Section 13(c) of this act.

Both the acts cited in the challenged act had been held unconstitutional. The Court found no valid rational basis for the classification in the challenged act. The Court found that the fact that residents in the territories within the classification had expended money and effort to incorporate under an invalid legislative enactment could not justify exempting them from the general incorporation requirements. The Court found no other rational difference between communities that fell within the act and those that did not.

In *Oakland v. McCaw, supra,* the Tennessee Court of Appeals found 2001 Tenn.Pub.Acts Ch. 129 unconstitutional. That act validated the corporate existence of any city that satisfied the following statutory criteria: first, the city had to be incorporated under the mayor-aldermanic charter and elected city officials before December 31, 1999; second, the city had to have functioned as a city continuously from the time it elected officials until the effective date of the act; and third, the city had to have received and expended state funding allocated for municipalities. The act validated the corporate existence of any city that satisfied these requirements, in spite of its failure to comply with the three-mile requirement in Tenn. Code Ann. § 6-1-201(b).

The Trial Court found the act violated the Municipal Boundaries Clause in Article XI, Section 9, of the Tennessee Constitution. The Court of Appeals affirmed the ruling of the Trial Court. The Court found, first, that the act created a special classification of cities in violation of the Municipal Boundaries Clause. The Court then analyzed whether the classification was supported

by a rational basis, although it declined to hold that this analysis was required when determining compliance with the Municipal Boundaries Clause. The Court noted that it was "sympathetic" to the argument that the act created stability and predictability for residents of the territories that came within it. 126 S.W.3d at 42. The Court found, however, that by exempting specific territories from the three-mile incorporation requirement in the general law, the act threatened the "reasonable expectations of existing municipal corporations." *Id.* The Court relied on *Huntsville* to conclude that the fact that citizens had spent time and effort running for city office and organizing the city government did not constitute a rational basis in support of the special classification established by the statute. 126 S.W.3d at 43. Finally, the Court relied on *Huntsville* for the following, more general observation:

> As a final note, we are unable to "discern a rational difference" between Hickory Withe [the city whose corporate existence was being challenged] in the one instance, and the hundreds of other small Tennessee communities who are prohibited from seeking incorporation because these communities lack 1,500 or more citizens, encroach too closely upon the boundaries of existing municipalities, or failed to comply with the plan of services or public hearing requirements set forth in T.C.A. § 6-1-201. "The record does not reflect any intrinsic difference between the community of [Hickory Withe] and these other small communities." We find simply that there is no rational basis to distinguish Hickory Withe from other similar small communities.

Id., citing *Huntsville v. Duncan,* 15 S.W.3d at 473 (citations omitted).

It can be argued that the amendment is materially different from the act found unconstitutional in *Oakland v. McCraw* because, under the amendment, a territory is allowed to remain incorporated only if the nearest adjacent municipality does not object to the existence or continued existence of such territory as a municipality in a court proceeding. It can, therefore be argued that, unlike the statute found unconstitutional in *Oakland,* the amendment protects the "reasonable expectations" of neighboring municipalities that no new cities will incorporate within three miles. We do not think this feature of the amendment is sufficient, however, to distinguish the amendment from the act found unconstitutional in *Oakland*. While the amendment protects the interests of the nearest adjacent city, it does not protect the interests of other existing cities that may be located farther away, but are still within three miles of the new city. Further, as the quotation above reflects, the Court in *Oakland* did not only rely on the fact that the act in that instance did not protect the interests of existing cities. Instead, the Court concluded generally that it could find no "intrinsic difference" between the territories that fell within the classification and those that did not. Similarly, this Office is aware of no intrinsic difference between the cities that fall within the classification established in the amendment and those that do not. For this reason, the classification established in the amendment is unconstitutional under Article XI, Section 8 and Article XI, Section 9 of the Tennessee Constitution because it suspends the general law requirements for incorporation and is not supported by a rational basis.

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