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Opinion No. 13-58

Constitutionality of Annexation by Ordinance

QUESTION

Does annexation by municipal ordinance violate the rights of an affected real property owner under the federal or Tennessee Constitutions?

OPINION

Absent invidious discrimination or an intent to circumvent the "one person, one vote" principle, annexation by municipal ordinance is constitutional. Neither the United States Constitution nor the Tennessee Constitution recognizes a right for a person to retain his or her real property in a particular unit of local government.

ANALYSIS

The Tennessee Constitution grants the General Assembly the exclusive authority to develop the process for creating and altering municipal boundaries in Tennessee. The "Municipal Boundaries Clause" of the Tennessee Constitution states in pertinent part:

> The 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.*

Tenn. Const. art. XI, § 9 (emphasis added).

The General Assembly, acting pursuant to the Tennessee Constitution, permits a municipality to annex territory in accordance with Tenn. Code Ann. §§ 6-51-101 to -121.[1]

[1] The General Assembly recently amended the annexation statutes to delay temporarily most municipalities from, on their own initiative, proceeding to annex certain territory while the General Assembly conducts a review of the annexation process. 2013 Tenn. Pub. Acts, ch. 441. Specifically, Chapter 441 added the following new section to the annexation statutes:

> (a)(1) Notwithstanding the provisions of this part or any other law to the contrary, from April 15, 2013, through May 15, 2014, no municipality shall extend its corporate limits by means of annexation by ordinance upon the municipality's own initiative, pursuant to § 6-51-102, in order to annex territory

Municipalities are authorized to annex territory adjacent to city boundaries either "when petitioned by a majority of the residents and property owners of the affected territory" or upon their own initiative "when it appears that the prosperity of such municipality and territory will be materially retarded and the safety and welfare of the inhabitants and property endangered." Tenn. Code Ann. § 6-51-102(a)(1). Such annexation occurs by the municipality enacting an ordinance after notice and public hearing, *id.*, and meeting the other requirements of Tenn. Code Ann. § 6-51-102. An annexation process commenced under Tenn. Code Ann. § 6-51-102 generally does not require a municipality to hold a referendum to determine whether voters who reside in the territory to be annexed are in favor of the annexation. *See* Tenn. Code Ann. § 6-51-102. *But see* Tenn. Code Ann. §§ 6-51-102(a)(2), -104, -105, and -109 (requiring in certain cases that annexation petitions be approved by voters in a referendum or election). An "aggrieved owner of property" that borders or lies within territory that is the subject of an annexation ordinance may contest an annexation ordinance by filing a suit in the nature of a quo warranto proceeding in accordance with Tenn. Code Ann. § 6-51-103. *See* Tenn. Code Ann. § 6-51-103(a)(1)(A).

The Tennessee Supreme Court has succinctly explained the purpose of Tennessee's annexation statutes, stating:

> The whole theory of annexation is that it is a device by which a municipal corporation may plan for its orderly growth and development. Heavily involved in this is control of fringe area developments and zoning measures to the end that areas of unsafe, unsanitary and substandard housing may not "ring" the City to the detriment of the City as a whole. In a word, annexation gives a city some control over its own destiny. The preservation of property values, the prevention of the development of incipient slum areas, adequate police protection within a metropolitan area, and the extension of city services to those who are already a

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> being used primarily for residential or agricultural purposes; and, except as otherwise permitted pursuant to subdivision (a)(2), no such ordinance to annex such territory shall become operative during such period. As used in this subsection, "municipality" does not include any county having a metropolitan form of government.
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> (2) If, prior to April 15, 2013, a municipality formally initiated an annexation ordinance delayed by subdivision (a)(1); and if the municipality would suffer substantial and demonstrable financial injury if such ordinance does not become operative prior to May 15, 2014; then, upon petition by the municipality, the county legislative body may, by a majority vote of its membership, waive the restrictions imposed on such ordinance by subdivision (a)(1).
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> (b) On or before January 14, 2014, the Tennessee advisory commission on intergovernmental relations (TACIR) shall complete a comprehensive review and evaluation of the efficacy of state policies set forth within title 6, chapters 51 and 58, and shall submit a written report of findings and recommendations, including any proposed legislation, to the speaker of the senate and the speaker of the house of representatives.

Tenn. Code Ann. § 6-51-122; 2013 Tenn. Pub. Acts, ch. 441, § 1.

> part of the city as a practical proposition, are the legitimate concern of any progressive city.

State ex rel. Collier v. City of Pigeon Forge, 599 S.W.2d 545, 547 (Tenn. 1980) (quoting *City of Kingsport v. State ex rel. Crown Enterprises, Inc.*, 562 S.W.2d 808, 814 (Tenn. 1978)).

The United States Supreme Court has recognized that the creation and alteration of municipal boundaries rests within the sound discretion of a state's legislative body and that a state's appropriate creation of an annexation process is "unrestrained by any provision of the Constitution of the United States." *Hunter v. City of Pittsburgh*, 207 U.S. 161, 179 (1907). In so finding, the Court rejected an annexed citizen's constitutional challenge that the annexation would subject citizens in the annexed territory to additional taxation resulting from the annexation without their consent, reasoning as follows:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. *The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.*

Id. at 177-79 (emphasis added).

The ruling in *Hunter* "remains good law," with two caveats. *City of Herriman v. Bell*, 590 F.3d 1176, 1184-85 (10th Cir. 2010). States and their political subdivisions may not "draw

boundaries that discriminate on an invidious basis, such as race or sex," *id.* at 1185 (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960), and equal protection prohibits states from drawing boundaries to restrict or dilute votes "in violation of the 'one person, one vote' principle," *id.* (citing *Reynolds v. Sims*, 377 U.S. 533 (1964); *Avery v. Midland County*, 390 U.S. 474 (1968)). Absent the existence of either of these unconstitutional motives in annexing territory, "states are vested with largely unrestricted power to determine the boundaries and manner of formation of their political subdivisions and how they vote." *Id. See Hunter v. Pittsburgh*, 207 U.S. at 178-79; *Berry v. Bourne*, 588 F.2d 422, 423-25 (4th Cir. 1978); *Deane Hill Country Club, Inc. v. Knoxville*, 379 F.2d 321, 325 (6th Cir.), *cert. denied*, 389 U.S. 975 (1967).

The Tennessee Supreme Court has likewise recognized that in annexation cases "there is no equal protection or due process argument that can properly be made when the statute is properly followed." *State ex rel. Wood v. City of Memphis*, 510 S.W.2d 889, 892 (Tenn. 1974). *See State ex rel. Vicars v. Kingsport*, 659 S.W.2d 367, 369-370 (Tenn. Ct. App. 1983). *See also Williams v. City of Nashville*, 89 Tenn. 487, 15 S.W. 364, 365 (Tenn. 1891) (concluding that "[p]lacing property within the corporate limits of a given town or city, where it will be subjected to the additional burden of municipal taxation and supervision, is not a taking of the property at all" given the "ownership is in no degree changed, and the increased burden is presumed to be equaled by the increased advantages").

In sum, annexation by municipal ordinance, as set forth at Tenn. Code Ann. § 6-51-102 and enacted by the General Assembly pursuant to the Municipal Boundaries Clause of the Tennessee Constitution, does not violate the federal or Tennessee Constitution unless the annexation process is motivated by invidious discrimination or is intended to restrict or dilute votes in violation of the "one person, one vote" principle. Thus, neither the federal nor the Tennessee Constitution recognizes that a citizen has a "right" to keep his or her real property in a particular unit of local government. *See Hunter v. City of Pittsburgh*, 207 U.S. at 128-29; *State ex rel. Balsinger v. Town of Madisonville*, 222 Tenn. 272, 282, 435 S.W.2d 803, 807 (1968) (stating that the fact that residents of an area to be annexed would be subjected to preexisting bond indebtedness of annexing city did not invalidate annexation, since the "extension of corporate limits so as to include additional territory is in no sense an impairment of the owner's liberty, nor is it a taking of private property for public use," with the Court observing that, if this were the case, "then no municipal corporation could be established or enlarged, and none of these valuable instrumentalities of the State would have a lawful existence").

Moreover, an allegation that a citizen in a territory proposed to be annexed by a municipality lacks representation on the issue of annexation, or on the creation or alteration of the laws in the annexed territory that will become part of the municipality if annexation is successful, is inaccurate. First, the General Assembly, which has the exclusive authority to set annexation parameters under the Tennessee Constitution, is ultimately accountable to all Tennessee voters. *See Hunter v. City of Pittsburgh*, 207 U.S. at 179 (recognizing that "those who legislate for the state are alone responsible for any unjust or oppressive exercise" of the annexation power). Second, once a territory is annexed, every citizen in that territory is granted the right to participate in the future governance of the annexing municipality and to work to

change or alter the laws of that municipality. *See Ratigan v. Davis*, 122 N.W.2d 12, 15 (Neb. 1963), *appeal dismissed for want of a substantial federal question*, 375 U.S. 394 (1964) (as long as the persons paying a tax are represented in the governmental body that enacted the law, they have the representation required by the maxim of no taxation without representation.)

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