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UTILITY EXTENSIONS TO AREAS VOLUNTARILY ANNEXED

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Several months ago, residents of the community of Pedunk petitioned the town of Podunk for annexation into Podunk's corporate boundaries. All of the landowners in the area seeking annexation signed the petition, and Pedunk met the North Carolina statutory requirements for annexation by petition.[1] *At the end of the summer, Pedunk was annexed by Podunk. Shortly after the annexation, one of the residents of the newly annexed community, Fred Simpson, applied to the city water and sewer department for service to his residence. The department responded that Fred lived too far from the closest water and sewer lines and that it would not extend service to his property. After exhausting all administrative remedies, Fred brought a mandamus proceeding to compel the city to extend utility services to his property.*

This bulletin discusses a city's obligations to extend utility services to areas that have been voluntarily annexed. The bulletin begins by distinguishing between voluntary and involuntary annexations in North Carolina, proceeds to a discussion of cities' discretion with regard to extensions, and ends with a discussion of the standard used by courts when reviewing cities' exercise of their discretion in these matters.

Annexation Methods and Requirements

North Carolina allows cities to extend their boundaries by annexing surrounding areas in either of two ways: A city may annex an area without regard to the wishes of the area's residents, as long as the area meets standards of urban development; or it may do so upon

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1. N.C. GEN. STAT. §160A-31 (1995) (hereinafter the General Statutes will be cited as G.S.).

petition from the area's real property owners. (There are two petition methods: one for contiguous property and one for noncontiguous property.) An important distinction between voluntary and involuntary annexation is the annexing city's statutory duty to provide services. The involuntary annexation statutes require the annexing city to develop a plan to provideservices to the proposed area of annexation and set time limits for extension of principal utility lines into the annexation area. In an involuntary annexation there is a clear duty to provide water and sewer services in the annexation area.[2]

The voluntary annexation requirements, however, are less specific. G.S. 160A-31(e), applicable to contiguous annexations, states, "[f]rom and after the effective date of the annexation ordinance, the territory and its citizens and property shall be subject to all debts, laws, ordinances and regulations in force in such municipality and shall be entitled to the same privileges and benefits as other parts of such municipality," and G.S. 160A-58.3, for noncontiguous annexations, uses almost identical language. The statutes do not include a timetable for provision of utility services; rather, in a sort of statutory equal protection, they entitle those being annexed to the "same privileges and benefits" as those already provided for in the city. Therefore, the question becomes, what obligation does a city have to extend utility lines to all portions of its territory? Given the lack of North Carolina cases that deal with this question,[3] North Carolina courts faced with claims such as Fred Simpson's are likely to turn to the rulings of courts in other jurisdictions. Most of those rulings involve demands for water services.

The Basic Rule: Municipal Discretion

The cases resolving this question begin with the premise that when a city undertakes to supply its citizens with water, it must generally do so to all applicants who are in a substantially similar position to those currently being served.[4] Nevertheless, "it has quite generally been held or recognized that a municipality exercises a discretionary function in deciding whether or not to extend its system to an entirely new section within its territorial limits, and cannot be compelled to do so at the instance of a prospective consumer, at least if its basis for refusing is in any way reasonable and does not, therefore, involve any abuse of discretion, or arbitrary fraudulent action."[5] Though often stated in other ways, this basic rule recognizing municipal discretion has been consistent over time, jurisdictions, and facts.

The doctrine summarized above originated in a number of cases decided in the early years of this century. Three are illustrative. In 1907 the Kentucky Supreme Court held in *Moore v. Harrodsburg*[6] that a city could not be compelled to extend its water system to a citizen owning land that was within the city limits but remote from the main body of the city. Moore sought to compel the city council to extend city water and electric lines so as "to give him relatively the same benefits from them as was afforded to other citizens and property owners of the city." In sustaining a general demurrer, the court stated, "The court cannot undertake to manage the affairs of the city by injunction. Where public duty is enjoined, the court may require the city authorities to act, but it cannot control their discretion as to how they shall act. . . . In the absence of fraud, corruption, or arbitrary action, the judgment of the city officials as to the management of the affairs of the city is beyond judicial control."[7] The language of the *Moore* opinion states clearly the discretion that is given municipal authorities with respect to their water systems and indicates what might compel judicial intervention.

In 1913 the Supreme Judicial Court of Maine in *Lawrence v. Richards*[8] accorded cities an even broader discretion. The petitioner sought to compel the respondent trustees to extend the district's water mains to his residence and supply him with water. He alleged that it was the trustees' legal duty to supply him with water and that they had no discretion in the matter. The trustees argued they were not bound to supply all inhabitants of the district but were vested with discretionary power to make such determinations; the petitioner's proposed extension would cost more than

2. G.S. 160A-35 (for cities under 5,000) and 160A-47 (for cities 5,000 and over).

3. The only North Carolina case remotely similar is Town of Dunn v. Tew, 219 N.C. 286, 13 S.E.2d 536 (1941), in which the court spent one short sentence on this issue. The case is summarized in note 44, *infra*.

4. C.C. Marvel, Annotation, *Right to Compel Municipality to Extend its Water System*, 48 A.L.R.2d 1222, 1225 (1956) (hereinafter *Right to Compel*). *See, e.g.*, Chicago v. Northwestern Mut. Life Ins. Co., 75 N.E. 803 (Ill. 1905) (holding that a city cannot arbitrarily select its patrons but must serve on equal terms all who may apply).

5. Marvel, *Right to Compel*.

6. 105 S.W. 926 (Ky. 1907).

7. *Id.*

8. 88 A. 92 (Me. 1913).

$10,000; and that by deciding the extension was too expensive they had exercised their discretion wisely.[9]

The court agreed with the trustees, stating that the power to determine whether extensions must be made must necessarily be vested in the trustees. In rendering its decision, the court distinguished municipal water service from an entitlement and offered an explanation for the distinction:

> It is a matter of common knowledge that water systems in towns or cities containing both an urban and a rural population, whether the systems be owned privately or municipally, never have been in fact, and are not now, anywhere extended beyond the more compact parts of the town into and through the rural parts. It is practicable in the rural parts for inhabitants to supply themselves. In the thickly settled parts, it gradually becomes inconvenient, impracticable, and sometimes impossible for the inhabitants to do so. . . . Organized action, either public or private, becomes necessary, and the individual then pays for a service which he can no longer perform for himself.[10]

The opinion also seems to indicate that the exercise of that discretion is not reviewable on *mandamus* under any circumstances.[11]

Unlike *Moore v. Harrodsburg*, the *Lawrence* court did not seem to place *any* restrictions on the municipalities' discretion regarding extensions.[12] At the end of the opinion when distinguishing a case that was relied on heavily by the petitioner, however, the court seems to indicate that the discretion it granted was predicated on an assumption of reasonableness.[13]

Finally, in 1915 the California Supreme Court clearly recognized a requirement of reasonableness in a municipality's exercise of the power of determining whether and how far to extend its system. *Lukrawka v. Spring Valley Water Co.*[14] held that where a company is charged with supplying a city with water and a reasonable extension of its system is required to supply citizens of the city, the company may, in certain circumstances, be compelled to undertake the extension. In *Lukrawka* the petitioners resided in an eight-square-block section of the city. The area had more than 100 buildings, occupied by approximately 100 families, with an aggregate value in excess of $500,000. The respondent was a corporation that had assumed the responsibilities and duties of supplying the city's inhabitants with water and therefore was subject to the obligations imposed on the city.[15] The citizens argued that because the respondent had the capacity and because they were citizens of the municipality, the water company was required to extend its mains some 2000 feet to supply them with water. The company responded that extensions were within its sole discretion and the "only legal duty which it owe[d] to such inhabitants [was] that when it laid its mains or laterals along the streets of the city it [had to] allow service connections to be made therewith for the benefit of property owners along the line of said mains and laterals."[16]

The lower court's decision in favor of the water company was reversed by the California Supreme Court, which held that the company could be compelled to extend its service to accommodate the petitioners. The court stated, however, that its conclusion did not mean that "the right of an inhabitant of the municipality or of a particular portion of it to compel the service to them by the water company through the extension of its system is an absolute and unqualified right" but that "[t]he right to require the service and the duty of furnishing it by an extension of the water system is to be determined from a consideration of the reasonableness of the demand therefor."[17] The court provided a list of factors to be considered in the determination of reasonableness, including the rights

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9. *Id.* at 94.

10. *Id.* at 95.

11. *Id.*

12. The court stated, "[t]here is no dividing line in the exercise of discretion. There is no ground for saying that the trustees have discretion as to part of the district, and have none as to the other part. They must have discretion as to all extensions or none. If they abuse their discretion, *the remedy does not lie in the power of the court, but in the wisdom of the Legislature.*" *Id.* (emphasis added).

13. *Lawrence*, 88 A. at 96 (the court distinguished *Robbins v. Bangor RY. & Electric Co.*, a case where *mandamus* was granted. In that case, there was no question of extension of the system, only whether a citizen could connect with an existing main. Consequently, the court held that the duty was ministerial and that the city could be compelled to connect the citizen to its water system. The *Lawrence* court noted that the *Robbins* court did not hold that "a corporation authorized to supply water to the public was bound at all hazards, without regard to expense or revenue, or the exercise of good business judgment, to extend its mains to every individual of the public who might demand it"). See Robbins v. Bangor RY. & Electric Co., 62 A. 136 (Me. 1905).

14. 146 P. 640 (Cal. 1915).

15. *Id.* at 641.

16. *Id.* at 642.

17. *Id.* at 646.

of the landowner as well as the duties of the water company.[18]

Moore, *Lawrence*, and *Lukrawka* are all old cases, but the doctrine they announce continues today essentially unchanged. The 1987 case of *State ex rel. Cox v. City of Raymore*[19] illustrates this point. In *Raymore* the landowners sought *mandamus* to compel the city "to provide its normal and ordinary municipal services including municipal water service, to land annexed by it [the city] in 1971." The property owners pointed out that the city, at the time of annexation, had claimed it had the capacity to furnish normal municipal services, including water service, to the area within a reasonable time after annexation. The annexation was subject to judicial approval, and in its judgment granting the annexation the court specifically cited the city's ability to provide such services within a reasonable time.[20] Therefore, the property owners argued, the city was equitably estopped from asserting that it was not required to furnish normal municipal services, including water service, to the area. The court disagreed, saying:

> What this case turns on is the issue of whether the furnishing of water service is a ministerial or a discretionary act of the City. Although the appellants' property lies within the City's corporate limits, it has been rather uniformly held that, although there exists a basic underlying obligation of a city owning a general domestic water system to supply all applicants in substantially like position to those being served, a city cannot be compelled to extend its system at the instance of a prospective customer. This is because a municipality exercises a discretionary function in deciding whether or not to extend its system to an entirely new section within its territorial limits.[21]

The cases set out above all involve water systems and in fact almost all the extant cases do so as well; but there is no reason to expect a different rule on sewer extensions. For example, in *City of Greenville v. Queen City Lumber Co.*,[22] a developer sought to enforce a contract with the city whereby the city was to extend its sewer system to his development site. The Mississippi Supreme Court held the contract was illegal and could not be saved by a doctrine applicable only to mandatory duties, because

> [m]ere statutory authority to construct sewers or drains does not impose any duty to exercise such authority; and, unless the duty is positively imposed by the state, the municipality has discretion to determine whether it will construct a system of drains or sewers, as well as discretion to determine the nature, extent, capacity, and cost of the system, the time and manner of its construction, the method of financing its construction and maintenance, and the length of the period for which a particular arrangement should be made for the disposal of sewage; and a city cannot be compelled to exercise its discretion regarding the construction or maintenance of a sewer system.[23]

The Reasonableness Requirement

These cases indicate a consistent legal rule: Cities enjoy a degree of discretion in deciding upon utility system extensions within the city limits. The rule is conditional, however: that discretion must be exercised reasonably. In *Moore v. Harrodsburg*[24] the court tempered the city's discretion by indicating that it would intervene if there was fraud, corruption, or arbitrary action, thereby clearly placing a reasonableness restriction on the decision makers. Similarly, although in *Lawrence v. Richards*[25] the court appeared to give the decision makers unbridled authority, the court's decision is premised on its contention that municipal water service is a response to the needs of urban dwellers and that it was practical for a remote resident to provide himself with water.[26] Had the citizen been a resident of the main body of the city, the court would likely have considered an extension to his property reasonable and would have decided in his favor.

In *Lukrawka v. Spring Valley Water Co.*,[27] the California Supreme Court noted the geography of the district, the petitioners' relationship to the water company's existing mains, the water company's obligations to the citizens of the municipality, and the

18. *Id.* at 646. (The reasonableness of the extension was determined by consideration of the facts in each particular case including, but not limited to, "consideration of the duties of the company, the rights of its stockholders, the supply of water which the company may control for distribution, the facilities for making extensions to a locality beyond its present point of service, the rights of existing customers, the wants and necessities of the locality demanding it, and how far the right of the community as a whole may be affected by the demanded extension.")

19. 723 S.W.2d 910 (Mo. App. 1987).

20. *Id.* at 910–911.

21. *Id.* at 911.

22. 86 So. 860 (Miss. 1956).

23. *Id.* at 863.

24. *See supra* text accompanying notes 4–5.

25. *See supra* text accompanying notes 7–14.

26. *See supra* text accompanying note 10.

27. *See supra* text accompanying notes 13–17.

company's capacity to extend service to the petitioners.[28] The court then held that the water company was obligated to provide the citizens service by extending its mains and that it had abused its discretion in refusing to do so. The court provided a long list of factors that should be considered in reaching a determination as to whether or not an extension would be reasonable.[29]

Finally, in *State ex rel. Cox v. City of Raymore*, the court refused to compel the city to extend water service to the petitioners despite the city's declarations at the time of annexation of its ability to provide such service. The court adopted the trial court's finding that the petitioners failed to allege that the City of Raymore exercised its discretion arbitrarily, capriciously, or in bad faith. The court also noted that the annexation law only required the city to allege that it *would* be able to provide normal municipal services within a reasonable time after annexation; the annexation law did not bind the city to do so.[30]

Other cases agree with this reasonableness requirement. In *Marr v. Glendale*[31] the California Court of Appeals refused to compel a city to extend its water system to a remote area of the city positioned higher than any of the city's reservoirs when the complaining citizen had an available alternative supply.[32] In *Schriver v. Mayor and City Council of Cumberland*,[33] a Maryland court denied a *mandamus* action to compel a city to extend its water mains where the city had neither the funds nor the capacity to raise the funds required for the extension. The court stated, "[t]he writ of mandamus. . . is not one issued for a petitioner as of right in him. While it is issued without hesitation *where it is just to do so* and *free from serious disadvantages*, the court exercises a discretion *after viewing the effects of the issue*."[34] And, in *Rose v. Plymouth Town*,[35] the court denied a petitioner's *mandamus* action requesting a city be compelled to extend its system where the city's annual revenue was under $200 and the cost of extending the system would be around $1,000. The court concluded the decision to extend was discretionary and the municipality's decision was conclusive unless unreasonable or arbitrary.[36]

In some cases, "even apparently reasonable extensions have been held properly within the discretionary power of a municipality to refuse,"[37] particularly when cost is a factor. In *Greenwood v. Provine*[38] a Mississippi court refused to compel an extension of the city's mains over a distance of two blocks. The court explicitly stated that the petitioners' position was untenable.[39] The court declared that "[t]he extension of the water system from one part of the city where already laid to another part depends upon the reasonableness of such extension, considering the demand for it, the number of water subscribers, and the revenue to be obtained from furnishing the water."[40] The *Greenwood* court was careful to distinguish the situation where an existing line abutted a plaintiff's property. In that case, it would be unreasonable to refuse to connect the plaintiff to the mains, and, consequently, *mandamus* would be available to compel them.[41] Similarly, in *Walter v. Mahaffey*[42] a Pennsylvania district court refused to compel an extension of one street block. In its opinion the court states that "it [is] the duty of the council to ascertain the financial ability of the borough to make extensions and where they should be laid."[43]

Conclusion

It appears clear that cities generally have discretion regarding extensions of water and sewage systems. As long as cities exercise this discretion reasonably, courts will defer to their judgment regarding extensions or the refusal to do so. The determination of the reasonableness of a city's exercise of its discretion will involve a number of factors, particularly the remoteness of the citizen(s) demanding service and the cost of extending service.

Due to the overwhelming consistency of opinions in the area of public utility extensions, it seems likely that North Carolina would follow the same rule when an area has been voluntarily annexed and property owners request municipal utility services.[44] This

28. *Lukrawka*, 146 P. at 646.

29. See note 18, *supra*.

30. *Raymore*, 723 S.W.2d 910 (Mo. App. 1987).

31. 181 P. 671 (Cal. App. 1919).

32. *Id.*

33. 181 A. 443 (Md. 1935).

34. *Id.* at 446 [citing *Kinlein v. Baltimore*, 85 A. 679 (Md. 1912); *McEvoy v. Baltimore*, 94 A. 543 (Md. 1915)] (emphasis added).

35. 173 P.2d 285 (Utah 1946).

36. *Id.* at 287.

37. Marvel, *Right to Compel, supra* note 4, at 1228.

38. 108 So. 284 (Miss. 1926).

39. *Id.* at 286.

40. *Id.*

41. *Id.*

42. 24 Pa. D. 954 (Pa. 1915).

43. Marvel, *Right to Compel, supra* note 4, at 1228.

44. Town of Dunn v. Tew, 219 N.C. 286, 13 S.E.2d 536

would be particularly true if a city has established policies for utility extensions, covering such matters as whether and when customers must bear the cost of extensions, and has followed those policies within the city. Such consistency would meet the statutory requirement that annexed citizens received the same privileges and benefits as citizens of the existing city. Consequently, unless our plaintiff, Fred Simpson, can allege and prove that in light of the relevant considerations, the city is acting unreasonably in its refusal to extend services to his property, he is unlikely to prevail in his *mandamus* proceeding.

(1941) supports the expectation that North Carolina would follow the national rule. In *Tew*, the town was seeking to enforce its tax lien against property owned by defendants. The property had been annexed by the town some years before, and the defendants made two arguments against their liability for the town tax: (1) there had been no voter approval of the annexation (which had been accomplished by legislative act) and (2) the town had not extended town services to their property. The court dealt at relative length with the first issue, holding voter approval was not necessary. On the second issue, the court said that these "other matters complained of by defendants as to improvements in the section, were in the sound discretion of plaintiff, the municipality." 219 N.C. at 292, 13 S.E.2d at 540.

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