

IN THE COUNTY COURT OF PULASKI COUNTY

IN RE: INCORPORATION OF THE COMMUNITY
KNOWN AS LITTLE ITALY

RESPONSE TO LETTER FROM CENTRAL ARKANSAS WATER
DATED DECEMBER 16, 2015

The Petitioners filed a Petition for Incorporation on May 13, 2015, seeking incorporation of the community known as Little Italy. The Court scheduled a hearing on the matter for July 13, 2015. Approximately one month before the scheduled hearing, Central Arkansas Water (“CAW”) publicized its opposition to the proposed incorporation of Little Italy citing concerns about the effect of incorporation on the Lake Maumelle Watershed Zoning Code (the “Zoning Code”). The Petitioners learned of these concerns through the media and quickly reached out to CAW to address CAW’s concerns and assure CAW of the Petitioners’ intent to adopt an ordinance mirroring the Zoning Code as soon as practicable. In order to allow time to reach a compromise with CAW and obtain other pertinent information and evidence for the incorporation hearing, the Petitioners requested a continuance, which the Court granted, and the hearing was continued until December 16, 2015. Unfortunately, the compromises CAW suggested either did not address the Petitioners’ reasons for seeking incorporation or were not feasible, and CAW found the compromise suggested by the Petitioners too indefinite. On December 16, 2015, CAW filed a letter stating its opposition with the Court (the “Letter”). For the reasons stated below, the Letter should be disregarded.

I. THE MAJORITY OF THE STATEMENTS OF FACTS IN THE LETTER ARE INACCURATE

CAW states it “has thoroughly researched the incorporation of the proposed Town and the area contained within the proposed Town,” but many of the pertinent facts included in the Letter indicate CAW merely took numbers from a sample budget used by the Petitioners in the preliminary stages of their incorporation efforts prior to their due diligence on an estimated budget for Little Italy.

1. Petition and Signatures

The Letter recognizes the Petitioners obtained the requisite number of signatures on the petition but incorrectly states the purpose of incorporation. As described in detail in Little Italy’s business plan, the Petitioners wish to incorporate Little Italy to establish and maintain self-governance for its people, grounded in the inalienable right of civic participation and equality for all citizens to freely choose what is most appropriate to ensure their rights of life, liberty and property, while also preserving the cultural and historical heritage of the area’s founders and improving services. CAW completely ignores these reasons for incorporation despite their inclusion in even the earliest Little Italy business plan, which CAW has used as the basis for most of its assertions and objections. In addition to ignoring Little Italy’s mission statement, as stated in the sample business plan, which remains a part of the actual business plan, CAW ignored the presentation of the mission statement at a town meeting attended by CAW representatives as well as the inclusion of the mission statement in the Petition.

2. Geographic Area

The Letter correctly notes Little Italy would cover approximately 8.8 square miles, and a portion of that area falls within the Lake Maumelle Watershed.

3. Nearby Municipal Corporations

CAW asserts in the Letter that Little Italy falls within five miles of three municipal corporations exercising their planning authority: the City of Bigelow, the Town of Fourche, and Pulaski County. The Petitioners have obtained written resolutions from the City of Bigelow and the Town of Fourche but not Pulaski County. According to CAW, Pulaski County has exercised its planning jurisdiction through the Pulaski County Subdivision and Development Code and the Zoning Code, and the Petitioners have failed to obtain consent from the Pulaski County Quorum Court for incorporation. However, as explained in detail below, the Petitioners do not need permission from the Pulaski County Quorum Court.

4. Population and Property Ownership

The Letter states that Little Italy would have an estimated population of approximately 380 and an estimated population density of approximately 43.4 individuals per square mile, both of which are slightly higher than the Petitioners' estimate of 350 residents and a population density of 40. The Letter asserts CAW owns approximately seven acres within the proposed boundaries, presumably to establish it as a "person interested" in the incorporation. The Letter also notes that CAW owns property adjacent to the boundary. However, CAW's ownership of property adjacent to the proposed boundary does not give CAW standing to oppose incorporation unless CAW can show it is threatened with direct pecuniary damage not shared by members of the public in general. *Turner v. Wiederkehr Village*, 261 Ark. 72, 546 S.W.2d 717 (1977). No evidence exists to show incorporation will decrease the value of CAW's property, thus leaving ownership of the seven acres included within the proposed boundary as CAW's sole argument for standing to oppose incorporation.

5. Budget and Public Facilities

The numbers referenced in the Letter for Little Italy's proposed budget are inaccurate and clearly based on the sample plan, which has been revised upon receipt of applicable information. The Letter states Little Italy will have revenues of \$16,350.00 for the general budget and \$20,292.85 for the street budget. Little Italy's actual estimated budget shows revenues of \$89,662.00 for the general budget and \$31,187.00 for the street budget. The estimated revenues are based on definite sources of income to which Little Italy would be entitled upon incorporation. Moreover, the budget lists several other potential sources of income, such as grants and other short-term financing options that may be available in the future. As those sources of income are speculative, they are given a value of \$0.00. However, even when only the assured sources of income are taken into account, all of which CAW could have calculated on its own had it taken the time to do so, Little Italy will have revenues in amounts far greater than those alleged by CAW.¹

The Letter also claims Little Italy does not include funds for police, professional services or non-street labor. However, Little Italy's proposed budget provides for an arrangement with the Perry County Sheriff's Department as well as for a City Marshal. Moreover, the proposed budget includes expenses for Municipal League Workers' Compensation for volunteer officers and for the proposed City Marshal. The proposed budget also includes expenses for jail contributions, court and recorder dues, and a city hall rental.

Next, the Letter states Little Italy would have the lowest revenue of any municipality with a population of 200 to 601. Presumably, CAW used the very inaccurate numbers from the sample budget to come to this conclusion. CAW also used an inaccurate number of miles of road

¹ Little Italy's estimated revenues for the general budget are **\$73,312.00** greater than the general revenues alleged by CAW, and Little Italy's estimated revenues for the street budget are **\$10,894.15** greater than the street budget revenues alleged by CAW.

for which a newly incorporated Little Italy would be responsible. Consequently, the Letter's estimate as to the amount of the budget allocated per mile for street and road maintenance is not accurate.

Almost every assumption and assertion made in the Letter's section on the Budget and Public Facilities is based on numbers that are no longer accurate.

6. Land Use

The purpose of the section of the Letter titled Land Use seems to be to show that the proposed town would be rural in nature. However, the U.S. Census Bureau classifies 395 of Arkansas's municipalities as rural. See U.S. Census Bureau, *Urban and Rural Classification*, <http://www.census.gov/geo/reference/urban-rural.html?cssp=SERP> (last visited January 8, 2016). Moreover, several Arkansas municipalities have a population density, which is the number of residents per square mile, less than that of Little Italy, and several more Arkansas municipalities have a population density only slightly higher than that of Little Italy. Thus, despite the rural nature of Little Italy, it would not be an oddity in Arkansas.

II. THE PETITION

1. The Proposed Town is not Unreasonably Large

As noted in the Letter, a determination of whether a proposed town is unreasonably large or small rests upon common sense. *White v. Lorings*, 274 Ark. 272, 623 S.W.2d 837 (1981). The Letter then cites to *Arkansas and Ozark Railway v. Busch*, a case in which the court found that a proposed town that would be three miles long and .25 miles wide and have a population of 21 was unreasonably large. 223 Ark. 27, 264 S.W.2d 54 (1954). That proposed town had a population density of 28, well below that of Little Italy. The Letter concludes the *Busch* town's population density is closer to Little Italy's population density than the population density of the

town in *White*, which the court determined was not unreasonably large, and thus, the Court should determine Little Italy is unreasonably large. However, the *Busch* town is not really comparable to Little Italy, but the town of Clarkedale, Arkansas, is. Clarkedale has a population of 371 and covers 11.45 square miles. With a population density of 32.4, Clarkedale was not considered unreasonably large as it was incorporated in 2000. Thus, the Letter's assertion that based on Little Italy's proposed size and population, "it is clear the proposed town is unreasonably large" is incorrect.

The Letter also asserts the proposed town is unreasonably large when examined from a public facilities and budgetary perspective. As noted above, CAW's assertions on these points cannot be given any weight because they are based on incorrect budget numbers that are far below Little Italy's actual budget. As evidenced by Little Italy's proposed budget, as well as testimony from the mayor of a town with similar sources of revenue to those of Little Italy, Little Italy's budget is reasonable, and Little Italy should have sufficient revenues to properly operate as a town.

2. The Proposed Town is Suited for Municipal Purposes

Following a page and a half of unfounded allegations supported by misconstrued legal analysis focused on persuading the Court the proposed area is "unreasonably large" because it would be incapable of "generating sufficient revenue to maintain **the expansive public infrastructure within its boundaries**" (emphasis added), CAW turns to its second basis for denying the Petition—"the land proposed to be included in the proposed Town is **primarily timber and agricultural land** and is therefore not suited for municipal purposes or 'adapted for urban use'" (emphasis added). The arguments that an incorporated Little Italy cannot afford to continue maintaining its expansive public infrastructure and that Little Italy is comprised

primarily of timber and agricultural land are incongruent. Regardless of these contradictory allegations crafted by CAW, its second contention ignores established case law pronounced by the Arkansas Supreme Court in *White v. Lorings*, 274 Ark. 272, 623 S.W.2d 837 (1981), which happens to be the very case upon which CAW's first argument is largely based. In *White*, the Court made it clear the agricultural or rural character of a proposed incorporated area is not a factor to be considered by the County Judge in determining whether to grant the Petition, and stated as follows:

The court further found that much of the area to be incorporated is agricultural or open and vacant land and would not derive any benefit from incorporation but would be subject to taxation. **Obviously, the court was taking into consideration the statutes which provide for annexation of territory to an already existing town.** Indeed, Ark. Stat. Ann. § 19-307.1 provides that lands used only for agricultural or horticultural purposes and where the highest and best use of certain lands is for agricultural or horticultural purposes shall not be annexed. **There has never been such a provision in the statutes governing the original incorporation of towns and cities.** In fact, Act No. I of Acts of the General Assembly of 1875 is still the controlling act relating to the incorporation of cities or towns.

274 Ark. at 275-76, 623 S.W.2d at 838 (emphasis added). Moreover, based on the Court's statement in *White*, the numerous annexation citations and precedents advanced by CAW have absolutely no bearing on the County Judge's determination regarding the Petition and should be ignored. Indeed, upon closer review, a vast majority of the legal authority referenced by CAW concerns cases involving annexation, rather than incorporation, rendering the Letter woefully flawed in legal reasoning.

Even assuming CAW is correct, and the agricultural or rural character of the proposed incorporated area should be a determining factor considered by the County Judge, the data collected by Pulaski County and State agencies and the information presented by Petitioners clearly show the proposed area suitable for incorporation. Specifically, according to data collected by the Pulaski County Assessor, the proposed incorporated area contains 433 parcels,

three improved commercial parcels containing a convenience store, liquor store and video store, two churches, one community center, one cemetery and seven subdivisions. Of the seven subdivisions, the following number of lots and residences are contained within the proposed incorporated area:

- Reece Creek: Seventeen (17) lots (two of which fall outside the proposed area) and Nine (9) residences;
- Dogwood Trails: Five (5) lots and Four (4) residences;
- Pleasant Shade: Six (6) lots and One (1) residence;
- Heather Ridge: Thirty-Nine (39) lots (one of which falls outside the proposed area) and Sixteen (16) residences;
- Madison Acres: Twenty-Three (23) lots and Fifteen (15) residences;
- Flowerwood Farms: Fifty-Eight (58) lots (fifteen (15) of which fall outside the proposed area) and Twenty-Three (23) residences; and
- Yarbrough Estates: Two (2) lots and One (1) residence.

CAW would have the County Judge look only to the data allegedly established by “CAW’s 2009 high resolution land use and land cover dataset” in considering the proposed area’s suitability for incorporation. However, this would require the County Judge to simply brush aside the volumes of data and statistics collected by Pulaski County and State agencies, and the Court should not be so inclined, especially given the fact that documentation establishing the authenticity of CAW’s data has not been provided, except in affidavits of an administrative assistant, a GIS manager and technician, and a customer relations/public affairs director employed by CAW. While CAW’s employees may be versed in researching, compiling and interpreting data pertaining to population density and area demographics due to their experience as a utility providing drinking water to Central Arkansas, the Petitioners assert it more likely the data compiled by Pulaski County and State agencies, such as the tax classifications and

assessments established by the Pulaski County Assessor, provide a more accurate and complete assessment of the proposed area's suitability for incorporation.

In short, the Letter summarily concludes the proposed town is not adapted for urban use based on the amount of the proposed boundary that is forest, pasture, and water. While the property might have areas that are "rural" in nature at this time, that should not lead to the determination that it is not suited for municipal purposes. Simply put, the mere fact that a portion of the proposed boundary is currently rural in nature does not mean that Little Italy cannot become more urban once incorporated. In fact, the Petitioners hope to eventually add businesses to Little Italy, especially businesses geared towards tourism given the rich history of Little Italy.

3. Avoiding Regulation is Not a Purpose of the Proposed Incorporation

As anyone in Central Arkansas with access to a newspaper or television is well aware, CAW is convinced the sole purpose of incorporation is to avoid the Zoning Code. While CAW has been quite vocal with this accusation, it is false and CAW has failed to point out a single example or provide any evidence showing how the incorporation of Little Italy will be detrimental to the Lake Maumelle Watershed. In sum, CAW has nothing other than baseless assertions to substantiate its accusation. CAW did not contact the Petitioners or the Little Italy Task Force about the possible implications incorporation could have on the Lake Maumelle Watershed before beginning a media campaign to oppose Little Italy's incorporation efforts, but if CAW had, the Little Italy Task Force would have assured CAW that incorporation would not adversely affect the Lake Maumelle Watershed.

The Little Italy Task Force offered to strongly lobby Little Italy's newly elected town council to adopt an ordinance identical to the Zoning Code, which it still intends to do. While CAW did not feel this solution acceptable, it was an unprecedented offer of accommodation. CAW proposed impractical solutions: (1) Little Italy could seek designation as a historic district, which would not achieve the Petitioners' goals of self-governance or provide a means for obtaining and providing better services to its residences; or (2) Little Italy could have the owners of at least seventy-five percent (75%) of the acreage within the boundary execute a Declaration of Historic and Rural Character Covenants whereby the owner agrees to abide by the regulations of the Zoning Code, which CAW knew, or should have known, to be impossible considering several property owners reside elsewhere and any party holding an easement, mortgage, lease, or other property interest would have to execute the Declaration as well.

After accusing the Petitioners of attempting to avoid the Zoning Code through incorporation, the Letter makes another baseless assertion that Little Italy could not provide enhanced municipal services. According to CAW, a municipal water system with no experience creating or implementing a budget for a town, "the Petitioners have not presented a realistic plan to fund and deliver [enhanced municipal] services other than through contracts with entities currently providing services to the area." This statement is inaccurate for the same reason that so many of CAW's statements in the Letter are inaccurate – such statements are based on outdated information that was released prior to the Petitioners completing due diligence. It cannot be stressed enough that the numbers upon which CAW relies come from a SAMPLE budget that does not reflect Little Italy's actual projected income or expenses. The SAMPLE budget is, thus, worthless for evaluating Little Italy's ability to provide the enhanced services the Petitioners seek to obtain. Little Italy does intend to maintain fire protection and waste management

services through nearly identical agreements with those providers, which it has the right to do. *See Ark. Att’y Gen. Op. 97-234* (the Arkansas Attorney General has interpreted Ark. Code Ann. § 14-53-101(a) to mean a town may either establish a fire department or contract for such services). But Little Italy also intends to improve existing services, such as police protection and road maintenance, and has created a realistic budget that demonstrates its ability to do so.

Dave Graf, the mayor of Cammack Village, which is a town with fewer businesses than a newly incorporated Little Italy, has reviewed Little Italy’s proposed budget and concluded the estimated budget is reasonable. As the mayor of a town, as opposed to a utility, Mayor Graf is much more qualified to evaluate how realistic the budget is than CAW. In addition to Mayor Graf, the Petitioners have contacted the mayors of Bigelow, Southside, and Greenland, as well as persons involved with the incorporation of Alexander, to get a better understanding of the costs of incorporation. They have also reached out to local law enforcement, local fire protection, the Pulaski County Conservation District, the Institute for Building Technology and Safety, the Pulaski County Assessor, the Arkansas Municipal League, Pulaski County Road and Bridge, Pulaski County Sanitation, Waste Management, Central Arkansas Risk Management Association (CARMA), the United States Census Bureau, the Arkansas Highway and Transportation Department, the Arkansas Treasurer of State, the Administrative Office of the Courts, the Pulaski County Sherriff’s Office, and the Pulaski County Election Commission, among others, to determine the expenses a newly incorporated Little Italy will face, all of which are shown in the proposed budget. While the Petitioners have provided ample evidence supporting Little Italy’s ability to provide enhanced municipal services, CAW has only offered conclusory statements that Little Italy has no realistic plan.

The Arkansas Supreme Court's holding in *Waldrop v. Kansas City Southern Railway Company*, 131 Ark. 453, 199 S.W. 369 (1917), is mistakenly relied upon by CAW. In *Waldrop*, the Court overturned the incorporation of the Town of Ogden because the record demonstrated the residents sought incorporation to form a special school district to exclude African Americans, and the incorporated area was structured to maximize the Town's tax revenues from land owned by the Kansas City Southern Railway Company for the sole benefit of the residents. Here, nothing in the record suggests the Petitioner's basis for seeking incorporation is grounded on illegal, immoral, or unconstitutional motives or an attempt to subject a few to the burdens of taxation for the benefit of the many. Thus, the Court's holding in *Waldrop* is inapplicable.

4. Little Italy's Boundary is Appropriate

The Letter states the Arkansas Supreme Court "has long held that 'stovepipe' annexations or incorporations cannot be used to . . . form a city through incorporation." Without providing a definition for "stovepipe," CAW concludes Little Italy's proposed borders are formed from improper stovepipes that are included "solely for the purpose of connection, not for any proper municipal purpose." This conclusion is baseless and incorrect.

First, while Little Italy's proposed boundary contains several irregular edges, at no point is the proposed corporate area less than ¼ mile in width, which is the rough equivalent of four blocks. At no point is the proposed width of the town so narrow or slender that width will interfere with any aspect of providing services or enjoying the benefits of incorporation. Moreover, at no point is the proposed town so narrow or slender that the only possible use of the area is to make one area of the town contiguous with another. In all cases the width of the incorporated area will not interfere with the configuration of the lots and parcels. Several Arkansas municipalities, including Bay, Bluff City, Caraway, Danville, Egypt, Fountain Lake,

and Wiederkehr Village, have borders that illustrate much more severe “stovepipe” edges, unlike those present in Little Italy’s proposed border. As recently as 1999, Garland County determined the much more irregular edges of the Fountain Lake boundary did not include impermissible “stovepipes” and approved incorporation of Fountain Lake.

Second, the majority of the Little Italy boundary is based on zoning maps created by Pulaski County Planning and Development (the “Zoning Map”), and any deviations from the Zoning Map’s boundaries are the result of residents of adjoining property voicing a desire to become part of an incorporated Little Italy so they may participate in self-governance and benefit from the improved services incorporation offers. This is evidenced by the overwhelming percentage of residents of the added areas who signed the Petition. For example, seven electors reside within the eastern appendage, all of which signed the Petition. Thus, despite CAW’s assertion to the contrary, the boundary was designed for a proper municipal purpose – to include those within the boundary that seek to be a part of an incorporated Little Italy.

5. Petitioners Have Obtained the Necessary Consent

The statute governing a petition for incorporation states that incorporation shall not be approved if any part of the proposed incorporated area lies within five miles of an existing municipal corporation AND within the area in which that existing municipal corporation is exercising its planning territorial jurisdiction, unless the governing body of the municipal corporation has consented to the incorporation by written resolution. Ark. Code Ann. § 14-38-101(b)(1). The Letter asserts the statute’s use of “municipal corporation,” instead of just “municipality,” indicates the General Assembly meant to include counties as an entity with the authority to exercise planning territorial jurisdiction. The Letter also asserts the Petitioners must

get consent from the Pulaski County Quorum Court because “Pulaski County has clearly exercised its planning territorial jurisdiction” within the proposed boundary.

The Arkansas statute outlining planning territorial jurisdiction, however, only references municipalities. *See* Ark. Code Ann. § 14-56-413. Thus, using the logic set forth in the Letter, the absence of a reference to “municipal corporations” indicates the General Assembly did not intend for the counties to have planning territorial jurisdiction. Moreover, as noted in Justice Johnson’s dissent in *Butler v. City of Little Rock*, 231 Ark. 834, 840, 332 S.W.2d 812, 816 (1960), “[i]t is fundamental in the law that municipal corporations have no extra-territorial powers” The Arkansas statute grants such territorial planning power only to municipalities, not municipal corporations. Given the Letter concludes this distinction is important with regards to the consent requirement of Ark. Code Ann. § 14-38-101(b)(1), the distinction must be equally important when determining planning territorial jurisdiction, which would mean Pulaski County does not have planning territorial jurisdiction and the Petitioners do not need the consent of the quorum court.

According to CAW’s construction of Ark. Code Ann. § 14-38-101(b)(1), CAW has failed to list another municipal corporation from which Little Italy would need consent: Perry County. Following CAW’s interpretation of the statute, which is clearly an interpretation contorted to fit CAW’s purposes, Pulaski County’s authority to govern incorporation of municipalities within its borders could be essentially overturned by Perry County withholding its consent. Obviously, such an interpretation is clearly opposite the plain and unambiguous language of the statute. CAW advances an interpretation that contravenes the rules of statutory interpretation and, candidly, common sense.

CAW also ignores the interplay between the Pulaski County Quorum Court and the Pulaski County Judge. The County Judge is the Chief Executive Officer of Pulaski County. Thus, while the County Judge would not have a vote on a resolution regarding matters such as incorporation, he would have the power of veto. As a result, even if the Pulaski County Quorum Court voted to oppose incorporation of Little Italy, the County Judge could veto said resolution if he determined incorporation to be right and proper. Conversely, if the Pulaski County Quorum Court voted in favor of a resolution for incorporation of Little Italy, the County Judge could veto that resolution. Accordingly, the legislature empowered the County Judge, not the Quorum Court, to make determinations regarding incorporation. CAW ignores this in its desperate attempt to obstruct Little Italy's incorporation efforts.

III. CONCLUSION

Although CAW claims to have found several flaws with the Petition and the proposed incorporation of Little Italy, its objection can be boiled down to its paranoia that the Petitioners plan to eliminate the Zoning Code through incorporation. The Petitioners drink the very water CAW seems to believe they wish to contaminate. Moreover, Little Italy Task Force members participated for months in crafting the compromise that became the Zoning Code and voted in favor of it. Put simply, CAW's concerns with regards to the Zoning Code are unfounded, and all other arguments CAW has set forth are either based on inaccurate information or baseless legal theories. Therefore, the Letter should be disregarded.

Respectfully submitted,

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