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COMMENTS

ANNEXATION IN VIRGINIA: THE 1979 AMENDMENTS USHER IN A NEW ERA IN CITY-COUNTY RELATIONS

I. INTRODUCTION

Annexation¹ has been the most common method of adjusting local government boundaries in the United States since the 1850's.² This widespread acceptance of annexation, however, has not created uniform procedures for initiating and completing annexation proceedings. Rather, the process of annexation varies considerably from state to state.³

The Virginia annexation process⁴ can best be understood in light of two principles — one which forms the foundation of local government law in Virginia; the other which forms the foundation of annexation law in Virginia.⁵

The first principle requires statewide city-county separation.⁶ In Vir-

1. The term annexation or annex is derived from the Latin word "annectere," meaning to tie or bind to. BLACK'S LAW DICTIONARY 81 (5th ed. 1979). In the context of contemporary local government law, annexation has been defined as the acquisition or absorption by a municipality or town of nearby unincorporated territory or land. M. Mashaw, *Virginia's Revised Annexation Policy: An Analysis of the 1979 Compromise and Its Implications* 7 (Aug. 1980) (unpublished master's thesis on file at the Commission on Local Government).

2. See M. Mashaw, *supra* note 1.

3. See REPORT OF THE COMMISSION ON CITY-COUNTY RELATIONSHIPS, REPORTED TO THE GOVERNOR AND GENERAL ASSEMBLY OF VIRGINIA, H. DOC. NO. 27, at 26 (1975) [hereinafter cited as STUART COMMISSION]. In general, there are five basic means by which annexation may be accomplished: (1) legislative determination — annexation through special act of the state legislature; (2) popular determination — annexation contingent upon one or more forms of popular participation and/or approval, e.g. a referendum; (3) municipal determination — annexation through unilateral municipal action; (4) judicial determination — annexation submitted to and approved by the judiciary; and (5) quasi-legislative determination — annexation decided by an independent administrative body. Most states use more than one of these procedures. *Id.* See also 2 E. McQUILLAN, *THE LAW OF MUNICIPAL CORPORATIONS* § 7.14 (3d ed. 1979); C. RHYNE, *THE LAW OF LOCAL GOVERNMENT OPERATIONS* 29 (1980); 1 C. SANDS & M. LIBONATI, *LOCAL GOVERNMENT LAW* § 8.30 (1981).

4. The statutory procedure for annexation in Virginia is found at VA. CODE ANN. §§ 15.1-1032 to -1058 (Repl. Vol. 1981 & Cum. Supp. 1983).

5. See generally Stuart, *The Commission on City-County Relationships: A New Look At An Old Dilemma*, 52 U. Va. Newsletter No. 3 (Nov. 1975) (discussing the findings of the Commission on City-County Relationships); M. Mashaw, *supra* note 1, at 11-14.

6. City-county separation on a statewide basis is unique to Virginia. See C. BAIN, "A BODY INCORPORATE" — THE EVOLUTION OF CITY-COUNTY SEPARATION IN VIRGINIA ix, 23 (1967) [hereinafter cited as C. BAIN, "A BODY INCORPORATE"]; C. BAIN, *ANNEXATION IN VIRGINIA* ix

ginia, cities and counties are independent of one another⁷ both politically and geographically,⁸ which avoids the inefficient overlapping of local government jurisdictions found in other states.⁹ This system of separation has been praised for its logic, but in the context of annexation, has often caused strained relations between local governments because the annexing municipality¹⁰ takes land which previously belonged to the county.¹¹

The second principle provides for judicial determination of annexation.¹² Virginia requires that annexation proceedings be conducted by the courts in accordance with general law.¹³ Judicial determination of annexation was designed to remove purely political motivation from consideration in annexation cases, ensuring that an impartial body capable of equitable resolution of complex, highly technical issues would make the ultimate determination.¹⁴

These two principles provide the legal framework within which Virginia's annexation laws operated in the past and continue to operate today.¹⁵ The remainder of this comment will deal with the political and legal climate which resulted in the adoption of the 1979 amendments,¹⁶

(1966) [hereinafter cited as C. BAIN, ANNEXATION]; see also Martin & Buchholtz, *Annexation — Virginia's Dilemma*, 24 WASH. & LEE L. REV. 241 (1967); Note, *Securing a Valid Annexation in Virginia: State and Federal Requirements*, 10 U. RICH. L. REV. 557, 558 (1976).

7. See VA. CONST. art. VII, § 1.

8. See Note, *supra* note 6, at 559.

9. See STUART COMMISSION, *supra* note 3, at 49.

10. The principle of city-county separation applies only to municipalities. Towns in Virginia are not separate and distinct from the counties in which they lie. See VA. CONST. art VII, § 1; C. BAIN, "A BODY INCORPORATE," *supra* note 6, at 27-28.

11. See STUART COMMISSION, *supra* note 3, at 49; see also Bain, *Annexation: Virginia's Not-So-Judicial System*, 15 PUB. AD. REV. 251 (1955). For an in-depth discussion of the etiology of the principle of city-county separation in Virginia, see C. BAIN, "A BODY INCORPORATE," *supra* note 6. See also Martin & Buchholtz, *supra* note 6, at 242-43; Note, *supra* note 6, at 559-60.

12. Prior to 1902, annexation in Virginia was carried out by the legislature in the form of special acts. See C. BAIN, ANNEXATION, *supra* note 6, at 1. The Virginia Constitution of 1902 abandoned this method of annexation and adopted a judicial determination of annexation in 1904. See Bain, *Terms and Conditions of Annexation Under the 1952 Statute*, 41 VA. L. REV. 1129, 1129 (1955). This remains the method of determining annexation today. See VA. CONST. art. VII, § 2; VA. CODE ANN. §§ 15.1-1032 to -1058 (Repl. Vol. 1981 & Cum. Supp. 1983).

13. The authority of the General Assembly to prescribe by general law the criteria and procedure for annexing territory is expressly set out in article VII, section 2 of the Virginia Constitution, which provides in pertinent part that "[t]he General Assembly shall provide by *general law* for the organization, government, powers, *change of boundaries*, consolidation and dissolution of counties, cities, towns, and regional governments." (emphasis added).

14. See STUART COMMISSION, *supra* note 3, at 33-35.

15. For a detailed discussion of the legal framework of annexation, see C. BAIN, "A BODY INCORPORATE," *supra* note 6; C. BAIN, ANNEXATION, *supra* note 6.

16. See *infra* notes 19-37 and accompanying text.

the 1979 amendments themselves,¹⁷ and an assessment of how the amendments have worked in practice.¹⁸

II. THE POLITICAL AND LEGAL CLIMATE LEADING UP TO THE 1979 AMENDMENTS

A. *The Strain on Local Government Relations*

During the latter half of the twentieth century, Virginia made the transition from a state with a predominantly rural population to one with a predominantly urban population.¹⁹ This demographic shift steadily increased the need for urban services and imposed heavier responsibilities on local governments.²⁰

Counties responded by providing their inhabitants with a greater number of urban services.²¹ The cost of providing these services made the counties increasingly apprehensive about losing territory through the annexation process because any resulting decrease in the county's tax base would hinder the county's ability to pay for services in the remainder of the county.²²

Cities also responded with increased services.²³ However, paying for those services became more difficult in cities where traditional revenues from local property taxes failed to raise sufficient income to cover the service needs of their residents.²⁴ The population of Virginia's cities consists of a statistically higher proportion of citizens in need of a high level of services than does the population in its counties.²⁵ Further, state aid to localities inequitably favored counties over cities in such areas as funding for sheriff and police departments and the construction and maintenance of highways.²⁶ Thus, Virginia cities came to view annexation as a method to acquire much needed revenue to remain a fiscally viable unit of government.²⁷

This situation created conflict between cities and counties whenever the county was threatened with annexation from an adjacent municipal-

17. See *infra* notes 38-99 and accompanying text.

18. See *infra* notes 100-210 and accompanying text.

19. Talcott, *Annexation: The Problem, and Some Solutions*, Richmond News-Leader, Jan. 16, 1979, at 10, col. 3.

20. *Id.*

21. See M. Mashaw, *supra* note 1, at 18.

22. *Id.* at 20; see also Michie & Mashaw, *Annexation and State Aid to Localities: A Compromise Is Reached*, 55 U. Va. Newsletter No. 11, at 42 (July 1979).

23. See M. Mashaw, *supra* note 1, at 16-18.

24. *Id.*; Michie & Mashaw, *supra* note 22, at 42.

25. See M. Mashaw, *supra* note 1, at 16-18 (indicating city populations include a higher percentage of the poor, the elderly, and minorities).

26. *Id.* at 21; Michie & Mashaw, *supra* note 22, at 42.

27. See STUART COMMISSION, *supra* note 3, at 28.

ity. The resulting strain on local government relations interfered with the resolution of problems that required regional consideration and cooperation.²⁸ In addition, annexation proceedings became increasingly costly in terms of time away from more productive pursuits and in terms of a drain on already low revenue resources.²⁹

Finally, the sociological element of civic pride has played a role in the strain on local government relations.³⁰ Citizens who have identified with one local government all of their lives and who have a strong sense of community pride often resist the annexation of their community by a municipality.

B. *The Stuart Commission*

These factors culminated in the creation of various study commissions charged with the task of proposing solutions to the problems posed by annexation.³¹ In 1971, the General Assembly imposed a moratorium on city-initiated annexations and on the incorporation of new cities.³² In conjunction with this moratorium, the General Assembly created the Commission on City-County Relationships (the Stuart Commission) to study annexation.³³ The General Assembly hoped that by staying pending annexation suits, the legal and political climate would be conducive to proper legislative review.³⁴

The Stuart Commission reported its findings to the General Assembly in 1975.³⁵ Yet, it was not until 1979 that the General Assembly responded to the various competing interests involved and developed a package of

28. See M. Mashaw, *supra* note 1, at 20-21 (citing examples of problems requiring regional consideration and cooperation which include water and sewage treatment, public transportation, and maintenance and development of libraries).

29. *Id.* at 15; Michie & Mashaw, *supra* note 22, at 42. See generally STUART COMMISSION, *supra* note 3, at 28.

30. See C. BAIN, "A BODY INCORPORATE," *supra* note 6, at 98.

31. See Talcott, *supra* note 19 (citing studies prior to 1970 including the Commission to Study Urban Growth (1951), the Study of Governmental Subdivision in Virginia (1956), the Study of Consolidation of Local Government Services (1957), the Study of Annexation and Consolidation (1963), the Virginia Metropolitan Areas Study Commission (1967), and the Richmond Boundary Expansion Study Commission (1969)).

32. The moratorium only applied to cities above a population of 125,000 and their adjoining counties. It was to run for a period of five years. In 1972, the moratorium was broadened to cover all counties and cities, with the exception of those localities with pending annexation suits, and was extended through June 30, 1977. When the General Assembly failed to reach agreement in 1977, a ten-year moratorium was imposed. The moratorium was lifted on July 1, 1980 as a result of the passage of the 1979 amendments. See generally STUART COMMISSION, *supra* note 3, at 8; M. Mashaw, *supra* note 1, at 25-26; see also 1971-72 Op. Va. Att'y Gen. 15-16 (affirming the validity of the moratorium).

33. 1971 Va. Acts, ch. 234.

34. Michie & Mashaw, *supra* note 22, at 41.

35. STUART COMMISSION, *supra* note 3.

legislation which addressed the problems plaguing Virginia's local governments.³⁶ One newspaper termed the legislation the "most significant legislation of the 1979 Session."³⁷

III. THE 1979 AMENDMENTS

The 1979 amendments consisted of three separate pieces of legislation — House Bills 599, 602 and 603.³⁸ House Bills 599 and 602 dealt primarily with adjustments in provisions for state aid to localities,³⁹ while House Bill 603 contained a significant revision of the annexation process.⁴⁰

The major areas of revision in House Bill 603 were: (1) the adoption of provisions to allow a county to apply for either complete or partial immunity from annexation, (2) the creation of a Commission on Local Government, an agency charged with the task of promoting the state's interest in annexation proceedings and insuring the continued viability of Virginia's political subdivisions, and (3) the adoption of specific amendments to the annexation statute itself.⁴¹

A. *Immunity from Annexation*

1. Complete or Total Immunity

A county which has a population of 20,000 persons and a density of 300 persons per square mile, or a population of 50,000 persons and a density of 140 persons per square mile may petition the circuit court of that county for an order declaring the county immune from city-initiated annexation and from the incorporation of new cities within its boundaries.⁴²

36. 1979 Va. Acts, ch. 85.

37. *Senate Approves Annexation Plans*, Roanoke Times and World News, Feb. 13, 1979, at A1, quoted in M. Mashaw, *supra* note 1, at 38.

38. 1979 Va. Acts, chs. 83-85. See M. Mashaw, *supra* note 1, at 25-37; Michie & Mashaw, *supra* note 22, at 41.

39. The purpose of House Bill 599 was to increase the amount of financial aid to municipalities in order to reduce the need for annexation. Aid was increased in such areas as (1) operating expenses for local police departments, (2) salaries of circuit court judges, (3) salaries and expenses of Commonwealth's attorneys, and (4) hospitalization and treatment of welfare recipients. The purpose of House Bill 602 was to allocate the funds available for highway construction and maintenance more equitably among cities and counties, thereby reducing the municipalities' need for annexation. See generally M. Mashaw, *supra* note 1, at 26-31; Michie & Mashaw, *supra* note 22, at 42.

40. See M. Mashaw, *supra* note 1, at 31-37; Michie & Mashaw, *supra* note 22, at 42.

41. Michie & Mashaw, *supra* note 22, at 42.

42. VA. CODE ANN. § 15.1-977.21 (Repl. Vol. 1981). But see VA. CODE ANN. § 15.1-977.23(B) (Repl. Vol. 1981) (one exception to the immunity from incorporation of new cities is a grandfather clause stating that any town which on July 1, 1979 possessed a population in excess of five thousand persons and was located in a county eligible for total immunity retained its right to become a city).

If the county meets these criteria, immunity is automatic and the circuit court cannot deny the county's petition.⁴³ Moreover, once a county is granted immunity, it becomes permanent.⁴⁴

The immunity provisions represent a major policy shift in annexation law.⁴⁵ Prior to 1979, the policy of the state had been that rural areas should be governed by county governments and urban areas should be governed by city governments.⁴⁶ This division of labor was based on a belief that city governments could best provide urban services. Nevertheless, as counties became increasingly urban in character and demonstrated an ability to deliver urban services, this policy lost much of its logic and support. It became apparent that annexation was no longer appropriate for those urban counties which were capable of delivering urban services as efficiently as the cities.⁴⁷ Hence, by sanctioning county government of urban areas, the immunity provisions signaled the abandonment of the previous policy.⁴⁸

The provisions for total immunity do not bar either citizen-initiated annexation⁴⁹ or town-initiated annexation.⁵⁰ Citizen-initiated annexations are not considered to be a threat to the county so long as the county remains prosperous and provides a sufficient level of services. Similarly, town-initiated annexations are not considered to be a threat to the county because towns are not independent of counties.⁵¹

Nine counties acquired eligibility for total immunity when the legislation went into effect in 1979.⁵² To date, all but two of those counties have applied for and received immunity.⁵³ Should all nine counties ultimately

43. See VA. CODE ANN. § 15.1-977.21 (Repl. Vol. 1981).

44. *Id.* § 15.1-977.22:2 (Repl. Vol. 1981).

45. See 1976-77 Op. Va. Att'y Gen. 8 (stating that there was initially some concern that the immunity provisions may have been an unconstitutional special act in violation of VA. CONST. art. VII, § 2, but the Attorney General of Virginia has opined otherwise).

46. See, e.g., *City of Roanoke v. County of Roanoke*, 204 Va. 157, 167, 129 S.E.2d 711, 717 (1963); *County of Norfolk v. City of Portsmouth*, 186 Va. 1032, 1044-45, 45 S.E.2d 136, 141 (1947). This policy is commonly referred to as the Staples Doctrine after Justice Abram P. Staples who wrote the opinion in *County of Norfolk v. City of Portsmouth*. See generally C. BAIN, ANNEXATION, *supra* note 6, at 97-99.

47. See STUART COMMISSION, *supra* note 3, at 25-28.

48. See *County of Rockingham v. City of Harrisonburg*, 224 Va. 62, 76, 294 S.E.2d 825, 831-32 (1982).

49. VA. CODE ANN. § 15.1-977.23(A) (Repl. Vol. 1981). Citizen-initiated annexations are those filed by county residents in the area to be annexed pursuant to VA. CODE ANN. § 15.1-1034 (Repl. Vol. 1981 & Cum. Supp. 1983).

50. *Id.* § 15.1-977.23(A) (Repl. Vol. 1981). Town-initiated annexations are those filed pursuant to VA. CODE ANN. § 15.1-1033 (Repl. Vol. 1981).

51. See VA. CONST. art. VII, § 1.

52. See Michie & Mashaw, *supra* note 22, at 42.

53. Interview with Ted McCormack, Assistant to the Director, Commission on Local Government (Aug. 4, 1983).

be granted immunity, a total of fifteen cities in Virginia would be affected.⁵⁴

2. Partial Immunity

A county which does not meet the criteria for complete immunity may petition the circuit court of the county for an order declaring a part or parts of the county immune from city-initiated annexation and from the incorporation of new cities. The court will grant partial immunity if it finds that appropriate urban-type services are provided to the area.⁵⁵

In considering whether such services are provided, the court is instructed to consider the type and level of services in the area; the county's efforts to comply with the state's environmental protection, public planning, education, public transportation and housing policies; the extent to which a community of interest exists between the part of the county for which immunity is sought and both the remainder of the county and the municipality; and whether either party has arbitrarily refused to cooperate in the joint provision of services.⁵⁶

The court's power to grant partial immunity is limited in those situations where partial immunity, if granted, would result in "substantially foreclosing" a city of less than 100,000 people from expanding its boundaries by annexation.⁵⁷

Finally, a 1983 amendment gives the court the express authority to award partial immunity to a greater or smaller area than the area requested.⁵⁸

B. *The Commission on Local Government*

Perhaps the most far-reaching change in the annexation laws brought about by the 1979 amendments was the creation of the Commission on Local Government.⁵⁹ The purpose of the Commission is to "help ensure that all of [Virginia's] counties, cities and towns are maintained as viable communities in which their citizens can live."⁶⁰ The Commission consists of five members appointed by the Governor and confirmed by the General

54. See Michie & Mashaw, *supra* note 22, at 42.

55. VA. CODE ANN. § 15.1-977.22:1 (Repl. Vol. 1981 & Cum. Supp. 1983).

56. *Id.* The report and recommendation of the Commission on Local Government analyzing the partial immunity request is required evidence in the proceeding. *Id.* However, reports of the Commission are not binding on the courts. See *infra* note 73.

57. VA. CODE ANN. § 15.1-977.22:1 (Repl. Vol. 1981 & Cum. Supp. 1983).

58. 1983 Va. Acts, ch. 217 (codified at VA. CODE ANN. § 15.1-977.22:1 (Cum. Supp. 1983)). Prior to this amendment, there was some uncertainty whether the court had that power. See *infra* text accompanying note 203.

59. See VA. CODE ANN. §§ 15.1-945.1 to -945.7 (Repl. Vol. 1981 & Cum. Supp. 1983).

60. *Id.* § 15.1-945.1 (Repl. Vol. 1981).

Assembly.⁶¹

The Commission's responsibilities are extensive. It is responsible for reviewing and assessing petitions for annexation, partial immunity, the establishment of towns, the incorporation of new cities, transitions from towns to cities, and voluntary boundary adjustments.⁶² The Commission also serves as a mediator between local governments involved in an annexation or immunity dispute.⁶³

The procedure for initiating annexation suits was altered substantially by the creation of the Commission. Previously, municipalities desiring to annex a portion of a neighboring county began by filing a petition in the circuit court of the county where the territory to be annexed was located. Upon the parties' request, a special annexation court would be created to determine whether the annexation was "necessary and expedient" according to law.⁶⁴ Today, as a consequence of both the 1979 and 1980 amendments, no court action may be filed without first notifying the Commission.⁶⁵ Once notified, the Commission investigates and analyzes the proposed action, and reports back to the parties within six months.⁶⁶ A written report which outlines the Commission's findings of fact and recommendations is issued to the parties.⁶⁷ The report must be based on the criteria and standards established by law for the particular type of petition involved.⁶⁸ The Commission cannot issue a report until it holds public hearings on the matter⁶⁹ and no court action may be filed until the Commission issues its report.⁷⁰

Once the Commission issues its report, the procedure remains much the same as it was prior to the 1979 and 1980 amendments. The party seeking annexation or immunity must petition the circuit court to create a special

61. *Id.* § 15.1-945.2. Terms are for five years and each term is staggered so that one term will expire each year. *Id.*

62. *Id.* § 15.1-945.3(H). The Commission has no authority to review petitions for total immunity since these are granted automatically once the required statutory criteria are shown to have been met. *See supra* notes 42-43 and accompanying text.

63. *See* VA. CODE ANN. § 15.1-945.3(G).

64. *See id.* §§ 15.1-1032 to -1058 (Repl. Vol. 1973 & Cum. Supp. 1978).

65. *Id.* § 15.1-945.7(A) (Repl. Vol. 1981 & Cum. Supp. 1983).

66. *Id.*

67. *Id.* § 15.1-945.7(B).

68. *Id.* The criteria and standards for annexation proceedings are found at VA. CODE ANN. §§ 15.1-1041 to -1042 (Repl. Vol. 1981). The criteria and standards for immunity proceedings are found at VA. CODE ANN. §§ 15.1-977.21 (total immunity), -977.22:1 (partial immunity). The criteria and standards for other proceedings are beyond the scope of this comment.

69. *Id.* § 15.1-945.7(B) (Repl. Vol. 1981 & Cum. Supp. 1983). Except for hearings or meetings, the provisions of the Virginia Freedom of Information Act, *id.* §§ 2.1-340 to -346.1, do not apply to the Commission. However, since the Commission is a state agency, the provisions of the Virginia Administrative Process Act, *id.* §§ 9-6.14:1 to .14:21, do apply.

70. *Id.* § 15.1-945.7(A).

annexation court.⁷¹ In proceedings before the annexation court, the report of the Commission is admissible into evidence.⁷² The court must consider the report but is not bound by the Commission's findings or recommendations.⁷³

In addition to issuing reports to the parties and the court in annexation and immunity proceedings, the Commission retains the authority to mediate disputes between political subdivisions of the state.⁷⁴ The Commission's most active role in the annexation process to date has been in the area of mediation.⁷⁵ Its authority is exercised by one of two methods. The first method allows the Commission to initiate attempts to mediate settlements of disputes which are referred to it for formal review.⁷⁶ The mediation can be conducted either by members of the Commission or, with agreement of the parties, by the appointment of an independent mediator.⁷⁷

The second method allows the parties involved in an annexation or partial immunity dispute to request that the Commission serve as mediator of the dispute. Any party may make this request by serving notice on the Commission of the party's desire to negotiate a settlement.⁷⁸ If the parties desire to negotiate without mediation from the Commission, the latter must nevertheless be advised of the progress of the negotiations. The Commission is required to terminate the negotiations if, after a hearing, the Commission finds that none of the parties is willing to continue to negotiate, or if it finds that three months have elapsed with no substantial progress towards settlement. In any event, negotiations are to cease twelve months from the time the initial notice of the desire to negotiate was filed with the Commission.⁷⁹

C. *Amendments to the Annexation Statute*

In addition to the immunity provisions and the creation of the Com-

71. *See id.* §§ 15.1-1033, -1034, -1038, -1168.

72. *Id.* § 15.1-945.7(B).

73. Commission reports are advisory only. *See id.* § 15.1-945.7(C).

74. *See id.* § 15.1-945.7(A), (E).

75. For example, since 1981 independent mediators were appointed by the Commission in at least four instances — Fredericksburg-Spotsylvania County, County of Augusta (partial immunity action), Emporia-Greenville County, and Waynesboro-Augusta County. In each instance some type of settlement agreement was reached.

76. VA. CODE ANN. § 15.1-945.7(A) (Repl. Vol. 1981 & Cum. Supp. 1983).

77. *Id.* Negotiations may be conducted in executive or closed session. Further, offers and statements made during the negotiations are not admissible in court and the Commission cannot report them. *Id.*

78. *See id.* § 15.1-945.7(E). Such a request may be made before or after the filing of an annexation or partial immunity suit in court. If the request is made after filing, the annexation or partial immunity suit will be stayed while negotiations are in progress. *Id.*

79. *Id.*

mission on Local Government, the 1979 amendments revised and reenacted the existing procedure for judicial determination of annexation.⁸⁰ One of the most significant changes was the codification of the factors used by the court in determining whether an annexation is necessary and expedient.⁸¹

The statutory standard by which all annexations are judged in Virginia is the test of necessity and expediency.⁸² The terms are to be used conjunctively and not in the alternative; thus, a proposed annexation must be shown to be both necessary *and* expedient.⁸³ In considering the necessity for and expediency of annexation, the annexation court must consider

the best interests of the people of the county and the city or town, services to be rendered and needs of the people of the area proposed to be annexed, the best interests of the people in the remaining portion of the county and the best interests of the State in promoting strong and viable units of government.⁸⁴

The 1979 amendments added the state-interest standard to the annexation test and for the first time codified the factors to be used by the court in making its determination of necessity and expediency.⁸⁵ With the exception of two of these factors,⁸⁶ the codification did not work a substantive change in annexation law. Courts had always considered these types of factors in determining the necessity for and expediency of annexation.⁸⁷ But, the purpose of the codification was two-fold. First, the intent

80. *See id.* §§ 15.1-1032 to -1058.

81. *See id.* § 15.1-1041.

82. *Id.* *See also* County of Norfolk v. City of Portsmouth, 186 Va. 1032, 1045-46, 45 S.E.2d 136, 142 (1947) (defining the statutory standard); Martin & Buchholtz, *supra* note 6, at 260.

83. *See, e.g.,* City of Falls Church v. Board of Supervisors of Fairfax County, 193 Va. 112, 115-16, 68 S.E.2d 96, 98-99 (1951); *see also* Johnston v. County of Fairfax, 211 Va. 378, 382, 177 S.E.2d 606, 609 (1970) (stating that the burden of proving necessity and expediency is on the proponents of the annexation).

84. VA. CODE ANN. § 15.1-1041(b) (Repl. Vol. 1981). The 1979 amendments added a "state-interest" standard in the last clause by instructing the court to consider the best interests of the state. *See* County of Rockingham v. City of Harrisonburg, 224 Va. 62, 74-75, 85, 294 S.E.2d 825, 830-31, 837 (1982) (showing an application of the state-interest test).

85. VA. CODE ANN. § 15.1-1041(b1) (Repl. Vol. 1981).

86. *Id.* § 15.1-1041(b1)(iii) (stating that the court shall consider to the extent relevant "[t]he need for urban services in the area proposed for annexation, the level of services provided in the county, city or town, and the ability of such county, city or town to provide services in the area sought to be annexed"), (b1)(v) (stating that the court shall also consider "[a]ny arbitrary refusal by the governing body of the petitioner or the county whose territory is sought to be annexed to enter into cooperative agreements providing for joint activities which would have benefited citizens of both political subdivisions").

87. *See, e.g.,* City of Roanoke v. County of Roanoke, 214 Va. 216, 227, 198 S.E.2d 780, 788 (1973) (a city's need for additional vacant land for residential, commercial, and industrial development is a factor to be considered in an annexation proceeding); Higgins v. City of

was to make the factors much more precise by spelling them out for the parties and the court. This would refine the issues in annexation proceedings, thus reducing the proceedings' length and cost. Second, prior to 1979, the courts were not required to consider all the factors in one proceeding. The result was a shifting emphasis on a variety of factors, leaving the annexation process without a great deal of consistency or structure. The 1979 amendments sought to remedy these defects.⁸⁸

The composition of the annexation court is the topic of another significant amendment to the annexation statute. The statute requires a special three-judge annexation court for all annexation and immunity proceedings, except those proceedings dealing with total county immunity.⁸⁹ It further provides that annexation courts will be selected from a panel of fifteen circuit court judges chosen by the Virginia Supreme Court.⁹⁰ The 1979 amendments provide that no judge will be allowed to hear disputes involving annexation of territory within his circuit.⁹¹ The purpose of this provision is to avoid the charges of bias and conflict of interest that had occurred under the previous law, which required that one judge on the panel be from the same circuit as the territory to be annexed.⁹²

The 1979 amendments increased from five to ten years the time limitation between one city-initiated annexation attempt and another.⁹³ Therefore, a city that institutes one annexation suit against a county may not bring another suit for ten years from the effective date of the annexation. If the annexation is denied, the ten-year period begins to run either from the date of the final order denying annexation or, if appealed to the Virginia Supreme Court, from the date of the supreme court's final order.⁹⁴

Roanoke, 212 Va. 399, 400, 184 S.E.2d 815, 816 (1971) (a city's ability to provide services to the area to be annexed is a factor to be considered); *City of Alexandria v. County of Fairfax*, 212 Va. 437, 441, 184 S.E.2d 758, 761 (1971) (a city's need to expand its tax base is not by itself grounds for justifying annexation); *Johnston v. County of Fairfax*, 211 Va. 378, 383, 177 S.E.2d 606, 609 (1970) (the court considered the need for urban services in the area to be annexed and the comparative ability of the city and county to provide same); *County of Fairfax v. Town of Fairfax*, 201 Va. 362, 368, 111 S.E.2d 428, 433 (1959) (the court considered the adverse effect of annexation on the county as a factor); *City of Falls Church v. Board of Supervisors of Fairfax County*, 193 Va. 112, 118, 68 S.E.2d 96, 100 (1951) (the community of interest among the affected area is entitled to consideration).

88. See STUART COMMISSION, *supra* note 3, at 41-42.

89. VA. CODE ANN. §§ 15.1-1168 to -1170 (Repl. Vol. 1981 & Cum. Supp. 1983).

90. *Id.* § 15.1-1168.

91. *Id.*

92. See STUART COMMISSION, *supra* note 3, at 41.

93. See VA. CODE ANN. § 15.1-1055 (Repl. Vol. 1981).

94. *Id.* This does not apply if the city moves to dismiss the case before a hearing on the merits. In such an instance, the city may refile after five years. Nor does the ten-year waiting period apply if the previous petition was dismissed due to a procedural defect, lack of jurisdiction, or any defense not reaching the merits of the case. *Id.* The present provisions eliminate an ambiguity that existed in previous statutes concerning when the time period begins to run on denial of annexation. See 1964-65 Op. Va. Att'y Gen. 5.

The 1979 amendments also included provisions for economic growth-sharing agreements between local governments.⁹⁵ Under a growth-sharing agreement, the city agrees to relinquish its authority to initiate annexation proceedings against all or any portion of the county for a given period of time. In exchange, the county agrees to share with the city the benefits of economic growth in the two jurisdictions.⁹⁶ These agreements were viewed as an alternative to judicial annexation proceedings.⁹⁷ However, the relevant provisions of the statute were repealed in 1983⁹⁸ and replaced with new provisions for voluntary agreements which were much broader and more inclusive than the previous provisions.⁹⁹ These voluntary agreements are the subject of the next section.

IV. AN ASSESSMENT OF THE 1979 AMENDMENTS IN OPERATION

A. *The New Trend Towards Voluntary Agreements in Annexation Cases*

Prior to the creation of the Commission on Local Government, there was no state machinery for resolving annexation disputes short of a lengthy, expensive court battle. This situation and its associated problems created the political and legal climate that led up to the adoption of the 1979 amendments.¹⁰⁰ Today, the Commission plays a central role in resolving annexation disputes. Furthermore, both the immunity provisions¹⁰¹ and the amendments to the annexation statute¹⁰² are designed to fit modern local government conditions and to streamline the annexation procedure.

After four years in operation, the results indicate a renewed cooperation between political subdivisions of the state. A trend toward voluntary settlement of annexation disputes appears to have developed. The overall numbers are impressive. Of nine cases reviewed and reported by the Commission, six cases included negotiated settlement agreements.¹⁰³

95. VA. CODE ANN. §§ 15.1-1166 to -1167 (Repl. Vol. 1981 & Cum. Supp. 1983).

96. *Id.* § 15.1-1166.

97. See Michie & Mashaw, *supra* note 22.

98. 1983 Va. Acts, ch. 523.

99. VA. CODE ANN. § 15.1-1167.1 (Cum. Supp. 1983).

100. See *supra* notes 19-37 and accompanying text.

101. See *supra* notes 42-58 and accompanying text.

102. See *supra* notes 80-99 and accompanying text.

103. See COMMISSION ON LOCAL GOVERNMENT, REPORT ON THE CITY OF BUENA VISTA — COUNTY OF ROCKBRIDGE ANNEXATION AGREEMENT (June 1983); COMMISSION ON LOCAL GOVERNMENT, REPORT ON THE CITY OF WILLIAMSBURG — COUNTY OF JAMES CITY ANNEXATION AGREEMENT (June 1983); COMMISSION ON LOCAL GOVERNMENT, REPORT ON THE CITY OF EMPORIA — COUNTY OF GREENSVILLE ANNEXATION AGREEMENT (May 1983); COMMISSION ON LOCAL GOVERNMENT, REPORT ON THE TOWN OF LEESBURG — COUNTY OF LOUDON ANNEXATION AGREEMENT (March 1983); COMMISSION ON LOCAL GOVERNMENT, REPORT ON THE CITY OF FREDERICKSBURG — COUNTY OF SPOTSYLVANIA ANNEXATION AND IMMUNITY AGREEMENT (June

1. Pending Unreported Cases Illustrative of the New Trend

The case of *City of Buena Vista — County of Rockbridge*¹⁰⁴ is a typical example of the type of agreement being reached today. The City of Buena Vista sought to annex 3.63 square miles of territory in Rockbridge County. After several months of negotiations, the parties reached a settlement agreement on June 2, 1982.¹⁰⁵

The agreement called for the annexation by Buena Vista of 3.75 square miles of territory located in Rockbridge County in exchange for an agreement by the city not to initiate another annexation proceeding against the county for twenty years following the effective date of the annexation. The agreement also included a number of utility provisions. Additionally, a supplemental agreement established the compensation to be paid to Rockbridge County for loss of net tax revenue.¹⁰⁶

The Commission reviewed the agreement and endorsed it without further comment. The Commission also specifically recommended that the annexation be approved by the court.¹⁰⁷

The importance of the *Buena Vista* case is reflected by the following comment of the Commission: "The Commission has not sought to analyze critically the annexation as a separate action, and nothing in this report should be construed as an endorsement of the annexation distinct from the agreement of which it is part."¹⁰⁸ The meaning of this statement is not entirely clear. If the Commission meant that the annexation would not have been approved as necessary and expedient had it been a separate action, then the presence of the agreement should not have made the Commission approve it. The inference is that the Commission lowered the standard for proving necessity and expediency in light of the county's acquiescence to the annexation. If this is true, the Commission deferred to what the parties considered necessary and expedient. However, that is outside the Commission's statutory power.¹⁰⁹ The Commission is to re-

1982); COMMISSION ON LOCAL GOVERNMENT, REPORT ON THE TOWN OF KENBRIDGE — COUNTY OF LUNENBURG ANNEXATION AGREEMENT (October 1981) (The six agreements involving negotiated settlements.).

For three cases which did not result in negotiated settlements, see COMMISSION ON LOCAL GOVERNMENT, REPORT ON THE CITY OF WAYNESBORO — COUNTY OF AUGUSTA ANNEXATION ACTION (July 1983); COMMISSION ON LOCAL GOVERNMENT, REPORT ON THE COUNTY OF AUGUSTA PARTIAL IMMUNITY ACTION (December 1982); COMMISSION ON LOCAL GOVERNMENT, REPORT ON THE CITY OF HARRISONBURG — COUNTY OF ROCKINGHAM ANNEXATION CASE (February 1981).

104. COMMISSION ON LOCAL GOVERNMENT, REPORT ON THE CITY OF BUENA VISTA — COUNTY OF ROCKBRIDGE ANNEXATION AGREEMENT (June 1983).

105. *Id.* at 1-2.

106. *Id.* at app. A.

107. *Id.* at 32-33.

108. *Id.* at 33.

109. See VA. CODE ANN. §§ 15.1-945.1 to -945.7 (Repl. Vol. 1981 & Cum. Supp. 1983).

view proposed annexations in accordance with the criteria established by law,¹¹⁰ and a voluntary agreement is not a factor to be considered.¹¹¹

This is not to say that what the Commission did was not in the best interests of either the parties or the state. The agreement was in the county's interest since the city cannot initiate another annexation proceeding for twenty years, ten years beyond the statutory limitation.¹¹² Rather, the point is that the Commission has no statutory authority at present to consider a voluntary settlement agreement between localities as a factor in determining whether an annexation is necessary and expedient.¹¹³ But it seems reasonable that the Commission should have authority to determine the best interests of the parties. A solution to this problem would be to amend the Code of Virginia¹¹⁴ to allow the courts and the Commission to consider the presence or absence of a voluntary agreement as a factor in determining the necessity and expediency of a proposed annexation.

Upon the petition of the parties in *Buena Vista*, the Circuit Court of Rockingham County appointed a three-judge annexation court to review the annexation and agreement. A trial date has not been set.¹¹⁵

A second case is *City of Williamsburg — County of James City*.¹¹⁶ The City of Williamsburg sought to annex a portion of James City County. The agreement signed on April 7, 1982 provided for the annexation of 3.88 square miles of territory in the county in exchange for an agreement by Williamsburg to refrain from attempting another annexation for fifteen years following the annexation.¹¹⁷

The primary significance of this case involves a provision in the agreement which commits both jurisdictions to oppose all citizen-initiated annexations for fifteen years following the effective date of the agreement.¹¹⁸ Some of the county citizens who lived outside the proposed annexation area, but who desired to be included in the annexed area, objected to this provision in the agreement. The citizens argued that the agreement was not in their best interest because it foreclosed all possibility of annexation

110. *Id.* § 15.1-945.7(B).

111. *See id.* § 15.1-1041 (Repl. Vol. 1981).

112. *See supra* note 93 and accompanying text.

113. *See* VA. CODE ANN. § 15.1-1041 (Repl. Vol. 1981).

114. The section of the Virginia Code which would require amending is § 15.1-1041(b1).

115. The three-judge annexation court was appointed by the Virginia Supreme Court on July 2, 1983, pursuant to VA. CODE ANN. § 15.1-1168 (Repl. Vol. 1981 & Cum. Supp. 1983) The members of the court are Kenneth Trabue, C.J., Wiley R. Wright and M.M. Long, Jr., J.J.

116. COMMISSION ON LOCAL GOVERNMENT, REPORT ON THE CITY OF WILLIAMSBURG — COUNTY OF JAMES CITY ANNEXATION AGREEMENT (June 1983).

117. *Id.* at 1-2.

118. *Id.* at app. A.

in the county for an excessive length of time.¹¹⁹

The Commission rejected this plea and approved the agreement.¹²⁰ Although the Commission report does not reflect it, the citizens had raised a substantive attack on the validity of those provisions. Under the Dillon Rule of strict construction, local governments may only exercise those powers that are expressly conferred or which are necessarily or fairly implied from the terms of a statute.¹²¹ The economic growth-sharing statute, the authority under which the agreement was executed, did not expressly or necessarily or fairly imply the power to reject all citizen-initiated annexation attempts for any period of time.¹²²

The legal problem spawned by the *Williamsburg* case was resolved by a 1983 amendment to the Virginia Code.¹²³ As of July 1, 1983, counties, cities and towns were given express authority to voluntarily agree to reject citizen-initiated annexations for the period of time specified by the parties.¹²⁴

Although the Williamsburg-James City agreement antedated this amendment, all prior voluntary agreements are retrospectively validated by another 1983 amendment.¹²⁵ This latter amendment repealed the economic growth-sharing statute and substituted new provisions governing the entry into and review of voluntary agreements.

2. Court and Commission Review of Voluntary Agreements

The voluntary agreements to date that have been reviewed by the Commission on Local Government were entered into under the authority of the economic growth-sharing provisions of the 1979 amendments.¹²⁶ These provisions proved to be inadequate because, although the Commission was given broad authority to negotiate or mediate settlements between jurisdictions, once the agreement was signed the Commission lacked statutory authority to review the agreements.¹²⁷ Furthermore, the economic growth-sharing provisions allowed the Commission to participate and assist in the negotiations only if requested to do so by the locali-

119. *Id.* at 53.

120. *Id.* at 54.

121. *See* *Tabler v. Board of Supervisors of Fairfax County*, 221 Va. 200, 202, 269 S.E.2d 358, 359 (1980) (discussing Virginia's application of the Dillon Rule concerning legislative power of local governing bodies).

122. *See* VA. CODE ANN. §§ 15.1-1166 to -1167 (Repl. Vol. 1981 & Cum. Supp. 1983).

123. 1983 Va. Acts, ch. 594 (codified at VA. CODE ANN. § 15.1-1034 (Cum. Supp. 1983)).

124. *See* VA. CODE ANN. § 15.1-1034(C) (Cum. Supp. 1983). *See also id.* § 15.1-1167.1(2).

125. 1983 Va. Acts, ch. 523 (codified at VA. CODE ANN. § 15.1-1167.1 (Cum. Supp. 1983)). *See also* VA. CODE ANN. § 15.1-1167.1(7).

126. VA. CODE ANN. §§ 15.1-1166 to -1167 (Repl. Vol. 1981 & Cum. Supp. 1983).

127. *See id.* § 15.1-945.7(A), (E) (stating the Commission's authority to negotiate and mediate settlements).

ties.¹²⁸ Thus, if the parties wanted to enter into an agreement without the Commission's assistance, that was their prerogative. To date, two agreements have excluded the Commission — those of the City of Charlottesville - Albemarle County and the City of Radford - Pulaski County.¹²⁹

Not only were the economic growth-sharing provisions inadequate,¹³⁰ but no mention was made of the Commission's authority to review settlement agreements in any other provision of the 1979 amendments. The only express authority given to the Commission is that of reviewing all petitions for annexation, partial immunity, and other status or boundary changes.¹³¹ Thus, the Commission may properly review only that part of an agreement which pertains to a proposed annexation or other matters within its express authority.

The Commission's position has been that the legislature intended that voluntary agreements be critically reviewed by the Commission.¹³² The argument was two-fold: first, because the Commission had not been specifically forbidden to review voluntary agreements and had been authorized to mediate settlements, there was an inference that the General Assembly intended that once the Commission had mediated a settlement it should review the settlement critically; and second, because the General Assembly had seen fit to give the Commission express authority to review town-county agreements and to make a critical assessment of their provisions, there was an indication of legislative intent to confer authority on the Commission to generally review all agreements.¹³³

The first argument has more merit than the second. In determining the legislative intent concerning the presence and scope of Commission review, the applicable principle of statutory construction dictates that remedial statutes are to be construed liberally to achieve the purposes of the legislation.¹³⁴ Since the 1979 amendments were remedial in nature, they should be construed liberally.¹³⁵ Therefore, it can be inferred that the legislature intended the Commission to have the authority to critically review voluntary settlement agreements.

The second argument does not fare as well. Although the Virginia Code

128. *Id.* § 15.1-1167 (Repl. Vol. 1981).

129. Interview with Ted McCormack, Assistant to the Director, Commission on Local Government (Aug. 4, 1983).

130. VA. CODE ANN. § 15.1-945.7(A), (E) (Repl. Vol. 1981 & Cum. Supp. 1983).

131. *Id.* § 15.1-945.7(A).

132. Commission on Local Government, Review of Negotiated Annexation Settlements (undated internal memorandum).

133. *Id.* at 1-3.

134. See *Scott v. Sylvester*, 220 Va. 182, 185, 257 S.E.2d 774, 775-76 (1979); *Virginia Brewing Co. v. Webber*, 167 Va. 67, 72, 187 S.E. 447, 449 (1936).

135. See 1982-83 Op. Va. Att'y Gen. 151 (stating that in his opinion the 1979 amendments were remedial in nature).

gives the Commission express authority to review all town-county agreements,¹³⁶ this alone does not confer authority as to agreements generally. Rather, an application of the maxim of statutory construction — *expressio unius est exclusio alterius*¹³⁷ — would dictate the opposite result.¹³⁸

The General Assembly resolved all doubts as to the scope of Commission review in 1983 by repealing the economic growth-sharing provisions and enacting new provisions which expressly give the Commission the authority to review voluntary settlement agreements.¹³⁹ The statute applies retrospectively, thus validating the Commission's review of prior agreements as well as those which, by the choice of the parties, were not reviewed by the Commission.¹⁴⁰

Not only was the Commission's scope of review a significant omission in the 1979 amendments, but the scope of judicial review of voluntary agreements was also a significant omission. Only one voluntary agreement has been presented to an annexation court for review since the passage of the 1979 amendments and the court held that it did not have the jurisdiction to review it.¹⁴¹

In *City of Fredericksburg v. County of Spotsylvania*,¹⁴² the parties entered into an annexation and immunity agreement on December 22, 1981. The agreement was reviewed by the Commission in its report of June, 1982.¹⁴³ The agreement provided that Fredericksburg would annex 4.6 square miles of territory in the county in exchange for the city's agreement not to initiate its own annexation or support any citizen-initiated annexations for a period of twenty-five years following the agreement.¹⁴⁴

The agreement was presented to the annexation court for approval and in a Memorandum Opinion the court held that it did not have the jurisdiction to approve or disapprove of the voluntary agreement provisions.¹⁴⁵

136. VA. CODE ANN. § 15.1-945.7(A), (E) (Repl. Vol. 1981 & Cum. Supp. 1983).

137. Literally meaning "the expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

138. The express authority conferred by VA. CODE ANN. § 15.1-1058.2 (Repl. Vol. 1981) to review town-county agreements coupled with a lack of similar authority to generally review agreements implies that the General Assembly sought to exclude such authority in the latter instance. See *Town of Christianburg v. Montgomery County*, 216 Va. 654, 658, 222 S.E.2d 513, 516 (1976).

139. 1983 Va. Acts, ch. 523 (codified at VA. CODE ANN. § 15.1-1167.1 (Cum. Supp. 1983)).

140. See VA. CODE ANN. § 15.1-1167.1(7) (Cum. Supp. 1983).

141. *City of Fredericksburg v. County of Spotsylvania* (Va. Annex. Ct., Apr. 26, 1983) (Order of Annexation), *appeal denied*, *Citizens for a Better Agreement v. City of Fredericksburg and County of Spotsylvania*, No. 83-1215 (Va. Nov. 17, 1983).

142. *Id.*

143. COMMISSION ON LOCAL GOVERNMENT, REPORT ON THE CITY OF FREDERICKSBURG — COUNTY OF SPOTSYLVANIA ANNEXATION AND IMMUNITY AGREEMENT (June 1982) [hereinafter cited as ANNEXATION AND IMMUNITY AGREEMENT].

144. *Id.* at 3.

145. *City of Fredericksburg v. County of Spotsylvania* (Va. Annex. Ct., Feb. 14, 1983)

The court ruled that it had jurisdiction to decide only the necessity and expediency of the proposed annexation.¹⁴⁶ The court advanced two arguments for this position. First, an annexation court is not a court of general jurisdiction, but rather a statutory court of limited jurisdiction. Thus, the court had no express authority to review agreements. Second, the court refused to approve or disapprove the agreement because to do so would be to give an impermissible advisory opinion in a case where no controversy involving the agreement had arisen.¹⁴⁷ As a result, the annexation court issued its Order of Annexation on April 26, 1983 approving the necessity and expediency of the annexation, but refusing to approve or disapprove the agreement.¹⁴⁸

On July 25, 1983, a petition for appeal was filed in the Virginia Supreme Court by intervenors seeking to overturn the court's holding concerning its lack of jurisdiction to review voluntary agreements.¹⁴⁹ In addition to seeking relief on the jurisdictional issue, the intervenors also challenged the validity of the agreement's provision calling for a twenty-five year moratorium on annexation by the city.¹⁵⁰ The thrust of the intervenors' complaint on the latter point was that in ten or fifteen years Spotsylvania County's population will be sufficient so that it may apply for total immunity.¹⁵¹ Therefore, the agreement's provisions which would have banned annexation for a period of twenty-five years were tantamount to foreclosing annexation permanently.¹⁵² The intervenors contended that the agreement was *ultra vires* under the Dillon Rule.¹⁵³ As previously stated, the Dillon Rule is a canon of strict construction which prohibits local governments from exercising any authority which is not expressly conferred, or necessarily or fairly implied from the terms of a statute.¹⁵⁴ Any doubts as to the existence of such authority will be construed against its existence.¹⁵⁵ The intervenors argued that the economic growth-sharing statute conferred no such authority on local governments

(Memorandum Opinion).

146. See Petition for Appeal at 7, *Citizens for a Better Agreement v. City of Fredericksburg and County of Spotsylvania*, No. 83-1215 (Va. July 25, 1983).

147. *Id.* at 7-8.

148. *City of Fredericksburg v. County of Spotsylvania* (Va. Annex. Ct., Apr. 26, 1983) (Order of Annexation).

149. Petition for Appeal at 2-3, *Citizens for a Better Agreement v. City of Fredericksburg and County of Spotsylvania*, No. 83-1215 (Va. July 25, 1983).

150. *Id.* at 3-4.

151. *Id.* at 16; Interview with Ted McCormack, Assistant to the Director, Commission on Local Government (Aug. 4, 1983). See also ANNEXATION AND IMMUNITY AGREEMENT, *supra* note 143, at 64-65.

152. Petition for Appeal at 16, *Citizens for a Better Agreement v. City of Fredericksburg and County of Spotsylvania*, No. 83-1215 (Va. July 25, 1983).

153. *Id.* at 25-27.

154. See *supra* note 121 and accompanying text.

155. See *Commonwealth v. County Board of Arlington County*, 217 Va. 558, 576-77, 232 S.E.2d 30, 42 (1977).

to agree to annexation moratoriums.¹⁵⁶

Although the petition for appeal was subsequently denied by the court,¹⁵⁷ the two issues in the case — the scope of judicial review of voluntary agreements and the cities' authority to relinquish their right to annexation for a specified period of time by agreement — made the appeal in the *Fredericksburg* case one of considerable interest to the practitioner who negotiates these types of agreements. Had the appeal been granted, it would have been the first case the Virginia Supreme Court heard concerning the validity of a voluntary agreement and the scope of judicial review since the enactment of the 1979 amendments. It is perhaps unfortunate that the court refused the petition for appeal; however, the absence of statutory authority that gave rise to the *Fredericksburg* case was remedied by the General Assembly in 1983 through enactment of a new provision governing voluntary agreements.

This newly promulgated voluntary agreement provision, effective July 1, 1983, specifically confers authority on annexation courts to review voluntary agreements and either grant or withhold their approval.¹⁵⁸ The courts are not, however, given authority to make changes in the agreements absent the consent of both parties. In deciding whether to approve or disapprove the agreements, the courts are directed to consider the best interests of the state and the parties. Other factors to be considered include whether the agreement promotes the orderly growth and continued viability of local governments.¹⁵⁹ Additionally, the General Assembly expressly authorized cities to enter into agreements giving up their annexation rights for a specified period of time.¹⁶⁰

Of greater importance to localities that entered into voluntary agreements before the 1983 amendments is a provision which provides that voluntary agreements previously entered into are deemed to be valid under the terms of the new statute.¹⁶¹ The general rule is that statutes are to be applied prospectively unless the clear expression and intent of the legislature is otherwise.¹⁶² Here, the statute contains a clear expression of legislative intent that it should be applied retrospectively.¹⁶³

156. Petition for Appeal at 26, *Citizens for a Better Agreement v. City of Fredericksburg and County of Spotsylvania*, No. 83-1215 (Va. July 25, 1983). *But see* 1982-83 Op. Va. Att'y Gen. 151 (stating that such authority may be fairly implied from the words of VA. CODE ANN. § 15.1-945.7 (Repl. Vol. 1981 & Cum. Supp. 1983)).

157. *Citizens for a Better Agreement v. City of Fredericksburg and County of Spotsylvania*, No. 83-1215 (Va. Nov. 17, 1983) (appeal denied).

158. VA. CODE ANN. § 15.1-1167.1(5) (Cum. Supp. 1983).

159. *Id.*

160. *See id.* § 15.1-1167.1(2).

161. *See id.* § 15.1-1167.1(7).

162. *See, e.g.,* *Ferguson v. Ferguson*, 169 Va. 77, 85-87, 192 S.E. 774, 776-77 (1937).

163. VA. CODE ANN. § 15.1-1167.1(7) (Cum. Supp. 1983) (providing in pertinent part that any voluntary agreements which "(i) [have] been previously entered into or (ii) which [have]

Therefore, Fredericksburg's agreement not to initiate annexation proceedings for twenty-five years is a valid exercise of express authority conferred by the new provisions governing voluntary agreements and the annexation court may properly review the agreement.¹⁶⁴

B. *County of Rockingham v. City of Harrisonburg*¹⁶⁵

Rockingham is the only reported case on annexation since the 1979 amendments were adopted. Additionally, it is the first case to be decided by the Virginia Supreme Court since the annexation moratorium was lifted on July 1, 1980.¹⁶⁶ *Rockingham* is significant because it gave the supreme court the opportunity to examine many of the provisions of the 1979 amendments. In fact, the court granted the appeal for just such an opportunity.¹⁶⁷

Rockingham did not involve a voluntary settlement agreement. In this respect it is reflective of pre-1979 annexation suits. The City of Harrisonburg sought to annex over fourteen square miles of Rockingham County.¹⁶⁸ The Commission on Local Government reviewed the proposed annexation and recommended that it be granted with certain limitations.¹⁶⁹ The annexation court found the proposal to be necessary and expedient, and ordered the annexation of 11.64 square miles of territory from Rockingham County.¹⁷⁰ The county appealed and the major question on appeal was whether the evidence was sufficient to prove that the annexation was necessary and expedient.¹⁷¹

The court examined the changes and the relevant legislative history of the 1979 amendments and reached five conclusions which are among the court's most important pronouncements in the case:

First, the state favors cooperation, rather than competition, among local governments. Second, annexation courts must balance the interests of the people in all the areas concerned. Third, annexation may not be warranted where urbanized counties already provide adequate urban services. Fourth, the state's interest in maintaining strong local governments is an important

been reviewed or [are] in the process of review by the Commission on Local Government, or (iii) which [have] been or [are] the subject of review by a special court convened under Chapter 26.2 of this title" are deemed to be in compliance with the terms of § 15.1-1167.1).

164. *Id.* § 15.1-1167.1(2), (5), (7).

165. 224 Va. 62, 294 S.E.2d 825 (1982).

166. *See supra* note 32.

167. *County of Rockingham v. City of Harrisonburg*, 224 Va. at 69, 294 S.E.2d at 827.

168. COMMISSION ON LOCAL GOVERNMENT, REPORT ON THE CITY OF HARRISONBURG — COUNTY OF ROCKINGHAM ANNEXATION CASE 8 (Feb. 1981).

169. *Id.* at 43. *See County of Rockingham v. City of Harrisonburg*, 224 Va. at 70, 294 S.E.2d at 827.

170. *County of Rockingham v. City of Harrisonburg*, 224 Va. at 70, 294 S.E.2d at 827.

171. *Id.* at 74, 294 S.E.2d at 830.

consideration. Fifth, the findings and recommendations of an impartial administrative agency will help to protect and promote that interest.¹⁷²

The court's fourth conclusion describes the state-interest standard which was added to the annexation test by the 1979 amendments.¹⁷³ The court interpreted the state-interest standard to be a significant addition to the necessity and expediency test and held that the purpose of the standard was to emphasize that annexation is more than a purely local question.¹⁷⁴

Other pronouncements in the case involved overruling prior case law. The state's previous policy that urban areas should be governed by city governments and rural areas should be governed by county governments¹⁷⁵ was no longer the law after the 1979 amendments. As such, the court overruled prior case law to the contrary.¹⁷⁶ However, the court made it clear that previous case law in other areas was still valid after the 1979 amendments. For example, the rule that the wishes of residents of the area to be annexed do not control the granting of an annexation¹⁷⁷ and the rule that no single factor controls in determining the necessity and expediency of annexation¹⁷⁸ remain valid.

In *Rockingham*, the Virginia Supreme Court also addressed the issues of city-county cooperation in the joint provision of services and the adverse impact of annexation on a county. With respect to the providing of services, the Virginia Code provides that any arbitrary refusal by a city or county to cooperate in a joint undertaking to provide services will be held against that party in a subsequent annexation proceeding.¹⁷⁹ Conversely, the Code directs the annexation court not to draw any adverse inference from joint activities undertaken by the two localities. The purpose of this provision is to promote cooperative ventures among adjoining political subdivisions of the state.¹⁸⁰ In this instance, Rockingham County charged that Harrisonburg had acted arbitrarily.¹⁸¹ The issue was in defining "arbitrary." The court found a mutual lack of cooperation between the parties, but stated that each party had "been looking out for their own inter-

172. *Id.*

173. *See supra* note 84 and accompanying text.

174. *County of Rockingham v. City of Harrisonburg*, 224 Va. at 85, 294 S.E.2d at 837.

175. *See supra* note 46.

176. *County of Rockingham v. City of Harrisonburg*, 224 Va. at 76, 294 S.E.2d at 831-32.

177. *Id.* at 77, 294 S.E.2d at 832 (citing *County of Henrico v. City of Richmond*, 177 Va. 754, 788-89, 15 S.E.2d 309, 321 (1941); *accord* *County of Norfolk v. City of Portsmouth*, 186 Va. 1032, 1041, 45 S.E.2d 136, 140 (1947)).

178. *County of Rockingham v. City of Harrisonburg*, 224 Va. at 80, 294 S.E.2d at 834 (citing *County of Fairfax v. Town of Fairfax*, 201 Va. 362, 368, 111 S.E.2d 428, 433 (1959)).

179. VA. CODE ANN. § 15.1-1041(b1)(v) (Repl. Vol. 1981).

180. *Id.*

181. *County of Rockingham v. City of Harrisonburg*, 224 Va. at 81, 294 S.E.2d at 834-35.

ests as they perceive them.”¹⁸² The court concluded that “[a]ctions prompted by a reasonable perception of legitimate self-interest are not arbitrary.”¹⁸³

With respect to the adverse impact of annexation, the court found that annexation usually harms the county initially.¹⁸⁴ But the court specifically held that the county’s ability and potential for future development after annexation was a relevant consideration in determining the adverse impact on the county. Thus, the court rejected Rockingham County’s argument that the so-called “growback” theory had been disapproved in earlier opinions of the court.¹⁸⁵

The Virginia Supreme Court ultimately held the proposed annexation to be necessary and expedient.¹⁸⁶ In the process, the court rubber-stamped the judgment of the annexation court. This case may presage a future deference to the findings of the annexation court, but two facts would tend to imply otherwise. First, the supreme court routinely defers to an annexation court’s findings of fact, but it may disregard the annexation court’s findings of fact if it believes them to be plainly wrong.¹⁸⁷ Second, the supreme court traditionally has not deferred to the annexation court’s determination of necessity and expediency where it believed the latter was in error.¹⁸⁸

C. *Problems In Partial Immunity Actions and Legislative Solutions*

In December, 1982, the Commission on Local Government issued its first report on a partial immunity action filed under the Virginia Code amendments.¹⁸⁹ Under the relevant provisions of the statute, a county can be granted partial immunity from annexation if it can demonstrate to the court that appropriate urban-type services are being provided to the parts of the county for which immunity is sought.¹⁹⁰ The case before the Commission involved the County of Augusta’s request for partial immunity for approximately 38.2 square miles of territory adjacent to the cities of

182. *Id.* at 81-82, 294 S.E.2d at 835.

183. *Id.* at 82, 294 S.E.2d at 835.

184. *Id.* at 84, 294 S.E.2d at 836.

185. *Id.* at 84 n.12, 294 S.E.2d at 836 n.12.

186. *Id.* at 85, 294 S.E.2d at 837.

187. *See e.g.*, *City of Alexandria v. County of Fairfax*, 212 Va. 437, 440, 184 S.E.2d 758, 760 (1971); *Johnston v. County of Fairfax*, 211 Va. 378, 384, 177 S.E.2d 606, 610 (1970).

188. *See, e.g.*, *City of Roanoke v. County of Roanoke*, 214 Va. 216, 198 S.E.2d 780 (1973); *Rockingham County v. Town of Timberville*, 201 Va. 303, 110 S.E.2d 390 (1959).

189. COMMISSION ON LOCAL GOVERNMENT, REPORT ON THE COUNTY OF AUGUSTA PARTIAL IMMUNITY ACTION 13 (Dec. 1982) [hereinafter cited as REPORT ON PARTIAL IMMUNITY ACTION]. *See also* VA. CODE ANN. § 15.1-977.22:1 (Repl. Vol. 1981 & Cum. Supp. 1983) (stating partial immunity provisions).

190. *See supra* text accompanying notes 55-56.

Staunton and Waynesboro.¹⁹¹ The Commission reviewed the type and level of services being provided in the area being proposed for immunity and those of the cities of Staunton and Waynesboro. The Commission found that comparable urban-type services were not being provided in the area proposed for immunity, nor was there a greater community of interest with Augusta County than with either city.¹⁹² The Commission also found that Augusta County had not fully complied with state policies with respect to public planning, and therefore the Commission was unable to recommend that partial immunity be granted.¹⁹³

The importance of the Augusta County case lies in two areas: (1) the definition of "comparable" urban-type services, and (2) the ability of the court and Commission to grant or recommend a greater or lesser area than that proposed for immunity by the county. In the first area, the problem the Commission had was whether to define "comparable" urban-type services as "equal," "approximately equal," or to use some other standard.¹⁹⁴ The applicable provision in the Code does not define the term.¹⁹⁵ A majority of the Commission members agreed that the services provided in the area proposed for immunity must "approximate" the services provided in the neighboring cities.¹⁹⁶ Although the Commission unanimously agreed that complete equality was not required,¹⁹⁷ two members dissented from the majority's interpretation of the meaning of comparable services. One member took the position that comparable services were "only those services that are necessary to meet the needs of the people being served"¹⁹⁸ Under this view, a county should not attempt to provide the same or approximate level of services as nearby cities when to do so would be to provide a level of services far beyond what is needed; such a policy would be irresponsible and economically unsound.¹⁹⁹ The issue seems to be resolved since the majority agreed upon the "approximate" equality standard.²⁰⁰ Using this standard, which is more rigid than that advocated by the dissent, the Commission denied Augusta County's request for partial immunity.²⁰¹

The denial of Augusta County's request raised a second problem. Several Commission members believed that portions of the area for which

191. See REPORT ON PARTIAL IMMUNITY ACTION, *supra* note 189, at 1.

192. *Id.* at 125.

193. *Id.* at 126.

194. *Id.* at 134-36 (Hensley, Comm'r, dissenting).

195. See VA. CODE ANN. § 15.1-977.22:1 (Repl. Vol. 1981 & Cum. Supp. 1983).

196. See REPORT ON PARTIAL IMMUNITY ACTION, *supra* note 189, at 129. (Beck, Comm'r, dissenting).

197. *Id.* at 134-35 (Hensley, Comm'r, dissenting).

198. *Id.* at 134 (Hensley, Comm'r, dissenting).

199. *Id.* at 135 (Hensley, Comm'r, dissenting).

200. *Id.* at 129 (Beck, Comm'r, dissenting).

201. *Id.* at 125.

immunity was sought provided a comparable level of urban-type services.²⁰² However, the Commission could not recommend that immunity be granted to a lesser area than that for which immunity was sought. At the time of the Augusta County case, there was no statutory authority that would allow the Commission to recommend or allow the annexation court to grant any greater or lesser area than that proposed by the county.²⁰³ This flaw in the 1979 amendments was corrected in 1983.²⁰⁴ Now the annexation court can grant and the Commission can recommend a greater or smaller area than the area for which partial immunity is sought.²⁰⁵ Interestingly, the Commission was not given the same express authority in annexation cases.²⁰⁶ This may have been because of legislative oversight or a belief by the legislature that such authority is implied from the terms of the statute.²⁰⁷ As a remedial statute, such authority could be implied.²⁰⁸ A preferable solution, however, would be to make the Commission's authority express. In any event, it was unnecessary to confer similar express authority on the courts in annexation cases because they previously had received and exercised such authority.²⁰⁹

The County of Augusta has chosen not to pursue its partial immunity request in the annexation court.²¹⁰

V. CONCLUSION

It will be many more years before the impact of the 1979 amendments can be fully assessed. The clearest trend to date has been the movement towards voluntary settlement of annexation disputes. Some of the defects and omissions in the 1979 revision of the annexation laws were remedied by amendments in 1983. However, the annexation process in Virginia remains in a state of study and revision and will continue to be for the foreseeable future. It can be said, however, that the 1979 amendments

202. *Id.* at 129 (Beck, Comm'r, dissenting); *id.* at 132-33, 137-38 (Hensley, Comm'r, dissenting).

203. See VA. CODE ANN. §§ 15.1-945.7, -977.22:1 (Repl. Vol. 1981).

204. 1983 Va. Acts, ch. 217 (codified at VA. CODE ANN. §§ 15.1-945.7, -977.22:1 (Cum. Supp. 1983)).

205. *Id.*

206. 1983 Va. Acts, ch. 217 specifies immunity actions and does not specifically mention annexation cases. See VA. CODE ANN. § 15.1-945.7 (Cum. Supp. 1983).

207. VA. CODE ANN. § 15.1-945.7 (Cum. Supp. 1983).

208. See *supra* notes 134-35 and accompanying text.

209. See VA. CODE ANN. § 15.1-1042(a) (Repl. Vol. 1981).

210. The City of Staunton and Augusta County reached agreement on March 22, 1983, to study consolidation of the two jurisdictions. The City of Waynesboro received a report in July, 1983 from the Commission on Local Government recommending the annexation by Waynesboro of 6.23 square miles of Augusta County. The annexation court has yet to be appointed. Nardi & Gordon, *Waynesboro Backed in Annexation Effort*, Richmond Times-Dispatch, July 9, 1983, at B1, col. 4.

ushered in a new era of cooperation in city-county relations. If measured solely by this achievement, the 1979 amendments have been a success.

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