

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

New Public School District #8,)	
)	
Appellant,)	
)	
vs.)	
)	Supreme Court No. 20160093
State Board of Public School Education,)	
and Kristi L. Gutierrez,)	
)	
Appellees.)	
)	

Appeal from Judgment Dated January 25, 2016
Case No. 53-2015-CV-00894
County of Williams, Northwest Judicial District
The Honorable Paul Jacobson, Presiding

**BRIEF OF APPELLANT
NEW PUBLIC SCHOOL DISTRICT #8**

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STATEMENT OF THE ISSUES

¶1 Whether the district court erred by holding as a matter of law that the State Board could consider and approve the subject Petition for Annexation of Property From One Public School District to Another (“Gutierrez Petition”) when the petition did not meet the requirements of N.D.C.C. §§ 15.1-12-03 and 15.1-12-05.

¶2 Whether the district court erred by holding 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, even though the property was not, in fact, contiguous with the Williston School District as of the dates the Williams County Reorganization Committee (“County Committee”) and State Board of Public School Education (“State Board”) considered and approved the Gutierrez Petition.

STATEMENT OF THE CASE

¶3 This case requires the Court to determine whether the Gutierrez Petition should have been considered and approved by the County Committee and the State Board when the property sought to be annexed was not yet contiguous to the Williston School District. In February of 2015, Petitioner and Appellee Kristi Gutierrez (“Gutierrez”) submitted the Gutierrez Petition to the County Committee requesting the annexation of the following lands from New Public School District # 8 (“New Public School District”) to the Williston School District: Lot 1 of Block 6 and Lot 34R of Block 5 in the Granite Peak Subdivision, located in Section 15 of Township 154 North, Range 101 West (“Subject Property”). See Appendix of Appellant New Public School District #8 (“App.”), 89, 102. Pursuant N.D.C.C. § 15.1-12-05(1)-(5), the County Committee held a

hearing on March 26, 2015, at which it heard testimony and considered the Gutierrez Petition. *See id.* at 110, 112-122. New Public School District appeared at the hearing in opposition to the Gutierrez Petition. *See id.* at 110, 116-121. At the conclusion of the hearing, the County Committee voted to approve the Gutierrez Petition annexing the Subject Property into the Williston School District. *See id.* at 122.

[¶4] Pursuant to N.D.C.C. § 15.1-12-05(5)-(12), a hearing was held on May 18, 2015, before the State Board to consider final approval of the Gutierrez Petition. *Id.* at 133-134. New Public again appeared at the hearing in opposition to the Gutierrez Petition. *See id.* at 29-38. Following the hearing, the State Board issued its Findings of Fact, Conclusions of Law, and Order dated June 25, 2015, approving the Gutierrez Petition. *See id.* at 132-144. New Public School District appealed the matter to the district court by serving a copy of its Notice of Appeal and Specifications of Error on upon the State Board, the Attorney General of the State of North Dakota, and Gutierrez. *Id.* at 145-147.

[¶5] Pursuant to N.D.C.C. § 28-32-46, the district court heard the appeal, and reviewed the determination by the State Board. On January 25, 2016, the district court entered Judgment in the case affirming the State Board's decision to approve the Gutierrez Petition. *Id.* at 151-156. New Public School District commenced the instant appeal by serving a copy of an Amended Notice of Appeal¹ upon the State Board, the Attorney General of the State of North Dakota, and Gutierrez. *Id.* at 159.

¹ A Notice of Appeal was originally filed on March 8, 2016. *See id.* at 157.

[¶6] New Public School District submits this Brief in support of its appeal in opposition to the district court’s Order Affirming Findings of Fact, Conclusions of Law, and Order issued on November 20, 2015, wherein the district court affirmed the State Board’s approval of the Gutierrez Petition. The Order Affirming Findings of Fact, Conclusions of Law, and Order issued by the district court on November 20, 2015 should be reversed and the Gutierrez Petition should be denied because the Order is not in accordance with the law, the Findings of Fact are not supported by a preponderance of the evidence, the Conclusions of Law and Order are not supported by its Findings of Fact, and the Findings of Fact do not sufficiently address the evidence presented to the District Court. Specifically, the district court erred in concluding that the State Board properly considered and approved the Gutierrez Petition because, at the time, the petition did not meet the requirements of N.D.C.C. §§ 15.1-12-03 and 15.1-12-05. In addition, the district court erred in concluding that the State Board properly approved the Gutierrez Petition because, at the time of consideration, the Subject Property was not contiguous with the Williston School District as required by N.D.C.C. § 15.1-12-03(1). For all of these reasons and as more fully explained herein, the Order Affirming Findings of Fact, Conclusions of Law, and Order issued by the district court on November 20, 2015 should be reversed and the Gutierrez Petition should be denied.

STATEMENT OF FACTS

[¶ 7] In February of 2015, Gutierrez, along with her husband Derek Gutierrez, Sharyn Silverio (“Silverio”), and Jonathan Lorch (“Lorch”), executed the Gutierrez Petition, requesting that the Williams County Committee order the annexation of the Subject Property from New Public School District to Williston School District. *See App.*,

89, 102. Annexation is the “alteration of a school district’s boundaries through the removal of real property from one school district and its attachment to another contiguous school district.” N.D.C.C. § 15.1-12-01(1). At the time of their execution of the Gutierrez Petition, the Gutierrez’s owned and resided with their children, Xavier Gutierrez and Allison Gutierrez, at Lot 1 of Block 6 of the Granite Peak Subdivision (“Gutierrez Property”). *See* App., 89, 90, 104. Silverio owned and resided with Lorch at Lot 34R of Block 5 in the Granite Peak Subdivision (“Silverio Property”). *Id.*

[¶ 8] According to N.D.C.C. § 15.1-12-03(1), real property to be annexed to a school district must constitute “a single area that is contiguous to the school district[.]” For purposes of school district annexation, “[c]ontiguous’ means two or more tracts of real property which share a common point or which would share a common point but for an intervening road or right of way.” N.D.C.C. § 15.1-12-01(2). Regarding the statutory contiguousness requirement, the Gutierrez Petition inaccurately states, “[t]his property constitutes a single area that is contiguous to the Williston Public School District.” App., 89. At the time that Gutierrez, Derek Gutierrez, Silverio, and Lorch executed the Gutierrez Petition, the Silverio Property was surrounded entirely by city lots within in New Public School District: Lot 1 of Block 5 to the north, Lot 33R of Block 5 to the east, Lots 1 and 2 of Block 6 to the south, and Lots 21 through 24 of Block 1 to the west, all in the Granite Peak Subdivision. *See id.* at 30, 102. Likewise, the Gutierrez Property was surrounded entirely by city lots within New Public School District: Lots 34R and 33R of Block 5 to the north; Lot 2 of Block 6 to the east; Lot 19 of Block 6 to the south; and Lots 25 through 28 of Block 1 to the west, all in the Granite Peak Subdivision. *Id.*

[¶ 9] Pursuant N.D.C.C. § 15.1-12-05(1)-(5), the County Committee held an annexation hearing on March 26, 2015, wherein it heard testimony and considered the Gutierrez Petition. *See id.* at 110, 112-121. According to the testimony of Williams County Superintendent of Schools, Jodi Johnson (“Johnson”), and the plats available to the County Committee, the statutory contiguousness requirement was purportedly established by way of Lot 1 of Block 5 in the Granite Peak Subdivision, which was owned by Halliburton Energy Services (“Halliburton Property”). *See id.* at 101-02, 107, 112. The Halliburton Property is contiguous to the Silverio Property, which is in turn contiguous to the Gutierrez Property. *See id.* Prior to the execution of the Gutierrez Petition, the Halliburton Property was approved for annexation from New Public School District to the Williston School District by the County Committee and later by the State Board on January 21, 2015. *See id.* at 30, 101-102, 107, 112. However, according to N.D.C.C. § 15.1-12-06, school district annexations “become effective on July first following final approval by the state board.” Thus, at the time of the March 26, 2015 hearing before the County Committee, and indeed at all relevant times including the date of the issuance of the June 25, 2015 Findings of Fact, Conclusions of Law, and Order issued by the State Board from which this appeal is taken, the annexation of the Halliburton Property from the New Public School District to the Williston School District was not yet effective. *See id.* The annexation of the Halliburton Property was not effective, if at all, until July 1, 2015, and therefore at all relevant times the Halliburton Property, the sole property allegedly establishing contiguousness with the Williston School District, was situated in New Public School District, not the Williston School District. *See id.*

[¶ 10] At the March 26, 2015 hearing, Gutierrez, Derek Gutierrez, and the Williston School District Assistant Superintendent Pam Lambert each testified in favor of the annexation. *See id.* at 110, 113-116. New Public School District Superintendent Rob Turner (“Turner”) and School Board Member Curt Sullivan each testified in opposition to the annexation. *See id.* at 110, 116-121. Despite the fact that the Silverio Property and the Gutierrez Property were not at the time contiguous with the Williston School District, the County Committee approved of the annexation at the conclusion of the March 26, 2015 hearing. *See id.* at 122.

[¶ 11] Pursuant to N.D.C.C. § 15.1-12-05(5)-(12), the State Board held a hearing on May 18, 2015 to consider final approval of the Gutierrez Petition. *See id.* at 133-134. Gutierrez was the only individual to appear and testify at the State Board hearing in favor of the Gutierrez Petition. *See id.* at 15-28, 132. Turner appeared on behalf of New Public School District and testified at the State Board hearing in opposition to the Gutierrez Petition. *See id.* at 40-55, 132. Legal counsel for New Public School District also addressed the State Board and argued that the Gutierrez Petition was not properly before the State Board because the Subject Property was not contiguous with Williston School District. *See id.* at 29-32, 132. As indicated above, the annexation of the Halliburton Property, upon which contiguousness was dependent, could not be effective until July 1, 2015. Despite the lack of contiguousness, the State Board approved the Gutierrez Petition in its Findings of Fact, Conclusions of Law, and Order issued on June 25, 2015, from which the present appeal is taken. *See id.* at 132-44, 147-49.

[¶ 12] With respect to contiguousness, the Findings of Fact, Conclusions of Law, and Order states, in relevant part:

II.

The annexation petition meets the requirements of N.D.C.C. §§ 15.1-12-03 and 15.1-12-04.

III.

State law requires that “[t]he property to be annexed . . . [must be] contiguous to the school district [annexed to].” N.D.C.C. § 15.1-12-03(1). “Annexations . . . become effective on July first following final approval of the state board.” N.D.C.C. § 15.1-12-06. On July 1, 2015, the effective date of this annexation, the petitioned property will be contiguous to the Williston School District, as required by N.D.C.C. § 15.1-12-03(1). See also, Tovey v. City of Charleston, 117 S.E.2d 872 (S.Car. 1961) and In re Lancaster City Ordinance No. 20-1952, 98 A.2d 33 (Pa. 1953).

Id. at 143.

STANDARD OF REVIEW

[¶ 13] “The judgment of the district court in an appeal from an order or rulemaking action of an administrative agency may be reviewed in the supreme court on appeal in the same manner as provided in section 28-32-46 or 28-32-47” of the North Dakota Century Code. N.D.C.C. §§ 28-32-49. “The appeal must be . . . taken within sixty days after the service of the notice of entry of judgment in the district court.” *Id.* A judge of the supreme court must review an appeal from the determination of a district court and administrative agency based only on the record filed with the court. *See* N.D.C.C. § 28-32-46. The court must reverse the order of the district court and agency if any of the following are present:

1. The order is not in accordance with the law.

* * *

5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

* * *

Id.

LAW AND ARGUMENT

I. Purpose of Annexations.

[¶ 14] Annexation is the redefining of school districts permanently in a way that makes sense to account for growth, attraction, and education in certain districts. *See generally* N.D.C.C. ch. 15.1-12. Annexation is not a process that should be entered into lightly. In creating N.D.C.C. § 15.1-12-03, the Legislature set forth a myriad of eligibility factors that must be met before a hearing is even considered. “Boundary changes . . . are permanent, and they irrevocably affect district population, tax base, size and allocation of resources.” *United States v. State of Tex.*, 158 F.3d 299, 307 (5th Cir. 1998). “Since the power of administrative officers to change the boundaries of school districts comes from the legislature, the existence and extent of any discretion in the exercise of such power must depend primarily upon the language of the statutes creating the authority.” *Discretion of Administrative Officers as to Changing Boundaries of School District*, 135 A.L.R. 1096 (1941). The provisions and intent of many statutes giving a power to alter school district boundaries are such that, “although the statutory requisites for the exercise of the authority exist, the designated administrative officers are not bound to make the

change, or do the act required of them to bring about the alteration, but have a discretion to determine whether it is for the best interests of the district or districts concerned, and to act or refuse to act accordingly.” *Id.* As a result, annexation is not a tool meant to create a permanent fix for a temporary problem, nor should it be a substitute for open enrollment under N.D.C.C. ch. 15.1-31.

II. Annexation Requirements and Procedure.

[¶ 15] The eligibility requirements and procedure for school district annexation are set forth in Chapter 15.1-12 of the North Dakota Century Code. N.D.C.C. § 15.1-12-03, entitled “Annexation of property to school district – Eligibility”, describes the requirements for property to be eligible for annexation to a school district, as follows:

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;*
2. The property to be annexed does not constitute an entire school district;
3. The annexation petition is signed by two-thirds of the qualified electors residing on the property to be annexed;
4. The annexation petition is filed with the county superintendent of schools whose jurisdiction includes the administrative headquarters of the district;
5. A public hearing is held by the county committee or the county committees, as required in section 15.1-12-05; and
6. The annexation petition is approved by the state board.

Id. (emphasis added). The requisite two-thirds of the qualified electors residing on the property sought to be annexed must sign the petition in the form described in N.D.C.C. § 15.1-12-04 and submit the petition to the county superintendent in order to request an annexation. *See id.* After the county superintendent schedules and gives proper notice of the public hearing, the county committee is to hold a hearing on the annexation petition. N.D.C.C. § 15.1-12-05(1)-(5). However, N.D.C.C. § 15.1-12-05(3) states:

Before the hearing, the county committee shall:

- a. Determine the number of qualified electors residing on the property to be annexed;
- b. Ensure that two-thirds of such qualified electors have signed the petition; and
- c. *Ensure that all other statutory requirements regarding the petition have been met.*

Id. (emphasis added). As discussed more thoroughly below, New Public School District asserts that the County Committee failed to ensure that the statutory contiguousness requirement was met as of the date of its annexation hearing and its decision to approve the annexation.

[¶ 16] At the annexation hearing before the county committee, the county committee is required to accept testimony and documentary evidence regarding various enumerated factors, including a catch-all provision:

- a. The value and amount of property held by each affected school district;
- b. The amount of all outstanding bonded and other indebtedness of each affected district;
- c. The levies for bonded indebtedness to which the property will be subjected or from which the property will be exempted, as provided for in section 15.1-12-08;

- d. The taxable valuation of each affected district and the taxable valuation under the proposed annexation;
- e. The size, geographical features, and boundaries of each affected district;
- f. The number of students enrolled in each affected district;
- g. Each school in the district, including its name, location, condition, the grade levels it offers, and the distance that students living in the petitioned area would have to travel to attend school;
- h. The location and condition of roads, highways, and natural barriers in each affected district;
- i. Conditions affecting the welfare of students residing on the property to be annexed;
- j. The boundaries of other governmental entities;
- k. The educational needs of communities in each affected district;
- l. Potential savings in school district transportation and administrative services;
- m. The potential for a reduction in per student valuation disparity between the affected districts;
- n. The potential to equalize or increase the educational opportunities for students in each affected district; and
- o. All other relevant factors.

N.D.C.C. § 15.1-12-05(4)(a)-(o). The county committee is required to make specific findings of fact and approve or deny the annexation, which was done by the County Committee in this case. *See App.*, 92-99. The minutes, records, documentary evidence, and other information is then forwarded to the State Board for consideration of the annexation's final approval. *See N.D.C.C. § 15.1-12-05(5)*. The State Board is then required to hold a hearing in a similar manner as the county committee, make specific findings, and approve or deny the annexation, which in this case was approved. *See N.D.C.C. § 15.1-12-05(6)*; *see also App.*, 132-144. New Public School District asserts that the Subject Property was not eligible for annexation pursuant to N.D.C.C. § 15.1-12-03(1) as it was not contiguous to the Williston School District at the time Gutierrez Petition was filed with and considered by the County Committee and the State Board.

III. The Property to Be Annexed Must Be Contiguous to the District Into Which It Is Sought to Be Annexed.

A. North Dakota law requires that property must be contiguous at the time the petition for annexation is considered.

[¶ 17] The North Dakota Legislative Assembly has made clear that school district annexations may only involve parcels of land contiguous to the school district to which the property is being annexed. This requirement is reinforced by the statutory definition of “annexation,” which “means the alteration of a school district’s boundaries through the removal of real property from one school district and its attachment to another *contiguous* school district.” N.D.C.C. § 15.1-12-01(1) (emphasis added). N.D.C.C. § 15.1-12-03(1) further states that in order to be eligible for annexation to a school district, property must “constitute a single area that is contiguous to the school district”. The purpose of the contiguousness requirement is self-evident. It prevents the creation of islands where a portion of a school district is cut off from the remainder of the school district.

[¶ 18] Contiguousness must be found to presently exist at the time the County Committee and State Board hear a petition and issue their respective findings and orders. This interpretation of the contiguousness requirement is supported by the clear language of the relevant statutory provisions themselves, which are written in present tense and give no indication of a legislative intent that the county committee or the State Board may assume that contiguousness will exist at a future date when a prior annexation is expected to be effective. The statutory definition of “annexation” is “the alteration of a school district’s boundaries through the removal of real property from one school district and its attachment to another *contiguous* school district.” N.D.C.C. § 15.1-12-01(1)

(emphasis added). This statutory provision refers to a contiguous school district, not a school district that is expected to be contiguous on a future date. Likewise, N.D.C.C. § 15.1-12-03(1) indicates that, “[r]eal property may be annexed to a school district provided. . . [t]he property to be annexed constitutes a single area that *is* contiguous to the school district.” (Emphasis added). This statutory provision does not discuss an area which *may be* or *will be* contiguous in the future, but rather an area that *is* contiguous. “Words used in any statute are to be understood in their ordinary sense,” and “[w]hen the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” N.D.C.C. §§ 1-02-02, 1-02-05. The Merriam-Webster dictionary defines the word “is” as “*present 3d singular of BE.*” See Merriam-Webster Dictionary, available at: <http://www.merriam-webster.com/dictionary/is>. (Emphasis added). Accordingly, use of the word “is” implies present tense. Further, N.D.C.C. § 15.1-12-05(3)(c) states that, “[*b*]efore the hearing, the county committee shall . . . [e]nsure that all other statutory requirements regarding the petition *have been met.*” (Emphasis added).

[¶ 19] There is no dispute that as of the date of the Gutierrez Petition, the March 26, 2015 hearing before the County Committee, the May 18, 2015 hearing before the State Board, and the Findings of Fact, Conclusions of Law, and Order issued by the State Board on June 25, 2015, the Subject Property was not contiguous to the Williston School District. Rather, the Subject Property formed an island entirely surrounded by city lots within the New Public School District. See App., 30, 102. The Halliburton Property, on which Gutierrez relies to establish contiguousness, was previously approved by the State Board on January 21, 2015 for annexation to the Williston School District,

but that annexation was not effective, if at all, until July 1, 2015, after the State Board heard and made its decision to grant the Gutierrez Petition. *See id.* at 30, 101-102, 107, 112; *see also* N.D.C.C. § 15.1-12-06. Thus, at all relevant times before and at the time the County Committee and the State Board considered and approved the Gutierrez Petition, the Gutierrez Petition was not contiguous to the Williston School District, as the Halliburton Property was still part of New Public School District. Consequently, existing contiguousness should have already been established at the County Committee level and the State Board level before either hears the petition to meet the statutory requirements.

[¶ 20] While some courts have held that a property need only be contiguous at the time the annexation becomes effective, these courts have relied on a state statute that specifically allows contiguousness to be established based on property approved for annexation, but not yet effective. For example, in *Koch v. Cedar County Freeholder Board*, 276 Neb. 1009, 759 N.W.2d 464 (2009), the Nebraska Supreme Court held that the Nebraska State Board of Public Education could consider prior applications for annexation of property not yet in effect in order to establish contiguity. Specifically, the Nebraska court held:

[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 being considered by the Board must be considered ‘together as a whole,’ and if *any* petition lacks contiguity, then *all* lack it.

Id. 276 Neb. at 1022, 759 N.W.2d at 474. This holding was based on the fact that Nebraska’s Legislature created a specific provision in their annexation statute allowing this. *See* Neb. Rev. Stat. Ann. § 79-458 (“For purposes of determining whether a tract of land is contiguous, all petitions currently being considered by the board shall be

considered together as a whole.”). Conversely, in the North Dakota annexation statute, the Legislature requires present contiguousness in order for property to be eligible for annexation. *See* N.D.C.C. § 15.1-12-03(1) (“Real property may be annexed to a school district provided . . . [t]he property to be annexed constitutes a single area that *is* contiguous to the school district.”) (Emphasis added).

B. The State Board’s interpretation contradicts the clear and unambiguous language of Chapter 15.1-12.

[¶ 21] New Public School District anticipates that the State Board will argue that deference should be given to the State Board’s interpretation of N.D.C.C. ch. 15.1-12. Courts often give deference to agency expertise if the subject matter of the agency decision is of a technical nature. *See New Town Pub. Sch. Dist. No. 1 v. State Bd. Of Pub. Sch. Educ.*, 2002 ND 127, ¶ 13, 650 N.W.2d 813. However, the determination of whether the contiguousness requirement is met is not technical in nature. Further, the interpretation of a statute by an agency charged with its execution is *only* entitled to weight and deference if the interpretation is reasonable and does not contradict clear and unambiguous language of the statute. *See Frank v. Traynor*, 1999 ND 183, ¶ 12, 600 N.W.2d 516, 520 (emphasis added). In this case, the State Board’s interpretation of the contiguousness requirement does contradict the clear and unambiguous language of the statute as set forth in detail in Section III.A., *supra*. Accordingly, the Court should not give weight or deference to the State Board’s interpretation of the contiguousness requirement.

C. Prohibiting the State Board from considering previously approved, but not yet effective annexations to establish contiguity would not go against public policy or impede annexations.

[¶ 22] Property to be annexed to a school district must be contiguous with the school district at the time a petition for annexation is submitted and a hearing on the petition is held. The Legislature set forth a specific framework and requirements for annexation. There is nothing in Chapter 15.1-12 that allows Petitioners and Appellees, the County Committee, or the State Board to rely on previously approved, but not yet effective annexations to establish the contiguity requirement. *See* N.D.C.C. Ch. 15.1-12. There is also nothing in Chapter 15.1-12 that states annexations should be favored, freely granted (even when all statutory requirements are met), or the statutory requirements should be liberally construed or applied. *See id.* Requiring property to be contiguous at the time a petition is submitted does not violate any public policy nor prohibit or impede annexations. Rather, it ensures, as the Legislature intended, that all statutory requirements of the petition are met prior to the petition being heard by the County Committee and the State Board.

IV. The County Committee and State Board Did Not Have Jurisdiction to Consider the Gutierrez Petition Due To the Lack of Contiguity.

[¶ 23] The Gutierrez Petition was not sufficient to invoke the jurisdiction of the County Committee or the State Board to annex the Subject Property to the Williston School District, and the Petition should never have been heard by either entity. As discussed above, North Dakota law requires in order to be eligible for annexation, the property to be annexed must be contiguous to the school district into which it is sought to be annexed. *See* N.D.C.C. §§ 15.1-12-01(1), 15.1-12-03(1). Prior to the hearing held by the County Committee, the County Committee is required to “[e]nsure that all other

statutory requirements regarding the petition have been met.” N.D.C.C. § 15.1-12-05(3)(c). If all of the statutory requirements are not met, the County Committee and the State Board lack jurisdiction to hear the petition. *See Cathay Special School Dist. No. 3 v. Wells County*, 118 N.W.2d 720, 726 (N.D. 1962). Further, when the County Committee and the State Board purport to approve an annexation petition when they lack jurisdiction, the approval is void. *Id.* Therefore, the County Committee, and in turn the State Board, acted unlawfully when it heard and approved the Gutierrez Petition because both lacked jurisdiction due to the absence of contiguousness between the Subject Property and the Williston School District.

[¶ 24] Moreover, if it is not the County Committee or the State Board that is expected to apply the statutory requirements set forth by the legislative body, then who should adhere to them? If the County Committee and the State Board do not have to apply contiguousness at the time the petition is submitted and heard, then when is the statutory requirement of contiguousness actually established? The County Committee and State Board are relying on an assumption that contiguousness will occur on July first, but relying on an assumption that contiguousness will happen and actually having present contiguity, as required by N.D.C.C. Ch. 15.1-12.15, are two entirely different situations.

V. Case Law in Other Jurisdictions Regarding Effective Dates of Annexation.

[¶ 25] With respect to the contiguousness requirement, the State Board referenced the following two court decisions in its Findings of Fact, Conclusions of Law, and Order: *Tovey v. City of Charleston*, 117 S.E.2d 872 (S.Car. 1961) and *In re Lancaster City Ordinance No. 20-1952*, 374 Pa. 543, 98 A.2d 33 (1953). These cases are distinguishable and the State Board’s reliance on these cases is misplaced.

[¶ 26] *Tovey* involved an effort to extend the corporate limits of a municipality by simultaneously annexing six parcels, the closest of which was contiguous to the existing municipality. *Tovey*, 117 S.E.2d at 478. In order to extend the limits of a municipality under South Carolina law, a majority of qualified electors from the municipality and the property to be annexed must approve in a special election. *Id.* A special election was held simultaneously with respect to all six parcels. *Id.* The elections in four of the parcels resulted unfavorably to annexation. *Id.* The vote as to the remaining two was favorable. *Id.* Certain qualified electors of the two favorable parcels brought an action to have the annexations declared null and void. *Id.* The appellants contended that at the time of the election, one of the challenged parcels was not contiguous because it was separated from the municipality from the other challenged parcel. *Id.* at 485. The *Tovey* court upheld the annexations because the elections relating to the challenged parcels both resulted favorably to annexation and the two areas were simultaneously and immediately declared parts of the municipality. *Id.* at 485-86. *Tovey* is distinguishable from the instant matter because in that case, the two annexations at issue were sought, approved, and effective simultaneously. Indeed, the *Tovey* court noted, “[t]here was never a moment of time when there was lack of contiguity between the [municipality] and the entire area which was annexed.” *Id.* In contrast, the annexation of the Halliburton Property, the property on which the County Committee and the State Board relied to establish contiguousness, was previously approved by the State Board, but not yet effective at the time of the Gutierrez Petition. At all relevant times, there was a lack of contiguity between the Subject Property and the Williston School District. Thus, *Tovey* is distinguishable and the State Board’s reliance on it is in error.

[¶ 27] In *Lancaster*, the Supreme Court of Pennsylvania sought to answer the question of “if the owners of ‘A’ successfully petition for annexation, may the owners of ‘B’, while an appeal from the ‘A’ annexation is pending, legally seek annexation on the basis that contiguity has been gained through ‘A’”. *Lancaster*, 374 Pa. at 544, 98 A.2d 33. The *Lancaster* court found that because “A” had been successfully annexed into the City of Lancaster, notwithstanding the appeal, the owners of “B” could rely on “A” to establish contiguousness to the City of Lancaster. *Id.* In *Lancaster*, the property on which the owners of “B” relied upon to establish contiguousness was effectively annexed but under appeal. In other words, the *Lancaster* court determined that it was proper to rely on property that was effectively annexed, but under appeal, to establish contiguousness. Here, the annexation of the Halliburton Property was not yet effective, let alone on appeal. Therefore, the issue before the *Lancaster* court is entirely different than the issue before this Court and the State Board’s reliance on *Lancaster* to support its erroneous interpretation of the contiguousness requirement is misplaced.

[¶ 28] The distinction between the date that an annexation is approved by the State Board and the subsequent effective date of July 1st is significant and must be recognized. This factor is not present in either the *Tovey* or the *Lancaster* cases. In the more analogous case of *In re Remonstrance Appealing Ordinance Nos. 98-004, 98-005, 98-006, 98-007 and 98-008, of Town of Lizton*, 769 N.E.2d 622 (Ind. Ct. App. 2002), the Indiana Court of Appeals sought to answer the question of whether a municipality may include annexed property as part of its territory before the annexation is effective when there are different parcels being annexed by different ordinances. Indiana courts have held that “an annexation ordinance becomes effective after the period for remonstrance

has passed or any remonstrances have been resolved.” *Lizton*, 769 N.E.2d at 633. However, the Indiana Court of Appeals noted that there is “a distinction between the effective date of an annexation ordinance and the effective date of the annexation itself if the municipality delays the effective date of the annexation by express terms in the ordinance itself. In such a case, the annexation ordinance would be effective sixty days after publication, *but the annexation itself would not be effective until the stated date.*” *Id.* (Internal citations omitted). (Emphasis added.) While there was no distinction between the effective date of the ordinance and the effective date of the annexation itself at issue in *Lizton*, the Indiana Court of Appeals nevertheless found that there was a lack of contiguity and held that:

[T]he annexation of Parcel One was not complete until the statutory period for filing remonstrances had passed. At that point and not before, Parcel One became a part of the Town, and land contiguous to it but not to other parts of the Town became eligible for annexation to the Town. Because the Town attempted to annex Parcels Two through Five prior to the end of the remonstrance period for the first ordinance annexing Parcel One, its attempt was invalid. Accordingly, we hold that the Ordinances annexing Parcels Two through Five are void, and such parcels are not a part of the Town.

Id. “To allow the Town to annex these parcels by this method would subvert [IC 36-4-3-4’s] statutory requirement of contiguity that our legislature has endorsed.” *Id.* at 634. As with IC 36-4-3-4, N.D.C.C. § 15.1-12-03(1) requires that the real property must be in fact contiguous to the annexing school district to be eligible for annexation.

[¶ 29] In this instance, if it was the intent of the Legislature that school district annexations take effect immediately upon State Board approval for the purpose of allowing school districts to rapidly expand through a series of serial annexations, the

statute would state as much. Instead, the school district annexation statute simply and clearly states that annexations by a school district become effective July 1 first following final approval of the State Board. *See* N.D.C.C. § 15.1-12-06.

VI. The State Board's Interpretation of the Contiguosness Requirement Would Create an Absurd Result.

[¶ 30] As discussed above, the property to be annexed to a school district must be contiguous at the time the county committee and State Board consider and issue orders on an annexation petition. The State Board takes the position that the County Committee and, in turn the State Board, may treat parcels previously approved for annexation by the State Board, but not yet effective under applicable statutory law, as effective nevertheless for purposes of establishing contiguosness in a subsequent annexation proceeding. It should be noted there are no exceptions provided in N.D.C.C. § 15.1-12-06 as to the effective date of annexations. Under the plain language of N.D.C.C. § 15.1-12-06, an annexation becomes effective for all purposes on July 1st following State Board approval. The statute does not state that the annexation may be considered effective at an earlier date solely for purposes of establishing contiguosness in a later annexation.

[¶ 31] Further, the State Board's application erroneously assumes that an annexation approved by the State Board will necessarily become effective on the following July 1st and this fact can allegedly be relied upon when determining contiguosness in a subsequent annexation during the same year. The assumption by the State Board in this regard is flawed in that it ignores the appealability of annexations to district court, and would produce an absurd result in many cases. This flaw can be illustrated with two hypothetical, but realistic, annexation proceedings: Annexation A and Annexation B.

[¶ 32] Annexation A involves the annexation of property from School District 1 to School District 2. Annexation A is approved by the County Committee and later given final approval by the State Board on July 2, 2015. District 1 receives notice of the State Board's order with respect to Annexation A on July 16, 2015. Pursuant to N.D.C.C. § 15.1-12-06, Annexation A is not effective until July 1, 2016.

[¶ 33] On July 3, 2015, the County Committee holds an annexation hearing to consider Annexation B, which also involves the annexation of property from School District 1 to School District 2, but the property sought to be annexed in Annexation B is only contiguous with School District 2 by way of the Annexation A property. The County Committee finds that Annexation A will be effective on July 1, 2016, and therefore, the Annexation B Property meets the contiguousness requirement. The County Committee considers various factors and approves Annexation B at its July 3, 2015 annexation hearing. The relevant documentation is sent to the State Board by the county superintendent.

[¶ 34] The State Board publishes notice of a hearing to be held on July 31, 2015, in accordance with N.D.C.C. § 15.1-12-05(6)(a). The State Board holds the hearing and finds that Annexation A will be effective on July 1, 2016, and therefore, the Annexation B Property meets the contiguousness requirement since Annexation B will also be effective on July 1, 2016. The State Board considers various factors and approves Annexation B.

[¶ 35] On August 14, 2015, pursuant to N.D.C.C. §§ 15.1-12-05(13), 28-32-42(1), and 28-32-42(3)(a), District 1 commences an appeal of Annexation A in district court. The district court and later the North Dakota Supreme Court find that the decisions

of the County Committee and State Board were not in accordance with the law, and the relevant factors in N.D.C.C. § 15.1-12-05(4)(a)-(o) were not properly considered by the County Committee and State Board. The North Dakota Supreme Court issues its opinion on June 30, 2016, resulting in the orders of the County Committee and State Board in Annexation A being overturned.

[¶ 36] On July 1, 2016, Annexation B becomes effective as a matter of law pursuant to N.D.C.C. § 15.1-12-06, and Annexation B is thereafter a part of District 2. However, the Annexation B property is now an island surrounded entirely by District 1, and not contiguous to the rest of District 2. By the time the appeal was concluded in Annexation A and it became clear that Annexation A could not in fact be used to establish contiguousness for purposes of Annexation B, it was long beyond the thirty day appeals deadline for Annexation B. *See* N.D.C.C. §§ 15.1-12-05(13), 28-32-42(1), and 28-32-42(3)(a). Under this hypothetical scenario, the statutory eligibility requirement of contiguousness was violated and there is no procedure to correct the violation.

[¶ 37] The violation of the contiguousness requirement in the above hypothetical scenario is a direct result of the County Committee and State Board making assumptions about contiguousness on a future date while ignoring the lack of contiguousness as of the dates of their respective hearings. A more reasoned interpretation of the statutes, and an interpretation that does not produce absurd results, is simply that the County Committee and State Board may not approve an annexation of property that is not presently contiguous to the school district to which the property is sought to be annexed.

[¶ 38] The contiguousness requirement and the time within the annexation procedure at which contiguousness must be established are based upon the same statutory framework and would be the same in all cases. While the State Board's interpretation of the statutes might not lead to an absurd result in the present case, it is not difficult to envision other cases in which such an interpretation would lead to absurd results. It should also be noted, the above hypothetical scenario is one of numerous potential scenarios and timelines of events that could lead to non-contiguous islands within school districts. For example, there is no prohibition on submission of a petition to re-annex property back into a district from which it was previously taken. It is conceivable that a parcel could be annexed from District 1 to District 2 and then, prior to the July 1st effective date, the petitioners and appellees move out of the school district and the new residents successfully petition for the parcel to be annexed back into District 1.

[¶ 39] The State Board's interpretation of the contiguousness requirement assumes State Board approval will necessarily result in an earlier annexation becoming effective on a particular future date: the following July 1st. It assumes there will be no intervening events, such as an appeal of an earlier annexation, prior to the effective date. Assuming future events, or the lack of future intervening events, is neither contemplated by the relevant annexation statutes, nor is it rational to do so as it risks the creation of non-contiguous islands within school districts, which is clearly in violation of the contiguousness requirement in N.D.C.C. §§ 15.1-12-01(1), 15.1-12-03(1).

VII. Contiguousness is Not a Moot Issue.

[¶ 40] The State Board may take the position that the issues raised in the present appeal are moot. It is now after July 1, 2015 and it can be known whether the

Halliburton Property was effectively annexed to the Williston School District making the Gutierrez Property and the Silverio Property contiguous to the Williston School District. First, the record does not reflect whether the Halliburton was effectively annexed to the Williston School District. Thus, it is improper for the Court to consider this fact. *See* N.D.C.C. § 28-32-46 (A judge of the supreme court must review an appeal from the determination of a district court and administrative agency based only on the record filed with the Court). More importantly, the issue on appeal to this Court is not whether the Halliburton Property has been effectively annexed into the Williston School District. Rather, the issue before the Court is whether the County Committee and the State Board properly interpreted and applied the contiguousness requirement set forth in N.D.C.C. §§ 15.1-12-01(1), 15.1-12-03(1). Contiguousness is a threshold requirement that must be established at the time the petition is filed and before the County Committee and the State Board hear the petition. Thus, the issue raised by this appeal is not moot regardless of whether the annexation of the Halliburton Property became effective July 1, 2015, a fact that is not proven by the record in this matter.

[¶ 41] Moreover, it matters whether the County Committee and the State Board properly interpreted and applied the contiguousness requirement for several reasons. First, as discussed in detail above, the Legislature set forth specific requirements for annexation of property from one school district to another, including contiguousness, and it matters whether the County Committee and the State Board properly interpreted and applied those requirements. There is a fundamental difference between the interpretation of the contiguousness requirement by the State Board and the clear and unambiguous language of N.D.C.C. §§ 15.1-12-01(1) and 15.1-12-03(1). The State Board essentially

proposes a wait-and-see approach to the contiguousness requirement, whereas the statutory language establishes contiguousness as a threshold requirement. Second, whether or not the contiguousness requirement is met effects when and whether the County Committee and the State Board should hear the petition. The timing of when the petition is heard and considered by the County Committee and the State Board may affect the evidence presented in favor of or in opposition to the proposed annexation, as well as the testimony and evidence offered on the relevant factors to be considered by the County Committee and the State Board as required by N.D.C.C. § 15.1-12-05(4)(a)-(o). It is evident upon review of the minutes and the findings of the County Committee and the State Board that significant weight was given to the testimony of Gutierrez, Silverio, and Lorch regarding specific issues relating to their school age children. If the petition was heard at a later date when the threshold contiguousness requirement was met, the testimony presented to the County Committee and the State Board may have been different—families may move and the concerns regarding children change as they age and progress through grade levels. Thus, the issue on appeal is not moot and it matters whether the County Committee and the State Board properly interpreted and applied the requirements of Chapter 15.1-12.

CONCLUSION

[¶ 42] Based on the foregoing, the Court should reverse the District Court's Order Affirming the State Board's Findings of Fact, Conclusions of Law, and Order issued November 20, 2015, and deny the Gutierrez Petition.

Dated this 20th day of April, 2016.

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ADDENDUM

1-02-02. Words to be understood in their ordinary sense.

Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained.

1-02-05. Construction of unambiguous statute.

When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

15.1-12-01. Definitions.

In this chapter, unless the context otherwise requires:

1. "Annexation" means the alteration of a school district's boundaries through the removal of real property from one school district and its attachment to another contiguous school district.
2. "Contiguous" means two or more tracts of real property which share a common point or which would share a common point but for an intervening road or right of way.
3. "Dissolution" means the process through which a school district ceases to function and the subsequent attachment of its real property to other school districts.
4. "Reorganization" means the formation of a new school district through the combination, in whole or in part, of two or more school districts.
5. "State board" means the state board of public school education.

15.1-12-03. Annexation of property to school district - Eligibility.

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;
2. The property to be annexed does not constitute an entire school district;
3. The annexation petition is signed by two-thirds of the qualified electors residing on the property to be annexed;
4. The annexation petition is filed with the county superintendent of schools whose jurisdiction includes the administrative headquarters of the district;
5. A public hearing is held by the county committee or the county committees, as required in section 15.1-12-05; and
6. The annexation petition is approved by the state board.

15.1-12-04. Annexation of property to school district - Petition requirements.

1. A petition to request the annexation of property must:
 - a. Be obtained from the county superintendent of schools;
 - b. Identify all property to be annexed, before circulation;
 - c. Identify one child whose place of residence is on the property to be annexed and whose parent has stated an intention to send the child to a public school in the district receiving the property during the school year following the effective date of the annexation;
 - d. Be signed in the presence of the petition carrier; and
 - e. Be submitted to the county superintendent whose jurisdiction includes the administrative headquarters of the district.

2. Any person who wishes to add or remove that person's name from the annexation petition may do so until five p.m. on the last business day before the public hearing by the county committee; provided the person appears before the county superintendent to request the action.

3. This section does not apply to annexations involving an exchange of property.

15.1-12-05. Annexation of property to school district - Hearing.

1. Upon receiving a petition for the annexation of property to a school district, the county superintendent shall schedule and give notice of a public hearing regarding the annexation.

2. The county superintendent shall publish notice of the public hearing in the official newspaper of the county in which the major portion of each affected school district's real property is situated, at least fourteen days before the date of the hearing. If no newspaper is published in the county, the county superintendent shall publish the notice in a newspaper in an adjoining county in this state.

3. Before the hearing, the county committee shall:

- a. Determine the number of qualified electors residing on the property to be annexed;
- b. Ensure that two-thirds of such qualified electors have signed the petition; and
- c. Ensure that all other statutory requirements regarding the petition have been met.

4. At the hearing, the county committee shall accept testimony and documentary evidence regarding:

- a. The value and amount of property held by each affected school district;
- b. The amount of all outstanding bonded and other indebtedness of each affected district;
- c. The levies for bonded indebtedness to which the property will be subjected or from which the property will be exempted, as provided for in section 15.1-12-08;
- d. The taxable valuation of each affected district and the taxable valuation under the proposed annexation;
- e. The size, geographical features, and boundaries of each affected district;
- f. The number of students enrolled in each affected district;
- g. Each school in the district, including its name, location, condition, the grade levels it offers, and the distance that students living in the petitioned area would have to travel to attend school;
- h. The location and condition of roads, highways, and natural barriers in each affected district;
- i. Conditions affecting the welfare of students residing on the property to be annexed;
- j. The boundaries of other governmental entities;
- k. The educational needs of communities in each affected district;

- l. Potential savings in school district transportation and administrative services;
- m. The potential for a reduction in per student valuation disparity between the affected districts;
- n. The potential to equalize or increase the educational opportunities for students in each affected district; and
- o. All other relevant factors.

5. Following consideration of the testimony and documentary evidence presented at the hearing, the committee shall make specific findings of fact and approve or deny the annexation. If the annexation is approved, the county superintendent shall forward all minutes, records, documentary evidence, and other information regarding the proceeding and the county committee's decision to the state board for final approval of the annexation.

6.
 - a. Except as provided in this subsection, the state board shall conduct a hearing after publication of a notice in the manner required in subsection 2, accept and consider testimony and documentary evidence regarding the proposed annexation, make specific findings, and approve or deny the annexation.
 - b. If no opposition is presented to the county committee at the hearing and the county committee approves the annexation, the state board may review the record of the county committee and give final approval to the annexation without holding its own hearing.

7. If the school districts involved in a proposed annexation include property in more than one county, but the major portion of each district's property is in the same county, the county committee of that county shall consider the annexation petition.

8. If the school districts involved in a proposed annexation are situated in more than one county and the major portion of each district's property is not in the same county, the county committees of those counties encompassing the major portion of each school district shall jointly consider the annexation petition. The county committees shall vote separately on whether to approve the annexation.

9. If the state board denies the annexation, another petition involving any of the same property may not be submitted to the county committee for a period of three months after the state board's denial. A petition involving any of the same property cited in the original petition may not be considered by the state board more than twice in a twelve-month period.

10. Regardless of how many county committees consider the annexation, the decision may be appealed to the state board.

11. Each annexation must receive final approval from the state board.

12. The county superintendent with whom the petition has been filed shall forward all minutes, records, documentary evidence, and other information regarding the annexation, and the county committee's decision to the state board for final approval or for consideration of an appeal.

13. A decision of the state board with respect to an annexation petition may be appealed to the district court of the judicial district in which the property to be annexed is located.

15.1-12-06. Annexation of property to school district - Effective date.

Annexations under this chapter become effective on July first following final approval by the state board.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

New Public School District #8,)
)
) Appellant,)
)
vs.) Supreme Court No. 20160093
)
State Board of Public School Education,) **CERTIFICATE OF SERVICE**
and Kristi L. Gutierrez,)
)
) Appellees.)
)

I hereby certify that on April 20, 2016, I electronically filed with the Clerk of the North Dakota Supreme Court the

1. BRIEF OF APPELLANT NEW PUBLIC DISTRICT #8; and,
2. APPENDIX OF APPELLANT NEW PUBLIC DISTRICT #8;

and served the same electronically on the following:

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