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DISCRETIONARY REVIEW GRANTED BY SUPREME COURT: AUGUST 15, 2007
(FILE NO. 2006-SC-0903-DG)

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001235-MR
AND
NO. 2005-CA-001305-MR

LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
CIVIL ACTION NO. 02-CI-006764

CITY OF PROSPECT, KENTUCKY — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY, JUDGE; HUDDLESTON AND KNOPF, SENIOR JUDGES.[1]

HUDDLESTON, SENIOR JUDGE: The Louisville/Jefferson County Metropolitan Government (Metro) appeals from a summary judgment that approved annexation by the City of Prospect, Kentucky (Prospect) of ten tracts of land containing approximately 50.3 acres. Prospect has filed a protective cross-appeal.

[1] Senior Judges Joseph R. Huddleston and William L. Knopf sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

On September 9, 2002, Prospect enacted an ordinance pursuant to Kentucky Revised Statutes (KRS) 81A.412[2] purporting to annex ten tracts of land contiguous to its city limits whose owners had consented to the annexation of their property. Shortly thereafter, Metro filed suit seeking a declaratory judgment that Prospect's annexation of the property was void *ab initio*.

On May 8, 1984, the City of Louisville's Board of Aldermen proposed an ordinance to annex certain tracts of land in eastern Jefferson County. The ordinance received a first reading and three subsequent first readings, but was never enacted. In 1986, the City of Louisville and Jefferson County entered into a legislatively-authorized compact under KRS 79.310. The compact called for Louisville and Jefferson County to create a cooperative framework for cohesive governance of the territory. In conjunction with the compact statute, Kentucky's General Assembly also enacted KRS 81A.005 which outlines the procedure for a first-class city's annexation of land when a cooperative compact is in effect. KRS 81A.005(3) gives priority to the first-class city's annexation ordinances existing on January 1, 1986. The statutory priority precluded annexation of

[2] KRS 81A.412 provides, in pertinent part, that "[a] city may annex any area which meets the requirements of KRS 81A.410, if each of the owners of record of the land to be annexed gives prior consent in writing to the annexation. * * * When a city has obtained the prior written consent of each owner of record of the land to be annexed, the city may enact a single ordinance finally annexing the land described in the ordinance. * * * Upon the enactment of this ordinance, the territory shall become a part of the city."

the same land by any other incorporated city within Jefferson County.

After a first reading of the ordinance on May 8, 1984, the Louisville Board of Aldermen reintroduced the ordinance every six months. During that time, the Board's Rule 30.15(B) deemed an ordinance expired if more than six months had elapsed between readings. The annexation ordinance was reintroduced on April 8, 1986, and shortly thereafter, the Board of Aldermen amended Rule 30.15(B) to exclude annexation ordinances from the reintroduction requirement. Accordingly, for our purposes, the "first reading" of the ordinance at issue in this case occurred April 8, 1986.

Metro argued before Jefferson Circuit Court that Prospect's annexation violated KRS 81A.005 because the area described in the 1986 proposed ordinance includes the same territory that Prospect sought to annex in 2002. Prospect countered with the argument that KRS 81A.005 is unconstitutional on its face as special legislation in violation of Sections 59, 60 and 156 of the Kentucky Constitution. The statute is special legislation, Prospect claimed, because it only applied to cities in counties containing first-class cities (*i.e.*, Louisville), of which Jefferson County was the only one. Prospect alternatively argued that the territory described in the Louisville ordinance was not contiguous to that city's boundaries and could not be legally annexed by Louisville. Finally, Prospect contended that

Louisville's sixteen-year delay in enacting the ordinance was unreasonable.

On cross-motions for summary judgment, the circuit court determined that the annexation statute was constitutional, but granted summary judgment in favor of Prospect because of Louisville's unreasonable delay in enacting the ordinance.

When we review a summary judgment, we first determine whether the circuit court correctly found that there was no genuine issue as to any material fact and, if so, whether the moving party (in this case, Prospect) was entitled to judgment as a matter of law.[3] "Only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in [its] favor should the motion for summary judgment be granted."[4] We owe no deference to the circuit court's legal analysis and review that court's conclusions of law *de novo*.[5]

On appeal, Metro argues that the circuit court erroneously determined that Louisville's ordinance lost priority because of inexcusable delay in its enactment.

Two cases are central to our analysis of this issue: *City of St. Matthews v. Arterburn*[6] (*Arterburn I*) and the subsequent litigation, *Arterburn v. City of St. Matthews*[7]

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[3] Ky. R. of Civ. Proc. (CR) 56.03; *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

[4] *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991).

[5] *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

[6] 419 S.W.2d 730 (Ky. 1967).

[7] 512 S.W.2d 505 (Ky. 1974).

(*Arterburn II*). In *Arterburn I*, the City of St. Matthews appealed the circuit court's dismissal of its petition to annex property encompassing "The Mall" located at the intersection of Shelbyville Road and the Watterson Expressway.[8] The circuit court held that St. Matthews's delay of five and one-half years without enacting the annexation ordinance was unreasonable.[9] According to Kentucky's highest court,

> It is recognized that a court may not legislate by fixing an arbitrary time limit in the absence of a statute fixing a maximum time. Further, annexation proceedings must be conducted and completed within a time that is reasonable.[10]

The Court went on to hold that the reasonableness of the delay was a factual issue.[11] The Court remanded the case to the circuit court for a determination as to whether St. Matthews's delay was "justifiable or excusable."[12]

After hearing St. Matthews's rationale for its delay, the circuit court found the delay reasonable, and the property owners appealed that finding.[13] In *Arterburn II*, Kentucky's highest court decided that St. Matthews's reasons for delay were legally insufficient. According to the Court, "the longer the delay the more compelling the explanatory evidence should be to

[8] *City of St. Matthews (Arterburn I)*, *supra*, note 6, at 731.

[9] *Id.*

[10] *Id.* at 732.

[11] *Id.*

[12] *Id.*

[13] *Arterburn (Arterburn II)*, *supra*, note 7, at 506.

satisfy the burden."[14] The Court also discussed the public policy implications inherent in an annexation dispute:

> If there is public policy in favor of continuity of municipal action, then potentially affected citizens have a right to reasonably prompt action to reduce their status to a condition of relative certainty so that they may plan their activities.[15]

The *Arterburn II* court ultimately determined that St. Matthews's delay was not justified or reasonable as a matter of law.[16]

In this case, Louisville relies on the compact legislation as its justification for failing to enact the annexation ordinance. KRS 81A.005 provides, in pertinent part, as follows:

> **Annexation by city of first class that has in effect a cooperative compact with its county**
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> (1) When a city of the first class, which has in effect a compact with the county pursuant to KRS 79.310 to 79.330, desires to annex unincorporated territory, the legislative body of the city shall enact an ordinance stating the intention of the city to annex. If an ordinance proposing to annex unincorporated territory has been enacted prior to July 15, 1986, and the ordinance annexing the territory to the city has not been enacted, then in order for the city to annex the territory during the time the compact is in effect, the legislative body of the city shall reenact the ordinance only including the same territory as the original and stating the intention of the city to annex. Such ordinances

[14] *Id.* at 507.

[15] *Id.*

[16] *Id.*

shall accurately define the boundary of the unincorporated territory proposed to be annexed, and declare it desirable to annex the unincorporated territory.

(2) The mayor of the city shall deliver a certified copy of the ordinance to the county clerk of the county in which the territory proposed to be annexed is located, who shall have prepared to be placed before the voters in each precinct embraced in whole or in part within the territory proposed to be annexed the question: "Are you in favor of being annexed to the city of _____?" * * *

(a) If more than fifty percent (50%) of those voting on the question approve of the annexation, the legislative body may proceed to annex the territory. * * *

(b) If fifty percent (50%) or less of those voting on the question approve the annexation, the ordinance proposing annexation shall become ineffectual for any purpose, subject to the provisions of KRS 81A.460.

(3) Once the ordinance stating the intention of the city to annex an area has been given its first reading or enacted by the city legislative body, no part of such area may be incorporated or be annexed by another city, unless such incorporation or annexation is pending at the time the ordinance is given its first reading, until the annexation proposal by the city of the first class is defeated pursuant to subsection (2) of this section or until the ordinance is withdrawn, repealed, or amended as to the area to be annexed according to subsection (4) of this section. This subsection shall apply to any proposing ordinance which has had a first reading or has been enacted as of January 1, 1986. Notwithstanding anything to the contrary in this subsection, any annexation by a city other than the first class or incorporation prior to January 1, 1986, shall not be

> nullified by the application of KRS 79.310 to 79.330; provided, however, that any city of the first class shall retain any legal annexation priorities which existed on January 1, 1986, to the territory so annexed or incorporated. All pending litigation challenging annexation of a specific unincorporated territory by the city of the first class arising from ordinances proposing to annex such territory enacted prior to July 15, 1986, shall, at the discretion of the court, be remanded on the docket of the appropriate court without prejudice during the term of the compact.
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> * * *

Louisville contends that the compact prohibited annexation by the city and granted it "unfettered legislative priority over the territory." We do not interpret the statute in this way. "Where the words used in a statute are clear and unambiguous and express the legislative intent, there is no room for construction and the statute must be accepted as it is written."[17] The statute is unambiguous, and we do not find any language prohibiting Louisville's annexation of the territory. Indeed, KRS 81A.005(2) explicitly sets forth the procedure Louisville was required to follow to annex unincorporated territory in Jefferson County.

However, this is only the first step in our analysis of this issue. Having determined the statute does not prevent annexation, we next look to Louisville's common law priority. Louisville was the first city to claim an interest in annexation of the subject territory. However, the ordinance languished for

[17] *Griffin v. City of Bowling Green*, 458 S.W.2d 456, 457 (Ky. 1970), citing *Fryman v. Electric Steam Radiator Corp.*, 277 S.W.2d 25, 27 (Ky. 1955).

sixteen years without enactment. According to *Arterburn I*, whether Louisville can justify or excuse this delay is a factual issue. As such, the question becomes whether Louisville presented any legally sufficient proof that this factual issue is in dispute. Louisville's only argument that the delay was justified turns on its interpretation of the compact legislation. Since we have determined the statute did not preclude annexation of the property, it is apparent the sixteen-year delay was inexcusable as a matter of law. Accordingly, summary judgment in favor of Prospect was proper.

Metro also contends that there is an issue of fact as to whether Prospect misled the landowners whose property is included in the territory it proposes to annex. This claim is not properly before us, as it was held in abeyance by the circuit court and not addressed in the summary judgment proceedings. In any event, we doubt that Metro has standing to assert a defense on behalf of the citizen-landowners affected by Prospect's annexation, all of whom agreed to annexation by Prospect and none of whom have complained of being defrauded or misled.

Given our decision affirming the circuit court's approval of Prospect's annexation of the territory in question, it is unnecessary that we address the issues raised in Prospect's protective cross-appeal.

The judgment is affirmed.

ALL CONCUR.

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