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STUDENT NOTE

Some Municipal Annexation Problems in West Virginia

When a city or town in West Virginia desires to annex additional territory, it is frequently faced with perplexing problems in determining just what the proper procedures are. In some instances it is almost impossible to say with certainty whether certain annexation provisions of the code are applicable for a proposed annexation. One of the major problems is that the annexation provisions of West Virginia’s code are found in two separate chapters, chapter 8 and chapter 8A. The requirements for annexing additional territory are quite different in each of the two chapters. The purpose of this note is to examine these different annexation laws and to explore some of the problems encountered in their interpretation and application.

HISTORICAL BACKGROUND

To get a clear picture of annexation law as it exists in West Virginia today, it is first necessary to trace its general history from the state’s inception to the present time.
For several years immediately following West Virginia's achievement of statehood there were no general statutory provisions under which a municipality could annex additional territory. If a municipality desired to incorporate additional land, it looked first to see if its charter provided any method by which the annexation could be accomplished. If not, then the municipality's only recourse was to request the legislature to pass a special bill authorizing the annexation.

When West Virginia's constitution was rewritten at the Constitutional Convention of 1872, a section was added forbidding the legislature to pass local or special laws in certain enumerated cases, among which are the incorporating or amending the charter of any city, town or village with a population of less than 2,000. This section provides that the legislature shall provide by general law for all such cases.

This section was first implemented in 1882 when the legislature passed a general law providing a means whereby towns with populations of less than 2,000 could alter their boundaries. This statute has undergone numerous changes, but its main provisions are still a part of West Virginia's code, and are found in chapter 8 of the 1931 code.

Although this legislation helped to remedy the situation for smaller towns and villages, it did nothing to help the towns and cities with populations of over 2,000. These larger municipalities continued to look to their charters to see if there were provisions for annexing additional territory. If not, they were still forced to follow the old and cumbersome process of seeking special legislation to amend their charters whenever they wished to change their boundaries.

In 1936 the voters of West Virginia adopted an amendment to their constitution known as the Municipal Home Rule Amendment. This amendment forbids the legislature to pass local or special laws incorporating cities, towns or villages, or amending their charters. It directs the legislature to provide by general laws for the incorporation and government of cities, towns and villages. Under these

1 W. VA. CONST. art. VI, § 39.
3 W. VA. CODE ch. 8, art. 2, § 8 (Michie Supp. 1965).
4 W. VA. CONST. art. VI, § 39A.
general laws the electors of each municipal corporation wherein the population exceeds 2,000 are to have the power and authority to frame, adopt and amend their charter, and, through their local governing body, to pass all laws and ordinances relating to their own municipal affairs, except to the extent that any such law or ordinance so adopted is inconsistent or in conflict with the constitution or the general laws of the state.

Following adoption of this amendment, the legislature enacted the Municipal Home Rule Law, designated as chapter 8A of the West Virginia Code, which was intended to implement the constitutional amendment. Chapter 8A provides by general law the machinery by which any city with a population in excess of 2,000 may amend parts of its existing charter, or, if it chooses, it may repeal its existing charter by adoption of a completely new charter. Those cities which repeal their old charters by adopting a completely new charter are thereafter referred to as home rule cities. Part of the general charter amending powers conferred by chapter 8A are concerned with the annexation of new territory.

**Non-Home Rule Municipalities**

With the addition of chapter 8A to the West Virginia code, cities of over 2,000 population had for the first time a general law under which they could annex additional territory without special legislation. Presumably this also gave towns with populations under 2,000 a choice of using either the annexation provisions contained in chapter 8 or those in chapter 8A.

In 1949 the legislature made extensive revisions to chapter 8, and one of the changes made was to eliminate from the general annexation sections of that chapter the provisions which had formerly limited their application to towns of less than 2,000 people. Parts of the 1949 revision to chapter 8 were declared unconstitutional in *Wiseman v. Calvert,* and in 1951 the legislature again revised chapter 8, but the provisions concerning annexation were substantially unchanged from the 1949 act.

Thus, non-home rule cities with populations over 2,000 (and presumably all towns with populations less than 2,000) could there-

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5 W. VA. CODE ch. 8A, art. 6. (Michie 1961).
after use either the annexation provisions of chapter 8 or of chapter 8A, whichever best suited their purposes.

In 1961 the legislature amended chapter 8 to provide that thereafter the annexation provisions of chapter 8 were to furnish the exclusive methods by which any non-home rule municipality could effect a boundary change, except for the minor boundary adjustment section contained in chapter 8A.

The principal provisions for initiating and accomplishing a chapter 8 annexation are found in one section. The first paragraph of that section provides that five per cent or more of the freeholders residing in a municipality may petition their council asking that a vote be taken on a particular annexation proposal. The paragraph spells out the manner in which the vote is to be taken, who is eligible to vote and the vote required for passage.

A proviso contained in the first paragraph limits (by reference to another section) such annexations to areas which are not within any incorporated municipality, which are urban in character, which contain at least one hundred persons and an average of not less than five hundred inhabitants per square mile and which do not contain any part in which the amount of territory is disproportionate to the number of its inhabitants. Although the language is not entirely unambiguous, the circuit court of the county can apparently nullify the election if, on certiorari, it choose to do so in order to prevent hardships and inequities, taking into consideration the topography of the annexed area, the benefits to be received from incorporation, the amount of uninhabited land required for parks and normal growth and development and the present and probable future uses of the area.

Paragraph two of chapter 8's annexation section is clearly supplemental to paragraph one, and adds the requirement that a majority of all votes cast by those persons eligible to vote in the annexation area must be in favor of the change in order to make it effective.

Paragraph three of the section contains a somewhat different procedure:

The council may by ordinance provide for the annexation of additional territory without ordering a vote on the question,
if sixty per cent of the qualified voters residing in such additional territory and of all persons, firms or corporations owning any part of such territory whether they reside therein or not, file with council their petition to be annexed.

This third paragraph was added by amendment in 1965. No reference is made to the proviso contained in paragraph one restricting the character or amount of the area to be annexed. It is difficult to believe that the legislature intended to limit the operation of that proviso to paragraph one, but as the section is written it is at least arguable that that is what it did.

If the proviso contained in paragraph one is not applicable to annexations accomplished under paragraph three, then it would appear that there are no restrictions on the kind or amount of territory which can be annexed. In *Davis v. Pt. Pleasant*\(^1\)\(^2\) the court was concerned with an annexation made in 1886 by the town of Point Pleasant, when the town contained only 1,100 people.

The plaintiff owned a 260 acre farm within the annexation area. His property contained no buildings, and between his farm and the pre-annexation town limits were two other large farms, each of which contained only farm buildings. None of these properties had been laid out in lots or streets, nor were any proposed; neither had any of these properties been offered for sale. The annexed area also included a large number of acres of mountain land. The plaintiff alleged that the town was large enough after the annexation to accommodate 150,000 people. He contended that he would receive no benefits from the annexation either then or in the foreseeable future and prayed that the town be enjoined from collecting any taxes on his farm and that the order of the court enlarging the town's boundaries be vacated as illegal and void. The trial court granted the injunction.

On appeal, the West Virginia Supreme Court reversed. While apparently sympathetic, the court felt that any relief had to come from the legislature. The court said: "Apparently objectionable in some instances as is this practice of extending corporate limits over large areas of agricultural lands for no other purpose than to gather taxes, yet the courts are powerless to afford relief."

It is not hard to imagine the mischief and the inequities which could result from the lack of any limitation on the amount or char-

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\(^1\) W. VA. 289, 9 S.E. 228 (1889).
acter of land which a city can annex. Through gerrymandering, one city could selfishly grab territory whose residents or property owners would prefer to be in another city, or in no city at all. A municipality could reach several miles beyond its present borders to annex a particularly attractive revenue producer such as a mine, a store or a large industrial plant.

If a municipality attempts an annexation under paragraph three, it would appear that approval of sixty per cent of the persons in each of two separate classes is necessary. Assuming this to be the proper construction of the statute, the first class consists of the qualified voters residing in the area to be annexed. Although "qualified voter" is not defined in the chapter, the phrase presumably refers to those persons who are eligible to vote in general and other special elections. The second class of persons consists of those persons, firms or corporations owning any part of the territory to be annexed, whether they reside therein or not. It is not clear what weight is to be given the votes of two or more persons holding property as tenants in common or as joint tenants.

Any proposed annexation under paragraph three would fail (the reader must be cautioned that this is the author's opinion of the most logical construction of the statute, but that it has not been judicially construed) if less than sixty per cent of those in either of the two classes favored the move, even though the aggregate number of those whose affirmative approval was needed greatly exceeded sixty per cent. For example, suppose an area containing several large apartment houses was proposed as an annexation area. Of the five hundred "qualified voters" living in the area, 450, or ninety per cent, favor annexation. The property is owned, however, by only one hundred persons, only fifty of whom favor annexation. The proposal would fail.

If under the preceding hypothetical situation the city were anxious to annex the area, it could then resort to a paragraph one annexation. "Qualified voters" resident in the area and those owning property in the area comprise but a single class of voters under a paragraph one annexation, and only a simple majority of those who cast their vote in that class is required to approve it. Of course, under paragraph one the annexation must be approved by a majority of the votes cast by qualified voters living within the city.

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Just as under paragraph three, it is also unclear under paragraph one how many voters can be qualified through joint ownership of one piece of property. Another problem is whether a person is entitled to two votes if he is a qualified voter living within the annex area and also owns property there.

**HOME RULE CITIES**

It would appear that chapter 8 has never conferred annexation powers on home rule cities, and that they have always been limited to the annexation provisions contained in chapter 8A, although at least one court decision casts some doubt on this.

In *Plymale v. City of Huntington*\(^4\) the West Virginia Supreme Court considered whether the city of Huntington, a home rule city, could employ one of the general municipal laws contained in chapter 8. The court held that it could and said that cities are free to use the general laws contained in chapter 8 regardless of whether they are home rule or non-home rule cities. While the law under consideration in *Plymale v. City of Huntington* conferred authority on municipalities to pass ordinances imposing refuse collection and fire service fees, it would appear that the same reasoning would likewise apply with equal force to the annexation provisions of chapter 8 and would give home rule cities their choice of using either the annexation provisions of chapter 8 or of chapter 8A.

However, the decision in *Plymale* is very questionable. One of the sections in chapter 8A provides: "Except as otherwise provided in this chapter none of the provisions of chapter eight of the official Code shall apply to cities which adopt a charter under this chapter. . . ."\(^5\) The court was apparently unaware of this code section, as no reference was made to it in the court's opinion.

There are three general annexation procedures provided in chapter 8A. Two of these, the provisions relating to consolidation of adjoining municipalities and to minor boundary adjustments, will be treated later in this note under separate sections. The third provisions relates to annexations, other than minor boundary adjustments, of unincorporated territory. It is this latter provision with which the remainder of this section of the note is concerned.\(^6\) For

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\(^4\) 147 W. Va. 728, 131 S.E.2d 160 (1963).
convenience, annexations accomplished under this provision shall be referred to as chapter 8A annexations.

A chapter 8A annexation is accomplished in much the same manner as a "paragraph one" annexation under chapter 8, but there are some significant differences. For instance, a chapter 8 annexation is initiated by a petition of at least five per cent of the freeholders residing in the municipality, while a chapter 8A annexation is initiated by a petition of at least ten per cent of the inhabitants of the municipality. The words "freeholders" and "inhabitants" both seem inclusive enough to include infants, mental incompetents and others who would not possess the qualifications necessary to vote at regular elections.

There are no restrictions on the character or amount of land which a city can take in under a chapter 8A annexation, except that the land must be contiguous to the city. The rule announced in Davis v. Pt. Pleasant,\textsuperscript{17} apparently applies, and a city is free to annex whatever territory it chooses, regardless of whether the move is prompted by proper or improper motives. The only limitation on this power is the necessity of getting the number of votes required to accomplish the annexation.

To pass, a chapter 8A annexation requires a favorable majority of the votes cast by qualified voters residing in the city. Application of this part of the statute poses no problem. However, the governing body of the municipality must order another election, to be held at the same time as the election at which the city's residents vote, in which all of the qualified voters residing in the annexation area and all of the qualified voters owning any part of such territory, whether resident thereon or not, are entitled to vote on the question.

As under chapter 8, the phrase "qualified voter" is not defined in the chapter. It is again presumed that this refers to a voter who is qualified to vote in general and other special elections. If this is the proper interpretation, then presumably one would have to be a resident of the county in which the proposed annex is located to qualify to vote by virtue of land ownership. The West Virginia Constitution provides that no person shall be entitled to vote who has not been a resident of the county in which he offers to vote for

\textsuperscript{17} Note 12, supra.
at least sixty days." Unlike chapter 8 annexations, chapter 8A apparently gives no vote to corporate landowners.

The confusion does not end there. Chapter 8A also provides that the annexation must be approved by a majority of the votes cast by the "qualified voters residing in and owning any portion" of the annexation territory. This language could well be construed to mean that only those who meet the double condition of living in and owning property within the area are entitled to have their votes counted. However, the language of the section enumerating those who are entitled to vote on the question would indicate that such was not the legislative intent, and that what the legislature probably intended to say was that a majority of the aggregate total of votes cast by those residing in and by those owning property therein is needed to approve the proposal.

Even if that is the proper construction to be placed on the language of the statute, it is still not clear whether a person who lives in the area and also owns property there is entitled to one or to two votes.

Consolidation

Another part of chapter 8A provides that any two or more municipalities may consolidate and become one municipality. The charter of the larger of the two merging corporations becomes the charter of the merged bodies. There is no provision in chapter 8 for effecting such a consolidation. As a result of the 1961 amendment limiting non-home rule municipalities to the boundary changing provisions of chapter 8, (except for minor boundary changes) there is considerable doubt as to whether or not one or more non-home rule municipalities can be parties to a consolidation without a change in existing law.

Minor Boundary Adjustments

The third procedure for effecting an annexation under chapter 8A is one permitting minor boundary adjustments. These minor boundary adjustments can be accomplished in a summary manner without an election.

18 W. Va. Const. art. IV, § 1.
The governing body of a municipality merely applies to the circuit court for such annexation. If the court is satisfied that it is a "minor boundary adjustment," it orders a public hearing. The hearing is held after due notice has been given, and, if no person having an interest in the land within the area to be annexed substantially opposes the annexation at the hearing, the court enters an order changing the boundaries of the municipality to embrace the annexed area.

While the court is given the task of deciding whether "the annexation applied for is only a minor boundary adjustment," there is nothing in the statute to define "minor boundary adjustment." With no statutory guidelines to aid the court in its determination, the court is apparently left with an extremely wide discretion in either permitting or denying a proposed annexation.

A 1963 amendment\textsuperscript{25} to the annexation provisions of chapter 8 forbade non-home rule cities and towns to employ the chapter 8A minor boundary adjustment provisions except in those cases where the territory to be annexed did not exceed thirty acres. This limitation was deleted by amendment in 1965,\textsuperscript{26} and there is now no limit fixed for the size of the area.

The circuit court must dismiss an application for a minor boundary adjustment if the application is "substantially opposed" at the hearing by a person having an interest in the land within the area to be annexed. In \textit{Frazier v. Easley}\textsuperscript{27} the West Virginia Supreme Court said by a dictum that that language limits use of the minor boundary adjustment machinery, as a practical matter, to those cases "where there is almost unanimous approval thereof." It is obvious that further judicial construction will be required to know with certainty exactly how many persons are needed to block such an annexation and how "substantial" their opposition must be.

If a proposed minor boundary adjustment should fail because of the opposition of a minority of the property owners in the annexation area, the municipality could still annex the area by using one of the other available annexation procedures.

Whether a town with a population of 2,000 or less can utilize the minor boundary adjustment provisions of chapter 8A is open to

\textsuperscript{27} 121 W. Va. 230, 2 S.E.2d 769 (1939).
question. In *Hayes v. Town of Cedar Grove*\(^{26}\) the West Virginia Supreme Court said:

The provisions of chapter . . . [8A], applying to Home Rule Cities, do not, nor can they be made to apply to towns and villages, which by that act are defined as municipalities with a population of 2,000 or less. Under that act, all existing charters continue as enacted, until amended, or a new charter substituted. As to cities, such amendment may be made, or a new charter substituted, by a vote of the people entitled to vote thereon; but an amendment to the charter of a town or village can only be made by the circuit court of the county in which it is situated, and in accord with the provisions of Code, 8-2-9 . . . .\(^{29}\)

While the code section, 8-2-9, referred to by the court, is, as that section then read, no longer part of the code, a careful scrutiny of its language fails to disclose anything there which would indicate that it was the exclusive method by which a town of 2,000 or less could change its charter. The statement of the court quoted above might be characterized as dicta, however, because the particular code sections in chapter 8A with which the court was concerned\(^{30}\) are clearly limited to "cities," which are defined for purposes of chapter 8A as " . . . municipal corporation[s] with a population in excess of two thousand."\(^{31}\) The minor boundary adjustment section\(^{29}\) does not contain the word city," but refers only to a "municipality." Furthermore, the decision in *Hayes* did not turn on interpretation of the chapter 8A code sections it cited, but the court cited them only as an indication of public policy.

The statement of the court in the *Hayes* case that the provisions of chapter 8A could not be made applicable to towns and villages was seemingly refuted by the language contained in a subsequent case, although the court felt the legislature had not done so. *In re Proposal to Incorporate the Town of Chesapeake,*\(^{32}\) the court said:

[Chapter 8A] does nothing more than provide for the amendment or adoption of charters by existing towns of a population

\(^{26}\) 126 W. Va. 828, 30 S.E.2d 726 (1944).

\(^{29}\) Id. at 837, 30 S.E.2d at 731.


\(^{33}\) 130 W. Va. 527, 45 S.E.2d 113 (1947).
of more than two thousand . . . While the legislature had full power, under the Home Rule Amendment, to legislate with respect to towns of less population than two thousand, it is clear that it did not do so [in chapter 8A].

The issue with which the court was concerned in this case was the original incorporation of a town with a population in excess of 2,000. Thus, any part of the court's statement indicating that chapter 8A has no application to towns with populations of 2,000 or less must again be characterized as dicta. When the court said it was clear that the legislature had not legislated in chapter 8A with respect to such towns, it did not explain or further elaborate on that statement. While the author would agree that most of chapter 8A has no application to towns of 2,000 or less, he does feel that the minor boundaries adjustment section of that chapter is a general law applicable to any city or town, regardless of its population.

The two cases quoted above were cited as authority for still more dicta in *Wiseman v. Calvert.* The court there said: "[Chapter 8A] does not apply to municipalities with a population of 2,000 or less."

In view of these expressions of opinion by West Virginia's highest court, it would be well for any attorney advising a town of 2,000 people or less to suggest avoiding the use of the minor boundary adjustment provisions of chapter 8A, even if he believed the court would uphold its use if the question were squarely presented to it. The same purpose can be achieved by following chapter 8 annexation procedures, and, while they are perhaps more cumbersome to use, they provide greater certainty under the circumstances.

**CONCLUSION**

As this article has attempted to demonstrate, West Virginia's annexation laws are in a state of confusion and are in dire need of an extensive revision.

Many of the words and phrases used, such as "qualified voter," "substantially opposed" and "minor boundary adjustment," should be more clearly defined. The statutes should spell out with greater precision just who is entitled to vote on annexation issues and when, if at all, one person might be entitled to two votes on such an issue.

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There is no apparent reason why some annexations should be restricted in the character and amount of land which can be annexed, while others have no restrictions whatever. It may be that in this age of rapid urban growth and professional land planning it is better to give cities a relatively free hand in projecting their future growth patterns and land requirements. This, of course, is a policy matter for legislative determination, but that determination should be made and then applied uniformly to all municipalities, whether home rule or non-home rule.

Much of the present confusion in West Virginia annexation law is the result of having annexation provisions in two chapters. Amendments made to these statutes in one chapter have not always been made with a proper appreciation of their effect on corresponding sections in the other chapter.

Probably the best solution to the whole problem is for the legislature to place all provisions relating to annexation in one chapter of the code. These provisions should be enacted only after careful study of existing constitutional and statutory provisions, and with full consideration given to prior decisions of the West Virginia Supreme Court. Until such a revision is made, West Virginia municipalities will continue to be plagued with a bewildering array of confusing and often contradictory annexation statutes.

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