

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
STATE BOUNDARY COMMISSION

IN RE:

PETITION FOR ANNEXATION OF
TERRITORY IN CLAM LAKE TOWNSHIP
TO THE CITY OF CADILLAC (WEXFORD
COUNTY)

Docket No. 13-AP-2

**CITY OF CADILLAC'S REBUTTAL TO 30-DAY SUBMISSION
OF HARING TOWNSHIP AND CLAM LAKE TOWNSHIP**

Introduction

"I didn't have time to write a short letter, so I wrote a long one instead."

-- Attributed to Mark Twain

Clam Lake Township and Haring Township (the "Townships") have spent **41 pages** – plus 45 exhibits – attempting to legitimize their hastily manufactured Act 425 agreement. The Townships' brief is presumably so lengthy because trying to make a sham agreement look legitimate requires long, tortured arguments and drawn-out rationalizations.

Despite their verbose efforts to justify their Act 425 agreement, the Townships have actually proven the opposite. The Townships' brief makes clear that the "new and improved" Act 425 agreement was designed specifically to thwart the annexation petition of TeriDee, LLC ("TeriDee"), which the Townships knew was about to be filed. The Townships used this Commission's prior decision as a blueprint to craft another fictional agreement intended to divest this Commission of jurisdiction and prevent commercial development of the subject property.

The Townships' efforts to block annexation must fail, as they did in the prior annexation proceedings. The new Act 425 agreement is yet another thinly veiled attempt to thwart

development by divesting this Commission of its jurisdiction. The Townships hurriedly approved the new agreement only after learning that TeriDee would be filing a new annexation petition. Because the agreement is a sham, the City requests that this Commission find that the agreement is invalid and approve the requested annexation.

Argument

I. The Townships' brief makes clear that the Act 425 agreement was designed to thwart annexation and block meaningful commercial development.

A. The Townships specifically intended to thwart annexation when they adopted the new Act 425 agreement.

The parties and this Commission are familiar with *Casco*, which prohibits municipalities from adopting “sham” Act 425 agreements to thwart annexation requests or deprive this Commission of its jurisdiction to consider annexation petitions. *Township of Casco v State Boundary Commission*, 243 Mich App 392; 622 NW2d 332 (2001). In the prior annexation proceedings, this Commission found that the Townships' Act 425 agreement was a sham under *Casco*. Now, the Townships strenuously argue that their new Act 425 agreement is not a sham under this Commission's prior decision or under *Casco*. But although the Townships have tried to better conceal their intentions this time, the new agreement is as fictitious as the last.

The Townships' true motives are made clear on page 2 of their brief, where the Townships boast that of the “five discrete deficiencies” identified by this Commission when it struck down the prior agreement, “each of those five deficiencies **has been remedied** in the 2013 Agreement[.]” (Townships' Brief, p. 2, emphasis added.) This shows that the Townships designed the new agreement specifically with this Commission in mind, planning all along to use the new agreement to thwart TeriDee's annexation petition. That is, the Townships failed to divest this Commission of jurisdiction in the last proceeding, so they *admittedly* tried to do a

better job of thwarting annexation this time by “remed[ying]” the agreement’s prior deficiencies. (The Townships ultimately failed to remedy the deficiencies, as discussed in Section C, below.)

Despite their obvious intentions, the Townships have the chutzpah to claim that “the Township [sic] acted with proper motives.” (Townships’ Brief, p. 14.) The Townships’ purported “evidence” of these “proper motives” is **their own statements** in a “public information sheet” that the Townships distributed for the May 8, 2013 public hearing. (Townships’ Brief, p. 14; Townships’ Exhibit 27.) The Townships are asking this Commission to find that they acted with proper motives simply because they say that they did.

Of course, the Townships’ motives have not changed since the last annexation proceeding. They adopted the new Act 425 agreement for the same reason that they adopted the previous agreement: the Townships oppose large-scale commercial development of the property, and they will do anything – even concoct sham Act 425 agreements – to try to stop it.

B. The Townships are attempting to thwart annexation because they dislike the nature of the proposed development.

The Townships have gone to great lengths to try to defeat this Commission’s jurisdiction and block annexation. Their motivation is clear. The Townships do not like the type of commercial development proposed by TeriDee, so they do not want this Commission to consider an annexation petition that would make that development an immediate reality.

The Townships vehemently oppose TeriDee’s proposed development even though they recognize that this Commission is not charged with determining the best use of the property. The Townships concede that “it is *not* [this Commission’s] role to subjectively weigh the relative benefits or drawbacks of [a particular] type of development,” as compared to alternative types of development. (Townships’ Brief, 22, emphasis in original.) Indeed, the Townships

acknowledge that “[t]hat type of comparison . . . is irrelevant to the validity of the Act 425 Agreement.” *Id.*

Yet in the same breath, the Townships openly complain – with obvious contempt – that they *simply do not like* the type of development proposed by TeriDee:

The community does not need a bunch of “Big Box” and “Mid Box” stores to clutter-up the Exit 180 intersection, which is exactly what Petitioners are promising to bring to their property. . . . “Big Box” and “Mid Box” stores do not become any less ugly and unsightly because they masquerade under the fancy, made-up name of “Cadillac Junction.” That name is just a façade, developed to conceal an actual intention to develop ugly, box-like development, which would be a detriment to the community.

(Townships’ Brief, p. 10, emphasis added.)

The Townships’ hostile criticism is mostly irrelevant to the petition before this Commission, except that it evidences the Townships’ true motivation; stop economic development at all cost. Further, the Townships’ statements are hypocritical given that Haring Township is home to a Meijer store and a Wal-Mart store – two so-called “Big Box” stores. The Townships do not complain that those businesses are “ugly,” given the significant contributions that they make to the area’s economy.

TeriDee’s proposed development will immediately bring an estimated 850 to 1,000 jobs to a community that desperately needs economic revitalization, and it will further economic growth in the surrounding areas. The proposed use of the property would be consistent with uses typically found at major highway interchanges. The Townships’ belief that TeriDee’s development would be “ugly” does not bar this Commission from considering and approving the annexation petition, and the Townships should not be permitted to block this important development project.

C. The Townships have not “remedied” the deficiencies identified by this Commission, and the new Act 425 agreement remains fatally flawed.

When it invalidated the Townships’ prior Act 425 agreement, this Commission identified five fatal flaws. The Townships claim, incorrectly, that they have “remedied” those deficiencies with their new Act 425 agreement. In fact, the purportedly “new and improved” version of the Act 425 agreements suffers from the same deficiencies, and the City urges this Commission to again conclude that the Townships’ agreement is a sham.

1. *The Townships’ “economic development project” is not a “sure thing.”*

The Townships first contend that they have identified a “clearly defined” economic development project: the provision of water and sewer services and “the provision of mixed-use commercial/residential development.” (Townships’ Brief, p. 5.) As a preliminary matter, it is clear from the history of this case that the Townships did not plan these “projects” because they wanted to promote economic growth in the area; rather, they scrambled to come up with something that might pass for an “economic development project” solely to thwart TeriDee’s genuine development efforts.

In any event, the improvements remain speculative. As they did at the public hearing, the Townships optimistically claim that Haring’s proposed wastewater treatment plant is a “sure thing.” (Townships’ Brief, pp. 4, 17.) Based on the representations in the Townships’ brief, however, the City understands that bonds have not actually been issued, bids have not been let, and construction has not begun. It is premature to conclude that the proposed wastewater treatment plant is *certain* to be constructed. Rather, construction of the plant remains subject to a number of contingencies. By contrast, the City of Cadillac stands ready *now* to provide water and sewer services to the property.

Even if Haring's wastewater treatment plant is constructed in the future, Haring's obligation to provide services to TeriDee remains illusory. Haring has "sole discretion" to determine whether it has capacity to provide services, even if Clam Lake requests that services be provided to the property. (Act 425 Agreement, pp. 5-6.) Moreover, as discussed in the City's 30-day submission, the Act 425 agreement erects obstacles to development, including 10 pages of zoning requirements that the property owner must satisfy before Haring will even "consider" a PUD rezoning application. (Act 425 Agreement, pp. 8-18.)

In their brief, the Townships seem proud of these arduous zoning requirements and even criticize the City for not having special zoning requirements that apply solely to this property. (Townships' Brief, p. 11.) But the Townships' creation of burdensome, heightened zoning requirements just for this property further prove that the agreement is designed to prevent economic development, not foster it. Unlike the Townships, the City will not dream up new zoning requirements to restrict development of the property. Rather, the City will apply the same consistent zoning standards that apply to other City property.

In response to the undisputed fact that the Townships cannot provide water or sewer services until *at least* the summer of 2015, the Townships argue that "Act 425 imposes no temporal requirement on when 'planned improvements' must be provided" and then attempt to compare this Act 425 agreement to an agreement in a different, unrelated case. (Townships' Brief, p. 9.) The Townships are dodging the issue. The Townships admit that they are unable to immediately provide water and sewer services, whereas the City is now – and has been – ready and able to provide the necessary services.

But for the Townships' ongoing interference, TeriDee could already be developing this property with City sewer and water services, and the area could be reaping the economic

rewards. Instead, the property sits vacant and undeveloped – spurring no economic growth – while the Townships continue their delay tactics and try to prevent important economic development. The Townships should not be permitted to misuse Act 425 in this way.

2. *Clam Lake receives no economic benefit under the agreement, and no rational municipality would approve such a one-sided agreement.*

The Act 425 agreement is not a genuine, bargained-for agreement between Clam Lake and Haring. This is obvious from the allocation of risk and costs between the parties. The Act 425 agreement requires Clam Lake to pay all of Haring’s costs, including actual attorney fees, arising out of the Act 425 agreement, including the costs of drafting and obtaining approval of the agreement, implementing new zoning requirements, and returning jurisdiction to Clam Lake upon termination of the agreement. Clam Lake also must pay for all costs associated with the new wastewater treatment plant, and Clam Lake must indemnify and hold Haring harmless against all claims related to the Act 425 agreement. In exchange, Clam Lake receives **no economic benefit**, as the agreement provides no revenue sharing. In other words, Clam Lake assumes all of the risk and receives nothing in exchange.

The Townships attempt to explain away the lack of economic benefit by claiming that Act 425 does not *require* revenue sharing and that the lack of a revenue sharing provision is “non-reviewable” by this Commission. (Townships’ Brief, p. 12.) The Townships miss the point completely. The lack of any revenue sharing when the agreement places all of the risks and costs on Clam Lake shows that the agreement is illusory and solely intended to divest this Commission of jurisdiction. No reasonable municipal official would approve such a flagrantly unfair agreement on behalf of Clam Lake unless the parties knew that the agreement was merely a sham. Nor would the same attorney represent both parties in such an imbalanced agreement – as the Townships’ attorney did – unless he knew that the parties would never have a dispute

because the agreement is merely a fiction. The fact that the parties could, theoretically, amend the agreement in the future to provide revenue sharing – as the Townships suggest in their brief – confirms that as adopted, Clam Lake receives no economic benefit from the Act 425 agreement. (Townships’ Brief, p. 13.)

This Commission recognized in the prior annexation proceeding that the Act 425 agreement was a sham because Clam Lake received no financial benefit from the agreement. Nothing has changed since that determination. Clam Lake still receives no economic benefit. This Commission should therefore reach the same conclusion and find that the agreement is a sham that does not divest this Commission of jurisdiction over TeriDee’s petition.

3. *The absence of incriminating e-mails does not make the Townships’ motives any less suspect.*

In the prior annexation proceeding, the Townships’ officials exchanged e-mails explaining that the Act 425 process was being rushed because the Townships were “trying to beat a review of the annexation application before the Boundary Commission.” This time, the Townships smugly inform this Commission that “the City can point to no e-mails” showing an intent to thwart annexation because “[t]hey do not exist.” (Townships’ Brief, p. 14.)

The lack of incriminating e-mails shows only that the Townships’ officials were more cautious in their written communications this time. It does not mean that the Townships genuinely wished to pursue an Act 425 agreement to promote economic development. To the contrary, as discussed above, the Townships approved this agreement for the sole purpose of trying to improperly divest this Commission of jurisdiction. That effort should be rejected.

4. *The cost study does not prove that Haring can provide sewer and water services more affordably than the City of Cadillac.*

The Townships argue that based on their own “cost study,” Haring can provide water and sewer services “at a cost that is *less* than the cost of providing City sewer and water services[.]”

(Townships' Brief, p. 15.) But as explained in the City's 30-day submission, the Townships reach this conclusion by adding an estimate of property taxes that would be paid to the City over a 10 year period. Including the City's estimated property taxes falsely inflates the cost of the City's services. The future property taxes – which the Townships cannot accurately estimate, as millage rates can change – are not *development costs*. Rather, property taxes will be paid by the future owners of the property. The cost of connecting to Haring for sewer and water services is millions more for the developer than connecting to the City of Cadillac. Thus, as in the previous proceeding, Haring cannot “effectively and economically” provide water and sewer services to the property.

5. *The timing of the Act 425 agreement further shows that it is a sham.*

The timing of the Act 425 agreement makes it obvious that the Townships were, once again, attempting to divest this Commission of its jurisdiction to hear TeriDee's annexation petition. As discussed in the City's 30-day submission, the Townships knew that TeriDee would be filing a new annexation petition. On April 11, 2013, a City official informed Clam Lake officials that TeriDee would be filing a new annexation petition. Consequently, Clam Lake and Haring were fully aware that a new annexation petition would be filed, and as soon as they found out, they rushed to create another sham agreement.¹

The Townships have failed to disclose to this Commission that they knew about the forthcoming annexation petition. Instead, they claim that the timing was “ideal” and that the new agreement is “a model of regional cooperation.” (Townships' Brief, p. 17.) Contrary to the

¹ The Townships have now provided documents showing that the new Act 425 agreement was first discussed at their April 30 and May 1, 2013, meetings, such that May 8 was not the first meeting at which the agreement was discussed. Still, those meetings were held after April 11, 2013, which is when a City official advised Clam Lake officials that TeriDee would be filing a new annexation petition.

Townships' insinuation, the timing of the agreement was not coincidental. The convenient timing of the new Act 425 agreement further establishes that the agreement is a sham.

In sum, the Townships have not "remedied" the deficiencies previously identified by this Commission. Instead, the Townships have shown that their reason for approving the Act 425 agreement was to block annexation and attempt to strip this Commission of jurisdiction. The City requests that this Commission reject the Townships' efforts to block annexation and instead allow the annexation proceedings to move forward.

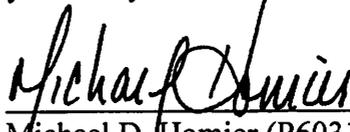
Conclusion

The purpose of Act 425 is to promote economic development. Despite that, the Townships are once again attempting to use Act 425 as a sword and shield to defeat an economic development opportunity that would bring new jobs and tax revenue into an area that is starved for economic growth. The Townships' Act 425 agreement is a sham, and its improper purpose is obvious from the provisions of the agreement and the timing and circumstances surrounding its adoption. Because the Townships' sham agreement cannot divest this Commission of jurisdiction, and because TeriDee's proposed annexation satisfies the statutory requirements, the City requests that this Commission approve the annexation.

Respectfully submitted,

FOSTER, SWIFT, COLLINS & SMITH, P.C.
Attorneys for City of Cadillac

Date: December 18, 2013

By: 
Michael D. Homier (P60318)
1700 East Beltline, N.E., Suite 200
Grand Rapids, MI 49525
(616) 726-2230