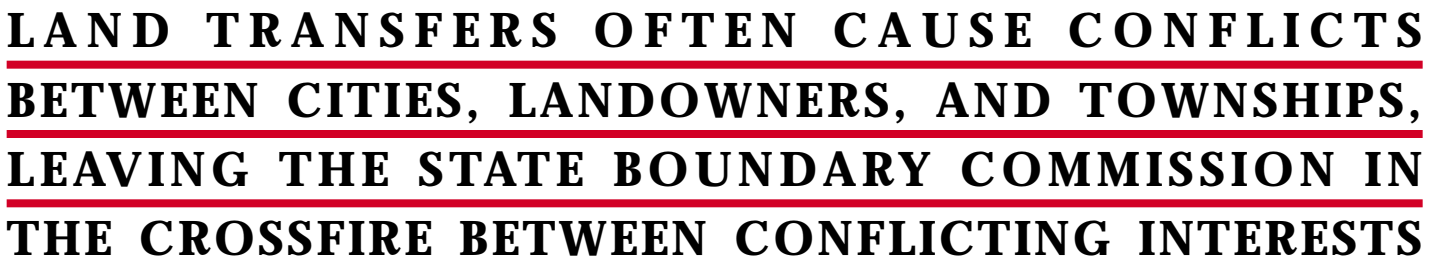



BY ROBERT J. PINEAU



The SBC has the clear authority to examine Act 425 agreements to determine if they comply with Act 425.



In a case of first impression, the Michigan Court of Appeals clarified the relationship between annexation petitions and agreements for conditional transfers of land and the role of the State Boundary Commission with respect to each. Annexation proceedings provide a transfer of land into the boundaries of a city. With Public Act 425 of 1984 (Act 425), the Michigan legislature codified a contractual method of annexation where one local unit of government conditionally transfers land to another local unit of government.¹ A conditional transfer agreement bars annexation of property covered by the agreement.² The bar to annexation is a source of conflict between cities, landowners seeking annexation, and townships participating in conditional transfer agreements (Act 425 agreements). The State Boundary Commission (SBC), the administrative agency charged with the jurisdiction to resolve petitions for annexation,³ is directly in the middle of these conflicting interests.

The court of appeals had the opportunity in *Township of Casco v Michigan State Boundary Commission*, to address and lend clarity to these issues. In its decision, the court held that to bar an annexation, Act 425 agreements must comply with both the form and substance of the Act 425 statutory requirements and that the SBC has the jurisdiction and authority to determine whether an Act 425 agreement meets the statutory requirements and is, therefore, a bar to an annexation proceeding.

THE BOUNDARY COMMISSION ACT

Before 1984, there was one way for a governmental unit to acquire jurisdiction over property located in another governmental unit—annexation. Annexation begins with a petition by either the governmental unit or the property owners.⁴ Once filed, the SBC has jurisdiction over the petition.⁵ The Boundary Commission Act (BCA) requires the SBC to hold public hearings to receive input.⁶ Under the BCA, the decision to annex requires the SBC to consider and weigh eight statutory factors.⁷

The process is lengthy and often adversarial, even when annexation is sought by the property owners. Although it may alter the boundaries of the property sought to be annexed, the SBC's authority is limited to granting or denying the petition. The governmental unit with jurisdiction over the property to be annexed often opposes the annexation because it receives nothing in return for the lost property and the reduction of its tax base. The SBC has no power to grant relief to the governmental unit for these concerns.

ACT 425

This backdrop started to change in 1979 when the General Motors Corporation wished to expand a production plant located in Flint.⁸ The city of Flint did not have suitable property available for the expansion, but neighboring Genesee Township did have a vacant industrial park that was suitable and available. Annexation of the land into Flint was an option. To facilitate the expansion of the plant, Flint and Genesee Township executed a contract to transfer the land to Flint in exchange for Genesee Township sharing in the tax revenues generated by the plant after its expansion. This "contractual annexation" provided Genesee Township with tax revenues

and Flint with the property necessary for the development project. This win-win situation provided Genesee Township compensation unavailable in an annexation proceeding.

The concept of a "contractual annexation" was novel and had no express statutory authority. Although the General Motors plant expansion did not occur for unrelated reasons, the Michigan legislature saw the value in contractual annexations, creating House Bill 4995. Their intent was to provide a mechanism in which two or more local units of government could authorize the conditional transfer of property, by mutual agreement, for the purpose of furthering an economic development project.⁹ HB 4995 was passed and Act 425 was signed into law, effective March 29, 1985.

Act 425 permits two or more local governmental units to conditionally transfer property for the purpose of completing an economic development project. An Act 425 agreement must contain certain provisions, may contain others, is valid for up to 50 years, and may be renewed. If validly enacted and properly filed, the Act 425 agreement acts as a bar to "another method of annexation or transfer." The filing of an Act 425 agreement is prima facie evidence of its validity.¹⁰

Act 425 has provided townships with a way to pool their land and resources to accomplish development projects benefiting both communities. These cooperative ventures, in the spirit of the Flint-Genesee Township agreement, are in keeping with the legislative intent. The bar to "another method of annexation or transfer," however, has been viewed by some townships as a way to inoculate themselves from annexations regardless of the viability or seriousness of their economic development project.

THE WHEATFIELD TOWNSHIP CASE

An early example of an improper use of Act 425 involved an agreement between Wheatfield and Williamston Townships. The city of Williamston filed an annexation petition seeking to annex land within Wheatfield Township. In response, Wheatfield and Williamston Townships entered into an Act 425 agreement. The stated economic development project was to control water pollution by extending Williamston Township's sewer system into Wheatfield Township. The SBC determined that the Wheatfield-Williamston Act 425 agreement was invalid and did not bar the annexation sought by the city of Williamston. The annexation petition was approved. On appeal to the Ingham County Circuit Court, Judge Lawrence Glazer affirmed the SBC's determination in an unpublished decision.¹¹ Judge Glazer held that the SBC had the authority to determine whether an Act 425 Agreement was valid—hence, the prima facie validity created by its filing could be rebutted and, in that case, was rebutted. Judge Glazer affirmed the SBC. No further appeals were taken.

TOWNSHIP OF CASCO V STATE BOUNDARY COMMISSION

In 1995, the city of Richmond filed an annexation petition regarding property located in Richmond Township.¹² In response, contiguous townships Casco, Columbus, and Richmond each

executed separate but identical Act 425 agreements with Lenox Township. The stated economic development project was to extend water and sewer services from Lenox into the other townships and to provide joint police, fire, emergency, and library services. The SBC found the Lenox-Richmond Township Act 425 agreement to be invalid and rejected the claim that it was a bar to Richmond's annexation petition. The SBC then denied the annexation petition on its merits.

In 1996, landowners in Casco and Columbus Townships petitioned the SBC for annexation of their land into the city of Richmond.¹³ The landowners sought access to the city's water and sewer services to complete several commercial and residential development projects. The land petitioned for annexation was covered by the Act 425 agreements between Lenox Township and Casco and Columbus Townships, which were executed in response to the 1995 SBC proceeding.

Casco and Columbus Townships opposed the annexation claiming that their Act 425 agreements barred consideration of the annexation petition. Lenox Township did not participate in the proceedings before the SBC. Lenox did participate in the appellate proceedings in the St. Clair Circuit Court. The landowners and Richmond countered by claiming that the agreements were invalid since Lenox could not provide the water and sewer services in the foreseeable future, if at all, and even if they could, the costs would be astronomical. Other evidence suggested that the true intent of the townships was to discourage development in favor of retaining their existing farm land. By contrast, Richmond had existing water and sewer services contiguous to the property that could be used immediately and inexpensively.

The SBC determined that the Act 425 agreements did not bar consideration of the merits of the annexation petition. The SBC then approved annexation. Casco, Columbus, and Lenox Townships appealed to the St. Clair County Circuit Court. Judge Daniel Kelly affirmed the SBC in all respects, holding that the prima facie validity of the Act 425 agreements could be rebutted, that the SBC had the authority to determine if the Act 425 agreements barred the annexation petition, that the SBC properly determined that the Act 425 agreements did not bar annexation, and that the annexation petition should be approved.

The townships sought and were granted leave to appeal to the Michigan Court of Appeals. The Michigan Court of Appeals affirmed Judge Kelly and the SBC.¹⁴ The court held that just filing an Act 425 agreement does not end the SBC's inquiry of whether the statutory bar to annexation exists. As the body given the jurisdiction to resolve annexation petitions, the SBC has the authority to interpret statutes affecting the discharge of its duties. This includes the authority to interpret the requirements of Act 425 and decide if an Act 425 agreement meets those requirements.

The townships' arguments that 1) the prima facie effect of the Act 425 agreements was conclusive and not subject to rebuttal, 2) the SBC, as an administrative body, had no jurisdiction to interpret statutes, contracts, or the Act 425 requirements, and 3) the decision by the SBC that the Act 425 agreements failed to meet the

requirements of Act 425 resulted in an unconstitutional impairment of their contract rights, were all rejected. In this case, according to the Michigan Court of Appeals, the SBC correctly discharged its duties and its decision that the Act 425 agreements were invalid was affirmed. The ultimate decision that annexation was warranted under the eight annexation criteria, which the townships did not appeal, was affirmed. The Michigan Supreme Court denied leave.

The import of this decision is that townships must enact Act 425 agreements that establish true economic development projects to create the bar to annexation provided by Act 425. While all of the parameters of a true economic development project were not stated by either the SBC or the Michigan Court of Appeals in *Casco*, it is clear that the promise of infrastructure necessary for development must include the ability to provide that infrastructure in the reasonably near future. In this case, water and sewer services were promised but the townships were vague about their ability to provide those services in a reasonable time period, if at all.

Townships can no longer maintain that any document entitled "Act 425 Agreement" creates a bar to annexation. The SBC has the clear authority to examine Act 425 agreements to determine if they comply with Act 425. If they do, the statutory bar to annexation is created. If they do not, the SBC may go on to consider the merits of the annexation. This ruling both strengthens the role of the SBC and provides more opportunities for cities and developers to pursue annexation as a tool for development. Alternatively, townships must provide real economic development alternatives through an Act 425 agreement if they hope to bar annexation of their land. Regardless of the source of the development opportunity, the landowner or developer, whose goal it is to develop the land in the most cost-effective and timely manner, is the real winner. ◆



Robert J. Pineau is a member of the Detroit firm of Kerr, Russell and Weber, PLC. He received a BA from Oakland University and a JD, cum laude, from Syracuse University College of Law. His practice areas include commercial litigation, intellectual property, and business law. He can be reached at RJP@KRWPLC.com.

Footnotes

1. MCLA 124.21.
2. MCLA 124.29.
3. MCLA 123.1011a.
4. MCLA 117.6.
5. MCLA 1011a.
6. MCLA 117.9(2).
7. MCLA 123.1009(a).
8. See House Legislative Analysis to HB 4995.
9. *Id.*
10. MCLA 124.
11. *Wheatfield Township v Michigan State Boundary Commission*, Ingham County Circuit Court No. 94-78685-AA, Bench Decision dated June 6, 1995.
12. SBC No. 95-AR-1.
13. SBC No. 96-AP-10.
14. *Casco*.