1-2-1971

Breternitz v. City of Arvada

NO. 24977

IN THE SUPREME COURT OF THE STATE OF COLORADO

CONNIE and BILL BRETERNITZ and JOYCE and RON TODD, Plaintiffs-Appellees, v. THE CITY OF ARVADA, a municipal corporation, Defendant-Appellant, CITY OF WESTMINSTER, a municipal corporation, Plaintiff-Intervenor-Appellee.	Error to the District Court of the County of Jefferson State of Colorado HONORABLE RICHARD E. CONOUR Judge

ANSWER BRIEF OF APPELLEES, BRETERNITZ AND TODD

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ANSWER BRIEF OF APPELLEES, BRETERNITZ AND TODD

STATEMENT OF ISSUES PRESENTED FOR REVIEW

AND

SUMMARY OF ARGUMENTS

I. The trial court correctly found the ordinance annexing certain territory to Arvada was void because:

a) the petition for annexation did not comply with the requirements of 139-21-6(2);

b) the finding and conclusions made by the Arvada City Council were not supported by the evidence presented at its public hearing;

c) the Municipal Annexation Act is unconstitutional as applied to the facts of the case:

i) the right of appellees to raise the issue;

ii) the constitutionality of 139-21-4(3);

iii) severability.

II. That the Annexation Ordinance is void and the judgment of the trial court should be affirmed for the following additional reasons:

a) Council amended the legal description of the petitions at its first hearing;

b) the Council that passed the ordinance on final reading was a different Council than the one that passed the ordinance on the first reading;

c) that the petition split the property without the consent of the property owners;

d) that the notice for the public hearing did not comply with the statute.

STATEMENT OF THE CASE

In the terms of the trial judge, Arvada intended to annex the property "come hell or high water, and with or without evidence."

STATEMENT OF THE FACTS

Appellees adopt the first paragraph of appellant's Statement of Facts and supplements it with the Findings of Fact of the trial court (ff. 96-133):

> "THIS MATTER came on for trial to the Court on March 24, 1970, and is a review in the nature of certiorari of the proceedings of the City Council of the City of Arvada annexing hereinafter-described lands in Jefferson County, Colorado, which review is pursuant to the provisions of Section 139-21-15, C.R.S. 1963, Vol. 9, and Rule 106, Colorado Rules of Civil Procedure. Two actions have been commenced which challenge or affect the validity of the annexation proceedings; this action, being No. 34330, and No. 34090, entitled Witkin VII, Inc., v. City of Arvada, a declaratory judgment action raising certain constitutional issues in connection with the proceedings and statute under which the annexation was effected.

"These Findings of Fact and Conclusions of Law will be limited to Case No. 34330 and will further be limited to the record of the City Council of the City of Arvada.

"To better understand the issues of law involved in this review, detailed findings of facts are necessary, and the Court finds:

"For several years prior to the commencement of the annexation proceedings hereinafter referred to, John J. Jones and Lorene H. Jones were the owners of approximately 725 acres of land in Jefferson County described as follows:

"The W1/2 of Section 25, except the South 100 feet thereof and the E1/2 of Section 26, except the South 100 feet thereof, all in Township 2 South, Range 69 West of the 6th P.M., together with all ditch and reservoir rights, right of ways and easements appurtenant thereto.

"Also a tract of land described as follows, to-wit: Commencing at the Southwest corner of the SE1/4 of Section 25, Township 2 South, Range 69 West of the 6th Principal Meridian, thence East along the Section line 509 feet to the point of intersection of said Section line with the County

Road; thence along the County Road in a Northeasterly direction a distance of 77 feet, more or less to a point; thence West 583 feet on a line parallel with the South line of the SE1/4 of Section 25, Township 2 South, Range 69 West to a point on the West line of said SE1/4, thence South on said quarter section line 30 feet to place of beginning, all of the above described land being in Township 2 South, Range 69 West of 6th Principal Meridian.

"On or about April 10, 1969, John J. Jones and Lorene H. Jones entered into an agreement with a real estate developer incorporated under the name and style of Witkin VII, Inc., to sell the aforesaid tract of land for a total purchase price of $1,600,000.00, the sale to be closed and the purchase price paid on or before April 10, 1970. The major portion of the Jones land adjoins the city limits of the City of Arvada, while a smaller portion of the easterly projection of the property adjoins the city limits of the City of Westminster. A major portion of the east half of Section 25 adjoining the Jones land has been platted and subdivided into a development known as 'Far Horizons', on which there are several hundred dwellings. The railroad line of the Colorado and Southern Railroad

Company runs across the northeast corner of the Jones land, separating from the main body a tract of slightly less than two acres, and runs in a diagonal direction across the north portion of the East half of Section 25 forming the north boundary of the Far Horizons Subdivision.

"Following the execution and delivery of its purchase contract with John J. Jones and Lorene H. Jones, Witkin VII, Inc., appears to have entered into some tentative negotiations with the Cities of Arvada and Westminster looking toward annexation of its proposed subdivision to either Arvada or Westminster, the result of which appears to have precipitated a race between these two developing municipalities to annex the Witkin-Jones development, a contest which has been won by the City of Arvada, or not, depending upon the outcome of this judicial review of its annexation proceedings, including a determination of the constitutional issues which appear to affect the rights of the parties who are caught in this municipal contest. Commencing at this point, the events will be related as they transpired, in chronological order.

"The problem of the Court is complicated by the fact that few of the documents making up the record of the City Council bear any filing marks, and it has been necessary to make repeated references to the record of testimony and some of the minutes to try to determine what happened and when.

"On April 30, 1969, a meeting was held by the so-called Citizens' Association, apparently made up of residents of the Far Horizons Subdivision, which at the time was not contiguous to any part of the municipal limits of the City of Arvada, although it was contiguous to the westerly limits of the City of Westminster. There is some suggestion that a considerable number of the residents of Far Horizons were less than enthusiastic about being annexed to Westminster but were agreeable to annexing by Arvada. However, at that time annexation to Arvada was impossible for lack of contiguity. Somewhere along the way someone developed the idea of annexing Far Horizons to Arvada by the device of including the 720 acres, more or less, belonging to Mr. Jones and contracted for sale to Witkin VII, Inc. At the meeting of the Citizens' Association on June 30, a Petition for Annexation Election was presented to the persons present at the meeting,

seeking annexation of approximately 1039 acres of land, made up of the J. J. Jones land, the Far Horizons Subdivision, and the unplatted portion of the East half of Section 25 lying south of Far Horizons. The petition was signed by 141 persons claiming to be property owners and qualified electors resident in the area proposed to be annexed, which was described as follows:

"Beginning at the NW corner Sec. 36, T2S, R69W, thence south along the west line of said Section 36 a distance of 93.83 feet; thence on an angle to the left of 75° 12' 18" a distance of 330.22'; thence on an angle to the left of 5° 16' 18" a distance of 478.63'; thence, on an angle to the left of 6° 30' 24" a distance of 541.39' to a point on the east line of, and 272.75' south of the NE corner of the NW1/4 of the NW1/4 of Sec. 36, T2S, R69W; thence on an angle to the right of 87° 05' 59" a distance of 1062.54' to the SE corner of the NW1/4 of the NW1/4 of Sec. 36, T2S, R69W; thence east along the south line of the north 1/2 of the north 1/2 of said Section 36 to the SE corner of the west 1/2 of the SW1/4 of the NE1/4 of the NE1/4 of Sec. 36, T2S, R69W; thence north along the east line

of said W1/2 of the SW1/4 of the NE1/4 of the NE1/4 of Section 36 to the NE corner of said W1/2 of the SW1/4 of the NE1/4 of the NE1/4 of Sec. 36; thence east along the south line of the N1/2 of the NE1/4 of the NE1/4 Sec. 36, T2S, R69W to the east line of said Section 36; thence north along the east line of said Section 36, to the SE corner of Section 25, T2S, R69W; thence north along the east line of said Section 25 to a point which is on the southwesterly right-of-way line of the Colorado & Southern and Chicago, Burlington and Quincy Railroad; thence northwesterly along said south R.O.W. line to a point which is on the north line of Sec. 25, T2S, R69W; thence west along the north line of said Section 25 to the NE corner of Sec. 26, T2S, R69W; thence west along the north line of said Section 26 to the west R.O.W. line of Wadsworth Boulevard (Colorado State Highway 121); thence south along said west R.O.W. line of Wadsworth Boulevard to the intersection of said west R.W.O. line of Wadsworth Boulevard with the north line of Section 35, T2S, R69W thence east along the north line of said Section 35 to the point of beginning; including all platted lands located therein.

"This Petition for Annexation Election was filed with the City Clerk of Arvada on May 1, 1969.

"On May 4, 1969, John J. Jones, Lorene H. Jones and Witkin VII, Inc. and the City of Westminster entered into a series of written agreements covering the Jones land hereinbefore described. One agreement was for the sale and purchase of water taps by Jones and Witkin VII Another was an agreement to annex the property in question to the City of Westminster. The third agreement was an agreement with Westminster Sanitation District dated May 7, 1969, for the sale and purchase of sewer taps, and the fourth was a Memorandum of Agreement to Annex, presumably for recording purposes. The instruments relating to annexation were recorded in the office of the County Clerk and Recorder of Jefferson County on the morning of May 5, 1969.

"On the evening of May 5, 1969, a meeting of the City Council of the City of Arvada was held, at which time the aforesaid Petition for Annexation Election was presented to the City Council. Immediately, Mr. James Elliott, acting under a power of attorney contained in the Petition for Annexation Election,

stated: 'There is a correction in the legal description which I would like to ask the Council to make at this time prior to consideration of the petition. On the sixth line from the bottom of the legal description contained in the petition and the third line from the bottom of the legal description on the annexation map, the legal description should be corrected to read as follows: And this is after the wording: (Colorado State Highway 121), "Thence south parallel to the center line of Wadsworth Boulevard 180 feet; thence west 25 feet along said R.O.W. Line;" and with that correction the petition stands as submitted.'

"The above-quoted words of Mr. Elliott were intended to replace the underlined portion of the description of the area sought to be annexed. With reference to the map, it would appear that there is a 180-foot long jog 25 feet in width in the west right-of-way line of Wadsworth Boulevard at the northwest corner of the east half of Section 26, and this amendment was for the purpose of correcting this slight defect.

"The record indicates that no annexation map was filed with the Petition for Annexation Election, and no annexation map appears to

have put in its appearance until the Council meeting of May 5, 1969, and perhaps later.

"In response to Mr. Elliott's suggestion that the petition should be amended, the following proceedings were had: 'Councilman Johnson, Mr. Mayor, I would like to move that the Petition for Annexation Election presented before us be amended pursuant to the words the Clerk has just read after parenthesis, Colorado State Highway 121, closed parenthesis, and add them at that point after the semicolon and also amended on the annexation map presented thereto.' This motion was carried by unanimous vote of councilmen present. It is interesting to observe that the annexation map presented to the Council contains a description which conforms with the amendment; and the Court is satisfied and so finds that no annexation map was ever tendered with the Petition for Annexation Election. However, there is another map in the file that does conform with the petition as originally filed, but there is nothing to indicate how this document got in the file or when it was tendered to the Council, and the Court is unable to determine which map got in the Council's records first.

"At the meeting of May 5, 1969, the Council of the City of Arvada adopted findings of fact and a resolution which found that the petition was in substantial conformity with the statute, and set the matter for a hearing before the Council on June 16, 1969, at 7:30 o'clock P.M. and directed the City Clerk to give notice as required by law.

"At the time of these proceedings, the City Council had been notified of the execution and delivery and recording of the Agreement for Annexation between J. J. Jones, Lorene H. Jones, Witkin VII, Inc., and the City of Westminster, but proceeded to ignore the execution and delivery of this Agreement for Annexation or the subordinate agreements relating to the purchase of sewer and water taps and proceeded as though the agreements to annex did not exist. Copies of all these documents were provided the City Council of the City of Arvada at the meeting of May 5, 1969.

"In the meantime, an action was commenced in the District Court of Jefferson County, being Civil Action No. 33183, entitled Witkin VII, Inc., a Colorado Corporation; City of Westminster, a Municipal Corporation; John J. Jones; Lorene H. Jones; Westminster Sanitation District,

a Quasi-Municipal Corporation, plaintiffs, vs. the City of Arvada and the individual members of the City Council, defendants, seeking a declaratory judgment to the effect that the various agreements between Witkin VII, the Joneses and the City of Westminster and the Westminster Sanitation District were valid, binding and enforceable agreements and specifically enforceable, and that the defendants were acting without jurisdiction and authority in proceeding with the annexation of the property covered by such agreements.

"A hearing was conducted by the Arvada City Council on June 16, 1969, at which hearing a number of witnesses were sworn and testified, following which the Council adopted a resolution making findings of fact and conclusions as follows:

"1. That not less than one-sixth (1/6) of the perimeter of the area proposed to be annexed is contiguous to the City of Arvada.

"This finding appears to be true, based upon an annexation map which is a part of the record of the City Council.

"2. That a community of interest exists between the territory proposed to be annexed and the City of Arvada;

that the territory proposed to be annexed is urban or will be urbanized in the near future; and that the territory proposed to be annexed is integrated or is capable of being integrated with the City of Arvada.

"The Court finds very little evidence in the record to support this finding.

"3. That the petition is signed by at least seventy-five (75) persons who are qualified electors and who are resident in and land-owners of the area proposed to be annexed.

"This finding is not supported by any competent evidence.

"4. That no land held in identical ownership, whether consisting of one tract or parcel of real estate or two or more contiguous tracts or parcels of real estate, is being divided into separate parts or parcels without the written consent of the landowner or landowners thereof, unless such tracts or parcels are separated by a dedicated street, road or other public way.

"This finding is not supported by the evidence, and in fact, is contrary to the evidence in that a small tract owned by John J. Jones

lying north of the right-of-way of the Colorado and Southern Railroad was excluded from the area proposed to be annexed without the written consent of Jones and is not separated from the remainder of the Jones land by dedicated street, road or other public way, unless the railroad right-of-way can be considered a public way or land in private ownership. This question will be considered and resolved in the appropriate conclusion of law.

"5. That no land held in identical ownership, whether consisting of one tract or parcel of real estate or two or more contiguous tracts or parcels of real estate, comprising twenty acres or more which, together with the buildings and/or improvements situated thereon, has an assessed value in excess of two hundred thousand dollars for ad valorem tax purposes for the year next preceding the annexation is included in the area proposed to be annexed without the written consent of the landowner or landowners, unless such tract of land is situated entirely within the outer boundaries of the City of Arvada as they exist at the time of annexation.

"This finding is not supported by any evidence other than the fact that the Jones land consists of one tract or parcel of real estate comprising twenty acres or more.

"The record is devoid of any evidence concerning the assessed value, which may or may not be in excess of two hundred thousand dollars for ad valorem tax purposes, but which is said in the arguments to be of an assessed value of less than two hundred thousand dollars. However, the Court is of the opinion that this particular finding is one of the decisive issues of this proceeding upon the basis of the constitutionality of the provision of the statute and will discuss the matter further and in detail in the conclusions of law.

"6. That the proposed annexation will not result in the detachment of territory from any school district and attach the same to another school district.

"The Court finds no evidence supporting this finding.

"7. That no additional terms and conditions will be imposed upon the area proposed to be annexed.

"There is no evidence to support this finding.

"The Council then concluded that the requirements of the applicable parts of the Municipal Annexation Act of 1965 had been met and that the territory proposed to be annexed

was eligible for annexation, and directed the City Attorney to petition the District Court of Jefferson County for an annexation election.

"It is interesting to note that the City Council ignored the fact that an agreement to annex had been entered into between the City of Westminster, John J. Jones, Lorene H. Jones and Witkin VII, Inc., dated May 4, 1969, together with the complementing agreements relative to purchase and sale of sewer and water taps, which agreements were of record in the office of the Clerk and Recorder of Jefferson County at the time the City Council of Arvada presumed to act upon the matter of the so-called Far Horizons annexation petition. Another interesting fact is contained in the minutes of the June 16, 1969, meeting of the Council, wherein Mr. Kahn, counsel for one of the objecting parties, commented on the fact that the findings of fact and conclusions thereon were prepared before the hearing, which seems to suggest to the Court that the Council intended to make these findings 'come hell or high water', and with or without evidence.

"On September 29, 1969, the Arvada City Council again met, at which time Ordinance No. 69-36, entitled 'An Ordinance to Annex Certain Real

Property to theCity of Arvada, Colorado', being the Far Horizons annexation ordinance, was read by title only, its passage on first reading was moved, and by unanimous vote the ordinance was approved on first reading, ordered published in full and a public hearing set for October 20, 1969. The publication of the ordinance was then made in one issue of the Arvada Citizen on October 2, 1969. On October 20, 1969, the Board met, at which time the Mayor Pro Tem read a restraining order issued out of the District Court of Jefferson County, restraining the City of Arvada and its Council from proceeding with the annexation until October 29, 1969. In view of this restraining order, the Council deferred any further action in the matter. This restraining order was subsequently discharged.

"On November 3, 1969, the Arvada City Council again met and again passed Ordinance No. 69-36, being the so called Far Horizons annexation, on first reading, ordered the ordinance published in full and setting a public hearing for November 17, 1969, at 7:30 P.M. Again, the ordinance was published in the Arvada Citizen under date of November 6, 1969. On November 17, 1969, at which time no one appeared to speak for or against the ordinance

or the petition for annexation election, the ordinance was passed.

"Between the first and second readings of Ordinance No. 69-36, there appears to have been a change in the membership of the City Council. The minutes of October 20, 1969, show that the City Council consisted of Mayor Bartlett and Councilmen Johnson, Smith, Trowbridge, Gorrell, Walker and Lowry. The minutes of November 17, 1969, show that the Council consisted of Mayor Johnson and Councilmen Binford, Dolan, Gorrell, Horan, Johnson, McGinley and O'Brian.

"Pursuant to order of the District Court, an annexation election was held on September 16, 1969, which resulted in 591 votes being cast for the annexation and 159 votes against. And on September 19, 1969, the District Court entered an order authorizing the City of Arvada to adopt an ordinance accomplishing the annexation of the property described in this proceeding.

"The Ordinance No. 69-36, which became Ordinance No. 787 on its final passage on November 17, 1969, was published in the Arvada Citizen under date of November 20, 1969, and is now in full force and effect, and the annexation became an accomplished fact."

ARGUMENT

I.a. The petition for annexation election did not comply with the requirements of 139-21-6(2).

The first rule of statutory construction is to give the words their usual meaning.

Bedford v. C.F. & I. Corp., 102 Colo. 538, 545, 81 P.2d 752:

> "[5] Whether we are considering an agreement between parties, a statute or a constitution, with a view to its interpretation, the thing we are to seek is the thought which it expresses. To ascertain this, the first resort in all cases is to the natural signification of the words employed, in the order and grammatical arrangement in which the framers of the instrument have placed them. If thus regarded the words embody a definite meaning, which involves no absurdity, and no contradiction between different parts of the same writing, then that meaning apparent upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. Newell v. People, 7 N.Y. 9, 97. This language was quoted by Mr. Cooley in his work on Constitutional Limitations, and by us in People ex rel. v. May, 9 Colo. 80, 85, 10 Pac. 641."

Denver v. Hobbs Estate, 58 Colo. 220.

It would be to hold that they meant to say that which they did not say, and that they did not intend to say that which, in the clearest and plainest language possible, they have said. In such case it is not for the courts to give to the language any different meaning from that plainly expressed.

Gavend et al. v. City of Thornton et al., 165 Colo. 182, 437 P.2d 778.

"[3,4] The statutory language is clear and explicit and requires no 'interpretation or construction beyond giving effect to the common and accepted meaning of the words employed . . . .'" City of Montrose v. Niles, 124 Colo. 535, 542, 238 P.2d 875, 878.

C R.S. 1963, 135-1-2(1). All words and phrases shall be understood and construed according to the approved and common usage of the language; . . . The trial court followed this Rule of Construction in interpreting the Municipal Annexation Act of 1965, hereinafter called Act. The section of the Act dealing with the requirement of a petition for an annexation election states:

"CRS '63, 139-21-6(2)(d)(i). The petition for annexation election

shall comply with the provisions of subsection (1)(d) of this section except that:

"(ii) It shall contain an allegation that the signers of the petition are qualified electors residing in and landowners of the area proposed to be annexed."

The trial court ruled the subsection means "that petition for annexation election shall comply with the provisions of subsection (1)(d) of this section, except that it shall contain an allegation that the signers of the petitions are qualified electors residing in and landowners of the area proposed to be annexed."

Appellant requests this Court to construe the subsection to mean: "the petition for annexation election shall comply with the provisions of subsection (1)(d) of this section, except that it shall contain an allegation that the signers of the petitions are qualified electors residing in and landowners of the area proposed to be annexed in lieu of an allegation that the signers of the petitions comprise the landowners of more than fifty per cent of the landowners included in the area proposed to be annexed, exclusive of streets and alleys."

The ruling by the trial court follows the general law. The suggestion by appellant is contrary to the general law. The court generally will not add to an exception by implication. Publix v. Barb, 139 Colo. 205, 338 P.2d 702:

> "The specification by the legislature of exceptions to the operation of a general statute, does not necessarily operate to preclude the court from applying other exceptions. However, where express exceptions are made, the legal presumption is that the legislature did not intend to save other cases from the operation of the statute. In such case, the inference is a strong one that no other exceptions were intended, and the rule generally applied is that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted, and excludes all other exceptions or the enlargement of exceptions made. Under this principle, where a general rule has been established by a statute with exceptions, the courts will not curtail the former, nor add to the latter, by implication. In this respect, it has been declared that the courts will not enter the legislative field and add to exceptions prescribed by statute."

New York Indemnity Co. et al. v. Industrial Commission et al., 86 Colo. 364, 281 P. 740:

> "[3] Since Robinson's employment was not procured for him by either Biers or the commission, it is outside the exception. Can we add it thereto? A well settled rule of construction forbids: 'It is well settled that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted and excludes all other exceptions.' 25 R. C. L., p. 983, §230. 'An express exception, exemption or saving excludes others.' Lewis' Southerland Stat. Const. (2d Ed.), Vol. 2, §494."

Appellant argues this literal interpretation renders the subsection 6(2) meaningless, and therefore the subsection should be given appellant's meaning. If the statute is to be interpreted away from the literal meaning, a more restrictive meaning is possible and consistent with legislative intent. A grant of power is strictly construed against the grantee and, therefore, if two interpretations are possible, the more restrictive should be selected.

C.R.S. 1963, 135-1-2(2) authorizes the construction that "petition" means "petitions", and therefore the total land contained in all the petitions filed with the City Clerk under subsection 6(1) and/or 6(2) "shall comply with the provision of subsection (1) (d) . . ." Subsection 6(2) is a defensive measure for annexation election of an area proposed under Section 6(1). This construction is consistent with the four requirements set forth in People v. Ropini, 107 Colo. 363, 112 P.2d 551:

". . . In approaching this problem of interpretation there should be kept in mind well known rules of statutory construction, such as: (1) The legislative intent is to be ascertained and given effect (People v. Texas Company, 85 Colo. 289, 275 Pac. 896); (2) that in ascertaining the intention of the legislature the courts should consider the old law, the mischief, and the remedy (Armstrong, Secretary v. Simonson, 84 Colo. 472, 271 Pac. 627); (3) that, if possible, effect should be given to every clause and section (Denver v. Campbell, 33 Colo. 162, 80 Pac. 142); (4) that where two constructions are possible, by one of which the entire act may be harmonized, while the other will create discord between different provisions, the former should be adopted (Colorado Springs Live Stock Co. v. Godding, 20 Colo. 71, 36 Pac. 884)."

The construction that subsection 6(2) is defensive is consistent with the history of Senate Bill 122 (the "Municipal Annexation Act of 1965") as it passed through the legislature.

Section 6 of the Act was amended six times but only three of the amendments are significant here.

Subsection 6(1)(d)(iv) was amended by changing the semicolon at the end to a comma and adding "and more than 50% of the resident real property owners of the territory to be annexed." (Senate Journal 1965, p. 763). This amendment was deleted by the House (House Journal 1965, p. 1283). The amendment prior to its deletion required 50% of the residents and the owners of 50% of the land to sign a petition to annex. The Senate's initial intent was to make annexations by petitions more difficult under the new law rather than less difficult.

It is difficult to imagine that the Senate could require under one section, the owners of 50% of the land and 50% of the residents and would allow only 10% of qualified electors owning any small percentage of the land to do the same thing under another section. It appears certain that the Senate intended subsection 6(2) to be defensive to subsection 6(1). The amendment changed the petition requirement, making it more difficult to

obtain a petition signed by both landowners of 50% of the land and 50% of the residents, still the total requirement before land could be annexed was unchanged from the Colorado law at that time, Denver v. Holmes, 156 Colo. 586, 400 P.2d 501, decided during the 1965 legislative session.

The second amendment, the House deleting the Senate amendment, only supports the fact that the legislature intended no different petition method under the new law.

The third amendment is found at page 1412 of the House Journal of 1965. This amendment added the last 5-1/2 lines to Section 6(3). Prior to the amendment subsection 3 ended with a period after 139-21-5. The amendment added the following:

> "(3) . . . except that a petition for annexation election filed pursuant to subsection (2) of this section shall take precedence over an annexation petition involving the same territory and filed pursuant to subsection (1) of this section, provided that such petition for annexation election shall be filed pursuant to subsection (1) of this section, provided that such petition for annexation election shall be filed at least ten days prior to the hearing date set for the annexation petition filed pursuant to subsection (1) of this section." (Emphasis supplied.)

This amendment was added to clarify the language of subsection 6(3) consistent with the intent of the legislature. The amendment states that subsection (2) was intended to be defensive to subsection (1) consistent with the former law.

There is no indication that the word "procedure" as used in subsection 6(3) is synonymous with "method". Dicta to the two recent cases, cited by appellant, decided by this Court and the three judge Federal Court suggest this use of the word "procedure". The word procedure as used in subsection 6(3) means the same thing that it means in subsections 6(1)(h), 6(2)(a) and 5(2)(a), that is the procedure followed by the annexation municipality. Subsection 6(2)(e) states "the requirements and procedures . . . shall be met and followed . . . ." Subsection 6(3) does not say there are alternative methods of annexation or have anything to do with initiating annexations, or with requirements of petitions. The House amendment changes the meaning of subsection 3 away from that set forth in the dicta of the two cases, to the meaning determined by Judge Conour. It must be assumed that subsection 6(3) did not express legislative intent prior to amendment and that the purpose of the amendment was to change the subsection to more nearly express the intent of the legislature.

A further indication of legislative intent results from comparing subsection 6(1)(b) with 6(2)(b) indicating the purpose of the petitions.

C.R.S. 1963, 139-21-6(1)(b):

> "(1)(b). The landowners of more than fifty per cent of the territory, excluding public streets and alleys, meeting the requirements of sections 139-21-3 and 139-21-4, may petition the city council of any municipality for the annexation of such territory."

C.R.S. 1963, 139-21-6(2)(b)(i):

> "(2)(b)(i). The qualified electors who are resident in and who are landowners of the area proposed to be annexed may petition the city council of any municipality to commence proceedings for the holding of an annexation election in the area proposed to be annexed. This petition shall meet the standards described in paragraphs (d) and (e) of this subsection (2) . . . ." (Emphasis supplied.)

To give these words their natural meaning indicates that subsection 6(1) deals with a petition to annex eligible land and subsection 6(2) deals with a petition for election of land proposed to be annexed, presumably, under subsection (1). This

use of different language in the subsections to identify the boundaries of the land included within the petition further indicates that subsection 6(2) is defensive to (1).

In the long run, it is land and not people that is annexed to a city. Appellant contends that the legislature intended that 10% of the qualified electors who reside in and own land are limited only by an election and the 1/6 contiguity rule. Such a broad grant of power should be clearly expressed and should not result from construction away from the literal meaning of the statute.

I.b. Findings and conclusions made by the Arvada City Council:

"139-21-9(1)(a) Upon the completion of the hearing, the City Council of the annexing municipality shall, by resolution, set forth its findings of fact and its conclusion based thereon with reference to the following matters:

"(b) Whether or not the requirements of the applicable parts of Sections 139-21-3 and 139-21-4 have been met."

139-21-3 requires the following:

(2) That not less than one-sixth of the perimeter of the area proposed to be annexed is contiguous.

(3) That a community of interest exists; that the territory proposed to be annexed is urban or will be urbanized in the near future.

139-21-4 requires the following:

(2) Land will not be divided.

(3) Not one parcel over 20 acres with an assessed value of over $200,000.00 shall be included without the owners written consent.

(4) No annexation proceedings have been commenced to annex part of the territory to another municipality.

(5) The annexation will not result in detachment of territory from any school district and attachment to another.

Pages 13-16 show the finding of the trial court in reviewing the record before appellant, City Council.

Appellant argues that evidence of one-sixth contiguity plus the statutory presumption is sufficient to cover Section 3.

The only evidence to support the finding under Section 4 is the petitions, which appellant argues is sufficient.

The source of the information on the petitions is as follows:

Page 25 of the transcript of the hearing before the Arvada City Council (ls. 6-9):

Mr. Kahn Question: "Did you type up the petition yourself, Mrs. Ekmark?

A. No.

Q. Who did that?
A. We asked the City of Arvada to help us with that."

Page 30 of the same transcript (ls. 12-22):

Mr. Kahn's Question: "Mr. Elliott, did you prepare the annexation petition for election involved in this matter?

A. I did not.

Q. Do you know who did?
A. I do not.

Q. Did you prepare the legal description and those matters prepared in the petition, the verbiage which precedes the actual signatures?
A. I did not.

Q. Do you know who did?
A. I do not."

Appellant argues the petitions prepared by unidentified third parties, signed by persons stating that they are landowners of specific land, is competent evidence to determine whether someone else's land is split and whether no one else's land comprises 20 acres or more with an assessed value of over 200,000 dollars -- all of this without an annexation map. The map was completed after the petitions were signed on April 30th.

Page 26 from the transcript (ls. 14-15):

Mr. Kahn's Question: "Was there a map shown to the people there?"

Mrs. Ekmark's Answer: "No."

Page 18 from the transcript (ls. 23 and 24):

Mr. Kahn's Question: "Were there any maps accompanying that petition at the time?"

Mrs. Morris' Answer: "The petition was the only document filed in my office."

Answer of Mr. Tobler, page 13, ls. 10 and 11: "This would have been on May the 1st when the map was completed."

Appellant further argues that it can make a finding as required by subsection 4(5) without any evidence whatever because it only applies to Denver. This was clearly not the intent of the legislature. The application of Section 19 depends upon the finding under subsection 4(5). The legislature certainly did not intend these two sections to apply only to Denver; that interpretation would be contrary to two provisions of the Colorado Constitution:

Article XX, Section 1 (applicable to all home rule cities including appellant):

> "The general annexation and consolidation statutes of the state shall apply to the City and County of Denver to the same extent and in the same manner that they would apply to the City of Denver if it were not merged . . . ."

Article V, Section 25.

This Court has twice ruled annexation and consolidation statutes unconstitutional in answer to interrogatories because they were special legislation applying only to Denver and were not, therefore, general.

In re Senate Bill No. 293, 21 Colo. 38.

In re Senate Bill No. 95, 146 Colo. 233.

Appellant's brief fails to mention that no finding was made concerning subsection 4(4). Subsection 4(4) determines the applicability of Section 13 of the Act. Arvada had actual notice on May 5 of an agreement to annex 720 acres of the property to Westminster. A memorandum of this agreement was filed pursuant to Section 20 of the Act. Under these circumstances a finding pursuant to subsection 4(4) was certainly applicable.

Appellant argues that the Arvada City Council can determine for subsections 4(2) and 4(3) the competency of evidence; for subsection 3(3) the weight of evidence; for subsection 4(5) for the necessity for evidence, and for subsection 4(4) the applicability of the section.

This would amount to an unlawful delegation of power to make the law.

Swisher v. Brown, 157 Colo. 378, 402 P.2d 621.

> "[8] As a general rule for determining constitutionality of delegation of authority by the legislature, this court has approved the statement contained in Field v. Clark, 143 U.S. 649, 693, 694, which reads:
>
> "'The true distinction . . . is between the delegation of power to

> make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.'"

See Hazlet v. Gaunt, 126 Colo. 385, 250 P.2d 188; Prouty v. Heron, 127 Colo. 168, 255 P.2d 755.

Appellant argues that the purpose of the hearing is to allow objectors to appear to inform the Council why the land is not eligible for annexation. In effect they argue that the Council is acting in its legislative capacity. This may be true at the time Council passes the ordinance, but not during the public hearing. Carroll v. Barnes, No. 23143, Colorado Bar Advanced Sheets, Vol. 21, No. 18, p. 436.

The Act in various sections required notice for a hearing, findings and a review by certiorari from the actions of Council. There is no indication that the legislature intended to delegate law-making power to the City. The hearing was not advisory in aid of the performance of Council's duties. It seems reasonably clear that the legislature established a quasi-judicial hearing to determine the requirements of Sections 3 and 4.

Agencies acting in their fact finding capacity are performing a quasi-judicial act. Shoenberg Farms v. Department of Agriculture, No. 22351, Colorado Bar Advanced Sheets, Vol. 20, No. 20, p. 443, 445. The requirement to find certain facts must include a requirement that some evidence be presented at the hearing.

See 2 Am. Jur. 2d 194, Administrative Law, § 387.

> "The Courts have generally held that it is improper for an administrative agency in a quasi-judicial or adjudicatory proceeding to base its decision of findings upon facts fathered from its own files without introducing the files in evidence, or upon facts obtained from other cases pending before or previously decided by the tribunal."

The position taken by the City of Arvada suggests that the City Council can, while sitting in a quasi-judicial capacity, be a silent witness as well as a judge. The Colorado Supreme Court has rejected this theory of law in McKay v. State Board, 103 Colo. 305, 314.

> "There is no evidence that the drugs prescribed by McKay were not prescribed in good faith. No doubt the amount prescribed and the frequency of prescription might be such that in

> and of itself it would indicate to one skilled in their proper use that one could not possess ordinary skill as a physician and in good faith so frequently prescribe such quantities. But, as heretofore pointed out, the law under which the Board acted, contemplates a review of the board's action by a court presumably not expert in medical matters, with authority in the court to determine whether the board regularly pursued its authority or abused its discretion. Without testimony by an expert the court cannot determine the limits of proper treatment in good faith of one possessing ordinary skill, nor can it assume that the board members out of their own individual knowledge and skill correctly fixed the limits within which one might prescribe in these particular cases and be within the bounds of ordinary care and skill so that good faith might be presumed, and beyond which good faith and ordinary skill could not both be successfully asserted. Such matters being only within the knowledge of experts must be shown by testimony of experts appearing in the record." (Emphasis supplied.)

The appellees agree that this Court cannot be called upon to determine whether the Council's findings were right or wrong, if there exists competent evidence to support the

findings. But appellant goes far beyond that by contending that its Council has the authority to decide not only the weight of the evidence, but also the necessity for evidence, without justification or excuse; that the Council is the sole arbiter and that its decisions are therefore not appealable; they are saying that a party who appears in opposition to the annexation must not only rebut the evidence that is presented, but also rebut those unknown facts contained in the councilmen's minds. The appellees contend that the Council, in reaching a decision without having before it competent evidence for those specific requirements of the statute, constitutes an abuse of discretion and is arbitrary and capricious, and, further, is a denial of due process of the law and equal protection of law as qualified by the Colorado and United States Constitutions.

McKay v. State Board, supra, at 317:

"We think the court was correct in its finding that the board had jurisdiction of the subject matter. We think it was in error in not holding that the court was without jurisdiction to enter the order revoking McKay's license because of a writ of certiorari raises not only the question of jurisdiction of the subject matter but also the

> question of whether the board regularly pursued its authority or greatly abused its discretion. The board has jurisdiction to enter an order revoking a license only when such order is based on competent evidence, and greatly abuses its discretion when it enters an order without evidence to support it. 'It must follow from what has been said of the power of the court to consider abuse of discretion, that it must in some cases consider the evidence in order to determine whether the facts shown come within the proper definition of that term as used in the statute, . . .'"

I.c. The Municipal Annexation Law is unconstitutional as it applies to the facts of this case.

i. The right of appellees to raise the issue. The appellant cites Cline v. Boulder, 450 P.2d 335 (Colo. 1969), to establish appellees herein have no standing to challenge the constitutionality of Section 4(3) of the Act.

In the Cline case the Clines owned all of the property being annexed which was smaller than 20 acres and worth less than $200,000.00.

This Court simply held that the Clines ". . . are not in a position to raise the question of the reasonableness

of the classification since no property involved in this annexation is subject to any of the exemptions, and the Act as applied to the facts herein does not discriminate against the Clines nor in favor of any other person." (Emphasis supplied.)

In the case at bar the petitioners all alleged that they resided in the Far Horizons area. Between the Far Horizons area and the City of Arvada is 720 acres owned by the Joneses which was subject to a contract to purchase by Witkin. All of the contiguous area is the Jones-Witkin land.

Mr. Graver, attorney for the Joneses, appeared and stated that neither of the Joneses signed an annexation petition and neither voluntarily consented to the annexation (City Council Transcript, p. 41, ll. 24-25).

Mr. Ginsberg, attorney, appeared at the hearing and signed as against annexation to Arvada for Witkin VII, Inc. Witkin VII was the plaintiff in a lawsuit to enjoin the annexation of the land to Arvada.

Without the inclusion of the 720 acres of land, Arvada would be annexing non-contiguous land.

Appellees are certainly affected by the inclusion of 720 acres without the written consent of the owners.

Gavend v. Thornton, supra, at 186:

> "In this view we cannot accept defendants' contention that plaintiffs have no standing to question the sufficiency of the school board's consent. Under C.R.S. 1963, 139-10-6, any person aggrieved by an annexation is entitled to have a court determine whether the annexation proceedings were in conformity with statutory requirements. City of Englewood v. Daily, 158 Colo. 356, 407 P.2d 325; City of Littleton v. Wagenblast, 139 Colo. 346, 338 P.2d 1025. Plaintiffs, as residents and property owners in the annexed area and in the school district, are aggrieved persons and have standing to secure judicial review of these annexation proceedings under C.R.S. 1963, 139-10-6."

I.c.ii. The constitutionality of Section 139-21-4(3).

Point I.c.ii. appears on pages 51-59 as an Appendix to this brief (Conclusion of Law of Judge Conour [ff. 191-209]).

I.c.iii. Severability.

Severability in this case is controlled by statute 135-1-5.

> "135-1-5. Severability of statutes.--If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid, unless it appears to the court that the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court determines that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." (Emphasis supplied.)

Appellant is requesting this Court to strike subsection 4(3) because the $200,000.00 provision is not severable from the remainder of the subsection. The legislature intended that certain 20-acre tracts could not be annexed.

The ruling of the trial court preserved this legislative intent, these 20-acre tracts cannot be annexed without the written consent of their owners.

The action of the trial court expanded the exception. Appellant asks this Court to strike the exception and thereby grant additional powers to municipalities. This is contrary to People v. Morgan, 79 Colo. 504, 509, 246 P. 1024.

Further, this is contrary to the strongest language found anywhere in the Act. 139-21-4(1). Notwithstanding any provision of this article to the contrary, the following limitations shall apply to all annexations:

Guided by this legislative mandate, subsection 4(3) is not severable from the remainder of the Act, but the $200,000.00 provision is severable from the remainder of subsection 4(3). Even though the trial court held a portion of 139-21-4(3) unconstitutional, its adoption by the legislature is an indication of a legislative intent as to exclusion of large tracts of land and District Courts should so construe 139-21-4(3).

The test for severability in Colorado follows the majority rule and is clearly stated in:

City and County of Denver v. Lynch, 92 Colo. 102, 18 P.2d 907.

> "[4] An act or a statute may be constitutional in one part and unconstitutional in another, and, if severable, the invalid may be stricken and the valid left stand. 6 R.C.L., §121, p. 121. The power of the court to make such a decision rests primarily upon legislative intent. If we may reasonably presume that the General Assembly would have passed this Act with the commissioners eliminated and the sole power to fix the amount of the allowance vested in the county judge, we may thus emasculate, and thus sustain it. Id. p. 123, §122. If the invalid portion of an act was apparently an inducement to the passage of the valid, the statute is not severable. Id. p. 125, §123. Nor can an essential part of an act which colors the whole, be stricken as invalid and the remainder sustained. Id. p. 127, §125."

Gordon v. Wheatridge Dist., 107 Colo. 128, 109 P.2d 899.

> "[10] Notwithstanding the power of taxation attempted to be authorized

by the act is offensive to the Constitution in the particulars stated and its levy must be restrained, we are of the opinion that as against the objections here advanced, the remainder of the act is valid and the questioned features severable therefrom. This is evident from the circumstance that the act (section 14) provides that such tax was designed to supplement 'other means of providing revenue for such districts' and not as the sole source thereof.

"Section 31 of the act, as it appears in S.L. 1939, page 610 provides: 'If it should be judicially determined that any part of this act is invalid or unenforceable, such determination shall not affect the remaining parts, it being the intention to make this act and all its parts severable.'"

Smith Bros. Cleaners & Dyers v. People, 108 Colo. 449, 119 P.2d 623.

"[4] Counsel for defendant contends that if the price-fixing provisions are void, the entire act falls. That a legislative act, several in its parts, may be unconstitutional in part and valid

as to the remainder, no longer is an open question. Home Owners' Loan Corporation v. Public Water Works District No. 2, 104 Colo. 466, 92 P. 2d 745; Gordon v. Wheatridge Water District, 107 Colo. 128, 109 P. 2d 889. If, standing alone, legal effect can be given to the unobjectionable part of the act, and the legislature intended the provision to stand, it does not fall. Dorchy v. Kansas, 264 U.S. 286, 44 S. Ct. 323, 68 L.Ed. 686."

II.

Appellees raised the following additional claims for relief with the trial court. The trial court's ruling starting at folio 134 covers these points. The points are summarized as follows:

a. The Arvada City Council amended the legal description on the petitions after they were signed and filed with the City Clerk.

This Court has ruled that the necessity for amendments leads inescapably to the conclusion that said petition was fatally defective.

Taylor v. Pile, 154 Colo. 516, 391 P.2d 670.

"[4] We address ourselves now to the question of whether the court

> ever acquired jurisdiction to order an election. An examination of the petition filed by the proponents of the plan to incorporate the village, a comparison of the description of the area to be included with the map attached to the petition, and the admitted fact that after the petition was fully prepared and signatures affixed thereto, changes were made in the description of the property to be included as set forth in the petition, and 'corrections' were made in the boundary lines as shown on the map annexed to the petition, lead inescapably to the conclusion that said petition was fatally defective and confers no jurisdiction upon the court to order an election."

b. A Council consisting of five new members from those approving the ordinance on the first reading passed the ordinance on final reading. A city council is not a continuing body, Marshall v. City of Golden, 147 Colo. 521, 363 P.2d 650, and therefore the ordinance annexing the property is a nullity.

c. The annexation split the Jones-Witkin land by following a railroad right-of-way. 139-21-4(2) prohibits this without the written consent of the property owners "unless such tracts

or parcel are separated by a dedicated street, road or other public way."

d. The notice for public hearing did not conform to Section 7 of the Act. The notice published was the resolution passed by Council. Section 7 requires publishing a copy of the resolutions for annexations under Section 5 and a copy of the petition under Section 6.

For all of the reasons set out herein the judgment of the trial court should be affirmed.

Respectfully submitted,

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APPENDIX

Conclusion of Law of Judge Conour (ff. 191-209):

With respect to the constitutional issue, defendants [appellant] contend that this issue is not justiciable in a certiorari proceeding, and that under the Act, the Court is limited to a determination of whether the City Council of Arvada exceeded its jurisdiction or abused its discretion under the provisions of the Act. Defendants [appellant] also contend in the companion case that the validity of the annexation can be determined only in a review proceeding authorized and provided for by the Act. If both of these contentions were legally sound, it would be a nice demonstration of having its cake and eating it too, and the constitutionality of various provisions of the Act would be judicially immune to any attack. The Court takes the view that the Legislature has no power to deprive the courts of their inherent power to determine whether or not the act of the Legislature is within the confines of its constitutional powers, under either the State or Federal Constitutions. The decisions of our Supreme Court in Toland v. Strohl, 147, Colo. 577, 364 P. 2d 588, and Colorado State Board v. Hohu, 129 Colo. 195, 268 P. 2d 401, suggest that in certiorari cases,

constitutional questions may be considered to prevent injustice. Hence, the validity of any annexation depends in part on whether or not Section 4(3) of the Act is constitutional. If it is not, then the annexation must fall as the Witkin-Jones land could not be included in the area being annexed and the indispensable contiguity would not be present. On the other hand, if Section 4(3) is valid, then the annexation could stand if jurisdiction was present by filing a valid petition.

Without quoting Section 4(3) in full, so far as relevant to this review, it provides that "no land held in identical ownership, whether consisting of one tract or parcel of real estate or two or more contiguous tracts or parcels of real estate, comprising twenty acres or more which has an assessed value in excess of two hundred thousand dollars for ad valorem tax purposes for the year next preceding the annexation, shall be included under this article without the written consent of the landowner or landowners, ..." (Underlining supplied.)

The record is devoid of any evidence concerning the assessed valuation of the Witkin-Jones 720-acre tract, even though the City Council made a finding that no tract in excess of twenty acres with the required minimum valuation was included. Without evidence it is

incomprehensible how such a finding could be made, and seems to have been possible only because the Arvada Council apparently took the view that the burden of proof was on the protestants, which it most decidedly is not. Perhaps the Council acted on some off-the-record information they or some of them had. If so, that, too, is impermissible.

The Municipal Annexation Act of 1965 requires the City Council to hold a hearing "to determine if the proposed annexation complies with 139-21-3 and 139-21-4 or such parts thereof as may be required to establish eligibility under the terms of this article." One of the vital determinations required to be made involves the limitations imposed by Section 139-21-4(3), yet the record is devoid of any evidence concerning the assessed valuation of the Witkin-Jones land, other than its acreage as disclosed by the map. In fact, the record is devoid of much relevant evidence on any relevant subject, including whether or not the petitioners are resident landowners and electors in the area sought to be annexed. There was some evidence that a certain number, unnamed, were qualified electors and that some were not, but beyond this point the evidence does not go. The finding on the eligibility is not supported by any evidence sufficient to justify the finding. The only conclusion the Court

can reach is that the Council was over eager to get on with the annexation and elected to proceed without evidence, or relied on some off-the-record information not appearing in the record. This it may not do.

While it is true that the Council had no power to determine the constitutionality of Section 4(3); In re District 50 Metropolitan Recreation District v. Furbush, 166 C. 63, 441 P. 2d 645; it did have a duty to receive sufficient evidence to support its findings. Section 139-21-7 makes it very clear that the Council must take evidence in some detail, and that it cannot make findings without supporting evidence. This means a hearing in fact, not in fancy, and not based on what some Councilman has in his mind.

This annexation proceeding could very well be overturned for lack of sufficient evidence to support the findings, but since the Court has concluded that the petition was fatally insufficient, and that Section 4(3) is unconstitutional, no useful purpose would be served by reversing the Council without determining the constitutional issue which is vital to this and future annexations.

Section 139-21-4(3) contains two provisions which must be considered

separately. The first is the twenty-acre limitation which appears to bear some reasonable relationship to annexation, and operates to restrict annexations without consent of the owner to areas of less than twenty acres. In People v. Maxwell, 162 C. 495, 427 P. 2d 310, the Court restated the standard governing such exceptions and limitations, quoting from an earlier decision, as follows: "It is conceded that the legislature may reasonably classify, and it is held that 'a law is not local or special when it is general and uniform in its operation upon all in a like situation.' People v. Earl, 42 Colo. 238, 264 and 265. There must be some distinguishing peculiarity which makes reasonable the exception of the designated class from the general law. The reason for such exception existing, the classification adopted is a matter to be determined by the legislature."

Such exceptions and limitations have a reason. It is obvious that if the owner of any small lot or tract of land could defeat the annexation of his property by withholding his consent, municipalities could never expand. The only question is how small or how large a tract must be before it becomes a reasonable exception to the general law applicable to all others in the affected area. The legislature in its discretion has said that the

annexation of any tract of twenty acres or more cannot be annexed without the written consent of the owner. This is a reasonable exception and in the opinion of the Court is reasonable and constitutional.

However, this does not aid Arvada to any discernable [sic] extent, since the Witkin-Jones land is 720 acres in area. It does not have and obviously could not obtain the written consent of Jones, the then record owner of the land. Likewise, it is in head-on collision with the further exception of Section 4(3) relating to the assessed valuation of in excess of $200,000.00. This exception the Court concludes is unconstitutional. It bears no reasonable relation to annexation of property by a municipality. The only thing that can be said for it is that it confers the right of preventing annexation upon the wealthy, while forcing it upon those who are poor or only moderately well off with respect to the value of their twenty acres or more. It frees the owner of a large factory from annexation while subjecting the small owner to the increased tax burden of being forcibly taken into a municipality. It exempts the owner of any large or palatial improvement situated on twenty acres or more from the municipal burdens, while subjecting the modest improvement on a tract of like size. It is a vicious and discriminatory example of class legislation

that cannot be justified on any just or reasonable theory. It denies equal protection of law, and is arbitrary, unreasonable, oppressive and unjust.

The $200,000.00 exception does not meet the test when squared with the standards laid down in McCarty v. Goldstein, 151 C. 154, 376 P. 2d 691, Champlin Refining Co. v. Cruse, 115 C. 329, 173 P. 2d 213, and District 50 Metropolitan Recreation District v. Burnside, 448 P. 2d 788, as follows: "Equal protection in its guaranty of like treatment to all similarly situated permits classification which is reasonable and not arbitrary and which is based upon substantial differences having a reasonable relation to the objects or persons dealt with and to the public purpose sought to be achieved by the legislation involved."

In dealing with like treatment to all similarly situated, we are not considering all whose property has an assessed valuation in excess of $200,000.00 and is twenty acres or more in area, but those whose property is twenty acres or more in area. The assessed valuation of the land involved in an annexation has no reasonable relation to the object involved. This exception was obviously written into the law to protect some person, firm or corporation. It clearly denies

equal protection of law, and cannot be allowed to stand. There is no reasonable or material difference between tracts of in excess of twenty acres in area, so far as annexation is concerned, whether the assessed valuation is $2,000.00 or $200,000.00. The only ascertainable difference is that all others in the area annexed are subjected to higher tax burdens because the area having the large valuation is excluded and is not required to contribute its just share to the general welfare, the Court must necessarily conclude that the resolution of this question is controlled by Mountain States Tel. & Tel. Co. v. Animas District, 152 C. 73, 380 P. 2d 560, and Colorado Interstate Gas Co. v. Sable District, 152 C. 89, 380 P. 2d 569.

Accordingly, the Court concludes that Section 139-21-4(3) is constitutional insofar as it exempts tracts in identical ownership comprising twenty acres or more, and is unconstitutional insofar as it exempts such tracts comprising twenty acres or more in identical ownership which, together with the buildings and improvements situated thereon, have an assessed valuation in excess of $200,000.00 for ad valorem tax purposes for the year next preceding the annexation. Under this determination, absent the written consent of the Joneses, the

Witkin-Jones tract was not subject to inclusion in the area sought to be annexed, and annexed, and the annexation of the area must fail even if all else was valid. It also necessarily follows that the annexation ordinance and all of the proceedings of the City of Arvada preceding the adoption of the ordinance are likewise void on this ground, as well as those already stated.

Inasmuch as the Municipal Annexation Act of 1965 includes a severability clause (not included in C.R.S. Vol. 9), the Court concludes that the remainder of the Act is not affected by its conclusion that Sec. 139-21-4(3) is unconstitutional in part, such portion being unnecessary to the remainder of the Act.

Accordingly, the Court finds and concludes that the annexation proceedings were and are void and of no force and effect for the reasons hereinbefore stated, and should be vacated, set aside and held for naught.