OAH 82-0330-31515

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Petition for Annexation to the City of Oslo A-7886

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The above-entitled matter came on for hearing before Administrative Law Judge Barbara J. Case on November 13, 2014, at the Oslo Community Center, 107 Third Avenue East, Oslo, Minnesota. Public testimony was taken before the parties presented their witnesses and an opportunity for additional public testimony was offered after the parties had presented all of their witnesses. One person from the public spoke and one person submitted written comments. Twenty-eight people attended the hearing.

Michael C. Couri, Couri & Ruppe, P.L.L.P., appeared on behalf of Oak Park Township (Township). Michael D. Williams, Williams & Aandal, appeared on behalf of the city of Oslo (City).

The Township submitted its Post-Hearing Brief on January 15, 2015 and its Proposed Findings of Fact and Conclusions of Law on January 20, 2015. The City submitted its Post-Hearing Brief on January 22, 2015 and its Proposed Findings of Fact and Conclusions of Law on January 22, 2015. The record closed on January 22, 2015.

STATEMENT OF THE ISSUE

Whether the Petition for Annexation filed by the City should be granted or denied based on the factors set forth in Minn. Stat. § 414.031 (2014).

SUMMARY OF CONCLUSION

The Administrative Law Judge concludes that the Petition for Annexation to the City from the Township (A-7886) should be denied.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

A. Background and Procedural History

1. On April 21, 2014, the City filed a Petition for Annexation with the Office of Administrative Hearings (OAH), requesting the annexation of portions of the Township.

2. The hearing on the Petition for Annexation was opened on June 6, 2014, and continued to November 13, 2014, for a further evidentiary and public hearing before Administrative Law Judge Barbara Case. The public hearing was held in Oslo, Minnesota, in the Community Center, 107 Third Avenue East, Oslo, Minnesota, 56744-0187.

3. A central background fact to the Petition for Annexation is that the entire City and subject area are surrounded by a recently reconstructed dike that protects the residents of both areas from the periodic flooding of the Red River of the North (Red River). The City engaged in the dike reconstruction project in approximately 2010.[1]

4. The City's Petition for Annexation sought the annexation of the following described property:

> PARCEL "A"
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> OSLO, MINNESOTA ANNEXATION SECTION 31 T155N, R50W
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> That part of Government Lots 1, 2 and 3 and the Northeast Quarter of the Southeast Quarter, of Section 31, Township 155 North, Range 50 West of the 5th Principal Meridian, Marshall County, Minnesota described as follows:
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> Commencing at the southeast corner of said Section 31; thence northerly along the east line of said Section 31 having a grid bearing of North 02 degrees 25 minutes 38 seconds East a distance of 1325.00 feet to the northeast corner of the Plat of Blocks 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28 Oslo, Marshall County, Minnesota in Southeast Quarter of Section 31, Township 155 North, Range 50 West and the point of beginning; thence continuing North 02 degrees 25 minutes 38 seconds East along said east line a distance of 2761.90 feet to the northeast corner of tract of land conveyed to the City of Oslo, Minnesota in a Quit Claim Deed recorded as Document Number 209667 in Book 158 of Deeds, pages 366-367, Marshall County Recorder office; thence North 87 degrees 48 minutes 03 seconds West along the northerly line of said conveyed tract of land a distance of 29.46 feet; thence South 09 degrees 58 minutes 16 seconds West continuing along said northerly line a distance of 103.58 feet; thence South 83 degrees 07 minutes 12 seconds West continuing along said northerly line a distance of 327.33 feet; thence

[1] Testimony (Test.) of Scott Sobiech, Civil Engineer and Project Manager for the Oslo Dike.

North 09 degrees 42 minutes 55 seconds East continuing along said northerly line a distance of 129.88 feet; thence North 43 degrees 41 minutes 24 seconds East continuing along said northerly line a distance of 159.14 feet; thence North 25 degrees 52 minutes 53 seconds West continuing along said northerly line a distance of 185 feet more or less to the southerly bank of the Red River of the North; thence southwesterly, southerly and southeasterly in varying directions along said southerly and southeasterly bank a distance of 4725 feet more or less to the northwest boundary corner of the Plat of Gunderson's Second Addition to the City of Oslo, Minnesota; thence South 87 degrees 34 minutes 16 seconds East along the north boundary line of said Gunderson's Second Addition a distance of 375 feet more or less to the easterly line of River Street in said Plat of Gunderson’s Second Addition; thence South 20 degrees 18 minutes 57 seconds East along said easterly line a distance of 260.49 feet to the northwest corner of Block 1 of said Gunderson's Second Addition; thence South 87 degrees 34 minutes 16 seconds East along the north line of said Block 1 a distance of 459.00 feet to the northeast corner of said Block 1; thence South 02 degrees 25 minutes 44 seconds West along the east line of said Block 1 a distance of 170.00 feet to the north line of said Plat of Blocks 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28 Oslo, Marshall County, Minnesota in Southeast Quarter of Section 31,Township 155 North, Range 50 West; thence South 87 degrees 34 minutes 16 seconds East along said north line a distance of 865.00 feet to the point of beginning. Containing 144.3 acres more or less.

All bearings are grid based on the Minnesota State Plane Coordinate System -North Zone of 1983 (NAD83).

and

PARCEL "B" OSLO, MINNESOTA ANNEXATION SECTION 32, T155N R50W

That part of West Half of Section 31, Township 155 North, Range 50 West of the 5th Principal Meridian, Marshall County, Minnesota described as follows:

Commencing at the southwest corner of said Section 32; thence northerly along the west line of said Section 32 having a grid bearing of North 02 degrees 25 minutes 38 seconds East a distance of 1076.00 feet to the northwest boundary corner of the Plat of Gunderson's First Addition to Oslo, Marshall County, Minnesota and the point of beginning; thence continuing North 02 degrees 25 minutes 38 seconds East along said east line a distance of 3010.40 feet to the northwest corner of tract of land conveyed to the City of Oslo, Minnesota in a Quit Claim Deed recorded as Document Number 209663 in Book 158 of Deeds, pages 359-360, Marshall County Recorder Office; thence South 87 degrees 48 minutes 03

seconds East along the north line of said conveyed tract of land a distance of 47.65 feet; thence South 01 degrees 12 minutes 35 seconds East continuing along said northerly line a distance of 85.50 feet; thence South 87 degrees 32 minutes 17 seconds East a distance of 1334.97 feet; thence South 02 degrees 50 minutes 02 seconds West a distance of 69.59 feet; thence South 66 degrees 28 minutes 22 seconds West a distance of 33.03 feet; thence South 01 degrees 38 minutes 10 seconds West a distance of 1951.04 feet; thence South 79 degrees 24 minutes 01 seconds East a distance of 58.27 feet; thence South 01 degrees 36 minutes 38 seconds West a distance of 50.00 feet; thence South 82 degrees 37 minutes 16 seconds West a distance of 58.55 feet; thence South 01 degrees 51 minutes 10 seconds West a distance of 622.65 feet; thence South 02 degrees 18 minutes 12 seconds East a distance of 91.82 feet; thence South 06 degrees 27 minutes 55 seconds East a distance of 241.50 feet; thence South 02 degrees 50 minutes 51 seconds West a distance of 236.95 feet; thence South 75 degrees 36 minutes 28 seconds East a distance of 71.04 feet; thence South 02 degrees 34 minutes 26 seconds West a distance of 44.04 feet; thence South 79 degrees 52 minutes 26 seconds West a distance of 74.15 feet; thence South 02 degrees 36 minutes 14 seconds West a distance of 87.09 feet; thence South 21 degrees 18 minutes 48 seconds West a distance of 54.60 feet; thence South 11 degrees 25 minutes 22 seconds West a distance of 143.74 feet; thence South 02 degrees 31 minutes 22 seconds West a distance of 118.15 feet; thence South 07 degrees 59 minutes 43 seconds East a distance of 62.48 feet; thence South 02 degrees 42 minutes 32 seconds West a distance of 113.92 feet to the northerly line of Trunk Highway Number 1 right of way; thence westerly a distance of 78.00 feet along said northerly right of way line and a curve not tangent to the last described line concave to the south, having a radius of 3894.71 feet and a central angle of 01 degrees 08 minutes 51 seconds and the chord of said curve bears North 87 degrees 54 minutes 08 seconds West to the east line of the Southwest Quarter of the Southwest Quarter of said Section 32; thence North 02 degrees 23 minutes 53 seconds East along said east line a distance of 587.97 feet to the northeast corner of the Southeast Quarter of the Southwest Quarter of the Southwest Quarter of said Section 32; thence North 86 degrees 54 minutes 58 seconds West along the north line of said Southeast Quarter of the Southwest Quarter of the Southwest Quarter a distance of 568.78 feet to the east boundary line of said Gunderson’s First Addition extended southerly; thence North 02 degrees 25 minutes 38 seconds East along said east boundary line extended southerly and the east boundary line of said Gunderson's First Addition a distance of 423.19 feet to the northeast boundary corner of said Gunderson's First Addition; thence North 87 degrees 34 minutes 22 seconds West along the north boundary line of said Gunderson’s First Addition a distance of 755.00 feet to the point of beginning. Containing 100.55 acres more or less.

All bearings are grid based on the Minnesota State Plane Coordinate System -North Zone of 1983 (NAD83)

B. Factors Required for Consideration of Annexation[2]

5. The statute that governs municipal boundary adjustments, Minn. Stat. §§ 414.01-.12 (2014) (Municipal Boundary Adjustments Act or Act), sets forth 17 factors that must be considered in deciding whether an annexation is appropriate under law.

1) Joint Informational Meetings

6. The first factor is recordings and public documents from joint informational meetings under Minn. Stat. § 414.0333 relevant to other factors in this subdivision.[3]

7. A joint informational meeting was held on August 7, 2014.[4] Written minutes of the meeting were not provided to the Administrative Law Judge. The Township provided a recording of the meeting, to which the Administrative Law Judge listened in its entirety.

8. The sentiments expressed at the joint informational meeting were much like those expressed at the public hearing. The residents of the subject area who spoke at the meeting opposed the annexation. The residents of the City who spoke expressed their feeling that if annexation did not occur the City might, in essence, cease to exist.[5]

9. At the meeting, the City's representatives stated that no developers had expressed a willingness to develop in the subject area. However, they noted, a few individuals had expressed a desire to relocate into the City if land became available.[6]

10. The City had contracted for the development of a Comprehensive Plan from the Northwest Regional Development Commission. The opinion of the person who directed the development of that plan was that the City should not undertake expansion at this time.[7]

2) Population and Households

11. The second factor is present population and number of households, past population and projected population growth of the annexing municipality and subject area and adjacent units of local government.[8]

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[2] Minn. Stat. § 414.031, subd. 4(a)(1-17).
[3] Minn. Stat. § 414.031, subd. 4(a)(1).
[4] Notice of Joint Informational Meeting Concerning Annexation by the City published in the Warren Sheaf on July 23 and 30, 2014.
[5] Recording of Joint Informational Meeting held August 7, 2014.
[6] *Id.*
[7] *Id.*
[8] Minn. Stat. § 414.031, subd. 4(a)(2).

12. Sometime between 2010 and 2012, the City experienced a precipitous drop in population when 27 properties were taken out of the City as part of the dike reconstruction project. Of those 27 properties, 22 were occupied residences. Thirty people left the City due to displacement by the dike project. Two residents moved their homes to other lots within the City limits. Those two residents had to remove existing homes from the lots in order to place their houses on the lots. One or two other families bought homes in town. Approximately 18 occupied residences did not relocate within the City.[9]

13. Prior to the dike project, census counts show the City's population steadily declining. The City's population declined from 367 in 1990, to 342 in 2000, to 330 in 2010.[10]

14. The current population of the City is approximately 300 people.[11]

15. Only three or four of the 22 families that were relocated due to the City's dike project remained in Oslo.[12]

16. The Township, of which the subject area is part, has experienced uneven population growth and decline. However, overall the Township has experienced a population increase from 131 in 2010 to 143 in 2013.[13]

17. There are six homes within the 244 acre subject area, or an average of one home per 40 acres.[14]

18. Fourteen residents reside in the six homes in the subject area.[15]

19. Three homes have been built in the City over the last three years.[16]

20. One home has been built in the subject area over approximately the past three years.[17]

21. The City, the subject area, and the Township of which the subject area is a part, all are within Marshall County. Marshall County has had a downward trend in population since 1990. It took a large drop in population between 1990 and 2010, from 11,000 to 9,500. Since that time the level of decrease has slowed, and at times been flat, but the trend continues downward.[18]

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[9] Test. of Karen Cote, City clerk.
[10] Minnesota State Demographer Data, 2015.
[11] *Id.*
[12] Test. of K. Cote.
[13] State Demographer's website.
[14] Test. of Pete Chwialkowski, Township supervisor and resident of subject area.
[15] Test of P. Chwialkowski.
[16] Test. of Scott Kosmatka, City mayor.
[17] Test. of P. Chwialkowski.
[18] http://www.minnesota-demographics.com/marshall-county-demographics.

3) Quantity of Land and Natural Terrain

22. The third factor is quantity of land within the subject area and adjacent units of local government; and natural terrain including recognizable physical features, general topography, major watersheds, soil conditions and such natural features as rivers, lakes and major bluffs.[19]

23. The subject area consists of approximately 244 acres.[20]

24. The City consists of approximately 243.2 acres.[21]

25. The two most apparent and significant physical features that impact both the City and the subject area are the Red River and the recently reconstructed dike that surrounds and protects both areas.[22]

26. The Red River comprises the border between the City and North Dakota.[23]

27. The topography for both the City and the subject area, and for the surrounding area as far as the eye can see, is remarkably flat.[24] As a consequence, when the Red River floods, as it does with regularity, the entire area is flooded unless it is protected by diking.[25]

28. The dike was first built in approximately 1964. It was reconstructed under the direction of the Army Corps of Engineers in 1975. The Federal Emergency Management Agency (FEMA) is in the process of updating flood plain rates for Marshall County. That process required municipalities with existing dikes to submit engineering documentation to demonstrate that an existing dike meets current design standards. A dike, like the City's, that was originally constructed by the Army Corp of Engineers must meet the standards of and be approved by the Corps. FEMA was unable to certify the Oslo dike as protecting those inside the dike from flooding because a portion of the existing dike was unstable.[26]

29. When the river rises there are various named stages of each river flood elevation. The City must take specific actions at each stage. At the first stage, or "action stage," the City starts organizing volunteers to take actions such as walking the dike and closing the two main gatewells.[27] At the second stage, or flood stage, some areas

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[19] Minn. Stat. § 414.031, subd. (4)(a)(3).
[20] Test. of P. Chwialkowski.
[21] http://www2.census.gov/geo/docs/maps-data/data/gazetteer/2010_place_list_27.txt.
[22] Exhibit (Ex.) 132.
[23] Ex. 132.
[24] Exs. 127-133; Administrative Law Judge's tour.
[25] Test. of S. Sobiech.
[26] Test. of S. Sobiech.
[27] There are four gatewells in the City. Regulations tell the City what it must do at each stage of a flood. Just before the first, or action stage, two of the four gatewells must be shut. In addition, this system requires a system of drainage ditches, holding areas, two permanent pumping stations and emergency

within the protected area start to fill up with water. At that stage the City must assure that volunteers walk the dike, all four gatewells must be closed and the pumping station must pump water out of the protected area and into the river.[28] Without the protection of the dike, at the third stage, or moderate flood stage, structures in town would be inundated with water and all of the subject area would be inundated with water. At the fourth stage, or major flood stage, the entire City and everything within the dike walls would be under water with the exception of a very few high spots.[29]

30. Between 2002 and 2013 the river rose to major flood stage six times and stayed there for a minimum of two weeks each time. Between 2002 and 2013 the river rose to moderate flood stage nine times.[30]

31. It is undisputed that the farmland and the homes in the subject area benefit from the protection of the dike.[31]

4) Degree of Contiguity

32. The fourth factor is the degree of contiguity of the boundaries between the annexing municipality and the subject area.[32]

33. The annexing municipality and the subject area are contiguous. More specifically, the northern edge of the City is contiguous with the southern edge of the subject area.[33]

5) Physical Development, Planning, and Intended Land Uses

6) Transportation Network

7) Land Use Control and Planning

34. The fifth factor is the present pattern of physical development, planning, and intended land uses in the subject area and annexing municipality including residential, industrial, commercial, agricultural and institutional land uses and the impact of the proposed action on those land uses.[34]

35. The sixth factor is the present transportation network and potential transportation issues, including proposed highway development.[35]

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pumps that can be moved to where they are needed. The northern gatewell is run by power from a tractor.

[28] Test. of S. Sobiech.

[29] *Id.*

[30] *Id.*

[31] Test. of P. Chwialkowski.

[32] Minn. Stat. § 414.031, subd. 4(a)(4).

[33] Ex. 132 (Arial photo of the City, circa 2014).

[34] Minn. Stat. § 414.031, subd. 4(a)(5).

[35] Minn. Stat. § 414.031, subd. 4(a)(6).

36. The seventh factor is land use controls and planning presently being utilized in the annexing municipality and the subject area, including comprehensive plans for development in the area and plans and policies of the metropolitan council; and whether there are inconsistencies between proposed development and existing land use controls and the reasons therefore.[36]

37. The most notable physical characteristic of the entire area, both the City and the subject area, is the dike that surrounds both. The City recently completed reconstruction of the dike. This reconstruction was required by the deteriorating condition of the existing dike and was mandated by FEMA. The total cost of the dike project was $14,280,000.[37]

38. The City has issued general obligation bonds of $117,000 to pay for its share of the cost of the project.[38] This cost is paid for by real estate taxes assessed on property in the City.[39]

39. The reconstruction of the dike required the removal of properties and homes on the west side of the city as detailed above in Finding of Fact 12. The homes had to be removed so that the dike wall could be moved further from the river in order to be built on stable ground.[40]

40. Only three or four of the families whose homes were removed for the dike construction relocated in the City.[41] At least in part, the reason that other families did not continue to live in the City was that there were no empty lots or homes for sale.[42]

41. Four new homes have been constructed in the City since 2000. There are currently no suitable building lots available for the construction of new homes in the City.[43]

42. Approximately 115 acres of the 244 acres in the subject area are actively farmed. The remainder of the subject area appears to be woods, wetland, or contains one of the six homes in the subject area.[44]

43. Five businesses have left Oslo since 2000 while one new business has located in Oslo during this same time period.[45]

44. Since 2000, approximately three or four new homes have been constructed in the Township.[46]

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[36] Minn. Stat. § 414.031, subd. 4(a)(7).
[37] Ex. 121.
[38] Ex. 124.
[39] Test. of K. Cote; Ex. 124.
[40] Administrative Law Judge's tour of the area.
[41] Test. of K. Cote.
[42] Test. of S. Kosmatka.
[43] *Id.*
[44] Test. of P. Chwialkowski.
[45] Test. of John Nelson, Oak Park Township Supervisor.

45. The City had several concept plan subdivisions drawn up for the property owned by the Batko family and abutting the City's northern border, but could not find a developer who believed it was feasible to develop this property. This was, at least in part, due to the fact that the City does not control or own that property. [47]

46. No developers have expressed an interest in developing homes anywhere in the City. [48]

47. The City has stubbed in three sanitary sewer lines and water leads next to the lower southwestern edge (the Batko property) of the subject area with the intention of those being able to be used for a housing development in that area just north of the City.[49]

48. The City retained a planning consultant and is developing a new zoning ordinance and new zoning map. Neither the new ordinances nor the map had been adopted at the time of the hearing.[50]

49. One major highway runs east-west through the City. The City roads are generally paved and the subject area roads are generally gravel. The only access to the subject area's roads is through the City's roads.[51]

50. Residents of both areas are not subject to the county's flood ordinance. That is they do not have to obtain a land use permit[52] as long as the dike is certified. They are also exempt from being required to buy flood insurance.[53]

8) Existing Governmental Services

51. The eighth factor is existing levels of governmental services being provided in the annexing municipality and the subject area, including water and sewer service, fire rating and protection, law enforcement, street improvements and maintenance, administrative services, and recreational facilities and the impact of the proposed action on the delivery of said services.[54]

52. The City stubbed three sanitary sewer and water leads to the Batko property, but the sewer leads are not active and cannot be used unless a sewer extension is installed which will connect these service leads to the City's sewer system.

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[46] Test. of J. Nelson.
[47] Test of S. Kosmatka.
[48] Test. of K. Cote.
[49] Test. of S. Kosmatka.
[50] Test. of K. Cote.
[51] Exs. 1 and 2.
[52] The purpose of the land use permit would be for the landowner to show that they have taken measures to raise their home above flood level. There are other restrictions on building and repairing homes that are within an unprotected flood zone. Similarly, home owners' septic systems are exempt from certain requirements by virtue of enjoying the protection of the dike.
[53] Test. of Jan Kaspari, Marshall County Water and Land Office.
[54] Minn. Stat. § 414.031, subd. 4(a)(8).

The City does not have an engineering plan for connecting these service leads to the City's system at this time.[55]

53. The City is lobbying for funds from the state of Minnesota to assist it to repair its water and sewer lines. If it is able to make these improvements it intends to extend sewer to two of the homes in the subject area.[56]

54. The City has no estimates for the cost to extend sanitary sewer service to the six homes in the subject area.[57]

55. The City has a very old zoning ordinance that was not submitted into evidence.[58]

56. The City has retained a planning consultant and is working on a new zoning ordinance and a new zoning map, but it has not adopted either of these documents.[59]

57. The City is concerned about controlling land use inside the dike. Specifically, it is concerned about the potential for large livestock operations to negatively impact everyone within the dike.[60]

58. The City's planning consultant recommended against annexation.[61]

59. The City has begun preparing a comprehensive plan but stopped working on it pending the outcome of this annexation proceeding in order to have a more accurate picture of the City's situation.[62]

60. The City has had approximately 50 water main breaks in the past three years.[63]

61. The City is in the process of preparing a grant application in an effort to obtain funding to assist in the cost of fixing the City's water mains.[64]

62. The dike must be mowed as part of its maintenance. The City bought a tractor for mowing the dike and it is used for that purpose approximately six times a year. The tractor also serves to plow the streets in the winter. The City also purchased

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[55] Test. of Melissa Knutson, Civil Engineer with CPS Engineering.
[56] Test. of S. Kosmatka. (The two properties were referred to as the Nording and Anderson families.)
[57] Test. of K. Cote.
[58] Test. of K. Cote.
[59] Test. of K. Cote.
[60] Test. S. Kosmatka.
[61] Test. of Sandra Simonson, City Councilwoman.
[62] Test. of S. Simonson.
[63] Test. of K. Cote.
[64] Test. of S. Simonson.

a large “batwing” mower which is used to maintain the dike, but serves other mowing functions as well.[65]

63. The City and, through the City the subject area, buys water from Marshall and Polk, a rural water supplier. The City provides water to the residents of the subject area at cost. While in the past the residents of the subject area paid nothing towards the maintenance of the water tower or the water lines, they are currently assessed $15 per month for maintenance of the system.[66]

64. The water supply line comes in on the south side of the City. To run the system the City must provide water pipes, a pumping station, and a storage tank. Without the storage tank the residents of both areas would not have water at certain times of the year when agricultural use of water is high. The water storage tank was required to be moved and protected as part of the dike reconstruction.[67]

65. The Township contracts with the City to provide fire protection to the Township, including the subject area.[68]

9) Previous Annexation Agreements and Orders

66. The ninth factor is the implementation of previous annexation agreements and orders.[69]

67. No evidence was offered regarding previous annexation agreements and orders. No claims regarding any previous agreements were raised at the hearing.

10) Environmental Problems

68. The tenth factor is existing or potential environmental problems and whether the proposed action is likely to improve or resolve these problems.[70]

69. The major environmental problem for the entire area is the periodic flooding of the Red River. The annexation would have no impact on the flooding or the dike, but would alleviate the problem perceived by the City of its having no empty lots for building. Since the reconstruction of the dike is complete, the annexation would have no impact on the continued protection of the entire area by the dike.

70. The flood dike was originally constructed in 1966 and protected the properties in the subject area, as these properties offered higher ground upon which to

[65] Test. of K. Cote.
[66] Test. of K. Cote; Test. of P. Chwialkowski.
[67] Test. of M. Knutson; Administrative Law Judge’s tour of the area.
[68] Test. of K. Cote.
[69] Minn. Stat. § 414.031, subd. 4(a)(9).
[70] Minn. Stat. § 414.031, subd. 4(a)(10).

place the dike, thereby requiring less fill than if the dike was placed on the City's existing borders.[71]

71. The City is currently undertaking the recertification of its flood dike to protect against a 100-year flood. This has required the purchase of 27 properties by the City and the removal of approximately 22 residences.[72]

72. Costs of the dike recertification are being provided mostly through state of Minnesota grant funding in the amount of $14,280,000, with the City being directly responsible for approximately $117,000 of the project cost.[73]

73. The physical construction of the dike is complete, and the only steps remaining to complete the dike certification process involve the processing of paperwork.[74]

74. Annexation of the subject area will not impact the certification of the dike, nor will it provide additional flood protection to the subject area beyond what exists currently. Certification is expected to occur in 2015.[75]

75. The City typically spends approximately between $2,100 and $5,100 annually maintaining the dike.[76]

11) Providing Needed and Enhanced Governmental Services

76. The eleventh factor is plans and programs by the annexing municipality for providing needed and enhanced governmental services to the subject area in a cost-effective and feasible manner within a reasonable time from the date of annexation.[77]

77. If the subject area were annexed, the City would not provide any additional services to the subject area that the Township does not already provide or that the residents do not already receive from private service providers.[78]

78. Ninety percent of the residences in the Township are served by the Marshall and Polk water system, independent of the City.[79]

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[71] Test. of J. Nelson.
[72] Test. of K. Cote.
[73] Test. of K. Cote.
[74] Test. of S. Sobiech.
[75] Test. of S. Sobiech.
[76] Ex. 125. At least in part the reason for the cost fluctuation is the amount of rain received and hence the frequency with which the vegetation needs to be mowed.
[77] Minn. Stat. § 414.031, subd. 4(a)(11).
[78] Test. of P. Chwialkowski.
[79] Test. of P. Chwialkowski.

12) Fiscal Impact

13) School Districts and Communities

79. The twelfth factor is an analysis of the fiscal impact on the annexing municipality, the subject area, and adjacent units of local government, including net tax capacity and the present bonded indebtedness, and the local taxes of the county, school district and township.[80]

80. The thirteenth factor is the relationship and effect of the proposed action on affected adjacent school districts and communities.[81]

81. The City currently has the highest tax rate in Marshall County. This is due, at least in part, because the City charges residents no special assessments for services such as sewer, water lines, and street repair. Rather than assess individuals through special assessment the City derives virtually all of its revenue from the tax levy. The City is unique in Marshall County in this regard.[82]

82. The tax capacity of the City is approximately $126,000. The tax capacity of the Township is approximately $746,000.[83]

83. The Township's tax rate in 2014 was 8.428.[84]

84. The City's tax rate in 2014 was 204.343.[85]

85. If the entire subject area were annexed, the new rate for the entire area would be slightly less than the City's current tax rate.[86]

86. Farmland in a flood plain along the Red River is worth less than land that is not prone to flooding, and so is taxed at a lower rate. One reason for that is the land prone to flooding is less desirable because there is a higher risk factor for not being able to raise a crop. Being inside the City's dike increases the value of the farmland. The farmland inside the dike is valued at $4,300 per acre and flood prone land just outside the dike is valued at $3,000 per acre.[87] Similarly, homes within the dike are assessed at a higher value than homes outside of the dike because they enjoy the protection of the dike.[88] However, land within the Township outside the dike, but which is not prone to flooding, is similar in value to farmland within the dike.[89]

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[80] Minn. Stat. § 414.031, subd. 4(a)(12).
[81] Minn. Stat. § 414.031, subd. 4(a)(13).
[82] Test. of Russell Steer, Marshall County Tax Assessor.
[83] Test. of R. Steer.
[84] Ex. 138.
[85] Ex. 138.
[86] Test. of R. Steer.
[87] *Id.*
[88] *Id.*
[89] *Id.*

87. The rate of the county wide taxes is the same for the City and the Township. There is no evidence that the granting or denial of the Petition for Annexation will impact that tax rate.[90]

88. The rate of the school district tax is the same for the City and the Township, and there was no evidence that the granting or denial of the Petition for Annexation will impact that tax rate or any other aspect of the local schools.[91]

89. The school in the City closed in 1984 and was consolidated into the Warren-Alvarado-Oslo School District. Most students attend school in East Grand Forks, Minnesota.[92]

90. In 2010, the City incurred a bond obligation for its portion of the dike reconstruction in the amount of $117,000.[93] Each payment is approximately $11,200 per year.[94]

91. In at least one owner's case, annexation would increase that owner's property taxes by $6,615.70 per year.[95]

92. If the entire subject area were annexed to the City, the City would receive between $17,400 and $18,900 per year in additional real estate taxes from the subject area.[96]

93. The City and the Township enjoy a history of cooperation between the people in their communities. In addition to a demonstration of providing mutual aid, residents of both areas have family members in the other.[97]

94. Township citizens constitute a number of the volunteer firefighters for the City's fire department.[98]

95. The Township contributes toward the cost of operating the City's fire department and has helped purchase equipment.[99]

96. Township citizens have helped the City sandbag and walk the dike during floods.[100]

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[90] Ex. 138; Test of R. Steer.
[91] *Id.*
[92] Test. of J. Nelson.
[93] Ex. 124.
[94] Ex. 119.
[95] Ex. 140; Test. of P. Chwialkowski.
[96] Test. of P. Chwialkowski; Test. of R. Steer.
[97] Test. of J. Nelson.
[98] Test. of S. Kosmatka.
[99] *Id.*
[100] Test. of P. Chwialkowski.

97. Township citizens have loaned equipment to the City to use to pump water out of the City during a flood.[101]

14) Adequacy of Town Government

15) Analysis of Governmental Services

16) If Only Part of a Township is Annexed

17) Information from Administrative Law Judge Tour

98. The fourteenth factor is adequacy of town government to deliver services to the subject area.[102]

99. The fifteenth factor is an analysis of whether necessary governmental services can best be provided through the proposed action or another type of boundary adjustment.[103]

100. The sixteenth factor is if only part of a township is annexed, the ability of the remainder of the township to continue or the feasibility of it being incorporated separately or being annexed to another municipality.[104]

101. The seventeenth factor is information received by the presiding administrative law judge from the tour required under the statute.[105]

102. No boundary adjustment is necessary to provide needed government services at this time.

103. If the subject area were annexed, the remainder of the Township has the ability to continue to operate.[106]

104. The information received by the presiding Administrative Law Judge from the required tour is incorporated, where germane, into the factors considered above.

105. In or about the fall of 2011, in order to prepare for the dike realignment and reconstruction, the City had to demolish its then existing water treatment building and construct a new water treatment facility.[107]

106. The City received a grant from the Minnesota Department of Natural Resources in the amount of $14,280,000 for the purpose of improvement of its flood

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[101] *Id.*
[102] Minn. Stat. § 414.031, subd. 4(a)(14).
[103] Minn. Stat. § 414.031, subd. 4(a)(15).
[104] Minn. Stat. § 414.031, subd. 4(a)(16).
[105] Minn. Stat. § 414.031, subd. 4(a)(17).
[106] *Id.*
[107] Ex. 120.

control systems including the dike.[108] The City has to repay approximately $117,000 of the grant.[109] This obligation is shared by all taxpayers in the City. The amount per year is approximately $11,000 and the last payment will be in 2026.

107. The City estimates that the dike runs approximately three linear miles.[110] The portion of the dike that is within the City limits is approximately one and one-half miles, and approximately one and one-half miles is in land located within the Township.[111]

108. The dike requires various types of maintenance such as mowing and rodent control. Since 2009, the cost of mowing has been as high as $4,590 in a year, and as low as $1,140.75.[112] The cost of rodent control has been as high as $3,000 and as low as $500 per year.[113] These costs do not include the more than $10,000 cost of the equipment that had to be purchased to care for the dike. The equipment was financed by the City on a lease-to-own basis.[114]

109. Future costs may be greater if the pumps or gatewells[115] that are part of the dike system need repair.

110. The City has general obligation bonds to finance the City's payments for the dike project.[116]

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction in this matter pursuant to Minn. Stat. §§ 414.01, .031, .12.

2. All of the jurisdictional prerequisites have been met and the Petition for Annexation is properly before the Administrative Law Judge for disposition.

3. Proper notice of the hearing in this matter has been given.

4. The area proposed for annexation is not urban or suburban in character and is not about to become urban or suburban in character.

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[108] Ex. 121.
[109] Ex. 121; Test. of Karen Cote.
[110] Ex. 125.
[111] Ex. 125; Test. of K. Cote.
[112] *Id.*
[113] *Id.*
[114] Test. of K. Cote
[115] Test. of K. Cote.
[116] Ex. 124.

5. Municipal government in the subject area is not necessary to protect public health, safety, and welfare.

6. Annexation would not be in the best interest of the subject area.

7. These Conclusions are arrived at for the reasons set forth in the following Memorandum, which is incorporated into these conclusions by reference.

8. The parties did not agree to a division of the costs before the commencement of the hearing pursuant to Minn. Stat. § 414.12, subd. 3. The Administrative Law Judge finds that, although the City did not prevail in its Petition for Annexation, the Petition for Annexation was not frivolous or without merit. Therefore, the cost of these proceedings shall be shared equally between the parties.

Based upon these Findings of Fact and Conclusions of Law, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. The City's Petition for Annexation is hereby **DENIED**.

2. Pursuant to Minn. Stat. § 414.12, subd. 3, the cost of these proceedings shall be divided as follows: to the City, 50 percent; and to the Township, 50 percent.

Dated: March 17, 2015

s/Barbara Case

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BARBARA CASE
Administrative Law Judge

NOTICE

This Order is the final administrative order in this case under Minn. Stat. §§ 414.031, .07, .09, .12. Pursuant to Minn. Stat. § 414.07, subd. 3, any person aggrieved by this Order may appeal to Marshall County District Court by filing an Application for Review with the Court Administrator within 30 days of this Order. An appeal does not stay the effect of this Order.

Any party may submit a written request for an amendment of these Findings of Fact, Conclusions of Law, and Order within seven days from the date of the mailing of the Order pursuant to Minn. R. 6000.3100 (2013). However, no request for amendment shall extend the time of appeal from this Order.

MEMORANDUM

A. Background

The single event that predominated all of the arguments presented in this case was the dike reconstruction work done by the Army Corps of Engineers in 2011-2012. It is undisputed that a prerequisite for, and consequence of, having the restoration work done was the loss of 27 properties and removal of approximately 22 residences. This resulted in a precipitous drop in population in a city whose population has been steadily declining. This population decline, the concomitant decline in the tax base, inevitable increases in some costs, (costs stemming from deferred infrastructure maintenance and necessary equipment costs), have left the City in need of an expanded tax base. However, Minn. Stat. §§ 414.01-.12 directs the Administrative Law Judge to consider whether the annexation is needed by the subject area; the needs of the City are not bases for an order for annexing unincorporated property.

The statute on annexing unincorporated property, Minn. Stat. 414.031, delineates 17 factors the Administrative Law Judge must consider in arriving at a decision. However, an order for annexation may be made only upon finding:

(1) That the subject area is now, or is about to become, urban or suburban in character;

(2) That municipal government in the area proposed for annexation is required to protect public health, safety, and welfare; or

(3) That the annexation would be in the best interest of the subject area.[117]

The City has not met its burden to show that any one of these three bases exist in this case.

[117] Minn. Stat. § 414.031, subd. 4(b)1-3.

B. The Concerns of Both Communities

The predominant concern expressed by both parties was the equitable distribution of taxes and costs relative to the burdens of and the benefits received from the dike. The subject area consists of approximately 244 acres which lie within the northern half of the diked area. The City believes that the Township residents living within the diked area are receiving a benefit for which they do not help pay. The subject area representatives believe that the Petition for Annexation is the City's attempt to resolve its fiscal problems by annexing land that is predominantly rural.

Without question, the dike defines a certain community that is not captured in the definition of city resident or subject area resident: those who enjoy the protection of the dike. However, the Act does not provide a remedy for what is perceived to be an injustice by the City officials. Had the City brought the Petition for Annexation before it proceeded with the dike, it might have prevailed under the "public health, safety and welfare" basis. Had the City brought the Petition for Annexation before the residents who had to be relocated, it might have had a claim under the "about to become urban or suburban" basis. With those two matters now in the past, the court must apply the three bases in the statute to the situation as it now exists.

C. Is the Subject Area now, or about to become, Urban or Suburban in Character?

The City agrees that the subject area is presently "basically agricultural with a smattering of personal residences." [118] The "City believes that if the petition for annexation is granted a large part of the area can be developed into an area for residential homes and thus become urban."[119] However, the statute does not allow an order for annexation where the area can or may be developed in the future but only where an area has already changed or is about to change in character. The City has steadily lost population over the past 20 years. The entire area, including Marshall County itself, has lost, not gained, population since 2000. Therefore, an order for annexation based on the area becoming "urban or suburban in nature" would be unsound.

It is possible that the City could attract back residents who left when their homes were purchased for the dike reconstruction. It is possible that the subject area will eventually attract new residents who desire to move into the protected area from the surrounding Township. However the statute requires something more imminent than a possibility: the subject area must be obviously changed or obviously about to change. That is not the case for the subject area here. Instead, it is presently agricultural and rural in nature and does not support an order for annexation under this provision of the statute.

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[118] City's brief at 1.
[119] *Id.*

D. Is municipal government in the area proposed for annexation is required to protect public health, safety, and welfare of the subject area?

The City rightly argues that had the "reconstruction of the dike not…occurred…the entire dike could have collapsed which would have been a disaster not only for the existing City, but also for the residents and owners of the proposed annexed property."[120] The City further claims that "the Court should now approve the annexation which will permit the City to properly tax these benefitted taxpayers."[121] Both parties focused their cases on the equitable distribution of the cost of the dike, taxes, and the costs of shared services.

While the City now wishes that it had predicated its involvement with the dike reconstruction on the annexation of all of the land within the dike's protection, the Act limits the presiding administrative law judge's authority to the facts as they exist in the present. The reconstructed dike is currently in existence and there are not facts to indicate that the denial of the present annexation petition will impact the dike. The protection of the dike is an existent fact for the City and the subject area.

The question then is: are other services from the City required for the subject area such that annexation should be ordered? The City currently provides a number of essential services to the subject area including, most importantly, water and fire protection. However, these services are presently provided to the subject area; there are no new services that the City would offer the subject area upon annexation.

The City does not currently provide sewer services to the subject area and, except for one residence, it is not clear that the City is capable of providing sewer services to the subject area. Rather, the City is prepared to provide sewer services to the area that it wishes to develop on its northern border where it has built sewer stubs.

The City argued that the residents of the subject area must drive on the City roads to access the subject area and that it maintains a city park. Roads and parks are typically open to all throughout the state and they do not form a basis to order the annexation. The City also held out mosquito control and garbage pick-up as potential services, but there is no indication that the subject area is not capable of taking care of these needs without annexation.

E. Would the annexation be in the best interest of the subject area?

The enabling provisions of the Act describe the parameters for the Administrative Law Judge's decision in this case. The enabling provisions shed light on what the legislature meant by "best interest of the subject area." These provisions state in relevant part that:

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[120] City's brief at 3 and 4.
[121] *Id.* at 4.

> Municipal government most efficiently provides governmental services in areas intensively developed for residential, commercial, industrial, and governmental purposes; and township government most efficiently provides governmental services in areas used or developed for agricultural, open space, and rural residential purposes.

The City argues that "should the City no longer provide dike protection, water services, fire protection, street access, mosquito protection and park services, the owners of the proposed annexed property would be harmed."[122] The Act requires the Administrative Law Judge to apply the law to the facts as they exist at present. Under the present conditions the subject area is used for agriculture and rural residential purposes. The subject area is not now, and is not imminently about to become, intensively developed. Following the general parameters of the Act which assume that townships are the preferred form of government for agricultural and rural residential purposes, and considering all of the factors set forth above, the Petition for Annexation fails.

B. J. C.

[122] City's brief at 6.