

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF L E E L A N A U

IN THE MATTER OF THE PROPOSED
ANNEXATION OF TERRITORY IN
ELMWOOD TOWNSHIP TO THE CITY
OF TRAVERSE CITY, MICHIGAN

TOWNSHIP OF ELMWOOD, a Michigan
political subdivision,

Petitioner,

File No. 89-2580-CD

SBC 84-AP-5

HON. PHILIP E. RODGERS, JR.

v

MICHIGAN STATE BOUNDARY COMMISSION,
a Michigan administrative agency,
and the MICHIGAN DEPARTMENT OF
TREASURY,

Respondents,

and

CITY OF TRAVERSE CITY,
Intervening Respondent.

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DECISION AND ORDER

This action commenced with the filing of a Petition for Review dated December 26, 1989. Petitioner seeks review of Respondent Michigan State Boundary Commission's approval of the annexation petition designated 84-AP-5 (hereinafter referred to as 84-AP-5). The parties made their oral arguments before this Court on November 1, 1993. Subsequently, in compliance with a stipulated briefing schedule, the parties submitted supplemental briefs. This Court has reviewed the petition, the briefs, the record and the Court file .

The standard of judicial review requires that actions of the Michigan State Boundary Commission (hereinafter Boundary Commission) be supported by competent, material and substantial evidence on the whole record. MCL 24.306; MSA 3.560(206); *Wolverine Lake v State Boundary Comm*, 79 Mich App 56, 61 n 4; 261 NW2d 206 (1977). In *Chase v State Boundary Comm*, 103 Mich App 193, 203-204; 303 NW2d 186 (1981), the higher court held that:

Final decisions of the Boundary Commission are judicially reviewable under the provisions of the Administrative Procedures Act of 1969, 1969 PA 306; MCL 24.201 et seq; MSA 3.506(101) et seq, as incorporated by reference in the state boundary commission act, MCL 123.1018; MSA 5.2242(18). The courts are instructed by statute as follows:

Sec. 106. (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

- (a) In violation of the constitution or a statute.
- (b) In excess of the statutory authority or jurisdiction of the agency.
- (c) Made upon unlawful procedure resulting in material prejudice to a party.
- (d) Not supported by competent, material and substantial evidence on the whole record.
- (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
- (f) Affected by other substantial and material error of law.

(2) The court, as appropriate, may affirm, reverse or modify the decision or order or

remand the case for further proceedings. MCL 24.306; MSA 3.506(206).

The following statutes set forth the procedures for petitions for annexation. MCL 123.1006; MSA 5.2242(6) provides as follows:

Except as otherwise provided in this act, the commission shall process all petitions and resolutions in the order in which they are filed and shall finally dispose of a petition or resolution before taking up any other petitions or resolutions which deal with all or any part of the same territory. With respect to petitions for annexation proceedings filed with the board of supervisors or the secretary of state and petitions or resolutions for boundary adjustment proceedings filed with the commission, covering all or any part of the same territory, the petition or resolutions first filed shall be processed before and take precedence over a petition or resolution subsequently filed.

MCL 123.1008; MSA 5.2242(8) reads, in pertinent part, as follows:

(3) At least 60 days but not more than 220 days after the filing with the commission of a sufficient petition proposing incorporation, the commission shall hold a public hearing at a convenient place in the area proposed to be incorporated. At the public hearing the reasonableness of the proposed incorporation based on the criteria established in this act shall be considered. If section 6 prohibits the commission's acting on a petition because 1 or more petitions or resolutions have priority the time period provided in this section shall commence on the date upon which the prohibition ceases. (Emphasis added.)

This controversy stems from the Boundary Commission's approval of a petition to annex a parcel of property located in Elmwood Township to the City of Traverse City. The subject property is owned by Roland Habrecht. Petitioner seeks judicial review of the Boundary Commission's approval of 84-AP-5 on several grounds. In the Petition for Review, Petitioner alleges, inter alia, that:

1) the Boundary Commission's determination that 84-AP-3 was "legally sufficient" was in error;

2) the Township, as a Charter Township, is exempt from annexation;

3) at the time 84-AP-5 was filed, the land proposed for annexation to the city of Traverse City was not contiguous to the city;

4) the petition for annexation may not be properly executed as required by Rules 25 and 26 of the Boundary Commission;

5) the Boundary Commission's determination that 89-AP-5 was "legally sufficient" may be violative of constitutional due process;

6) that the decision of the Boundary Commission substantially affects the rights of the residents of the township and the township.

The Boundary Commission determined, on December 5, 1989, that the petition was legally sufficient; the Township seeks this Court's reversal of that administrative decision. The crux of the Township's challenge to the Commission's action is whether the proposed annexed lands were contiguous with the City of Traverse City¹ as required by *Genesee Two v Genesee Co*, 369 Mich 592; 120 NW2d 759 (1963) and *Midland Two v State Boundary Comm*, 401 Mich 641, 677; 259 NW2d 326 (1977). At the time Mr. Habrecht filed 84-AP-5, a previously filed petition designated as 81-AP-3 was in litigation. The two petitions are related to the extent that Mr. Habrecht is the owner of both parcels of real property. ² Ultimately, the Township appealed this Court's approval of Petition 81-AP-3.

The Court of Appeals approved the annexation of lands described in 81-AP-3 on October 25, 1988. On July 31, 1989, the Supreme Court denied leave to appeal. It is the opinion of this

Footnote 1: Brief in Support of Petition for Review, pp 7-8.

Footnote 2: Litigation in this Court and the appellate courts related to 81-AP-3 includes the following case numbers:

13th Judicial Circuit Court File No. 78-608-2-OCB and File No. 79-864-CB, consolidated under File No. 78-608-2-CB; Court of Appeals Docket Nos. 56328, 56329.

13th Judicial Circuit Court File No. 84-1645-CB and File No. 84-1666-CB, consolidated under File No. 84-1645-CB; Court of Appeals Docket Nos. 98734; Supreme Court Docket No. 84700.

Court that, pursuant to the Boundary Commission approval of 81-AP-3 and the appellate courts' decisions regarding that determination, the lands described in 84-AP-5 are contiguous to the City of Traverse City.

Petitioner argues that the Boundary Commission lost jurisdiction over 84-AP-5 because it failed to hold a public hearing within the timeframe provided by MCL 123.1008; MSA 5.2242(8), *supra*. The subject annexation petition, hereinafter referred to as 84-AP-5, was filed on July 3, 1984 by Roland Habrecht. Petitioner argues that the 220 day limit expired on February 9, 1985, nearly 5 years before the Boundary Commission held the public hearing on February 20, 1990.

Respondent argues that MCL 123.1008(3), *supra* tolled the running of the 220 day time limit. Respondent contends that after the petition was put on "inactive status" on April 16, 1985, the clock was not running on the statutory requirement to have a hearing within 220 days. Respondent argues that the clock started running again on July 31, 1989 when the Supreme Court denied leave to appeal. The Supreme Court issued two orders relating to the denial of leave to appeal; one order was issued on May 31, 1989, the other order was issued on July 31, 1989.

The Township asks this Court, if it determines that the "inactive status" is appropriate, to analyze whether the Order of May 31, 1989 or the Order of July 31, 1989, effectively terminated the Stay. The Boundary Commission argues that from December 26, 1986, when this Court issued the Order of Stay, until July 31, 1989, when the Supreme Court denied the motion for reconsideration and ruled that the Order to Stay (Motion to Stay) was moot, 84-AP-5 was properly "inactive". This Court agrees.

The gravamen of Respondent's argument is that its placing 84-AP-5 on "inactive status" during the appeal process of 81-AP-3 was appropriate action and properly preserved the issue of contiguity. Respondent concludes that the Supreme Court's denial of the motion for reconsideration of 81-AP-3 left the parties with the Court of Appeals' affirmation of the annexation. When the higher court affirmed the Boundary Commission's approval 84-AP-5, the subject parcel was contiguous with the annexed parcel included in 81-AP-3 and thereby contiguous with Traverse City. It is the opinion of this Court that the review processes for

81-AP-3 and 84-AP-5 were inextricably linked. This Court finds merit in the following text from page 17 of Respondent's brief:

Under Section 6 of the Commission's Act and 1979 AC, R 123.23(2), the 220-day deadline does not apply when a petition is blocked by the pending disposition of another petition dealing with all or a part of the same territory. Given the limitations inherent in the management of the Commission's docket, it was within the discretion of the Commission to determine that the removal of the legal challenge blocking its consideration of 84-AP-5 occurred on July 31, 1989 (rather than May 31, 1989) 3 when the Township's petition for rehearing and stay were denied. Under this timetable, the 220th day for a public hearing was approximately March 8, 1990, and the public hearing on February 20, 1990 was held within that deadline.

It is the opinion of this Court that the Supreme Court's Order issued on July 31, 1989 specifically and effectively terminated the Stay.

Petitioner sets forth its arguments regarding its status as "charter township", in part, as follows:

Without going into great detail, Section 34 of the Charter Township Act (supra) 4 exempts certain charter townships from annexation to any contiguous city if they meet certain criteria. Prior to the December, 1989 "Legal Sufficiency Hearing", the Boundary Commission was advised that the Township of Elmwood had become a "Charter Township" as of 1987. This information was communicated by documentation from the Township Clerk (Exhibit "G") under date of December 1, 1989 prior to the Hearing.

Footnote 3: The Township argued that, if this Court should find that the delay attributable to the "inactive status" was proper, that the 05/31/89 Supreme Court's denial of leave to appeal is the date which starts the clock running on the 60-220 day timeline to determine the deadline for the public hearing pursuant to MCL 123.1008(3).

Footnote 4: Referring to 1947 PA 359; MCL 42.1 et seq; MSA 5.46(1) et

seq.

While the statute that provides exemption (Act 359, supra) seems to indicate an absolute exemption if certain criteria are met, neither the statute creating the Boundary Commission (supra) nor the Administrative Rules (as the best the undersigned is able to determine) indicate when the Boundary Commission must consider and review the "exemption" question. Appellant believes that the issue is properly considered at the first stage, being the Legal Sufficiency Hearing. The basis of Appellant's reasoning is that a charter township is, by law, exempt from annexation. Thus, any petition which would seek to annex lands located in such a qualified township would, by statute, not be legally sufficient. As a result, the Commission must consider the Township's status at the Legal Sufficiency Hearing.

In the instant case, the Boundary Commission took the position that a review of charter township status does not occur until the public hearing (Transcript, Page 14; Exhibit "X"). Further, the Commission did not, in fact, consider the question at the Legal Sufficiency Hearing. This, Appellant contends, is a further defect in the proceedings.

Brief in Support of Petition for Review, pp 16-17. Again, the same arguments apply. But for the stay of proceedings, there is no question that 84-AP-5 was filed long before the Township elected charter status. A properly filed annexation petition cannot lose its legal sufficiency due to township action which occurs three years after it was filed. Recognition of charter status on those facts causes material prejudice to the party seeking annexation and who lawfully abided by the Respondent's decision to place the matter on inactive status pending the review of 81-AP-3.

The Township raises the following issue as another technical defect of the petition for annexation and the Boundary Commission's disposition of the matter:

"there was a failure to designate the 'highway' in question. *** [I]t appears that the Boundary Commission felt that the area for annexation included to the center of the highway, which may or may not be Carter Road,

since the legal description does not identify the highway in question. Further, Appellant submits that the legal description (Exhibit "A") specifically excludes any portion of the "highway" (whether it is Carter Road, or some other highway). However, the Boundary Commission appears to have included that in its determination of legal sufficiency, which amounts to an expansion of the area proposed for annexation. Mr. Habrecht's Petition clearly covered land lying south of the "highway" and did not extend to the centerline; and under Boundary Commission rules, there are limitations on expanding the area proposed for annexation without further, additional public notice.

Brief in Support of Petition for Review, pp 6-7. A review of the documents in the file make it clear that the "highway" is Carter Road. It is the opinion of this Court that the area annexed by the Boundary Commission does not include any portion of the "highway"/ Carter Road. Carter Road is a public roadway, maintained by the Leelanau County Road Commission. The portions of Carter Road which abut real property owned by Mr. Habrecht are not annexed to the city of Traverse City. There has been no improper expansion of the annexation request.

The provisions of MCL 123.1018 structure this Court's review of this matter. This Court finds the following succinct remarks from the Boundary Commission's brief to be accurate and instructive:

The Township has failed to show any prejudice to the Township in the timing of either the legal sufficiency hearing or the public hearing, or in any of the determinations of the Commission.

In *Avon Twp v Michigan State Boundary Comm'n* [sic], 96 Mich App 736, 751; 293 NW2d 691 (1980), the court noted the lack of vested rights in municipal boundaries and expressed the view that a party must show prejudice to a substantial right before a court would set aside a Commission order on the basis of a procedural error:

Plaintiffs have failed to show they are entitled to complain about unlawful procedures of the Boundary Commission in that they have not alleged any judicially cognizable prejudice. Pursuant to *Midland Two*, supra

[401 Mich 641; 259 NW2d 326 (1977)] no person or township has any vested right to or legally protected interest in the boundaries of governmental units, irrespective of inconveniences and burdens that may attend a change in those boundaries. Hence, plaintiffs have not shown prejudice to a substantial right, a showing which is required by § 106 of the Administrative Procedures Act of 1969, 1969 PA 306, §106; MCL 24.306; MSA 3.506(206), before an agency's order will be set aside as unlawful.

In light of Avon Twp, supra and Midland Twp supra, this Court does not find merit in Petitioner's arguments that the Boundary Commission's actions are procedurally defective. The Township has not shown a "judicially cognizable prejudice" as required by Avon. The Township's complaint alleges a plethora of procedural violations. It is the opinion of this Court that the Boundary Commission's approval of 84-AP-5 is supported by competent, material and substantial evidence on record. The Commission's decision to approve the annexation was not arbitrary, or capricious. MCL 24.306; Wolverine Lake, supra; Chase, supra. This Court hereby affirms the Boundary Commission's decision to approve 84-AP-5. The instant petition is denied. No costs are awarded.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 5/18/95