2-7-1975

Board of County Com'rs of Jefferson County v. City and County of Denver

IN THE SUPREME COURT

STATE OF COLORADO

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON, STATE OF COLORADO, a body politic and corporate; JOHN A. TOPOLNICKI; DARRELL M. PINCKNEY: and ERNEST WILROY RENSHAW, Plaintiff-Appellees, vs. THE CITY AND COUNTY OF DENVER, STATE OF COLORADO, a municipal corporation; THE CITY COUNCIL OF THE CITY AND COUNTY OF DENVER, STATE OF COLORADO; THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, STATE OF COLORADO, Defendants-Appellants.	)	NO. 26637

REPLY BRIEF OF DEFENDANTS-APPELLANTS

APPEAL
FROM THE DISTRICT COURT
COUNTY OF JEFFERSON
CIVIL ACTION NO. 42004

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Reply to County's Argument I:

The County argues in its first section that the annexation is void because Denver did not proceed under Section 31-8-120, C.R.S. 1973. The undisputed facts establish that the land annexed was a portion of a street together with tax exempt land owned by Denver. There is not evidence of the existence of school children living in any portion of the territory. Section 31-8-120, C.R.S. 1973, is concerned with two ratios, assessed value and school children, before and after annexation. Its purpose is to prevent Denver from annexing tax base without annexing children. Section 31-8-120, C.R.S. 1973 was not intended to and has no applicability to this annexation from a procedural or substantive point of view.

Reply to County's Argument II:

The County argues and the trial court reasoned that when the Act excluded streets and alleys in Section 31-8-107(1)(g), C. R. S. 1973, if they intended to accomplish the same result in Section 31-8-106, C.R.S. 1973, the language would have specifically provided that result. Denver replies that this argument has no more logic than the argument that if the legislature intended that streets and alleys were to be included, the Act would have required the municipality to own 100% of the territory to be annexed including streets or alleys.

The Act, in fact, says neither and statutory construction limited to Sections 31-8-106(3) and 31-8-107(1)(g), C. R. S. 1973, does not lead to either result. The application of the rule of "expressio unius est exclusio alterius" does not support either construction and is not of universal application.

Park v. Soldiers' and Sailors' Home, 22 Colo. 86, 43 Pac. 542, (1896):

> The maxis "expressio unius est exclusio alterius" is not, however, of universal application. It has its exceptions, one of which is that when there is reason for mentioning one thing

> and not the other, the absence of any mention of the latter will not be considered as an exclusion. Sedgwick on Statutory Construction, page 31; Sutherland on Statutory Construction, sec. 329.

Rather than arguing that the legislature would have added "including streets and alleys" or "excluding streets and alleys", if that was their intention, Denver replies that the failure to add either shows an intent not to change the law. This is particularly true when Denver v. Holmes, 156 Colo. 586, 400 P.2d 901, was decided on April 5, 1965, while the legislature was debating the Municipal Annexation Act of 1965.

Reply to County's Argument III:

The County argues that the school board resolution must literally accompany the petition or resolution to each councilman's hand for the action of Council to be proper. The undisputed facts establish that the resolution of the school board was adopted and filed with the Clerk and Recorder of Denver. This Court has held in Pomponio v. Westminster, 178 Colo. 80, 496 P.2d 999:

> The next question raised regards the time and contiguity requirements of section 139-21-5(2)(a). The Pomponios argue that a survey must be made and specific dates established in order for City Council to find that the requirements of section 139-21-5(2)(a) for involuntary annexation are met. We do not agree. City Council can take official notice of all maps, records and other pertinent information within the city's files to insure a fair disposition of the controversy. See Denver v. Dore, _____ Colo. _____, 490 P.2d 694 (1971). In the instant case, a summary of this information was presented by testimony and exhibits in the record at the public hearing before the Westminster City Council. (emphasis added)

Additionally, Denver points out that the section of the Act relied on by the County does not require a School Board Resolution. Section 31-8-105(4) requires a school board resolution to accompany petitions filed under Section 31-8-107 and resolutions adopted pursuant to Section 31-8-106. The annexation of city-

owned land is accomplished under Section 31-8-106(3) which is accomplished by ordinance with no reference or requirement for the adoption of a resolution. In any event, whether or not a school board resolution was required, one was adopted and is part of the record.

Reply to County's Argument IV and V:

Two facts should be restated:

1) In this annexation not less than one-sixth of the perimeter of the area proposed to be annexed was and is contiguous with the City and County of Denver;

2) The territory as shown by the records of Jefferson County to be owned by Denver, abuts the former boundary of Denver at a single point. This fact is admitted by the County in its Answer Brief at page 11.

It should be further noted that the legislature substantially changed the eligibility requirement by the Act of 1965. The former statute, 139-10-2(c), 1973 C.R.S., provided that the territory:

> (c) abuts upon or is contiguous to the city, city and county, or incorporated town to which it is proposed to be annexed in a manner which will afford reasonable ingress and egress thereto, provided that not less than one-sixth of the aggregate external boundaries of the territory to be annexed must coincide with existing boundaries of the annexing municipality.

The present statute, Section 31-8-104(1)(a), C. R. S. 1973 provides:

> (a) that not less than one-sixth of the perimeter of the area proposed to be annexed is contiguous with the annexing municipality.

Denver replies to the argument of the County by stating that the facts as shown on the annexation map attached to the opening brief shows that this annexation is proper under the language of Section 31-8-104(1)(a), C.R.S. 1973. Denver further replies that under Section 31-8-104 the size and shape of an annexation is a legislative determination to be made by City Council and not a judicial determination to be made by the Court.

The County questions the eligibility of the subject property for annexation to City. Citing cases from other jurisdictions with similar factual situations may be misleading without a careful review of the statutes and case law from that jurisidiction. Most annexation cases start from a decision made by City Council or a State Boundary Commission that certain property is in fact eligible for annexation. The significant variation between jurisdiction concerns the role of the Court in reviewing that decision. Broadly stated, the state legislature in adopting its annexation statute establishes the facts which must exist to make specific territory eligible for annexation. The appellate courts in some jurisdictions then determine whether the eligibility for annexation exists as a judicial question while the appellate courts in other jurisdictions determine whether there is sufficient evidence to support the determination of the City Council that the territory is eligible for annexation. To repharase this question as it applies to the shape or size of the territory annexed: Is the determination of what area is contiguous to the City a judicial question for the Court or a legislative question for the City Council?

(1) Jurisdictions Holding That the Issue is Legislative.

In City of Safford v. Town of Thatcher, 495 P.2d 150, Arizona, it is stated that:

> First, the court must determine if the municipality followed the steps outlined in the statute for enacting an annexation ordinance. Secondly, the court must determine if the ordinance as enacted is reasonable. We are convinced that Arizona has clearly committed itself to the view that judicial inquiry is limited to the former and the courts will not concern themselves with the reasonableness or wisdom of annexation, since that is exclusively a legislative and political problem. See In re City of Phoenix, 52 Ariz. 65, 68-69, 79 P.2d 347, 348 (1938), where Justice Alfred c. Lockwood, speaking for the court, stated:
>
> "The power to create and to destroy municipal corporations, and to enlarge or diminish their boundaries is universally held to be solely and exclusively the exercise of legislative power. . ."

California approved (prior to a statute authorizing annexation of roadways) annexation of a 100 foot strip 12,655 feet long. In City of Burlingame v. San Mateo County, 203 P.2d 807, California, it is stated that:

> Contiguity does not depend on the extent of the property annexed and the question whether a municipal corporation should annex certain territory is political rather than judicial.
>
> [5,6] This question is ruled by People v. City of Los Angeles, 154 Cal. 220, 97 P.211. In that case, the City of Los Angeles annexed a strip sixteen miles in length and about half a mile in breadth. The court said, 154 Cal. at pages 224-226, 97 P. at page 312:
>
> "It will be observed from these provisions of the act that there is no limitation whatever expressed in the statute as to the extent or form of the territory to be annexed, and there is nothing from which any limitation can be implied."

Texas approved twelve separate strips each 10 feet wide and 1 mile long. In May v. City of McKinney, 479 SW.2d 114, it is stated:

> The right of the City of McKinney, a home rule city, to annex any territory is derived from Article 11, section 5 of the Constitution of Texas which restrains the exercise of legislative powers only to the extent that same shall not be inconsistent with the Constitution or general laws enacted by the legislature. Article 1175, sec. 2, V.A.C.S., as well as the charter of the City of McKinney, grants to such city the legislative power to annex territory "lying adjacent to said city" and Article 970a, sec. 7, subd. A, V.A.C.S., grants to a home rule city the power to annex territory only within the confines of its extraterritorial jurisdiction which, as applied to McKinney, is defined in section 3, subd. A (2),

> Article 970a, V.A.C.S., as being an area within one mile of the corporate limits of said city. Thus it would appear to be without question that the only limitations placed upon the City of McKinney to annex territory within its extraterritorial jurisdiction of one mile would be that such annexed territory is "adjacent thereto" and not a part of any other municipality.

Nebraska approved an irregular shaped parcel with 132 different calls of metes and bounds north and south about 7 miles east and west varying from 252 feet to 2950 feet. Bierschank v. City of Omaha, 135 NW.2d, 12, cites Wagner v. City of Omaha, 55 NW.2d 490, in which it is stated:

> As stated in Horbach v. Butler, 135 Neb. 394, 281 N.W. 804, 805:
> "In the absence of a showing that the city council acted outside of their granted powers, or of a showing that they abused the discretion lodged with them, in the exercise of a granted power, the finding of the city council is conclusive.

Oklahoma approved a 67 foot strip 18-1/2 miles long. Botsford v. City of Norman, 354 F.2d 491, Oklahoma.

Wyoming approved a petition taking in 64 blocks of a total of 120 blocks of West Laramie. In West Laramie v. City of Laramie, 457 P.2d 498, it is stated:

> [2,3] As a general proposition, the size and shape of the area to be annexed is a political question. 2 McQuillin, supra, §7. 18(c), p. 353. Under our statute the only requirement with respect to the scope and extent of the area to be annexed is that it must be contiguous to the annexing city or town. That the area involved was contiguous is undisputed. In an annexation proceeding the courts are not concerned with the wisdom or expediency of altering the boundaries of a city or town by annexation. City of Burlingame v. San Mateo County, 90 Cal. App.2d 705, 203 P.2d 807, 811; Hopperton v. City of Covington, Ky. App., 415 S.W. 2d 381, 384. It is also to be observed that the reasonableness of the action taken by the governing body, which incidentally counsel for appellants treats as synonymous with arbitrary action, is presumed and the burden on the landowner attacking the ordinance on that basis clearly to show by substantial evidence that such action was unreasonable. 2 McQuillin, supra, § 7.23, pp. 388-390.

(2) Jurisdictions Holding That the Issue is Judicial.

Illinois approved a strip annexation 300 feet by 1,987.50 feet with 675

feet contiguous to the City with the top of the strip attaching to a parcel 1,326 by 2,000 feet to form a large "L" shaped parcel. In Re Village of Buffalo Grove, 261 NE.2d 746, it is stated that:

> The finding of the trial courts to contiguity or lack of it will not be disturbed on appeal unless it is manifestly against the weight of the evidence.

In the City of Clinton v. Owners of Property, 191 NW.2d 671, Iowa, it is stated:

> [16,17] Our review is de novo in this equity case. Section 624.4, Code 1971, Rule 334, R.C.P. Especially when considering the credibility of witnesses we give weight to the fact findings of the trial court but are not boundy by them. Rule 344(f)(7), R. C. P.

In Hopperton v. City of Covington, 415 SW.2d 381, Kentucky, it is stated:

> [4,6] Appellants urge that it was error for the trial court to find under KRS 81.-110 that the failure to annex will materially retard the prosperity of the city and of the landowners and inhabitants of the area. The evidence establishes that the lack of undeveloped land has seriously hindered the city in its efforts to attract new industry and to implement its urban renewal program. It further reveals that the 346 residents of the 1620 acre area to be annexed are dependent on septic tanks for sewage disposal although the soil is heavy clay. This and other deleterious conditions are not conducive to the proper utilization of this area's potential. The city showed that as soon as possible it would provide the needed municipal services such as are enumerated in Hellman v. City of Covington, Ky., 393 SW.2d 889, (which case involved a nearby tract of land). The findings of the trial court, as set forth in an enlightening opinion, are abundantly supported by the evidence.

It is further stated, in Town of Owosso v. City of Owosso, 189 NW.2d 421, Michigan, as follows:

> So as to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation. Contiguity is generally required even in the absence of statutory requirement to that effect, and where the annexation is left in the discretion of a judicial tribunal, contiguity will be required as a matter of law. Genesee Township, supra, 603, 120 NW.2d 764.

In Town of Lyons v. City of Lake Geneva, 202 NW.2d 228, Wisconsin, it is further stated:

> . . .this court established the rule of reason to be applied in the review of annexation proceedings in addition to the statutory requirements. Town of Fond du Lac v. City of Fond du Lac (1964), 22 Wis.2d 533, 126 NW.2d 201; Mt. Pleasant v. Racine (1964), 24 Wis.2d 41, 45, 127 NW.2d 757. Under this rule, (1) exclusions and irregularities in boundary lines must not be the result of arbitrariness, (2) some reasonable present or demonstratable future need for the annexed property must be shown, and (3) no other factors must exist which would constitute an abuse of discretion.

(3) Colorado - Before cases from other jurisdictions are cited as applicable to a Colorado annexation, Colorado's annexation law should be evaluated.

A review of Colorado Annexation statutes and case law indicates Colorado is included within the states where the size and shape of annexed territory is a legislative decision. This is supported by a review of amendments of statutory law and cases decided thereunder.

(i) Statutory Law. Section 6709 of the 1908 Session Laws allowed the annexation of 4 acres of platted contiguous territory. "If the court finds the allegations of the petition to be true, and that justice and equity requires that said territory or any part thereof should be annexed."

Under the principal set forth in Enos v. District Court, 124 Colo. 335, 347, 238 P.2d 861, the language "justice" and "equity" requires a judicial determination.

The Session Laws of 1921, Section 9215 and 1935, Chapter 163, Section 293, contain the same language.

The annexation statute was substantially amended by the Session Laws of 1945 and 1947, striking the language "justice and equity" and requiring a (i) 1/6 boundary contiguity, (ii) reasonable ingress and egress thereto, and (iii) preventing division of territory of one owner. This substantially changed the annexation procedure in Colorado.

In Littleton v. Wagenblast, 139 Colo. 346, 338 P.2d 1025, it is stated:

> In the brief of counsel it is taken for granted that the county court is, under the statute, vested with discretionary power, as though the statute contained the words found sometimes in similar statutes, directing the court to grant the petition after hearing, 'If justice and equity require that such territory should be disconnected.' But no such provision is contained in the statute, and the words 'determine' and 'should' found therein do not authorize the court to do as it pleases. The statute is, in our opinion, mandatory; and if, upon the trial, it appears that the conditions required to be established by the statute have been established, it becomes the duty of the court to enter a decree disconnecting the territory from the city or town."

The Act of 1965 eliminated the requirements that there be reasonable ingress and egress to the territory, that it abut upon or be contiguous to the annexing municipality, but did add several additional limitations, Section 31-8-105; this Act also changed language requiring that 1/6 of the boundary of the territory annexed be contiguous with the boundaries of the annexing municipality as set out above. Legislatures have stricken provisions requiring the court to determine justice and equity; making a finding of reasonable ingress and egress; but most significant the legislature has stricken the requirement that the territory annexed be contiguous or abut upon the City. The Act now only requires that the perimeter of the annexation boundary to be contiguous.

These statutory changes indicate the clear intent of the legislature of Colorado in designating the City Council as the body to determine the size of shape of territory eligible for annexation, so long as "not less than one-sixth of the area proposed to be annexed is contiguous . . ."

(ii) Colorado Case Law. The Colorado Annexation Law indicates that the determination is not a judicial determination.

In Englewood v. Daily, 158 Colo. 356, 407 P.2d 325, under the former annexation statute, it is stated that:

> The hearing had upon the plaintiffs' complaint in the lower court was held pursuant to the provisions of C.R.S. 1963, 139-10-6, which allows "any person aggrieved by any annexation proceedings" to obtain a judicial review of the same. While this section of the statute does not, itself, delineate the authority of the reviewing court upon such review, its obvious purpose is to permit the court to determine only if the procedural mandates of the statute have been met; it cannot pass upon the wisdom of the annexation itself, nor can it invalidate any annexation for a reason other than a failure to comply with the provisions of the statute. City of Littleton v. Wagenblast, 139 Colo. 346, 338 P.2d 1025.

In County Commissioners v. Denver, 170 Colo. 56, 459 P.2d 292, again under the former statute, it is stated that:

> Plaintiffs' position apparently is that though tax exempt land may be included within the area sought to be annexed, such may not be situated on the perimeter abutting on the annexing municipality and thus used in meeting the contiguity requirements of C.R.S. 1963, 139-10-2(1)(c). We do not agree. Certainly the statute contains no such restrictions and we are not inclined to engraft onto the law such limitations by judicial interpretation.

In Westminster v. District Court, 167 Colo. 263, 447 P.2d 537, under the present Act, it is stated that:

> Although the respondents have attempted to justify the action of the trial court as a stay order, pursuant to power granted by rule, a reading of the order leaves little doubt that it is actually an injunction or restraining order. As such it is an unconstitutional interference with the statutory powers and duties of the City of Westminster. The legislature has power to prohibit a court from issuing injunctions in certain cases. See Denver Local Union No. 13 v. Perry Truck Lines, Inc., 106 Colo. 25, 101 P.2d 436; Enochs v. Williams Packing & Navigating Co., 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed. 2d 292. It has in effect done so in the annexation statute.

The question of a Colorado municipal boundary of 50 feet connecting two separate sections of a City has been before this Court twice in the last 3 years. In one case, the issue was discussed in the decision. In the other, it was not.

One of the cases was under the current Annexation Act and involved a very exaggerated fact situation and in which the plaintiffs attempted to interest

this Court in the shape of an annexed tract involving a road. Fort Collins-Loveland Water District v. City of Fort Collins, 174 Colo. 79, 482 P.2d 986. The Fort Collins case involved a true "flagpole" annexation wherein Fort Collins annexed a county road (the flagpole) to reach and annex property (the flag) which not only did not otherwise touch its municipal limits but was hundreds of feet from them. In that case, the plaintiffs vigorously asserted the impropriety of the flagpole annexation configuration and specifically called it to the Court's attention, set out in plaintiff-appellant's brief. This Court rejected the challenge to the annexation on other grounds (standing and timeliness) without mentioning the configuration of the area annexed. Hence, we can conclude that this configuration did not "shock the conscience" of this Court or lead it to conclude that the annexation was void ab initio. In any event, there is certainly nothing in any of the Colorado case law which supports the County's contention that the courts can or should impose additional conditions on the statutory conditions for annexation eligibility.

The other case was a disconnection case where this Court held that a City could consist of two parts joined by a 50-foot strip. In Greenwood Village v. Savage, 172 Colo. 217, 471 P.2d 606, it is stated that:

> THE TRIAL COURT ERRED WHEN IT DECREED DISCONNECTION OF THE TERRITORY INVOLVED AS SUCH DISCONNECTION DIVIDES THE TOWN INTO TWO PARTS.
>
> The town relies on the rule announced in Heckendorf supra, to the effect that disconnection of territory from a municipality cannot be decreed when the result is to divide the municipality into separate parts. Mrs. Savage asserts, even if the rule contended for is the law, that there has been no division of the town by virtue of the disconnection.
>
> As noted above, the amended petition excepted from the territory to be disconnected the west fifty feet, the west thirty feet of which constituted the east half of South Clarkson Street. The excepted strip, for practical purposes, is twenty feet in width and approximately 1288.75 feet in length.

> The town concedes that "the corridor of twenty feet connected the extreme west portion of the town to the east portion of the town," but poses the question whether "this umbilical cord" is sufficient in law to avoid the principle set forth in the Heckendorf case. Heckendorf held that no disconnection of land can be upheld which divides a town "into two areas wholly isolated from each other."
>
> The principle set forth in Heckendorf is not statutory law. However, the legislature has met many times since 1952 and, in its wisdom, has not seen fit to abrogate, expand, or modify the rule. We are not inclined to expand it.
>
> Under the circumstances shown to exist here the creation of the "corridor: has the effect of making the town's boundaries somewhat irregular, but, so far as the small area of the town which lies west of South Clarkson Street is concerned, it remains contiguous to the rest of the town with the same access to all parts of the town as existed before this disconnection. It is not "wholly isolated." The rule is not one of symmetry, but of contiguity. Richelt v. Town of Julesburg, supra.

It must be concluded that unless declared to be ineligible by the statute, the property is eligible for annexation.

Reply to County's Argument VI:

The County argues that McCray v. City of Boulder, 165 Colo. 383, 439 P.2d 350 is authority to void the annexation ordinance. Denver replies that that case does not stand for that proposition. The McCray case cites Fladung v. Boulder, 160 Colo. 271, 417 P.2d 787 as presenting an identical question. The Fladung case states that the ordinance does not comply with the Boulder Charter on emergency ordinances and sets out that Charter as follows:

> . . . was passed by the city council on the day it was introduced, in violation of Section 17 of the said Charter," which provides:
>
> "EMERGENCY MEASURES: No ordinance shall be passed finally on the date it is introduced, except in cases of emergency, for the preservation of the public peace, health or property, and then only by a two-thirds vote of the Councilmen present. The facts showing such urgency and need shall be specifically stated in the measure itself. **** "

The Court then set out the general law, at page 275:

> This court has repeatedly held that a legislative body may prevent a referendum to the people by declaring that the act in dispute is "necessary for the immediate preservation of the public peace, health and safety." In Re Senate Resolution No. 4, 54 Colo. 262, 130 Pac. 333; Van Kleeck v. Ramer, 62 Colo. 4, 156 Pac. 1108. This court has also held that, whether the recital in a municipal ordinance that it is "necessary for the immediate preservation of the public peace, health or safety is true or not, is a legislative, and not a judicial question." Shields, et al. v. City of Loveland, et al., 74 Colo. 27, 218 Pac. 913.

And then concluded that the ordinance barely complied with the Boulder Charter.

The ruling of the McCray case is the same. Without the provision of the Denver Charter to establish identical limitations the McCray case is meaningless.

Denver's Charter contains no such limitation and the general law as set out at page 275 of the Fladung case applies.

CONCLUSION

In annexing the territory owned by the City and County of Denver, the Denver City Council did not exceed its jurisdiction or abuse its discretion, and the District Court judgment should be reversed.

Respectfully submitted,

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