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Local Government–Municipal Corporations–Annexation Invalidated. Saunders v. City of Little Rock, 262 Ark. 256, 556 S.W.2d 874 (1977).

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NOTES

LOCAL GOVERNMENT—MUNICIPAL CORPORATIONS—ANNEXATION INVALIDATED. *Saunders v. City of Little Rock,* 262 Ark. 256, 556 S.W.2d 874 (1977).

On October 9, 1975, the Board of Directors of the City of Little Rock enacted an ordinance[1] providing for annexation of approximately fifty-five square miles of land contiguous to the city. Pursuant to statute,[2] an election was held in which the electors approved the annexation by a vote of 8440 to 5182. Several residents of the affected area filed a remonstrance[3] in Pulaski County Circuit Court contending that the ordinance and annexation failed to comply with statutory requirements[4] because a significant portion of the land included in the annexed area was acreage used for mining operations or was marshy bottom land subject to flooding. The remonstrants alleged that either of these conditions was incompatible with municipal uses. The trial court apparently found that the annexation ordinance complied with the applicable statute and declared the lands to be annexed.[5]

The Arkansas Supreme Court reversed, holding that testimony that the city was using one or two abandoned bauxite pits for a landfill site did not constitute in and of itself substantial evidence that the whole mining area was adaptable to some form of municipal use[6] as required by the annexation statute,[7] especially when the area was reserved for mining purposes only and would be zoned for mining if the annexation were upheld. The court concluded that the

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1. Little Rock, Ark., Ordinance 13,098 (Oct. 9, 1975).

2. ARK. STAT. ANN. § 19-307.2 (Cum. Supp. 1977).

3. "[A] representation made to a court . . . wherein certain persons unite in urging that a contemplated measure be not adopted . . . ." BLACK'S LAW DICTIONARY 1459 (4th rev. ed. 1968).

4. ARK. STAT. ANN. § 19-307.1 (Cum. Supp. 1977) provides in part that the lands to be annexed must meet at least one of the following requirements:

> (1) platted and held for sale or use as municipal lots; (2) whether platted or not, if the lands are held to be sold as suburban property; (3) when the lands furnish the abode for a densely settled community, or represent the actual growth of the municipality beyond its legal boundary; (4) when the lands are needed for any proper municipal purposes such as for the extension of needed police regulation; or (5) when they are valuable by reason of their adaptability for prospective municipal uses.

5. Saunders v. City of Little Rock, 262 Ark. 256, 257, 556 S.W.2d 874, 875 (1977).

6. The area consisted of between 7.8 and 15.6 square miles. *Id.* at 261, 556 S.W.2d at 877.

7. ARK. STAT. ANN. § 19-307.1 (Cum. Supp. 1977).

erroneous inclusion of the mining lands completely voided the annexation. *Saunders v. City of Little Rock*, 262 Ark. 256, 556 S.W.2d 874 (1977) [*Saunders II*].

Land may be annexed by a municipality where the area is needed, adaptable, or suitable for proper municipal uses.[8] This adaptability may be prospective as well as present.[9] Annexation not only adds to the size of a city but also is a means of providing city services to those people who live in developed areas at the municipal periphery or beyond the corporate boundary.[10]

In Arkansas there are two different methods by which a municipality can initiate annexation of contiguous lands.[11] In *Vestal v. Little Rock*[12] the court provided the following test to determine whether an application for annexation is "right and proper":

> [C]ity limits may reasonably and properly be extended so as to take in contiguous lands, (1) when they are platted and held for sale or use as town lots, (2) whether platted or not, if they are held to be brought on the market and sold as town property when they reach a value corresponding with the views of the owner, (3) when they furnish the abode for a densely-settled community, or represent the actual growth of the town beyond its legal boundary, (4) when they are needed for any proper town purpose, as for the extension of its streets, or sewer, gas, or water systems, or to supply places for the abode or business of its residents, or for the extension of needed police regulation, and (5) when they are valuable by reason of their adaptability for prospective town uses; but the mere fact that their value is enhanced by reason of their nearness to the corporation, would not give ground for their annexation, if it did not appear that such value was enhanced on account of their adaptability to town use.
>
> We conclude further that city limits should not be so extended at [*sic*] to take in contiguous lands, (1) when they are used only for purposes of agriculture or horticulture, and are valuable on account of such use, (2) when they are vacant and do not derive special value from their adaptability for city uses.[13]

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8. 2 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 7.18 (3d ed. F. Ellard 1966).

9. ARK. STAT. ANN. § 19-307.1 (Cum. Supp. 1977).

10. Gitelman, *Changing Boundaries of Municipal Corporations in Arkansas*, 20 ARK. L. REV. 135 (1966).

11. There are other methods by which land may be annexed to a municipality; for example, through an action taken by adjoining landowners who wish to have their property become part of the city or town. ARK. STAT. ANN. § 19-301 (1968).

12. 54 Ark. 321, 15 S.W. 891 (1891).

13. *Id.* at 323-24, 15 S.W. at 892. The *Vestal* rule has been followed in virtually every Arkansas annexation case since 1891 and has been cited with approval or expressly adopted and followed in numerous jurisdictions. *See, e.g.*, Copeland v. City of St. Joseph, 126 Mo.

The first and more difficult annexation procedure begins when the governing body of the city or town, by ordinance or resolution, submits the question of annexation to the electors of the municipality and the affected area.[14] This method requires a favorable vote of both a majority of the qualified electors in the municipality voting on the issue and a majority of the qualified electors in the affected area voting on the issue. If the two required majorities are obtained, the matter goes to the county court. If there are no objections, or if any objections are dismissed and not successfully appealed to the circuit court, the annexation becomes final. After the county court approves the annexation petition, "any person interested"[15] may institute a proceeding in the circuit court within thirty days to prevent the annexation.[16] The circuit court then holds a trial *de novo* in which it exercises the same discretion the county court could have exercised initially.[17] The statute requires that the court approve the annexation if it finds that annexation would be "right and proper."[18]

The second procedure by which land meeting the *Vestal* criteria may be annexed through an action initiated by a city or town is by an ordinance adopted by a two-thirds vote of the total membership of the governing board of the municipality.[19] After this procedure takes place, the question of annexation is submitted to the qualified electors of the annexing city and the area to be annexed.[20] Approval is obtained by a simple majority of all votes cast. The annexation is valid even if the electors in the area to be annexed vote heavily against the annexation. Objections to the annexation must be made to the circuit court which determines whether the annexed land meets the statutory requirements.[21]

In 1974 the Arkansas Supreme Court decided *Saunders v. City of Little Rock*[22] [*Saunders I*]. In this case the City of Little Rock

417, 29 S.W. 281 (1895); State v. City of Reno, 71 Nev. 208, 285 P.2d 551 (1955); Portland Gen. Elec. Co. v. City of Estacada, 194 Or. 145, 241 P.2d 1129 (1952). No contrary authority was found; the rule appears to be universal.

14. ARK. STAT. ANN. § 19-307 (Cum. Supp. 1977).

15. *See* City of Crosset v. Anthony, 250 Ark. 660, 665, 466 S.W.2d 481, 485 (1971) in which the court defined "any person interested" as being any person who has some interest in the city or the area to be annexed.

16. ARK. STAT. ANN. § 19-303 (1968).

17. Gitelman, *supra* note 10, at 144.

18. ARK. STAT. ANN. § 19-302 (1968).

19. ARK. STAT. ANN. § 19-307.1 (Cum. Supp. 1977). This provision was adopted as 1971 Ark. Acts 298 and is the *Vestal* rule almost verbatim. It was amended by 1975 Ark. Acts 904 to permit annexation of agricultural land.

20. ARK. STAT. ANN. § 19-307.2 (Cum. Supp. 1977).

21. ARK. STAT. ANN. § 19-307.3 (Cum. Supp. 1977).

22. 257 Ark. 195, 515 S.W.2d 633 (1974).

had attempted to annex fifty-five square miles of territory by using the second annexation procedure previously described.[22.1] The annexation ordinance was adopted by the city's board of directors and subsequently approved by the voters in a special election.[23] Some property owners in the affected area filed a remonstrance with the circuit court which ruled that the annexation was valid.[24] The Arkansas Supreme Court reversed because the fifty-five square mile area contained lands used exclusively for agricultural purposes.[25] In 1975 the Arkansas Legislature responded to the decision in *Saunders I* by amending the statutory *Vestal* rule to permit the annexation of agricultural lands[26] but the remaining *Vestal* criteria were left basically intact.

In *Saunders II* the City of Little Rock again sought to annex the fifty-five square mile area that had been the subject of the controversy in *Saunders I.* The annexation attempt was challenged again by some of the landowners in the affected territory. The annexation, however, was challenged on the ground that a substantial portion of the area was not suitable for municipal uses because approximately twelve and one-half square miles of the area was below the hundred year flood plain level and approximately eight to sixteen square miles of the land was devoted to or leased for mining. The city offered testimony that (1) the mining area should be annexed and zoned to prevent residential encroachment in those areas and allow some of the land to be reclaimed by using some of the abandoned mining pits as landfill sites; (2) the annexation of the entire area was necessary to attract industry to the city; and (3) annexation was essential to provide efficient administration of fire and police services in the area and to assure that transportation and utility networks were extended in an orderly fashion.[27]

In deciding *Saunders II* a majority of the Arkansas Supreme Court stated that the city's use of one or two bauxite pits as a landfill site did not constitute substantial evidence that the entire mining area would be adaptable to prospective municipal uses, especially when the city had indicated that the area would be reserved

22.1. *See* text at note 19 *supra.*

23. *Id.* at 196, 515 S.W.2d at 633.

24. *Id.*

25. *Id.* at 198, 515 S.W.2d at 634. The court construed the inclusion of the agricultural land as being contrary to the provisions of 1971 Ark. Acts 298, § 1.

26. ARK. STAT. ANN. § 19-307.1 (Cum. Supp. 1977).

27. The city contended that all of the affected area met one or more of the five criteria described in the pertinent statute. *See* note 4 *supra.* If any one of the five elements is supported by the evidence, the annexation is proper. Louallen v. Miller, 229 Ark. 679, 317 S.W.2d 710 (1958).

strictly for mining purposes if the annexation were upheld.[28] The court reasoned that the mining area was not needed for any municipal purpose such as the extension of police regulation because the vacant area was not being held for use as municipal lots or for urban development.[29] The court emphasized that the mining area would continue to be used for mining purposes after annexation[30] and noted that "[a] city's desire to zone vacant lands outside a city that do not derive a special value from their adaptability for city uses is not a needed police regulation for any proper municipal purpose . . . ."[31] The court also observed that the annexation of lands for purposes of taxation only is prohibited by the Arkansas Constitution[32] and stated that "where it is manifested that the owners of land taken into a city can derive no benefits from being placed within the incorporated limits, such action amounts to the taking of private property for public use in the form of taxation without giving any compensation."[33]

The erroneous inclusion of the mining lands caused the entire annexation to be voided; therefore, the court did not make a decision about the Fourche Creek flood plain except by indicating that the flood plain land probably would not be suitable for annnexation.[34] Justice Hickman dissented and criticized the majority for failing to specifically rule on the issue of whether the flood plain property could be annexed legally. This same issue was raised but not ruled upon in *Saunders I.* He noted that the only evidence in the record about the mining lands was favorable to the City of Little Rock and that "[t]he evidence in the case is overwhelming that the city will offer full services to all the annexed area and that the property is needed within the corporate city limits for an orderly growth of the area."[35]

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28. Saunders v. City of Little Rock, 262 Ark. 256, 261, 556 S.W.2d 874, 877 (1977).

29. ARK. STAT. ANN. § 19-307.1 (Cum. Supp. 1977).

30. Saunders v. City of Little Rock, 262 Ark. 256, 262, 556 S.W.2d 874, 877 (1977).

31. *Id.*

32. ARK. CONST. art. 2, §§ 22-23.

33. Saunders v. City of Little Rock, 262 Ark. 256, 261, 556 S.W.2d 874, 877 (1977) (citing Town of Ouita v. Heidgen, 247 Ark. 943, 946, 448 S.W.2d 631, 633 (1970)).

34. *Id.* at 262, 556 S.W.2d at 878. *But see* City of Little Rock v. Findley, 224 Ark. 305, 272 S.W.2d 823 (1954) in which the court suggested that the Fourche Creek flood plain might be appropriately included in an annexed area. The trial court had rejected the annexation attempt and found that a portion of the Fourche Creek bottom lands was not susceptible to urban use. The Arkansas Supreme Court said that the city's proof was persuasive and that the weight of the evidence might be in its favor but upheld the trial court's judgment under the rule that the circuit court's judgment will be affirmed if it is supported by substantial evidence. *Id. See* Burton v. City of Ft. Smith, 214 Ark. 516, 216 S.W.2d 884 (1949).

35. Saunders v. City of Little Rock, 262 Ark. 256, 266, 556 S.W.2d 874, 880 (1977)

Saunders II is significant because under the ruling Arkansas municipalities will find it more difficult to annex an area which contains land used for mining operations; moreover, it raises serious questions regarding annexation of flood plains. Mining areas, such as rock quarries and gravel or sand pits, which are commonly found on the outskirts of many Arkansas cities and towns, may have to be bypassed and left as unincorporated pockets when a municipality annexes adjacent land for its orderly growth. Similarly, the court stated in dictum that annexation of a flood plain may be illegal. This could seriously curtail annexation attempts by municipalities in eastern Arkansas where bayous and swamps occasionally overflow, causing adjacent land to be designated as flood plains.

Saunders II is particularly significant because it has left unsolved the problem of orderly growth in Little Rock. The city has tried to annex this area twice and presumably still wishes to do so, but the court has not indicated whether the annexation will ever be right and proper. The lack of guidelines promotes the possibilities of a *Saunders III.* It appears that the city might exclude from annexation all pockets of land where mining operations exist. Such an approach could create a noncontiguous patchwork of unincorporated areas within the city's boundaries. It is unclear whether flood plain areas can be included in an area to be annexed in order to retain contiguity. If the legislature plans to amend the existing annexation statutes, the following modifications might be considered: (1) the addition of a clause which provides that if a majority of the land area meets any of the five *Vestal* criteria then the annexation is valid;[36] or (2) the replacement of the specific criteria found in *Vestal* with the rule of reasonableness. The issue of reasonableness of annexation should turn on whether there is a sufficient showing that the land is suitable for annexation. If reasonable men could differ on this question, the evidence would be sufficient to support a decision in favor of the annexing municipality. If this rule were implemented, the court could not substitute its judgment for that

(Hickman, J., dissenting).

36. "[U]sually, however, if a substantial part of an area is appropriate for annexation it is deemed immaterial that a small portion thereof is unadaptable to municipal uses, or is unsettled, or is in other respects not appropriate to annexation." 2 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 7.18 (3d ed. F. Ellard 1966) (footnotes omitted). *See* State v. City of Nashville, 208 Tenn. 290, 345 S.W.2d 874 (1961) (river bottom farm land of little value and not susceptible to municipal services or benefits could be included in annexation). *See also* Hollingsworth v. City of Greenville, 241 S.C. 378, 128 S.E.2d 704 (1962) (fact that land was largely undeveloped and rather thinly populated in comparison with rest of area sought to be annexed was not sufficient ground for invalidating annexation).

of legislative or political officials.[37] The primary drawback to the rule of reasonableness is that it leaves a lot of room for the court to exercise its own discretion in determining reasonableness. The legislature could also consider (3) an amendment of the present statute to allow an appeal from a decision of the circuit court upholding an annexation only if a majority of the owners of land in the affected territory file their remonstrances in writing against the annexation within a definite time period such as 60 days.[38] The drawbacks that would be encountered if one of the suggested modifications were adopted by the legislature should be weighed against the flaws that exist under the present system of allowing the court to decide whether the annexation is right and proper.

[Note by Ray Owen, Jr.]

37. *See* 2 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 7.18 (3d ed. F. Ellard 1966). For cases in which the rule of reasonableness is followed, *see* Morton v. Johnson City, 206 Tenn. 411, 333 S.W.2d 924 (1960); Town of Brookfield v. City of Brookfield, 274 Wis. 638, 80 N.W.2d 800 (1957).

38. *See* IND. CODE ANN. § 18-5-10-24 (Burns 1974).