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 OF ANNEXATION**

This matter is before Chief Administrative Law Judge Tammy L. Pust upon the City of Proctor's request for approval of annexation under Minn. Stat. § 414.033 (2016).

John H. Bray, Maki & Overom, appears on behalf of the City of Proctor (City of Proctor). Robert E. Asleson, Assistant City Attorney, appears on behalf of the City of Duluth (City of Duluth) and in opposition to the requested annexation-by-ordinance. Kenneth D. Butler, Kenneth D. Butler, Ltd., appears on behalf of the Township of Midway (Midway Township) and in opposition to the requested annexation-by-ordinance.

Based upon 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

Background

1. Midway Township abuts both the City of Duluth and the City of Proctor, and is dissected in its southern half by Interstate 35 (I-35), the main corridor to the Arrowhead region of Minnesota.[1]

[1] City of Proctor Submissions (Aug. 31, 2015) (City of Proctor Submissions) at Exhibit (Ex.) C (Midway Township Comprehensive Plan) at Map 1.

2. For decades, the potential for development along the I-35 corridor has been an issue of public discussion and municipal planning in the City of Duluth, the City of Proctor, and Midway Township.[2]

3. Most relevant to the instant proceeding is the limited commercial development that exists at the intersection of I-35 and West Skyline Parkway, which consists of a hotel, liquor store and small grocery or other commercial entity on the north side of I-35, plus a fast food restaurant, a gas station and another hotel on the south side of I-35.[3]

4. Notwithstanding plans for a golf course and other amenities linked to the Spirit Mountain recreation area located in the immediate vicinity, no significant development has occurred in this portion of the I-35 corridor for many years.[4]

5. Believing that a large commercial hunting and fishing store was interested in locating in the area, on February 13, 2012 the City of Proctor adopted Ordinance No. 01-12 and thereby sought to annex-by-ordinance certain property owned by the Olivers (Olivers property), as requested by the property owners. The annexation-by-ordinance was approved by order issued by the Office of Administrative Hearings on February 15, 2012. The City of Duluth challenged the issued order on procedural grounds, which challenge was denied upon review by the district court[5] and at the Minnesota Court of Appeals.[6] That annexation-by-ordinance proceeding brought into the City of Proctor the property located immediately adjacent to the property that is the subject of the current proceeding. No development has taken place on the Olivers property since its annexation.[7]

6. In January 2013, the City of Proctor sought to annex the entire 11,451 acres of Midway Township pursuant to Minn. Stat. § 414.031 (2012). The City of Duluth intervened in and opposed the annexation proceeding. Annexation was denied by the Office of Administrative Hearings on March 6, 2014.[8]

7. The present annexation-by-ordinance action is the third annexation proceeding brought by the City of Proctor involving properties located in Midway Township and opposed by that municipality as well as by the City of Duluth.

Orderly Annexation Efforts by Duluth and Midway Township

8. On January 14, 2013, the City of Duluth and Midway Township entered into

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[2] *Id.* at Ex. C, at 3.
[3] Tour of the subject property (Oct. 9, 2015).
[4] *Id.*
[5] City of Proctor Submissions at Ex. E (*Twp. of Midway v. City of Proctor*, No. 69DU-CV-12-520 (Minn. Dist. Ct. May 29, 2012)).
[6] *Twp. Of Midway v. City of Proctor*, A12-1272, 2013 WL 1943010, at *1 (Minn. Ct. App. May 13, 2013).
[7] Tour of the subject property.
[8] *In the Matter of A-7840 - City of Proctor/Midway Township; the Petition for Annexation of Midway Township*, OAH Docket 60-0330-30448, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (Mar. 6, 2014).

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).[9]

9. In the OA Agreement, the Orderly Annexation Area was divided into three categories identified as Parcel I, Parcel II, and Parcel III, all of which were made subject to various terms of the OA Agreement.[10]

10. The City of Duluth and Midway Township agreed that the majority of the properties contained in Parcel I were owned by the City of Duluth and could be annexed by ordinance by the City of Duluth "at such time as it deems appropriate."[11]

11. With respect to Parcel II and Parcel III, the OA Agreement provides that the City of Duluth will not initiate annexation until the properties become "more characteristic of urban or suburban development than of rural development" with respect to population density, and until the City of Duluth is best able to provide necessary transportation and utility infrastructure.[12]

12. It is the understanding of Midway Township that the OA Agreement "precludes any other annexation of any part of Midway [Township] by any process and by any municipality without the express permission of both the City of Duluth and Midway [Township,]"[13] and it was with the intent to effectuate that understanding that Midway Township executed the OA Agreement.[14]

13. 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.[15]

14. On August 25, 2014, the City of Duluth filed with the Office of Administrative Hearings a request for approval of the annexation-by-ordinance pursuant to Minn. Stat. § 414.033 (2014), related to Parcel I.[16]

15. 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 (2014).[17]

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[9] City of Proctor Submissions at Ex. C at Ex. A (Agreement for Orderly Annexation by and between the City of Duluth and the Town of Midway (Jan. 14, 2013) (OA Agreement)).
[10] *Id.* at 1.
[11] *Id.* at 2.
[12] *Id.*
[13] City of Proctor Submissions at Ex. C at 16.
[14] *Id.* at 1.
[15] *In the Matter of OA-1545-1 Duluth/Midway Township Pursuant to Minnesota Statutes 414*, OAH Docket No. OA-1545-1, Ordinance No. 10321 (July 21, 2014) (received at OAH on Aug. 25, 2014).
[16] *Id.*
[17] Correspondence from Robert Asleson (Oct. 8, 2014).

16. By Order of the Chief Administrative Law Judge issued on October 14, 2014, approximately 2,488 acres, constituting the Parcel I properties in the OA Agreement, were annexed into the City of Duluth under the authority of Minn. Stat. § 414.0325.[18]

17. As required by the OA Agreement, the City of Duluth and Midway Township have put in place a Joint Planning and Zoning Commission made up of six members, three from each community, and charged with the responsibility of making any changes to Midway Township's Comprehensive Plan or any ordinances relating to that plan.[19]

18. 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.

Subject Properties

19. The present proceeding involves approximately 92 acres of real property (Property) legally described as follows:

> Northeast Quarter of Southeast Quarter (NE¼ of SE¼), Section Twenty-one (21), Township Forty-nine (49), Range Fifteen (15).
>
> East Half of Northwest Quarter of Northeast Quarter (E½ of NW¼ of NE¼), 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 (SW¼ of NE¼), 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).[20]

20. The Property is owned by Julie Ann (Hovland) Savalas and George Hovland, III (Landowners)[21] and located in what is known as the "Midway Park area" of Midway Township, St. Louis County, Minnesota.[22] It is highlighted in yellow on the illustration inserted below.[23]

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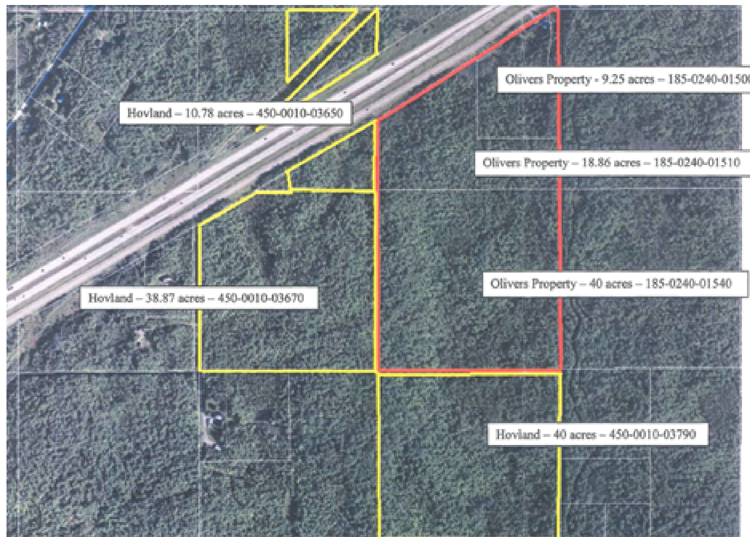
[18] *In the Matter of OA-1545-1 Duluth/Midway Township Pursuant to Minnesota Statutes 414*, OAH Docket No. OA-1545-1, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (Oct. 14, 2014).
[19] Joint correspondence from Kenneth D. Butler and R. Asleson (August 31, 2015).
[20] Ordinance No. 03-14 (Aug. 18, 2014) (Ordinance) at Ex. A.
[21] City of Proctor Submissions at Ex. A (Owners and Encumbrance Report (Aug. 21, 2015)).
[22] Ordinance.
[23] Ordinance at Ex. B. The property outlined in red is the Olivers property, described above.



21. The Property is located within Parcel II as designated in the OA Agreement between the City of Duluth and Midway Township.[24]

22. The Property consists of wooded acreage. No one resides on the Property. The property is zoned Rural Residential 2, which is a Midway Township district "established to provide semi-rural living within the predominately forested portions of the Township while insuring, to the greatest degree possible, the continued existence and values of the existing forested lands."[25]

23. The Property is not currently served by public wastewater or any other municipal utilities.[26]

24. The Property's location with respect to the I-35 corridor contributes to the Landowners' belief that the Property has value for commercial development purposes, [27] though no specific development plans were evidenced in the record.

Public Wastewater Facilities and Services

25. The Western Lake Superior Sanitary District (WLSSD) operates a wastewater collection system within a legislatively determined boundary encompassing approximately 530 square miles,[28] which includes the City of Proctor, the City of Duluth and Midway Township.[29] Only approximately 16.2 percent of the area within WLSSD's boundaries is currently served by public wastewater facilities, while an additional 9.9 percent of the area has been identified by local governments for future public wastewater

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[24] *See* OA Agreement.
[25] City of Proctor Submissions at Ex. C at 9.
[26] *Id.* at Ex. A (Property Owner Petition to Municipality for Annexation by Ordinance (May 15, 2014) (Petition)).
[27] *Id.*
[28] City of Proctor Submissions at Ex. D.
[29] *See* Minn. Stat. § 458D.02, subd. 2 (2016).

service.[30] Areas designated for future wastewater service, where public wastewater facilities are planned as appropriate for extension, are referenced in the WLSSD's planning documents as areas within its "urban service boundary."[31]

26. WLSSD has two interceptor sewers which carry wastewater flow through Midway Township.[32]

27. As a separate utility customer of the WLSSD with a specific allocation agreement, Midway Township owns and operates the wastewater utility in the Midway Park area and is the utility for direct connections to the WLSSD in the area in which the Property is located.[33]

28. The Property is located approximately 2.3 miles from the Scanlon Interceptor, the closest wastewater interceptor main currently included in the WLSSD system.[34]

29. The Property is not within WLSSD's current urban service boundary.[35]

30. The Property is not included within Midway Township's proposed utility service areas.[36]

31. Extending wastewater utility services to the Property would require: (a) modification of the extending municipality's comprehensive plan to reflect the extension; (b) a request to the WLSSD to modify its urban service boundary to include the Property; and (c) formal action by the WLSSD Board in favor of granting the extension.[37]

32. The Landowners did not request the extension of sanitary sewer or other municipal utilities from Midway Township before filing their Petition with the City of Proctor.[38]

33. Testimony at the hearing indicated that the Property could be connected to

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[30] City of Proctor Submissions at Ex. D.
[31] WLSSD Comprehensive Wastewater Service Plan, at 52-53, of which the Chief Administrative Law Judge takes public notice pursuant to Minn. R. Evid. 201. Western Lake Superior Sanitary District, *Comprehensive Wastewater Services Plan*, wlssd.com/wp-content/uploads/2016/02/WLSSD-Comprehensive-Plan-2010.pdf.
[32] Correspondence from Joe Jurewicz (July 15, 2014).
[33] *Id.*
[34] City of Proctor Submissions at Ex. B.
[35] Correspondence from Jack Ezell, WLSSD (July 7, 2014).
[36] City of Proctor Submissions at Ex. C at Map 4 at 10. The Chief Administrative Law Judge takes judicial notice, pursuant to Minn. R. Evid. 201, that Midway Township's proposed utility service area remains unchanged in its updated Comprehensive Plan adopted by the Town Board of Supervisors on June 2, 2016. Midway Township, MN, *Midway Comprehensive Plan*, http://www.midwaytwpmn.govoffice2.com/index.asp?SEC=8839F836-1A58-422F-918B-1A050A2C4F67&DE=795A6B70-4915-499E-8AC3-1A8C9DB68E44&Type=B_BASIC.
[37] *Id.*
[38] Correspondence from K. Butler (July 15, 2014).

public sanitary sewer services in three variations: (a) constructing a new force main from the City of Proctor's existing sanitary sewer located close to the intersection of Old Highway 61 and Village Drive, then running parallel to Old Highway 61 to the Property; (b) constructing a new force main from the City of Duluth's existing sanitary sewer located close to W. Skyline Parkway and then across undeveloped terrain directly to the Property; or (c) constructing a new force main from the City of Proctor's existing sanitary sewer located close to the intersection of Old Highway 61 and S. Ugstad Road, running it south on S. Ugstad Road under I-35, then turning west at Russell Road to the Property.[39]

34. The probable costs of any of these extension options, whether completed by the City of Proctor, the City of Duluth or Midway Township, are reasonably estimated to total between $1,544,400 and $2,534,400.[40]

35. The City of Duluth will allow extensions of its water system into Midway Township, but will not share in the financing of any extension of water service.[41]

36. The OA Agreement does not contain any provision requiring the City of Duluth to contribute toward the cost of wastewater service extensions to the designated areas.[42]

37. Both Midway Township and the City of Proctor take the position that they are capable of providing public wastewater facilities to the Property, and as such those services should be deemed "otherwise available" under the applicable statute.[43]

38. The record is this matter does not establish that either Midway Township or the City of Proctor have planned for the expenditure of necessary public funds, requested or obtained the inclusion of the Property into the WLSSD urban service boundary, obtained any necessary rights-of-way or taken any other concrete or specific actions necessary to actually provide public wastewater services to the Property or to indicate a specific intent with specific plans to do so at any identified time in the future.

Proctor's Annexation-by-Ordinance Proceeding

39. On or about May 15, 2014, the Landowners executed a Petition to Municipality for Annexation by Ordinance requesting annexation of the Property to the City of Proctor.[44]

40. The City of Proctor held a public hearing on the Petition on August 4, 2014.[45]

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[39] Maps 1, 2 and 3, submitted by the City of Duluth at the October 9, 2015 oral argument.
[40] Correspondence from Eric R. Schaffer (August 31, 2015) with attached estimates; Correspondence from J. Jurewicz (October 8, 2015) with attached estimate.
[41] City of Proctor Submissions at Ex. C at 11.
[42] OA Agreement.
[43] *Id.*; Correspondence from J. Jurewicz, P.E. (undated, faxed on July 15, 2014); Correspondence from Keith Hamre (July 30, 2014); Affidavit (Aff.) of J. Jurewicz (Aug. 28, 2015).
[44] Petition.
[45] Correspondence from K. Butler (Aug. 6, 2014). The following documentation was made part of the record

41. On August 18, 2014, the City of Proctor[46] adopted Ordinance Number 03-14 (Ordinance) in an effort to annex the subject Property into the City of Proctor.[47]

42. The Ordinance contains the following relevant recitals:

a. The Property is unincorporated and abuts the City of Proctor on its southerly boundary;[48]

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 population of the Property is zero;

h. 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.

i. Upon annexation, the City of Proctor will make a payment in the amount of $400 to Midway Township in the first year in which Proctor can levy against the Property, and will make a second and final payment to Midway Township in the next succeeding year, all pursuant to Minn. Stat. § 414.036

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at the public hearing: Correspondence from K. Butler (July 15, 2014); Correspondence from J. Jurewicz, P.E. (undated, faxed on July 15, 2014); Correspondence from Jack Ezell (July 7, 2014); Correspondence from K. Hamre (July 30, 2014).

[46] This annexation-by-ordinance action is the third annexation proceeding by the City of Proctor involving properties located in Midway Township and opposed by that municipality as well as by the City of Duluth. The first proceeding involved the property located immediately adjacent to the current Property. In that proceeding, the City of Proctor's adopted Ordinance No. 01-12 on February 13, 2012, and the approval of the annexation-by-ordinance pursuant to Minn. Stat. § 414.033 (2010) in an order issued by the Office of Administrative Hearings on February 15, 2012. The City of Duluth challenged the issued Order on procedural grounds, which challenge was denied upon review by the Tenth Judicial District Court in *Twp. of Midway v. City of Proctor*, No. 69DU-CV-12-520 (Minn. Dist. Ct. May 29, 2012, and at the Minnesota Court of Appeals in *Twp. Of Midway*, 2013 WL 1943010, at *1. The second proceeding resulted from Proctor's January 16, 2013 attempt to annex the entire 11,451 acres of Midway Township pursuant to Minn. Stat. § 414.031 (2012). Duluth intervened in and opposed the annexation proceeding. Annexation was denied by the Office of Administrative Hearings on March 6, 2014. *In the Matter of A-7840 - City of Proctor/Midway Township; the Petition for Annexation of Midway Township*, OAH Docket 60-0330-30448, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (Mar. 6, 2014).

[47] Ordinance.

[48] The Petition recites that the Property abuts Proctor on the city's western boundary.

(2016).[49]

43. The City of Proctor filed the Ordinance with the Office of Administrative Hearings on or about December 18, 2014 and tendered the required filing fee on or about January 8, 2015.[50]

44. On or about January 16, 2015, the City of Duluth filed an objection to the proposed annexation-by-ordinance of the Property, 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 by any other municipality.[51]

45. The City of Duluth also asserted that public wastewater facilities are available to the Property such that the statutory requirements for annexation-by-ordinance are unmet.[52]

46. On August 21, 2015, the Chief Administrative law Judge issued Findings of Fact, Conclusions of Law and Order Regarding Supplementation of Record requiring the parties to submit evidence regarding the availability of wastewater treatment facilities to the Property and evidence that all owners of record had executed the Petition.

47. On August 31, 2015 and September 1, 2015, the City of Proctor submitted evidence and argument in response to the August 21, 2015 Order.

48. On August 31, 2015, the City of Duluth: (a) moved for amendment of the Findings of Fact, Conclusions of Law and Order Regarding Supplementation of Record dated August 21, 2015; (b) moved in support of the intervention of Midway Township; and (c) requested a hearing on the motion for amended findings and that the Chief Administrative Law Judge tour the Property.[53]

49. In an October 6, 2015 Order Allowing Intervention of Midway Township as a Party to the Proceeding and Scheduling Tour and Oral Argument, the Chief Administrative Law Judge allowed Midway Township to intervene as a party pursuant to Minn. R. 1400.6200 (2015) and scheduled both oral argument on the pending motion and the Property tour.

50. On October 9, 2015, the Chief Administrative Law Judge heard oral argument on the pending motion for amended findings and toured the Property, accompanied by counsel for all parties.

51. The submitted record closed on October 9, 2015.

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[49] Ordinance.
[50] Correspondence from J. Bray (Dec. 18, 2014); Correspondence from John H. Bray (Jan. 6, 2015).
[51] Correspondence from R. Asleson (Jan. 14, 2015).
[52] Correspondence from K. Butler (July 15, 2014).
[53] Joint correspondence from K. Butler and R. Asleson (August 31, 2015).

52. According to the records of St. Louis County, of which the Chief Administrative Law Judge takes judicial notice pursuant to R. 201, Minn. R. Evid., the Property generated a total value of $372.28 in taxes payable to Midway Township in 2016.[54]

53. The record is silent as to any agreement between the parties regarding the division of costs as required by Minn. Stat. § 414.12, subd. 3 (2016).

Based upon a review of the files and proceedings herein and consideration of applicable law, the Chief Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. Annexations by ordinance are governed by the provisions of Minn. Stat. ch. 414 (2016) and Minn. R. 6000 (2015).

2. The Chief Administrative Law Judge has jurisdiction over these proceedings pursuant to Minn. Stat. § 414.01, subd. 1 (2016).

3. The Municipal Boundary Adjustment Act (Act) authorizes the Chief Administrative Law Judge to scrutinize proposed municipal boundary changes "to protect the integrity of land use planning in municipalities and unincorporated areas so that the public interest in efficient local government will be properly recognized and served."[55]

4. A municipality's attempt to annex property by ordinance is final on the date the ordinance is approved by the Chief Administrative Law Judge.[56]

5. The City of Proctor has fulfilled all procedural requirements of law and rule such that this matter is properly before the Chief Administrative Law Judge.

6. 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. …

7. Public wastewater facilities are not "otherwise available" to the Property, as that term is used in Minn. Stat. § 414.033, subd. 2(3).

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[54] St. Louis County 2016 Property Tax Statements for PIDs: 450-0010-03790; 450-0010-03670; 45-0010-03650.
[55] Minn. Stat. § 414.01, subd. 1b(3).
[56] Minn. Stat. § 414.033, subd. 7.

8. The Ordinance complies with Minn. Stat. 414.033, subd. 2(3).

9. 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.

10. At present, there is no other "boundary adjustment proceeding pending before the chief administrative law judge"[57] which involves the subject Property.

11. 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, subd. 2(3), as long as the annexation-by-ordinance is commenced by a municipality not a party to an underlying orderly annexation agreement.

12. Minn. Stat. § 414.036 sets forth the following with regard to the reimbursement of townships for the lost value of property annexed into an adjoining municipality:

> Unless otherwise agreed to by the annexing municipality and the affected town, when an order or other approval under this chapter annexes part of a town to a municipality, the order or other approval must provide a reimbursement from the municipality to the town for all or part of the taxable property annexed as part of the order. The reimbursement shall be completed in substantially equal payments over not less than two nor more than eight years from the time of annexation. The municipality must reimburse the township for all special assessments assigned by the township to the annexed property, and any portion of debt incurred by the town prior to the annexation and attributable to the property to be annexed but for which no special assessments are outstanding, in substantially equal payments over a period of not less than two or no more than eight years.

13. As the Ordinance provides for reimbursement to the Township in the amount of $400 each year for two years, that being a reasonable amount representing "all or part of the taxable property annexed" given the Property's generation of $372.28 in

[57] *Id.*, subd. 6.

annual taxes to Midway Township, the Ordinance complies with Minn. Stat. § 414.036.

14. Pursuant to Minn. Stat. § 414.12, subd. 3, the Chief Administrative Law Judge must apportion the Office of Administrative Hearings' judicial costs of contested case proceedings in boundary adjustment matters to the parties in an equitable manner if the parties have not otherwise agreed to a division of the costs.

Based upon 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. The City's Annexation Ordinance No. 03-14 is hereby **APPROVED** effective as of the date of this Order.

2. Pursuant to and in satisfaction of Minn. Stat. § 414.036, the City of Proctor shall reimburse Midway Township $400.00 each year for two years as stated in Ordinance No. 03-14.

3. Pursuant to Minn. Stat. § 414.12, subd. 3, it is equitable to allocate the costs of this matter, billed as required by law at the approved hourly rates of the Office of Administrative Hearings, to the parties as follows: to the City of Proctor - 75%; to the City of Duluth – 20%; and to Midway Township - 5%. An itemized invoice for costs will be sent under separate cover.

Dated: October 10, 2016

TAMMY L. PUST
Chief Administrative Law Judge

NOTICE

This Order is the final administrative order in this case under Minn. Stat. §§ 414.033, .07, .09, .12 (2016). Minn. Stat. § 414.033, subd. 7 requires that a copy of the annexation ordinance be filed with the township, the appropriate county auditor(s), and the Secretary of State.

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 Order 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

Midway Township and the City of Duluth entered into the OA Agreement for the express purpose of blocking the City of Proctor's continued attempts to annex portions of the township. They did so believing that the City of Proctor's efforts to peel off and swallow up properties into its boundaries through annexation would have significant negative effects on the region's planning efforts. This policy argument is best captured in the words of the Director of the Department of Planning and Construction Services for the City of Duluth:

> [T]he proposed annexation is not good public policy because it represents a piecemeal and haphazard approach to planning for the long-term development of what is probably the most important transportation corridor in the entire Arrowhead region. This approach to development threatens the future development of a critical asset to the region and therefore, by extension, the region itself. The City of Duluth has made no secret of its belief that the I-35 corridor is a key element in the development of the Arrowhead region including the City of Duluth, the Township of Midway and the City of Proctor and that, as such, it needs an area-wide approach to develop a plan for use and growth that will benefit everyone.[58]

The Chief Administrative Law Judge agrees that these public goals are laudable and should, to the extent allowed by the law, be recognized and implemented. In support of these goals, she notes that the Act, Minn. Stat. Ch. 414 (2016), contains very clear legislative findings that "sound urban development and preservation of agricultural land and open spaces through land use planning is essential to the continued economic growth of this state" and that "joint resolutions for orderly annexation … should be encouraged."[59] She acknowledges further her statutory authority to make boundary adjustment determinations designed to extend city boundaries to areas that are "in the process of being developed for intensive use for residential, commercial, industrial, institutional, and governmental purposes or are needed for such purposes" and to deny city's attempts to expand into "unincorporated areas which are used or developed for agricultural, open space, and rural residential purposes and are not presently needed for more intensive uses."[60] And last, the Chief Administrative Law Judge is keenly aware that orderly annexation agreements executed pursuant to Minn. Stat. § 414.0325 are built upon joint planning efforts by two or more municipalities related to specific property and, as such, represent a broad consensus of elected officials regarding what is best for their communities with respect to boundary issues.

If these were the only statutory authorities at issue, the result in this case would be clear. The facts in the record, including the tour of the Property, evidence that the Property has all the characteristics of a rural area: it is undeveloped; completely wooded and unimproved; unserved by municipal services; and not presently needed for any identified

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[58] Correspondence of K. Hamre (July 30, 2014) (emphasis in original).
[59] Minn. Stat. § 414.01, subd. 1a(1), (5).
[60] *Id.*, subd. 1b(1), (2).

intensive use. If this proceeding was like most other annexation processes outlined in Chapter 414, the rural character of the Property together with its lack of tie to any proposed development or other necessary use would likely result in a denial of the attempt at annexation.

But this is not the typical case. This proceeding presents a situation wherein one statutory process appears to directly conflict with another. Specifically, this case presents the following critical issue for determination: whether the orderly annexation process of Minn. Stat. § 414.0325 trumps the annexation-by-ordinance process set out in Minn. Stat. § 414.033, subd. 2(3).

I. OA Agreement Does Not Foreclose Annexation-by-Ordinance

The City of Duluth and Midway Township assert that "the City of Proctor lacks both standing and jurisdiction to entertain the proposed annexation."[61] These parties' position is that once the Property was included in the area designated for orderly annexation under Minn. Stat. § 414.0325, it cannot be annexed-by-ordinance by a different municipality under Minn. Stat. § 414.033. In their words, "[t]here 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.[62] While they acknowledge that "the statute does not specifically provide that the existence of an orderly annexation agreement covering the subject property pre-empts the annexation process set forth in Minn. Stat. § 414.033,"[63] the City of Duluth and Midway Township point to Minn. Stat. § 414.0325, subd. 1(b) and subd. 1(e), read in conjunction with Minn. Stat. § 414.01, subd. 1a(5), as statutory support for their position. The Chief Administrative Law Judge reviews each of these statutes below.

The orderly annexation statute, at Minn. Stat. § 414.0325, subd. 1(b), provides as follows:

> A designated area is any area which the signatories to a joint resolution for orderly annexation have identified as being appropriate for annexation, either currently or at some point in the future, pursuant to the negotiated terms and conditions set forth in the joint resolution. Land described as a designated area is not, by virtue of being so described, considered also to be annexed for purposes of this chapter.

The statutory language is clear and unambiguous: it basically defines the term "designated area" as property that the orderly annexation agreement signatories have agreed is "appropriate for annexation" pursuant to the terms of an orderly annexation agreement at any point in time. But that is all it says. It does not specify that designated property is *only* appropriate for *orderly* annexation; the term "orderly" does not appear in this subsection of the statute. This portion of the Act does not in any manner address the

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[61] Correspondence from K. Butler (July 15, 2014).
[62] *Id.*
[63] Joint correspondence from K. Butler and R. Asleson (Aug. 31, 2015).

simultaneous existence of Minn. Stat. § 414.033, subd. 2(3), nor does it contain any language that addresses or even creates an ambiguity about how annexations-by-ordinance interact with orderly annexations. The statutory section is completely silent on the critical issue, and so provides no support for the municipalities' position.

In the same manner, Minn. Stat. § 414.0325, subd. 1(e), does not provide support for the position of Midway Township and the City of Duluth. That subdivision of the statute provides that once an orderly annexation agreement is in place, annexations of designated property "may be initiated by: (1) submitting to the chief administrative law judge a resolution of any signatory to the joint resolution; or (2) the chief administrative law judge." Read fairly, the statute does designate the two ways a designated property can be annexed within the context of an orderly annexation proceeding. It does not state that these are the *only* ways annexations of designated property can be initiated. The statute's use of the permissive term "may"[64] rather than the mandatory terms "must" or "shall"[65] indicates that there could be other ways to initiate annexation of designated property, albeit not through the orderly annexation process set out in section 414.0325. This section of the Act does not address the annexation-by-ordinance process of Minn. Stat. § 414.033, subd. 2(3), in any manner. Therefore, it does not support the position that section 414.0325 statutorily outweighs section 414.033 in the present matter.

In fact, Minn. Stat. § 414.0325 specifically addresses Minn. Stat. § 414.033 in its reference to a notice requirement that comes into play "at least 60 days before a petition is filed under this section or section 414.033."[66] While this reference is tangential to the analysis at issue, its existence lends support to the conclusion that the legislature was fully aware of the interplay between section 414.0325 and section 414.033 when it crafted and amended the Act over the years.

In further confirmation of the legislative intent that the two sections of the Act operate together, Minn. Stat. § 414.033, subd. 2(3), specifically refers to the potential of an existing orderly annexation agreement, as follows:

> 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:
>
> . . .
>
> (3) 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. **Except as provided for by an orderly annexation agreement,** this clause may not be used to annex any property contiguous to any property either simultaneously proposed to be or previously annexed under this clause within the preceding 12 months if the

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[64] Minn. Stat. § 645.44, subd. 15 (2016)
[65] *Id.*, subds. 15a, 16 (2016).
[66] Minn. Stat. § 414.0325, subd. 1a.

property is or has been owned at any point during that period by the same owners and annexation would cumulatively exceed 120 acres; or . . . .[67]

This reference makes clear that the legislature envisioned that the annexation-by-ordinance process in Minn. Stat. § 414.033 might at times be used to annex property that is subject to or addressed by an orderly annexation agreement. As such, the legislature cannot be said to have intended Minn. Stat. § 414.0325 to take precedence over Minn. Stat. § 414.033 in all circumstances.

By its terms, Minn. Stat. § 414.033 allows a municipality to annex "unincorporated property" that abuts the municipality.[68] The statute does not restrict annexation-by-ordinance to unincorporated property that is not designated under an orderly annexation agreement; the only restriction it identifies is that the property must abut the municipality and must be located outside a municipality.[69] If the property meets those criteria, and the statute's specified conditions and processes are met, annexation-by-ordinance should be approved.[70] In the present case, the Property is unincorporated and abuts the City of Proctor, making it an appropriate candidate for annexation-by-ordinance unless such is foreclosed by the fact that the Property is designated for orderly annexation under section 414.0325.

The City of Duluth and Midway Township urge the Chief Administrative Law Judge to elevate section 414.0325 over section 414.033 on the basis of the Act's embedded legislative finding that "joint resolutions for orderly annexations … should be encouraged."[71] Contrary to this suggestion, the Chief Administrative Law Judge is not free to determine which of the policy objectives embedded in the Act are the most important, nor to pick and choose which portions of the Act should be given effect and which should be ignored. Instead, she is required by law to interpret the Act in order to ascertain and effectuate the legislature's intent.[72] The determination of legislative intent must be made in a manner that considers all sections of a legislative enactment and attempts to harmonize and give effect to all provisions.[73] The Chief Administrative Law Judge "may not add words to a statute that were intentionally or inadvertently omitted by the legislature,"[74] and she may "consult prior versions of a law only to solve an ambiguity, not to create one."[75]

As such, the Chief Administrative Law Judge cannot insert the term "only" into the orderly annexation statute, nor can she change the term "may" to "shall" in Minn. Stat. §

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[67] Emphasis added.
[68] Minn. Stat. § 414.033, subd. 1.
[69] Minn. Stat. § 414.011, subd. 3.
[70] Minn. Stat. § 414.033, subd. 7.
[71] Minn. Stat. § 414.01, subd. 1a(5).
[72] Minn. Stat. § 645.16 (2016).
[73] *Chanhassen Estates Residents Ass'n v. Chanhassen,* 342 N.W.2d 335, 339 (Minn.1984); *see also* Minn. Stat. § 645.17 (2016) (statute must be considered as a whole to harmonize and give effect to all provisions).
[74] *Twp. of Midway*, 2013 WL 1943010, at *2.
[75] *Rockford Twp. v. City of Rockford*, 608 N.W.2d 903, 905-06 (Minn. Ct. App. 2000); *see also Welscher v. Myhre*, 231 Minn. 33, 36, 42 N.W.2d 311, 313 (1950) (if statutory language is clear and unambiguous, no reference should be made to prior enactments).

414.0325, subd. 1(e). She is not free to ignore the terms of Minn. Stat. § 414.033 based on the legislative finding that orderly annexations are to be encouraged. Only the legislature can address the structural inadequacies or perceived inconsistencies of the Act. The Chief Administrative Law Judge must merely apply the statute as it was drafted and as it stands; she cannot add to it requirements that are unstated within the Act.[76]

The Chief Administrative Law Judge finds that Minn. Stat. § 414.0325 and Minn. Stat. § 414.033 can be harmonized and both given effect. Section 414.0325 defines the orderly annexation process and procedures governing the actions by signatories to an orderly annexation proceeding with respect to designated property. Signatories must comply with the terms and conditions of Minn. Stat. § 414.0325,[77] but in its current form the statute does not require non-signatories to do so. Instead, the Act allows municipalities who are not a signatory to an orderly annexation agreement to commence an annexation-by-ordinance proceeding for any unincorporated property which abuts its borders.

This conclusion is consistent with both the rules of statutory construction and with the terms of the Act itself. It avoids a finding that the provisions at issue are irreconcilable. Had that finding been necessary, the same result would have prevailed. The rules of statutory construction mandate that, in cases of irreconcilability between statutes, the legislation enacted later must be given precedence.[78] Minn. Stat. § 414.033, subd. 2(3), was enacted in 1992,[79] some 14 years after Minn. Stat. § 414.0325 was passed in 1978.[80] Therefore, even if the reconciliation of the statutes based on signatory status fails, the provisions of section 414.033, subd. 2(3), would, in effect, trump the restrictions of section 414.0325.

This conclusion is consistent with existing case law. In *City of Wyoming v. Minnesota Office of Administrative Hearings*,[81] 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.[82] The court of appeals noted that chapter 414 contemplates situations involving conflicting annexation petitions and bestows upon the chief administrative law judge[83] the discretion to determine which of

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[76] *Vill. of Goodview v. Winona Area Indus. Dev. Ass'n,* 289 Minn. 378, 380-81, 184 N.W.2d 662, 664 (1971) (stating that a municipal commission is not allowed to add statutory requirements that are not stated in chapter 414).

[77] *See* Minn. Stat. § 414.0325, subd. 6.

[78] *See* Minn. Stat. § 645.26, subd. 4 (2016) ("When the provisions of two or more laws passed at different sessions of the legislature are irreconcilable, the law latest in date of final enactment shall prevail.").

[79] 1992 Minn. Laws ch. 556, § 4, at 1664.

[80] 1978 Minn. Laws ch. 705, § 14, at 630-33.

[81] 735 N.W.2d 746, 748 (Minn. Ct. App. 2007), *review denied* (Minn. Sept. 26, 2007).

[82] *Id.*

[83] 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

the competing petitions for annexation should proceed first.[84] *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.

Contrary to the suggestion of the City of Duluth and Midway Township, the earlier decisions of the Office of Administrative Hearings are not inconsistent with this determination. In the matter docketed as *City of Mankato and Township of Mankato OA Agreement*,[85] the city and the township had agreed to an orderly annexation agreement designating the entire township for future annexation to the city. Notwithstanding the existence and terms of the agreement, five separate annexations were requested, and approved, of designated property to a non-signatory to the agreement: the City of Eagle Lake.[86] All five annexations were approved pursuant to Minn. Stat. §§ 414.031 and 414.033, notwithstanding the fact that the properties were included in an orderly annexation agreement under Minn. Stat. § 414.0325. Likewise, in the matter titled *City of Sartell and LeSauk Township OA Agreement*[87] the Office of Administrative Hearings approved an annexation brought under Minn. Stat. § 414.031 notwithstanding that it involved property designated under an orderly annexation agreement.[88]

Although neither party identified or addressed *LaCrescent Twp. v. City of LaCrescent,*[89] in the proceeding before the Office of Administrative Hearings, the Chief Administrative Law Judge addresses it herein for purposes of informing any reviewing court of her relevant analysis. In *LaCrescent,* a city and a township entered into an orderly annexation agreement, originally in 1979 and readopted in 1985, providing for the orderly annexation of designated property. In 1992, the Minnesota Legislature amended the Act to add the following provision as an independent subdivision 2a of section 414.033: "[I]f land is owned by a municipality or if all of the landowners petition for annexation, and the land is within an existing orderly annexation area as provided by section 414.0325, then the municipality may declare the land annexed."[90] Taking advantage of the amendment, in 1993 the owners of the designated property petitioned the city for annexation-by-ordinance. The city adopted an annexation ordinance, which the Minnesota Municipal Board approved. The township sued, arguing that the city's annexation-by-ordinance was void because it violated the terms of the orderly annexation agreement executed by the city and the township. The township alleged that section 414.033, subd. 2a, was ambiguous in that it was inconsistent with and would effectively negate the usefulness of section 414.0325. The Minnesota Court of Appeals was not persuaded, found the statute

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boundary." *See* Minn. Stat. § 414.01, subd. 1 (2006). That duty is now vested in the chief administrative law judge. *See id.* (2016).

[84] *City of Wyoming*, 735 N.W.2d at 753.

[85] *City of Mankato and Twp. of Mankato OA Agreement*, OAH Docket. No OA-357.

[86] *See* OAH Docket Nos. A-5627 (annexed 5.1 acres under section 414.033, subd. 2(1); approved March 1, 1996); A-5628 (annexed 27.27 acres under section 414.033, subd. 2(3); approved March 1, 1996); A-6038 (annexed 1.8 acres under section 414.033, subd. 2(3); approved November 13, 1998): A-6072 (annexed 3.62 acres under section 414.033, subd. 5; approved September 3, 1999); A-6229 (annexed 0.21 acre under section 414.033, subd. 2(1); approved February 1, 2000).

[87] *City of Sartell and LeSauk Twp. OA Agreement*, OAH Docket No. OA-276.

[88] *Id*., at FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER dated May 24, 1999.

[89] 515 N.W.2d 608 (Minn. Ct. App. 1994).

[90] Minn. Stat. § 414.033, subd. 2a (1992).

to be clear and unambiguous, and upheld the annexation-by-ordinance.

This case raises two issues for consideration. The first is whether *LaCrescent* is at all instructive with regard to the present case wherein the municipality attempting to annex-by-ordinance is not a signatory to the orderly annexation agreement, opposite the fact pattern in *LaCrescent*. The second issue is whether the case has any remaining relevance given the 1997 repeal of section 414.033, subd. 2a.[91]

With respect to the first issue, the Chief Administrative Law Judge finds *LaCrescent* to be consistent with the determination that the two sections of the Act are not irreconcilable but instead can be harmonized. The *LaCrescent* court had no difficulty finding that the important public policies expressed in section 414.0325 could not take precedence over specific legislative language allowing for the annexation process specified in section 414.033. While the court referenced the import of the section 414.0325 policy favoring orderly annexation, it did so only to confirm that the policy was in fact being followed by allowing the annexation of property which both the city and the township had already determined should be annexed at some future point.

The more complex issue raised by *LaCrescent* is whether the 1997 repeal of Minn. Stat. § 414.033, subd. 2a, reveals anything relevant to the current case. At first glance, one might be tempted to argue that the legislature's repeal of this provision indicates an intent to disallow what had earlier been allowed: a municipality annexing-by-ordinance property designated for orderly annexation. It does not, as explained below.

The first bar to this analysis is found in the rules of statutory construction. Without a finding that the words of a statute are ambiguous, the legislative history of a statute cannot be used to determine legislative intent: "the letter of the law shall not be disregarded under the pretext of pursuing the spirit."[92] The wording of section 414.033, subd. 2(3), is not ambiguous. At best, it only becomes ambiguous upon delving into the legislative history of the interplay between the two sections of the Act. As the law allows the Chief Administrative Law Judge to "consult prior versions of a law only to solve an ambiguity, not to create one[,]" the history of the Act does not provide any support for the position of Midway Township and the City of Duluth in the present matter.[93]

Even if the rules of statutory construction were ignored or the Act found to be ambiguous, the result remains the same. The 1997 repeal of Minn. Stat. § 414.033, subd. 2a, was the last in a series of legislative actions related to this issue. In 1994 while the *LaCrescent* case was on appeal, the Legislature added language to section 414.033, subdivision 2a, to specify that annexation-by-ordinance under the provision "does not otherwise affect the other terms and condition of existing orderly annexation agreements entered into pursuant to section 414.0325."[94] In 1996 the Legislature again amended the Act, this time specifically linking the two sections of the Act by specifying that the annexation of property designated for orderly annexation could be initiated by: any

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[91] 1997 Minn. Laws ch. 202, art. 5, §§. 2, 9, at 1578-80.
[92] Minn. Stat. § 645.16.
[93] *See Rockford Twp.*, 608 N.W.2d at 905-06; *see also Welscher*, 231 Minn. at 36, 42 N.W.2d at 313.
[94] 1994 Minn. Laws ch. 511, § 5, at 622.

signatory to the orderly annexation agreement; the Minnesota Municipal Board itself; or "as provided in section 414.033, subdivision 2a."[95] This added language was repealed the next year when section 414.033, subdivision 2a, was repealed in its entirety.[96]

In the midst of all this legislative tinkering, it is important to note that the 1997 Legislature merely repealed subdivision 2a of section 414.033 and all references to it; it did not amend any portion of section 414.033, subdivision 2(3), the subdivision upon which the present proceeding is premised. The language of section 414.033, subdivision 2(3), has for 25 years allowed a city to annex-by-ordinance specified acreage of abutting property that is unincorporated, upon receipt of a petition from the owners of the property. This portion of the Act has never required that the property be free of orderly annexation designation. As such, the fact that the legislature repealed one specific provision, which had apparently been used only by municipalities who were signatories to orderly annexation agreements as in *LaCrescent,* but left the other untouched does not alter the analysis above relating to the reconciliation of the two portions of the Act.

As the case law is not supportive, neither does any other segment of the annexation-by-ordinance statute support the claims made by the City of Duluth and Midway Township. Minn. Stat. § 414.033, subd. 6, 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.[97]

Throughout the many months of the pendency of the present case, however, there has never been any other boundary adjustment proceeding pending before the Chief Administrative Law Judge. Although the OA Agreement has been filed with and approved by the Office of Administrative Hearings, the City of Duluth is not currently attempting to annex any portion of Midway Township. Therefore, the annexation-by-ordinance statute provides no avenue whereby the Chief Administrative Law Judge can provide the relief requested by the City of Duluth and Midway Township.

Likewise, nothing in Minn. Stat. § 414.0325 provides such an avenue. 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 to the orderly annexation agreement. While the Chief Administrative Law Judge may agree that language to that effect would be in keeping with the legislative direction that orderly annexation and joint planning should be encouraged, adding that language rests with the Minnesota Legislature and not with this administrative court. Therefore, the Chief Administrative Law Judge finds that there is no statutory support upon which to conclude that the OA Agreement trumps the annexation-by-

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[95] 1996 Minn. Laws ch. 303, § 10, at 62 (emphasis added).
[96] 1997 Minn. Laws ch. 202, art. 5, §§ 2, 9, at 1578-80.
[97] Minn. Stat. § 414.033, subd. 6.

ordinance statute in the present case.

II. Rural Nature of Property Does Not Bar Annexation.

At oral argument on the motion for reconsideration, the City of Duluth and Midway Township suggested that the rural character of the Property should prevent its annexation. These parties noted that the Act, overall, encourages annexation only of property that is "intensively developed for residential, commercial, industrial, and governmental purposes,"[98] that being property described as urban or suburban in character through the various provisions of the Act. At the same time, the Act envisions that "areas used or developed for agricultural, open space, and rural residential purposes,"[99] deemed rural in character throughout the Act, are best left under township government.

Again, the Chief Administrative Law Judge does not disagree with the overriding premise of the Act. And again, this premise is not controlling in the present matter. Instead, the specific language of Minn. Stat. § 414.033, subd. 2, provides that once the section's criteria are met "any such land is deemed to be urban or suburban in character." Therefore, it is irrelevant that the Property is fully wooded, uninhabited, unimproved and unserved by municipal services. Because it meets the criteria of Minn. Stat. § 414.033, subd. 2, by operation of law it is "deemed to be urban or suburban in character" and therefore appropriate for annexation.

III. Public Wastewater Services are not "Otherwise Available."

In order to be annexable under Minn. Stat. § 414.033, subd. 2(3), the statute requires that the Property be "not presently served by public wastewater facilities or public wastewater facilities are not otherwise available." The record clearly established that the Property is not presently served by public wastewater facilities. The City of Duluth and Midway Township argue that public wastewater facilities are "otherwise available" to the Property and so the requirements of the statute are not met.[100]

In construing a statute's terms, a court must attempt to ascertain and give effect to the intent of the legislature.[101] Words not defined in a statute should be given their plain and ordinary meaning[102] in light of the context in which the legislature employed them.[103]

Merriam-Webster's Dictionary defines the term "available" to mean: "easy or possible to get or use; present or ready for use."[104] According to other courts' examining

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[98] Minn. Stat. § 414.01, subd. 1a(2).
[99] *Id*.
[100] Correspondence from K. Butler (July 15, 2014).
[101] Minn. Stat. § 645.16; *see also Swenson v. Holsten*, 783 N.W.2d 580, 583 (Minn. Ct. App. 2010).
[102] Minn. Stat. § 645.08(1) (2016); *see also Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980).
[103] *City of Brainerd v. Brainerd Investments P'ship*, 827 N.W.2d 752, 759 (Minn. 2013) (noting statutory term should be defined by its context); *Harrison ex rel. Harrison v. Harrison*, 733 N.W.2d 451, 457 (Minn. 2007) ("[W]e examine the words of a statute in context rather than isolated from their setting.")
[104] MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/available (last

the meaning of the term pursuant to Webster's Third New International Dictionary, "available" means "capable of use for the accomplishment of a purpose: immediately utilizable … accessible."[105]

In Chapter 414, the requirement that public wastewater services be "otherwise available" is consistent with the framers' purpose[106] of facilitating annexation "to existing municipalities of unincorporated areas unable to supply municipal services."[107] In the present matter, the record established that neither the City of Proctor, nor Midway Township or the City of Duluth, have any specific current, or even specifically articulated future, plans to provide public wastewater services to the Property. All parties evidenced that it was feasible for them to provide such service in the future if a myriad of requirements were met, including but not limited to: requesting and obtaining approval to include the Property in the urban service boundary of the WLSSD; amending operative land use planning documents to provide for the extension of service; obtaining necessary right-of-way access from property owners unrelated to the present proceeding in order to extend service from any existing utility connection; and earmarking sufficient public funds to pay for the necessary construction and related work, estimates of which total somewhere between $1.5 million and $2.5 million.

On these facts, in no sense of the term can it be determined that public wastewater services are "otherwise available" as required by the statute. Therefore, the City of Proctor has established all the required criteria of Minn. Stat. § 414.033, subd. 2(3), and the annexation-by-ordinance will be approved.

IV. Tax Reimbursement

Minn. Stat. § 414.036 defines the parameters of statutorily authorized compensation attributable to the loss of property annexed into an adjoining municipality. By its terms, the statute directs that a town which loses property through annexation is entitled to "reimbursement … for all or part of the taxable property annexed"[108] and to be paid that reimbursement "in substantially equal payments over not less than two nor more than eight years."[109]

Under the statute, the Township is entitled to recover from the City a tax reimbursement charge for "all or part of the taxable property annexed."[110] The Property generates taxes of $372.28 per year. Thus, the statute allows the Township to recover this value "in substantially equal payments over not less than two nor more than eight

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visited Oct. 10, 2016).

[105] *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001); *Spencer v. Warden FPC Duluth*, CIV. 13-177 JNE/JJK, 2014 WL 5106741, at *3 (D. Minn. Oct. 10, 2014).

[106] *Sleiter v. Am. Family Mut. Ins. Co.,* 868 N.W.2d 21, 26 (Minn. 2015) (notes with approval the practice of interpreting statutory wording consistent with legislative purpose being served).

[107] Minn. Stat. § 414.01, subd. 1a(4).

[108] *Id*.

[109] *Id*.

[110] Minn. Stat. § 414.036.

years."[111]

In the Ordinance, the City of Proctor has agreed to provide to Midway Township the amount of $400, for each of two years, in satisfaction of the requirement of the statute. Given that this amount approximates the taxable value lost by the township, it is appropriately incorporated into this Order.

V. Apportionment of Costs

Minn. Stat. § 414.12, subd. 3, requires the Chief Administrative Law Judge to allocate equitably between the parties the costs of administrative law judge time spent on boundary adjustment matters. This legislative directive is mandated by the fact that the Office of Administrative Hearings operates primarily[112] as an "enterprise fund" within the executive branch of Minnesota state government. As such, Minn. Stat. §§ 14.53 and 14.55 (2016) direct the Office of Administrative Hearings to assess its costs to the state agencies and other political subdivisions to which it provides the services of administrative law judges. Each fiscal year, Minnesota Management & Budget approves a billable rate for the agency's services, and the agency then charges for its services pursuant to this approved hourly rate.[113]

Some history is instructive.[114] Legislatively created in 1959, the Municipal Boundary Board operated until 1999 when it was legislatively dissolved. During the Board's 40-year tenure, the appointed board members issued final decisions and the costs of the agency were legislatively funded. In 1999, the functions of the board were transferred to the Office of Strategic and Long Range Planning, commonly referred to as Minnesota Planning, and in 2003 the functions were again transferred, this time to the Minnesota Department of Administration. Since 1999, administrative law judges at the Office of Administrative Hearings have presided over all contested case proceedings related to municipal boundary adjustment matters. In accord with Minn. Stat. § 14.53 and 14.55, the costs of the services provided by administrative law judges[115] have been equitably apportioned to the parties to boundary adjustment matters under the authority of Minn. Stat. § 414.12.

In recognition of the legislature's funding scheme pertinent to the state agency, Chapter 414 specifically provides that the Office of Administrative Hearings "is not liable for [its] costs"[116] but instead "the costs must be allocated on an equitable basis" by the Chief Administrative Law Judge unless otherwise agreed to by the parties.[117] The record in this matter does not indicate that the parties have addressed or agreed to an allocation

[111] *Id.*
[112] The Office of Administrative Hearings receives different funding for the work of its Workers' Compensation Division and for contested cases related to data privacy matters.
[113] *See* Minn. Stat. §§ 14.53, .55.
[114] *See* Office of Administrative Hearings' website at http://www.mba.state.mn.us/History.html.
[115] Parties are not and have not been billed for the costs of the administrative staff in the Municipal Boundary Adjustment Unit, which remain funded through a general fund appropriation from the legislature.
[116] Minn. Stat. § 414.12, subd. 3(b) (2016).
[117] *Id.*, subd. 3(a), (c) (2016).

of costs. Therefore, and as required by statute, the Chief Administrative Law Judge has allocated to the parties the total costs of the agency's billable time, measured at the current approved rate of $170 per hour.

T. L. P.