20160093

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

New Public School District #8, Appellant, v. State Board of Public School Education, and Kristi L. Gutierrez, Appellees.	)	**Supreme Court No. 20160093** **District Ct. No. 53-2015-CV-00894**

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STATE OF NORTH DAKOTA

APPEAL FROM THE DISTRICT COURT
JUDGMENT DATED JANUARY 25, 2016
WILLIAMS COUNTY, NORTH DAKOTA
NORTHWEST JUDICIAL DISTRICT

HONORABLE PAUL JACOBSON

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

[¶1] Whether the District Court correctly held as a matter of law that the Petition for Annexation from One Public School District to Another ("Gutierrez Petition") which was considered and approved by the State Board of Public School Education ("State Board"), met the requirements of N.D.C.C. §§ 15.1-12-03 and 15.1-12-05.

[¶2] Whether the district court correctly held as a matter of law that the contiguousness requirement set forth in N.D.C.C. § 15.1-12-03(1) was met because the property sought to be annexed was expected to be contiguous with the Williston Public School District #1 ("Williston School District") on July 1, 2015.

STATEMENT OF THE CASE

[¶3] The State Board accepts the Statement of the Case as written in Appellant's Brief, ¶¶3-5, with exception to Appellant's Paragraph 6. The District Court did not err in concluding that the State Board properly considered and approved the Gutierrez Petition, because the Gutierrez Petition met the requirements of N.D.C.C. §§ 15.1-12-03 and 15.1-12-05.

STATEMENT OF FACTS

[¶4] The State Board accepts the Statement of Facts as written in Appellant's Brief, in regards to ¶¶ 7, 9, 10 and 12. The State Board takes exception to ¶8 because the Gutierrez Petition correctly stated, "[t]his property constitutes a single area that is contiguous to the Williston Public School District." See Appendix of Appellant New Public School District #8 ("App."), 89. The State Board also takes exception to ¶11, as the Gutierrez Property did not lack contiguousness.

STANDARD OF REVIEW

[¶5] The State Board accepts the Standard of Review as written in Appellant's Brief, ¶13.

LAW AND ARGUMENT

I. The Property to be Annexed must Constitute a Single Area that is Contiguous to the School District.

A. North Dakota law requires that property be contiguous at the time of annexation with a school district.

[¶6] "Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears . . ." N.D.C.C. § 1-02-02. "Words and phrases must be construed according to the context and the rules of grammar and the approved usage of the language . . ." N.D.C.C. § 1-02-03. North Dakota law requires that property to be annexed to a school district be contiguous when the property is annexed. N.D.C.C. § 15.1-12-03 states: "Real property may be annexed to a school district provided: 1. The property to be annexed constitutes a single area that is contiguous to the school district . . . ." (emphasis added). N.D.C.C. § 15.1-12-06 indicates when previously approved annexations will take place: "Annexations under this chapter become effective on July first following final approval by the state board." Property may not be annexed to a school district if it is not contiguous to the school district at the time of annexation, which is the July first following final approval by the State Board.

[¶7] On January 21, 2015, the State Board approved the annexation of the Halliburton Property to Williston School District. App., 107. The Halliburton Property became annexed to Williston School District on July 1, 2015, under N.D.C.C. § 15.1-12-06. When the Halliburton Property was annexed on July 1, 2015, all properties

contiguous with the Halliburton Property were contiguous with the Williston School District. On July 1, 2015, the Gutierrez Property was contiguous with the Halliburton Property and the Williston School District. App., 101-102, 106-107. When the State Board granted the Petition for annexation of the Gutierrez Property, it authorized annexation of the Gutierrez Property to the Williston School District to occur on July 1, 2015 under N.D.C.C. § 15.1-12-06. Because the Gutierrez Property was contiguous to the Halliburton Property, and the Halliburton Property had been annexed to the Williston School District on July 1, 2015, the Gutierrez Property was contiguous to the Williston School District when it was annexed on July 1, 2015. App., 101-102, 106-107. There never was a moment of time when there was a lack of contiguity between the Williston School District and the Gutierrez Property when the Gutierrez Property was annexed. See Tovey v. City of Charleston, 117 S.E.2d 872, 877 (S.C. 1961). There is nothing in N.D.C.C. §§ 15.1-12-03, 15.1-12-04 or 15.1-12-05 that prohibits the Gutierrez Property from simultaneously commencing annexation proceedings. It is sufficient if on July 1, 2015, when the properties were annexed, the Gutierrez Property and the Halliburton Property were contiguous to each other, and one of them [Halliburton Property] was contiguous to Williston School District. N.D.C.C. §§ 15.1-12-03(1) and 15.1-12-06.

B. The State Board's interpretation of the laws under which it operates is entitled to deference.

[¶8] "The State Board is an administrative agency." New Town Pub. Sch. Dist. No. 1 v. State Bd. of Pub. Sch. Educ., 2002 ND 127, ¶ 5, 650 N.W.2d 813; see also N.D.C.C. § 28-32-01 (2). Courts' review of administrative agencies' decisions is

governed by N.D.C.C. § 28-32-46. New Town Pub. Sch. Dist., 2002 ND 127, ¶ 5, 650 N.W.2d 813.

[¶9] In reviewing an administrative agency's findings of fact, courts "exercise restraint and do not make independent findings of fact or substitute [their] judgment for that of the agency; rather, [they] determine only whether a reasoning mind could have reasonably determined the agency's factual conclusions were supported by the weight of the evidence from the entire record." Id. Determination of an administrative agency is presumed to be correct. In re Annexation of a Part of Donnybrook Pub. Sch. Dist. No 24, 365 N.W.2d 514, 518 (N.D. 1985); Barnes Cty. v. Garrison Diversion Conservancy Dist., 312 N.W.2d 20, 25 (N.D. 1981). Moreover, "[w]here the subject of an agency decision is a technical one, the expertise of the agency is entitled to respect." Turnbow v. Job Serv. N.D., 479 N.W.2d 827, 828 (N.D. 1992); see also New Town Pub. Sch. Dist., 2002 ND 127, ¶ 13, 650 N.W.2d 813 (explaining issues involving "technical questions regarding school district financing . . . are within the State Board's expertise" and the Court gives "appreciable deference to agency expertise if the subject matter of the agency decision is technical").

[¶10] Additionally, the interpretation of a statute by an administrative agency charged with its execution is entitled to weight and courts "will defer to a reasonable interpretation of that agency unless it contradicts clear and unambiguous statutory language." Frank v. Traynor, 1999 ND 183, ¶12, 600 N.W.2d 516; see Turnbow, 479 N.W.2d at 830 ("We will normally defer to a reasonable interpretation placed on a statute by the agency responsible for enforcing it, especially when that

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interpretation does not contradict the statutory language") (citing Schaefer v. Job Serv. N.D., 463 N.W.2d 665, 667 (N.D. 1990)). An administrative agency "has a reasonable range of informed discretion in the interpretation and application of its own rules." Bottineau Cty. Water Res. Dist. V. N.D. Wildlife Soc'y, 424 N.W.2d 894, 900 (N.D. 1988). An agency's expertise in applying the statutory schemes under which it operates is entitled to special deference when the subject matter is complex or technical. Americana Health Care Ctr. v. N.D. Dep't of Human Servs., 540 N.W.2d 151, 153 (N.D. 1995); Cass Cty. Elec. Coop. v. N. States Power Co., 518 N.W.2d 216, 220 (N.D. 1994) ("deference to an agency's interpretation of a statute 'is an important consideration when an agency interprets and implements a law that is complex and technical.'") (quoting W. Gas Res., Inc. v. Heitkamp., 489 N.W.2d 869, 872 (N.D.1992)).

[¶11] Annexations of property to a school district become effective on the July 1, following final approval by the State Board. N.D.C.C. § 15.1-12-06. The property to be annexed must be a single area that is contiguous to the school district. N.D.C.C. § 15.1-12-03(1). Thus, it is a reasonable interpretation of the aforementioned statutes to conclude that property to be annexed must be contiguous with the school district on July 1, the time of annexation. This interpretation and practical application does not contradict the plain and unambiguous language of N.D.C.C. § 15.1-12-03(1). The interpretation by the State Board that the significant date for contiguousness is the effective date of the annexation does not contradict the purpose of the statute as no portion of a school district is cut off from the remainder by its action in approving this annexation.

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C. Prohibiting the State Board from considering new annexation petitions before actual annexation of previously granted petitions would go against sound public policy.

[¶12] North Dakota law does not require that property be contiguous with a school district when a petition is submitted or a hearing to consider a petition for annexation is held. N.D.C.C. § 15.1-12-04 contains requirements for a petition for annexation of property to a school district, and N.D.C.C. § 15.1-12-05 contains procedures for hearings regarding annexation of property to a school district. N.D.C.C. § 15.1-12-04 does not require that property be contiguous with a given school district when a petition is submitted to the county superintendent. N.D.C.C. § 15.1-12-05 does not require that property be contiguous with a given school district when a hearing on annexation is held. There is no state law which requires that petitioned property be contiguous to a given school district during the petition and hearing processes.

[¶13] Requiring the State Board to wait to take action on new petitions for annexation of land affected by the annexation of lands already approved by the State Board would go against sound public policy. A situation could arise where several properties whose contiguity with a given school district are all dependent on each other applied for annexation in the same year. If the Appellant's position was adopted, it would require the State Board to wait to consider each successive request until the preceding property was actually annexed to the school district before considering the next petition. This could potentially take years of waiting for successive July 1 annexation dates to resolve all the pending petitions. Instead, the State Board should be allowed to consider all petitions before the State Board in a

given year before each July 1 in order to find that otherwise noncontiguous property is contiguous when considered together.

[¶14] Additionally, if the State Board is not allowed to consider previously granted petitions for annexation of property to establish the contiguity of succeeding petitions, each succeeding petitioner would be forced to include the already granted property or possibly additional larger properties in its new petition to establish contiguity. This would require a great deal of additional work for all involved, and the county committees and State Board would need to reconsider land it had already considered and approved for annexation each time a successive petition is brought. This result would not only waste time but also unreasonably and unnecessarily expend administrative and taxpayer resources.

[¶15] The State Board should not be prohibited from applying its reasonable interpretation of N.D.C.C. § 15.1-12-03 under which it operates. The State Board should be allowed to consider previously granted petitions for annexation of property for purposes of establishing the contiguity of property in succeeding petitions for annexation.

II. The Williams County Committee and State Board had jurisdiction to consider the Petition.

[¶16] The Williams County Committee and State Board had jurisdiction to consider the Petition. That the Williams County Committee satisfied the requirements of N.D.C.C. § 15.1-12-05(3)(a)-(b) is not in dispute. The Williams County Committee also satisfied the requirements of N.D.C.C. § 15.1-12-05(3)(c), which states before the hearing the county committee shall "[e]nsure that all other statutory requirements regarding the petition have been met." (Emphasis added). The Williams County

Committee is not required to ensure that all statutory requirements for final annexation have been met before holding the hearing - to hold otherwise would obviate the need for a hearing. Contiguity is a requirement for annexation itself and must exist before property is annexed, but is not a requirement for submission and consideration of a petition for annexation. See N.D.C.C. § 15.1-12-03(1) (listing prerequisites for annexation, not consideration of a petition for annexation). The requirements for consideration of a petition do not mention that the property be contiguous before a petition is considered. See N.D.C.C. § 15.1-12-05. The Williams County Committee had jurisdiction to consider the Petition, and the School Board also had jurisdiction to approve the Petition. Id.

III. The Town of Lizton case is distinguishable.

[¶17] In re Remonstrance Appealing Ordinance Nos. 98-004, 98-005, 98-006, 98-007 & 98-008, of Town of Lizton, 769 N.E.2d 622 (Ind. Ct. App. 2002), is distinguishable from the present appeal because the annexation of the first contiguous property was actually grieved before annexation of the second property took place. In that case, a remonstrance had been filed regarding the annexation of a first property, the success or failure of which the contiguity of a second property depended because the second property was contiguous with the city in question only through the first property. Id. at 626, 634. A remonstrance is a "formal complaint or protest against governmental policy, actions, or officials." Remonstrance, Black's Law Dictionary (10th ed. 2014). The Court stated that a remonstrance "abates the culmination of the annexation pending a review by the courts and places upon the municipality the burden of sustaining the annexation in

the courts as provided by statute." Id. at 628.

[¶18] In the present appeal, no remonstrance, grievance, or appeal was filed regarding the previously granted petition for annexation of the Halliburton Property. The Halliburton Property was actually annexed on July 1, 2015, satisfying the contiguity requirement for the Gutierrez Property when it was annexed. Because the annexation of a first property providing contiguity to a second property was never called into question in the present appeal, the central issue in Town of Lizton, Town of Lizton does not assist Appellant. It is noted the Indiana Court of Appeals' holding in Town of Lizton is contrary to the Supreme Court of Pennsylvania's holding in In re Lancaster City Ordinance No. 20-1952, 98 A.2d 33 (Pa. 1953), which held that a petition for annexation of a second property that was brought during the pendency of an appeal of a first contiguous property could be brought before the conclusion of the appeal of the first contiguous property as long as the appeal of the first property was settled before annexation of the second property became effective.

[¶19] Additionally, Indiana has a statutory remonstrance period not present in North Dakota law that was determinative in the Town of Lizton decision. See, 769 N.E.2d at 632-33; Ind. Code § 36-4-3-7. Indiana law provides that ordinances for annexation of property to a city take effect a certain number of days after their publication unless a remonstrance and appeal is brought. Ind. Code § 36-4-3-7. North Dakota law does not contain such a restriction, stating only that "[a]nnexations under this chapter become effective on July first following final approval by the state board," and that property to be annexed must be contiguous to the school district in question at the time the annexation becomes effective. N.D.C.C. §§ 15.1-12-03(1),

15.1-12-06. In the facts of this appeal, the Halliburton Property annexation was never challenged or appealed, and even if it had been, it would not have automatically prevented annexation of the Halliburton Property as might have occurred under Ind. Code § 36-4-3-7.

[¶20] In Koch v. Cedar Cty. Freeholder Bd., the Nebraska Supreme Court held that the Nebraska State Board of Public Education could consider prior applications for the annexation of property contiguous with the school district in question that had not yet gone into effect to establish the contiguity of property in other petitions that would not be contiguous if considered alone. 759 N.W.2d 464 (Neb. 2009). It wrote:

> [T]he district court . . . transferred land that was not necessarily contiguous to the Hartington school district, but whose contiguity could be established through other properties currently before the Board that were contiguous . .
> . . [A]ll petitions [before the Board] could be considered together in order to find that otherwise noncontiguous land is nevertheless contiguous.
>
> Id. at 474-75.

[¶21] Although not the focus of its decision, the Oregon Court of Appeals held in Messer that the District Court could consider the petition of an applicant whose property was not yet contiguous with the desired school district, but would later be contiguous through the property of another applicant. Messer v. Polk Cty. Dist. Boundary Bd., 670 P.2d 183 (Or. Ct. App. 1983) (explaining that the property in question, which was contiguous to the Dallas School District, should not have been excluded from a petition, since it resulted in denial of the petition as to adjoining property which was not contiguous to the Dallas School District).

[¶22] Courts have also held that noncontiguous property can be considered

contiguous for purposes of annexation by considering the application for annexation of contiguous property which is itself contiguous with the first noncontiguous property. In Tovey, the South Carolina Supreme Court addressed two separate petitions for annexation of two different properties to the City of Charleston. 117 S.E.2d 872. The laws of South Carolina required the properties be contiguous before they could be annexed to the city and required an election of members of the properties to decide whether the properties should be annexed. Id. at 873-874. The first property for consideration was contiguous with the City of Charleston, but the second property was not. The second property was contiguous with the first property, and if the first property was annexed, the second property would be contiguous and eligible for annexation. Id. at 876-877.

[¶23] The Court held that the residents of the second property did not need to wait to receive the results of the election from the first property before commencing their election, because contiguity was only a requirement for annexation itself, not for commencing the election proceedings: "It is sufficient if at the time such areas are annexed, all are contiguous to each other, and one of them is contiguous to or adjoins the city." Id. The Court recognized that "if the election relating to the attachment of [the first area] had not been favorable, [the second area] could not have been annexed because there would have been a lack of contiguity between it and the City," but "[b]oth elections resulted favorably to annexation and the two areas were simultaneously declared parts of the City of Charleston. There was never a moment of time when there was lack of contiguity between the City and the entire area which was annexed." Id.

[¶24] The Supreme Court of Pennsylvania considered a situation where a first property contiguous to a city was annexed, and a petition for annexation of a second property that was separated from the city by the first property was filed during the pendency of an appeal regarding the annexation of the first property. In re Lancaster City Ordinance No. 20-1952, 98 A.2d 33 (Pa. 1953). The annexation of the first property was affirmed on appeal, and the Court held that the second property gained contiguity through the first property. The Court held the second property could be annexed to the city even though the petition for annexation of the second property had been submitted before the first property's appeal was decided. Id.

[¶25] As in the decisions described above, the Gutierrez Property gains contiguity with the Williston School District through its contiguity with the Halliburton Property. The cases described above did not require that the residents of the properties gaining contiguity through another property wait to submit petitions or commence annexation proceedings until the question of contiguity was definitively decided, but only that the areas be contiguous at the time of annexation, or when the annexation would go into effect. Because the Gutierrez Property was contiguous with the Williston School District at the time of annexation on July 1, 2015, the annexation of the Gutierrez Property was proper.

IV. The absurd result described by Appellant would not be avoided by adoption of Appellant's interpretation of the law.

[¶26] Appellant describes at some length how, hypothetically, the State Board's position could lead to an absurd result. Brief of Appellant New Pub. Sch. Dist. #8 ¶¶ 30-39. If this Court adopts Appellant's position, however, it would not prevent the

same result from occurring. If, as Appellant argues, the State Board waits to rule on a petition involving property whose contiguity is established by the property of a prior petition, the annexation of the prior property could still be appealed after both properties have been annexed. For example, if the petition on the prior property establishing contiguity is submitted on April 15, and granted on June 10, and the second property's petition is submitted on June 11, and granted on June 25, both properties would be annexed on July 1 of that year. An appeal could still be brought regarding the first property, possibly leading to the creation of an island if the appeal regarding the first property is successful and the second property has already been annexed. Additionally, as the Appellant admits in its brief, "there is no prohibition on submission of a petition to re-annex property back into a district from which it was previously taken." Id. at ¶ 38, which could lead to similar results over different timelines.

V. The issue of whether the annexation of the Halliburton Property will be appealed in the future is moot as the property was already annexed.

[¶27] The issue of whether the annexation of the Halliburton Property will be appealed in the future is moot as the property was already annexed. Rule 42(c), N.D.R.App.P., provides:

> When an issue before the court may have become moot due to a change in circumstance, the parties shall advise the court in writing and explain why appeal of the issue should or should not be dismissed.

[¶28] It is well-settled law that courts do not issue advisory opinions or grant injunctive relief where the plaintiff or appellant is no longer subjected to the conditions of which he complains. The North Dakota Supreme Court has explained:

> Mootness is a threshold issue we decide before reaching the merits of an appeal. An appeal is moot when an appellate court is unable to render effective relief because of the lapse of time or because of the occurrence of an event prior to the appellate court's determination. Mootness may arise from an event which occurred after the district court's decision, but before oral argument.

Peters-Riemers v. Riemers, 2003 ND 96, ¶ 13, 663 N.W.2d 657 (citations omitted). See also Fercho v. Remmick, 2003 ND 85, ¶ 7, 662 N.W.2d 259. The Court "does not render advisory opinions," and "will dismiss an appeal if the issues become moot or academic so no actual controversy is left to be determined." Id.

[¶29] The issue of whether the annexation of the Halliburton Property may be appealed in the future is moot as the property was already annexed on July 1, 2015, and was not appealed. The Halliburton Property established contiguity with the Williston School District for the Gutierrez Property when it was annexed on July 1, 2015. Consideration of whether an approved but pending annexation that may be appealed can be considered for purposes of establishing contiguity for a different property would be an advisory opinion because it would not affect the outcome of the present appeal.

CONCLUSION

[¶30] The State Board's respectfully requests that this Court affirm the District Court's Order Affirming the State Board's November 20, 2015 Findings of Fact, Conclusions of Law, and Order.

Dated this 10th day of May, 2016.

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STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

[¶1] Lisa A. Johnson states under oath as follows:

[¶2] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶3] I am of legal age and on the 10th day of May, 2016, I served the attached **BRIEF OF APPELLEE** upon New Public School District #8, by and through their attorneys, Amy Lynn De Kok and David Ray Phillips, and upon Kristi L. Gutierrez, by placing true and correct copies thereof in envelopes addressed as follows:

Amy De Kok
Fredrikson & Byron
1133 College Drive Ste 1000
Bismarck, ND 58501

David Phillips
Fredrikson & Byron
1133 College Drive Ste 1000
Bismarck, ND 58501

Kristi L. Gutierrez
2823 23rd Street W
Williston, ND 58801

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Lisa A. Johnson

Subscribed and sworn to before me
this 10th day of May, 2016.

DONNA J CONNOR
Notary Public
State of North Dakota
My Commission Expires Aug. 6, 2021

Notary Public