

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Annexation of  
Certain Real Property to the City of  
Proctor from Midway Township  
(MBAU Docket A-7919)

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER REGARDING  
SUPPLEMENTATION OF RECORD**

This matter is before Chief Administrative Law Judge Tammy L. Pust on request of the City of Proctor for approval of annexation by ordinance of certain real property under Minn. Stat. § 414.033 (2014).

John H. Bray, Maki & Overom, appears on behalf of the City of Proctor. Robert E. Asleson, Assistant City Attorney, appears on behalf of the City of Duluth and in opposition to the requested annexation by ordinance.

Based on the submissions of the parties and for the reasons set forth in the Memorandum attached hereto, the Chief Administrative Law Judge makes the following:

**FINDINGS OF FACT**

1. This action relates to certain real property (Property) owned by Julie Savalas and George Hovland, III (Landowners) and legally described as follows:

Northeast Quarter of Southeast Quarter (NE $\frac{1}{4}$  of SE $\frac{1}{4}$ ), Section Twenty-one (21), Township Forty-nine (49), Range Fifteen (15).

East Half of Northwest Quarter of Northeast Quarter (E $\frac{1}{2}$  of NW $\frac{1}{4}$  of NE $\frac{1}{4}$ ), EXCEPT Minnesota Power & Light Company right-of-way 3.35 acres; and EXCEPT highway right-of-way, Section Twenty-one (21), Township Forty-nine (49), Range Fifteen (15).

Southwest Quarter of Northeast Quarter (SW $\frac{1}{4}$  of NE $\frac{1}{4}$ ), EXCEPT .07 acres for right-of-way for Minnesota Power & Light Company; and EXCEPT highway right-of-way, Section Twenty-one (21), Township Forty-nine (49), Range Fifteen (15).<sup>1</sup>

2. The property is located in St. Louis County, Minnesota,<sup>2</sup> and is highlighted in yellow on the map inserted below.<sup>3</sup>

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<sup>1</sup> Ordinance No. 03-14 (Ordinance), Exhibit (Ex.) A.

<sup>2</sup> Ordinance.

<sup>3</sup> Ordinance, Ex. B.



### Duluth/Midway Township Orderly Annexation Efforts

3. On January 14, 2013, the City of Duluth and the Township of Midway (Midway Township) entered into an Orderly Annexation Agreement (OA Agreement) and thereby designated certain real property as an Orderly Annexation Area pursuant to the authority of Minn. Stat. § 414.0325 (2012).<sup>4</sup>

4. In the OA Agreement, the Orderly Annexation Area was divided into three categories, identified as Parcel I, Parcel II, and Parcel III, each of which were made subject to various terms of the OA Agreement.<sup>5</sup>

5. The parties agreed that the majority of the properties contained in Parcel I were owned by the City and could be annexed by ordinance by the City of Duluth “at such time as it deems appropriate.”<sup>6</sup>

6. With respect to Parcel II and Parcel III, the OA Agreement provided as follows:

The City will not initiate annexation of any property within Parcels II or III of the Orderly Annexation Area during the term of this orderly annexation agreement unless and until said property meets both of the following criteria:

- A. The density of population and development in the area to be annexed becomes more characteristic of urban or suburban development than of rural development.

<sup>4</sup> Agreement for Orderly Annexation by and between the City of Duluth and the Town of Midway (Jan. 14, 2013).

<sup>5</sup> *Id.* at 1.

<sup>6</sup> *Id.* at 2.

B. Transportation or utility infrastructure in and through the area to be annexed is best provided by the City.<sup>7</sup>

7. On July 21, 2014, the City of Duluth adopted Ordinance No. 10321 approving the annexation by ordinance of Parcel I, with the consent of Midway Township.<sup>8</sup>

8. On August 25, 2014, the City of Duluth filed with the Office of Administrative Hearings a request for approval of annexation by ordinance, pursuant to Minn. Stat. § 414.033 (2014), related to Parcel I.<sup>9</sup>

9. On October 8, 2014, the City of Duluth amended its request for annexation of Parcel I to constitute a request for approval of orderly annexation pursuant to Minn. Stat. § 414.0325.<sup>10</sup>

10. By Order of the Chief Administrative Law Judge issued on October 14, 2014, approximately 2,488 acres constituting the Parcel I properties were annexed to the City of Duluth under the authority of Minn. Stat. § 414.0325.<sup>11</sup>

11. To date, neither the City of Duluth nor Midway Township have commenced any further proceedings with the Office of Administrative Hearings related to the annexation of the properties designated as Parcel II or Parcel III in the OA Agreement.

#### Proctor's Annexation by Ordinance Proceeding

12. The Property that is the subject of the instant proceeding is located within Parcel II as designated in the OA Agreement between the City of Duluth and Midway Township.<sup>12</sup>

13. On August 18, 2014, the City of Proctor adopted Ordinance Number 03-14 (Ordinance) in an effort to annex the subject Property to the City of Proctor.<sup>13</sup>

14. The City filed the Ordinance with the Office of Administrative Hearings on or about December 18, 2014 for the purpose of obtaining approval of the annexation of the Property, and tendered the required filing fee on or about January 8, 2015.<sup>14</sup>

15. The Ordinance contains the following relevant recitals:

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<sup>7</sup> *Id.*

<sup>8</sup> Ordinance No. 10321 (July 21, 2014) (received at OAH on Aug. 25, 2014).

<sup>9</sup> *Id.*

<sup>10</sup> Correspondence from Robert Asleson (Oct. 8, 2014).

<sup>11</sup> Findings of Fact, Conclusions of Law and Order in OAH MBA Docket No. OA-1545-1 (Oct. 14, 2014).

<sup>12</sup> See OA Agreement.

<sup>13</sup> Ordinance.

<sup>14</sup> Correspondence from John H. Bray (Dec. 18, 2014); Correspondence from John H. Bray (Jan. 6, 2015).

- a. The Property is unincorporated and abuts the City of Proctor on its southerly boundary;
- b. The Property consists of 92 acres;
- c. The Property is not presently served by public sewer facilities or public sewer facilities are not otherwise available;
- d. The Property is not located within a flood plain or shoreland area;
- e. The Property is currently designated as residential;
- f. Annexation is requested to facilitate the extension of city services for the development of the Property;
- g. The City of Proctor held a public hearing related to the annexation of the Property on August 4, 2014;
- h. The population of the Property is zero;
- i. The Property is about to become urban or suburban in nature in that commercial use is being proposed for the Property which will require city services, including public sewer facilities.<sup>15</sup>

16. The Ordinance also references a “petition signed by all the property owners,” but no such petition is attached to or was filed with the Ordinance.<sup>16</sup>

17. On January 16, 2015, the Office of Administrative Hearings received from the City of Duluth an objection to the proposed annexation by ordinance of the Property to the City of Proctor, which objection is grounded in the fact that the Property is subject to the OA Agreement executed by the City of Duluth and Midway Township and the assertion that the Property is therefore not legally eligible for annexation by ordinance from any other adjoining municipality.<sup>17</sup>

18. In addition, the City of Duluth asserts that “public wastewater facilities are available to the [Property].”<sup>18</sup>

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<sup>15</sup> Ordinance.

<sup>16</sup> *Id.*

<sup>17</sup> Correspondence from Robert Asleson (Jan. 14, 2015).

<sup>18</sup> Correspondence from Kenneth D. Butler (July 15, 2014).

Based on a review of the files herein, the Chief Administrative Law Judge makes the following:

### CONCLUSIONS OF LAW

1. The Chief Administrative Law Judge is authorized to review and approve an annexation ordinance pursuant to Minn. Stat. Ch. 414 (2014) and Minn. R. 6000 (2015).

2. Except as identified with respect to the Order Regarding Supplementation of Record, the City of Proctor has fulfilled all procedural requirements of law and rule so that this matter is properly before the Chief Administrative Law Judge.

3. The Ordinance was passed under Minn. Stat. § 414.033, subd. 2(3), which provides:

A municipal council may by ordinance declare land annexed to the municipality and any such land is deemed to be urban or suburban in character or about to become so if . . . the land abuts the municipality and the area to be annexed is 120 acres or less, and the area to be annexed is not presently served by public wastewater facilities or public wastewater facilities are not otherwise available, and the municipality receives a petition for annexation from all the property owners of the land.

4. Minn. Stat. § 414.0325, subd. 6, describes the validity and effect of an orderly annexation agreement as follows:

An orderly annexation agreement is a binding contract upon all parties to the agreement and is enforceable in the district court in the county in which the unincorporated property in question is located. The provisions of an orderly annexation agreement are not preempted by any provision of this chapter unless the agreement specifically provides so. If an orderly annexation agreement provides the exclusive procedures by which the unincorporated property identified in the agreement may be annexed to the municipality, the municipality shall not annex that property by any other procedure.

5. At present, there is no other “boundary adjustment proceeding pending before the chief administrative law judge”<sup>19</sup> which involves the subject Property.

6. There is no statutory basis upon which to conclude that Minn. Stat. § 414.0325 trumps or otherwise preempts the annexation process set forth in Minn. Stat. § 414.033, as long as the annexation-by-ordinance is commenced by a municipality not a party to an underlying orderly annexation agreement.

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<sup>19</sup> Minn. Stat. § 414.033, subd. 6.

Based on the files and record herein, and for the reasons set forth in the accompanying Memorandum, the Chief Administrative Law Judge issues the following:

### ORDER

1. On or before 4:30 p.m. on August 31, 2015, the City of Proctor shall submit evidence establishing that all Landowners signed a petition requesting annexation by ordinance of their Property to the City of Proctor.

2. On or before 4:30 p.m. on August 31, 2015, the City of Proctor, Midway Township and/or the City of Duluth, at the option of each, shall submit supplemental evidence<sup>20</sup> related to whether the subject Property is “presently served by public wastewater facilities or public wastewater facilities are otherwise available” as specified in Minn. Stat. § 414.033, subd. 2(3), which evidence shall specifically address the following issues:

a. Does public wastewater infrastructure currently exist such that the Landowners could obtain these services upon mere payment of a connection fee and the completion of minor connection services by the authorized agency?

b. If the answer to the first question is negative, describe what construction would be required in order to lay in public wastewater infrastructure to a location such that it would be available for immediate connection by the Landowners, specifying amount of pipe or other materials, distance to be covered, and a reasonable estimate of cost associated with any necessary construction, plus any other relevant evidence.

c. If the answer to the first question is negative, specify what governmental processes/actions would be necessary in order to commence installation of any necessary public wastewater infrastructure to a location such that it would be available for connection by the Landowners (which agencies/bodies would need to approve; how much time would be required; etc.)

3. Upon receipt and review of the supplemented record, the Chief Administrative Law Judge will issue an order either approving or disapproving the subject Ordinance pursuant to Minn. Stat. § 414.033.

Dated: August 21, 2015

s/Tammy L. Pust  
TAMMY L. PUST  
Chief Administrative Law Judge

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<sup>20</sup> The following evidence is already in the record and need not be resubmitted: Correspondence from Kenneth D. Butler (Aug. 6, 2014); Correspondence from K. Butler (July 15, 2014); Correspondence from Joe Jurewicz, P.E. (undated, faxed on July 15, 2014); Correspondence from Jack Ezell (July 7, 2014); Correspondence from Keith Hamre (July 30, 2014).

## NOTICE

This Order is the final administrative order in this case under Minn. Stat. §§ 414.033, .07, .09, .12 (2014). Pursuant to Minn. Stat. § 414.07, subd. 2, any person aggrieved by this Order may appeal to St. Louis 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 this Findings of Fact, Conclusions of Law, and Order Regarding Supplementation of the Record within seven days from the date of the mailing of the Order pursuant to Minn. R. 6000.3100 (2015). However, no request for amendment shall extend the time of appeal from this Order.

## MEMORANDUM

Duluth argues that “the City of Proctor lacks both standing and jurisdiction to entertain the proposed annexation.”<sup>21</sup> Duluth reasons:

There is no statutory authority under Minnesota Law which permits a municipality to consider an annexation by ordinance petition of real property which is subject to an existing Orderly Annexation Agreement between two or more other municipalities. The January 14, 2013 Orderly Annexation Agreement between the City of Duluth and the Township of Midway encompasses the Savalas/Hovland real property and for that reason it cannot now be annexed under Minn. Stat. § 414.033 without the consent of the parties to the Orderly Annexation Agreement.<sup>22</sup>

Duluth’s argument presumes that an OA Agreement trumps and supersedes a subsequent annexation by ordinance. But Duluth fails to cite any legal authority for its position, and, in fact, relevant law contradicts the presumption.

In *City of Wyoming v. Minnesota Office of Administrative Hearings*,<sup>23</sup> the Wyoming City Council and the Wyoming Town Board approved a joint resolution and orderly annexation agreement to annex all of Wyoming Township into the City of Wyoming. The parties filed the orderly annexation agreement with the Office of Administrative Hearings, but before the annexation was officially approved, the City of Chisago City and the City of Stacy petitioned the OAH to annex portions of Wyoming Township.<sup>24</sup> The court of appeals noted that chapter 414 contemplates situations involving conflicting annexation petitions and bestows upon the chief administrative law judge<sup>25</sup> the discretion to

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<sup>21</sup> Correspondence from K. Butler (July 15, 2014).

<sup>22</sup> *Id.*

<sup>23</sup> 735 N.W.2d 746, 748 (Minn. Ct. App. 2007), *review denied* (Minn. Sept. 26, 2007).

<sup>24</sup> *Id.*

<sup>25</sup> In 2007 when *City of Wyoming* was decided, the statute gave the director of the Office of Strategic and Long Range Planning the duty to “conduct proceedings, make determinations, and issue orders for the creation of a municipality, the combination of two or more governmental units, or the alteration of a municipal boundary.” See Minn. Stat. § 414.01, subd. 1 (2006). That duty is now vested in the chief administrative law judge. See *id.* (2014).

determine which of the competing petitions for annexation should proceed first.<sup>26</sup> *City of Wyoming* therefore stands for the proposition that an annexation pursuant to an OA Agreement does not automatically supersede a later filed annexation action.

Neither does the annexation-by-ordinance statute support the claims made by Duluth and Midway Township. The statute provides as follows:

Whenever a proceeding for annexation is initiated under this section and all or any part of the land is included in another boundary adjustment proceeding pending before the chief administrative law judge, no action thereon shall be taken by the municipality, unless otherwise provided by an order of the chief administrative law judge, until final disposition has been made of the pending petition.<sup>27</sup>

In the present case to date, however, there is no other boundary adjustment proceeding pending before the chief administrative law judge; the OA Agreement has been filed with the Office of Administrative Hearings but Duluth is not currently attempting to annex any portion of Midway Township. These circumstances demonstrate, even more persuasively than in *City of Wyoming*, that the Ordinance must be considered under Minn. Stat. § 414.033 despite the existence of an OA Agreement between Duluth and Midway Township.

Nothing in Minn. Stat. § 414.0325 provides otherwise. While the statute specifically notes that the terms of an orderly annexation agreement are binding on the parties thereto, it does not elevate the agreement terms above the statute as a whole with respect to nonparties. Therefore, there is no statutory support for Duluth's argument that the OA Agreement trumps the annexation-by-ordinance statute as a matter of law.

However, Duluth also argues that "public wastewater facilities are available to the [Property]."<sup>28</sup> Under the statute, the area to be annexed must not be presently served by public wastewater facilities or public wastewater facilities must not be otherwise available.<sup>29</sup> Therefore, if Duluth is correct and public wastewater facilities are available to the Property, annexation by ordinance may be inappropriate.

The statute authorizes the Chief Administrative Law Judge to "require the city or property owners to furnish additional information concerning an annexation by ordinance to inform the Chief Administrative Law Judge about the extent to which the proposed annexation conforms to the statutory criteria set forth in sections 414.01, subdivision 1, and 414.031, subdivision 4."<sup>30</sup> Section 414.01, subdivision 1, states that it is the Chief Administrative Law Judge's duty to "conduct proceedings, make determinations, and issue orders for the creation of a municipality, the combination of two or more governmental units, or the alteration of a municipal boundary." Under section 414.031,

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<sup>26</sup> *City of Wyoming*, 735 N.W.2d at 753.

<sup>27</sup> Minn. Stat. § 414.033, subd. 6.

<sup>28</sup> Correspondence from K. Butler (July 15, 2014).

<sup>29</sup> Minn. Stat. § 414.033, subd. 2(3).

<sup>30</sup> *Id.*, subd. 10.

subdivision 4, one relevant factor to be considered by the Chief Administrative Law Judge is the “adequacy of town government to deliver services to the subject area.” As the current record is inadequate to support a finding related to the availability of public wastewater service to the subject Property, supplementation will be allowed as set forth in the present Order.

Minn. Stat. § 414.033, subd. 2(3), allows for annexation by ordinance in appropriate circumstances if “the municipality receives a petition for annexation from all the property owners of the land.” While the City of Proctor’s Ordinance recites that all property owners petitioned for annexation, the signed petition itself is not provided. Therefore, it is not apparent from the current record whether the Ordinance is appropriate for approval. This too supports the request for supplementation of the record as noted in the present Order.

**T. L. P.**